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## JUDGE WARREN HENRY BRISTOL: A MAN OF HIS TIME AND PLACE?

By Mark Thompson

The effort in 2010 to obtain a “pardon” for Billy the Kid brought out some remembrances of other players in the Lincoln County “War,” including Judge Warren Henry Bristol who was to try and sentence William Bonney, or whatever his name really was, for the murder of Sheriff William Brady. The descriptions of the judge were not complimentary: a dim bulb; a Republican hack; would rather do something dishonest than illegal; an undistinguished Minnesota legislator; and, a corrupt judge, the latter from an internet posting which may have actually predated 2010. Were these “true,” or were they merely examples of holding “figures from the past accountable for not thinking and acting as right-minded people do today”<sup>1</sup>?

Warren Bristol was born in Stafford, New York on March 19, 1823. His father was a physician and Warren was a child of privilege, at least as reflected in his education. He attended private schools in the nearby western New York towns of Yates, Lima and Wilson. He may have briefly attended the Fowler State and National Law School in Saratoga County on the east side of the state, which would have put him in that rare category of 19<sup>th</sup> C. lawyers, those who had some academic or “trade school” education in law.<sup>2</sup> He moved to Lockport, New York and read for the law in the office of Edward I. Chase, the brother of politician and future Chief Justice of the United States, Salmon P. Chase of Ohio. Bristol was admitted to practice in New York, perhaps even before attending law school.

Supposedly headed for Elgin, Illinois in 1850, Bristol slept through his stop on the Mississippi and continued on to St. Paul, Minnesota, then making his way slightly further up river to St. Anthony in late 1850 or early 1851.<sup>3</sup> Not unlike many lawyers of his time, he had to find other work to pay the bills but as the only resident lawyer in the county, he was elected in 1852 as the first district attorney of Hennepin County.<sup>4</sup> After

moving to Red Wing in 1855, he was elected district attorney in Goodhue County. In March of 1855, Bristol joined others in a meeting at St. Anthony which resulted in appointment of a committee, including Bristol, charged with the task of organizing the first convention for the Republican Party in Minnesota. As with all such enterprises, many would have joined because of the political opportunity, but prompted by the passage of the Kansas-Nebraska Act of 1854, the initial Republican Party also included many idealists opposed to slavery. We do not know Bristol's personal motivation, but he was elected chairman of the convention held in St. Paul in July, 1855.<sup>5</sup>

After his move to Goodhue County, Bristol was elected to three terms in the Minnesota legislature, 1866-70, one term in the House and two in the Senate. I suppose to judge whether or not his service was "undistinguished" one could examine the printed legislative journals but, because they are not yet digitized, a trip to St. Paul is probably required. We do know that he carried the bill in the state senate in 1868 asking the U.S. Congress to consider "annexing" the territory between Minnesota and Alaska.<sup>6</sup> You might deem that effort "Quixotic," or perhaps "good politics," depending on your point of view. In April 1872 at the time of his appointment by President U.S. Grant as an associate justice of the New Mexico Territorial Supreme Court, Bristol obviously had some legal and political experience. Whether his political career had risen above the status of "hack" is probably in the eye of the beholder.

The New Mexico territorial judge held something of a "hybrid" position. He was the trial judge for federal cases as well as for cases of "general jurisdiction," i.e. what we would think of today as "state law cases." At the trial level the judges were each assigned to a specific district and most made their homes in that district and held court in each of the counties making up the district. The judges also sat in panels of three as justices on the Supreme Court of New Mexico. As an appellate court, they had jurisdiction similar to a present day federal circuit court and also as the supreme court of the territory, the appellate court for "general law" cases. (I believe that the judges did not sit in review of their own district court cases, although this potential for conflict was long the source of criticism.) Appeal from the New Mexico Supreme Court, in both the federal and territorial cases, was to the U.S. Supreme Court.

On paper, this sounds like a pretty interesting job but my impression is that Presidents had a relatively hard time filling the positions. For example, Benjamin Harrison was unsuccessful in persuading the recently retired Speaker of the House of Representatives to take a N.M. judgeship. His second choice was A.A. Freeman, who, with some prior political experience in his native Tennessee, had just finished seven years as an assistant U. S. Attorney General.<sup>7</sup> President Cleveland in 1885 felt the need to publicly praise William B. Fleming of Kentucky for the latter's willingness to take a New Mexico judgeship as a consolation prize—Fleming had wanted to be appointed the U.S. Attorney for Kentucky.<sup>8</sup> For the sixty-two years of New Mexico territorial history, the Republicans were in power for about 38 years, the rest being four years of Whigs and, giving Andrew Johnson back to the Democrats, about 20 years for the Democrats. The judges reflected the politics of the U.S. Presidents, who appointed them to specific four year terms.<sup>9</sup>

Perhaps the shortage of top-drawer lawyer/politicians willing to go to New Mexico in the late 19<sup>th</sup> century is not really surprising. One of the things we do not like to think about today is just how New Mexico was viewed from “back East.” Some examples from an 1876 description first published in the *Detroit Tribune*: “I have been told that there are not more than fifteen hundred Americans in the Territory . . . the large proportion of the whites are outcasts from the East, the scum of our large cities . . . a virtuous woman or a trustworthy man is unknown . . . robberies and murders are of every-day occurrence, and a man's life is hardly safe.”<sup>10</sup> And, from a *N.Y. Times* editorial: “It is evident that the proposition to make a State of this miserable Territory is not carried on its own merits . . . It is a scheme to sweep into Statehood a nomadic and ignorant people.” And, of course, the real crux of the matter, “Yet it is gravely proposed to give this handful of people [the fifteen hundred “Americans”] . . . the right to send two Senators to vote equally with those of New York, Ohio, Pennsylvania, and other great States of the Union.”<sup>11</sup> New Mexico judgeship, anyone?

Judge Bristol served for 12 years and three months on the New Mexico territorial court, a record surpassed only by Judge Frank W. Parker, who had attended law school at the University of Michigan, but who, at the time of his appointment, was a small town lawyer in Hillsboro, New Mexico.<sup>12</sup> In February of 1876, President Grant reappointed

Bristol two months before his first term was to expire. In 1880, perhaps influenced by criticism of Bristol's handling of the Lincoln County problems, President Rutherford B. Hayes decided Bristol should not be reappointed. The President first nominated William W. Peck of Wyoming, whose nomination was rejected by the Senate Judiciary Committee. The President then nominated S. Newton Pettis who was rejected by a vote of the Senate. A third President Hayes appointee, Charles Pelham, was likewise rejected. Hayes gave up and re-nominated Bristol who was confirmed by the Senate on December 14, 1880.<sup>13</sup>

During his tenure, Bristol authored 38 opinions as an appellate judge. Like most of those early territorial court opinions they are certainly not "must read," although I think that the unusual facts in a decision he wrote in 1873 make interesting reading. The case involved an attempt to collect on a surety bond given by a Receiver (of moneys) for the General Land Office. Judge Bristol, writing for the court, held that the surety (insurer) was not off the hook just because the Receiver was murdered and the funds he held for the United States were stolen.<sup>14</sup>

With such a long tenure, it is not surprising that Bristol has both supporters and detractors. After he had resigned as judge *The Rio Grande Republican* said that when he arrived and for about four years thereafter, he knew less law than the average lawyer practicing in the third district.<sup>15</sup> The lawyer/politician/historian, Ralph Emerson Twitchell, was enthusiastic about Bristol, saying in 1912 that he filled his position "with great honor and credit."<sup>16</sup> A federal court history notes that, unlike some of his colleagues, he was diligent in holding court twice a year in each of the three counties then making up the Third District. The district included Grant, Doña Ana and Lincoln counties, stretching across the southern part of the territory from Texas to Arizona.<sup>17</sup> During his "free time," Bristol was associated with the founding of two parishes of the Protestant Episcopal Church: St. James, Mesilla Park, N.M., 1875; and, St. Luke's, Deming, N.M, 1884.<sup>18</sup> Upon his death, the Bishop's Committee at St. Luke's praised Bristol as a "broad and liberal Christian."<sup>19</sup> .

Bristol's time in New Mexico is ultimately judged, of course, by his association with the Lincoln County War of 1878-79. Joel Jacobsen, lawyer and historian, opined, perhaps with some exaggeration, that "were it not for the troubles in Lincoln County . . .

[Bristol] would have died with hardly a trace that he had been alive.”<sup>20</sup> It was Jacobsen who thought Bristol was dishonest in his “finding” of facts necessary to sustain both civil and criminal cases against Alexander McSween, when even non-lawyer observers said there was no evidence to support the findings. As Jacobsen and others point out, Judge Bristol, along with Republican “ringleader,” Thomas B. Catron,<sup>21</sup> favored McSween’s opponents during the “war.” Bristol’s declaration of essential legal facts notwithstanding, the grand jury refused to indict McSween in the criminal case.

On April 1, 1878, William Bonney, a/k/a Billy the Kid, and several others, carried out the ambush killing of Sheriff William Brady in Lincoln. Judge Bristol was to open a term of court in Lincoln on April 8, 1878, and, as he traveled from Mesilla to Lincoln, he learned that he was also a target of these same men. The U.S. military commander at Ft. Stanton near Lincoln sent soldiers out to meet the Judge’s party and took him to the fort where he apparently stayed during the term of court. Joel Jacobsen indicates that he finally opened a grand jury inquiry on April 13, 1878 and from our perspective that would have been his first mistake. Under Bristol’s guidance, the grand jury indicted several men, including William Bonney, for the murder of Sheriff Brady. Today, we would expect that a judge whose life had been threatened by a potential accused to recuse himself before the grand jury met. Such a move, though undoubtedly possible, would have been very impractical in New Mexico in April of 1878 and may not have been even briefly considered.

The Kid was not arrested on the warrant for Brady’s murder until after a new sheriff, Pat Garrett, was elected in 1880. Many historians understandably treat the trial for that crime as something of an afterthought. Today we would certainly not expect a judge to conduct the trial of a person who had allegedly threatened to kill that judge. Again, maybe it was impractical to have expected a recusal in 1881, but the failure to recuse casts doubt on the fairness of the judge at the trial.

Two “technical” issues create the most commentary on Bristol’s handling of the trial. Some historians thought Bonney was first charged in federal court for the killing of Brady. The lawyer Joel Jacobsen clarifies that issue by pointing out that Bonney was charged with another crime, the killing of Andrew Roberts on the Mescalero Apache reservation. Bonney’s lawyer for that case, Ira Leonard, persuaded the judge that the

killing of Roberts occurred on a private, non-federal, “enclave” within the reservation and Bristol was obliged to dismiss that federal prosecution. Bristol then proceeded to try the territorial case, the killing of Brady, and, as some historians say, same judge, same courthouse, same jury pool. But not the same lawyer for the defense and it is that factor which leads to the second technical issue, the one arguably most misconstrued by Bristol’s critics.

Bonney’s appointed lawyer for the Brady case, Albert Jennings Fountain, was to become one of the top lawyer/politicians in southern New Mexico. According to one of his biographers, Fountain had become adept at getting juries to go for a “lesser included offense” in defending several accused criminals. Bristol was apparently determined to prevent that result in the prosecution of Bonney for the murder of Sheriff Brady but eliminating jury consideration of a “lesser included offense” is not an easy task, especially in murder cases. Commentators have argued that Bristol was attempting to direct a verdict of guilty. It may be “splitting hairs,” but, as argued by Fountain’s biographer, Bristol simply eliminated consideration of any other types or degrees of murder and then allowed Fountain to “soften” the impact of the instructions.<sup>22</sup> Fountain failed, of course, to persuade the jury that acquittal was required and, following the conviction, Bristol sentenced The Kid to hang. It was one of seven such sentences he imposed between 1875 and 1881, a record according to former New Mexico State Historian, Robert Torrez.<sup>23</sup>

The same article which in 1885 criticized Bristol for his lack of legal knowledge upon arrival in New Mexico indicated that he had become a pretty good judge but that in his last years on the bench he had become “cranky.”<sup>24</sup> Part of his problem was his opposition to moving the county seat of Doña Ana County from Mesilla, where he lived, to Las Cruces, only a few miles away. In 1882, he “solved” his problem by purchasing property and eventually moving his residence to Deming about sixty miles west of Las Cruces. He did not, as suggested by Ralph Twitchell and others, wait to resign until a Democrat, Grover Cleveland, had been inaugurated as President in 1885. Instead, he resigned “suddenly and unexpectedly” effective July 26, 1884.<sup>25</sup> At least one biographer claims the resignation was prompted by his health,<sup>26</sup> but perhaps Bristol, like many other

political observers, could see the handwriting on the wall in 1884—the Republicans were going to be swamped.

It is probably obvious that I am not ready to canonize Warren Bristol, but neither am I willing to consign him to the dustbin of history. I would argue that overall he made a positive contribution to the New Mexico territorial judiciary under difficult circumstances. After his resignation he practiced law in Deming and was elected as one of the Grant County delegates to the 1889 Constitutional Convention. Bristol died on January 12, 1890, and the town of Deming shut down for his funeral.<sup>27</sup> Eventually his widow, Louisa (Armstrong) Bristol, returned him (and herself) to Lockport, New York where he is buried in a family plot in Cold Springs Cemetery, a cemetery on the National Register of Historic Places. New Mexicans may agree that, based upon the accompanying photo, the family plot looks like a more peaceful resting place than that much abused burial plot of Billy the Kid near Ft. Sumner, New Mexico.

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thirty years and now lives in Centennial, Colorado.*

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<sup>1</sup> David Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge U. Press: 1998), p. xii.

<sup>2</sup> General biographical information can be found in the Warren Bristol entry in *An Illustrated History of New Mexico* (1895), pp. 250-53, “reprinted” on the website of the New Mexico State Historian. This publication is very typical of the 19<sup>th</sup> C. subscription biographies, i.e., it is not an attempt at “disinterested history.” According to Wikipedia, the Fowler law school was not founded until 1849 and Bristol left New York in 1850. It seems odd that if he was already practicing law in Lockport that he would have gone across the state to attend school at age 26, but I did not find evidence to support or refute this biographical assertion.

<sup>3</sup> John H. Stevens, *Personal Recollections of Minnesota and its People ,and Early History of Minneapolis* (Minneapolis; Marshall Robinson editor & publisher, 1890), pp. 92, 130-31.

<sup>4</sup> *Id* at 192-93.

<sup>5</sup> “The Genesis of the Republican Party in Minnesota,” *Minnesota History* (1917), Vol. 2, pp. 24-30.

<sup>6</sup> Russell Fridley, “When Minnesota Coveted Canada,” *Minnesota History* (1968), Vol. 41, pp. 76-79.

<sup>7</sup> I readily admit that Judge Freeman was one of my favorites. See, “President Benjamin Harrison, Judge A.A. Freeman and the Shalam Colony,” *So. N. M. Hist. Rev.* (Vol. 16, Jan. 2009), reprinted on the website of the New Mexico State Historian.

<sup>8</sup> “Letter from President Cleveland,” *The Rio Grande Republican* (Las Cruces, N.M., Sat. October 10, 1885), p. 2.

<sup>9</sup> If forced to come up with an “equal opportunity political hack,” I might nominate Chief Justice Thomas Smith appointed by the Democrat, Grover Cleveland. Smith had served as a county judge and a state legislator in Virginia, as well as N.M. U.S. Attorney during Cleveland’s first term. Smith made the history books by allegedly orchestrating a case against (Republican) lawyer Thomas B. Catron, with the intent of sitting on the case as a judge. William A. Keleher, *The Fabulous Frontier* (Albuquerque: U. of New Mexico Press, Rev. ed., 1962), pp. 128-29.

<sup>10</sup> “The Kind of Civilization Prevalent in the Would-Be State,” *The New York Times* (Sunday, April 16, 1876), p. 9.

<sup>11</sup> “The New Mexico Job,” *The New York Times* (Wed. May 24, 1876), p. 4.

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- <sup>12</sup> Another of my favorites, I will confess. See my essay, “Judge Frank Wilson Parker: Frontier Lawyer, Political Warrior,” published online by the New Mexico State Historian and the Hillsboro Historical Society.
- <sup>13</sup> James K. Logan, ed., *The Federal Courts of the Tenth Circuit: A History* (Denver: U.S. G.P.O., 1992), p. 238. “Filling Federal Offices,” *The New York Times* (Wed. Dec. 15, 1880), p. 2.
- <sup>14</sup> *United States v. Watts*, 1 N.M. 553 (N.M. 1873).
- <sup>15</sup> (untitled) *The Rio Grande Republican* (Las Cruces, N.M., Saturday, Sept. 12, 1885), p. 2.
- <sup>16</sup> R. E. Twitchell, *The Leading Facts of New Mexico History, Vol. 2* (Santa Fe: Sunstone Press 2007, facsimile of the 1912 ed.), p. 420, n. 247.
- <sup>17</sup> Logan, ed., *The Federal Courts of the Tenth Circuit: A History*, note 12, *supra*, at 234.
- <sup>18</sup> Lee Priestly, *Journeys of Faith: The Story of Preacher and Edith Lewis* (Las Cruces, N.M.: Arroyo Press, 1992), p. 70. <http://saintlukesdeming.org/History.html>. Because he served on the vestry and had been in Red Wing since 1855, I strongly suspect that he participated in the founding of Christ Church, Red Wing in 1858, but have been unable to find evidence regarding the founding of the parish.
- <sup>19</sup> “In Token of Respect,” *The Headlight* (Deming, N.M., Sat., Jan. 25, 1890), p. 3.
- <sup>20</sup> Joel Jacobsen, *Such Men as Billy the Kid* (Lincoln: U. of Nebraska Press, 1994), p. 59. Although I claim no expertise on the subject, I think Jacobsen’s book is both a good read and appears to be well researched. Also in that genre, I would recommend Robert M. Utley, *High Noon in Lincoln County: Violence on the Western Frontier* (Albuquerque: U. of New Mexico Press, 1987).
- <sup>21</sup> Bristol is often accused of being a part of the “Santa Fe Ring,” another aspect of the charge that he was just a “political hack.” I find the accusation amusing given the fact that the alleged ringleader, Thomas B. Catron, was appointed U.S. Attorney by President Grant just two months before Bristol was appointed judge. It seems natural that they would feel some kinship. Another fact I find interesting is that Thomas B. Catron was married to Julia A. Walz of a politically connected family in Mankato, Minnesota. Her brother, Edgar Walz, was a business associate of Catron and played a minor role in the Lincoln County War. See generally, Victor Westphall, *Thomas Benton Catron and his Era* (Tucson: U. of Arizona Press, 1973). Julia Walz Catron essentially raised the daughter of her brother William Walz after his wife died. William followed his father-in-law, Abner Tibbetts, from Minnesota to El Paso, Texas. Judge Bristol had connections to both William Walz and Abner Tibbetts. See e.g., “New Mexico As Seen By A Minnesotan,” *The Lake City Leader* (Lake City, Minn., Thursday, May 13, 1875), p. 5. Perhaps a “Minnesota Republican Ring?”
- <sup>22</sup> Gordon R. Owen, *The Two Alberts: Fountain and Fall* (Las Cruces: Yucca Tree Press, 1996), pp. 91-92.
- <sup>23</sup> Robert Torrez, “Judges and the Art of Judicial Sentencing in Territorial New Mexico” published on the website of the Office of the State Historian.
- <sup>24</sup> Note 15, *supra*.
- <sup>25</sup> “Judge Bristol Resigns,” *The Rio Grande Republican* (Las Cruces, Sat. Aug. 2, 1884), p. 3.
- <sup>26</sup> Paxton P. Price, “Judge Warren Bristol: Lincoln County War Judge,” *Pioneers of the Mesilla Valley* (Las Cruces; Yucca Tree Press, 1995), p. 170. Price also says the resignation occurred in 1885.
- <sup>27</sup> “Judge Warren Bristol,” *The Headlight* (Deming, N.M., Sat. Jan. 18, 1890), p. 3.