THE ORIGINS OF AN EXPANDED FEDERAL QUESTION JURISDICTION: THE FISK RAID AND THE REMOVAL ACT OF 1868

Philip Leonard Merkel
Savannah, Georgia

A.B., University of Illinois, 1970
J.D., University of Illinois, 1974

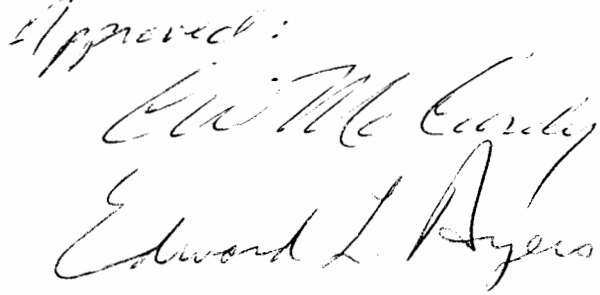
A Thesis Presented to the Graduate
Faculty of the University of Virginia
in Candidacy for the Degree of
Master of Arts

Corcoran Department of History

University of Virginia

May, 1983

Approved:



Introduction

During and after the Civil War, Congress rapidly expanded the types and numbers of suits which parties could originate in or remove to the federal courts. Increasingly, cases which state courts had traditionally decided, such as actions arising under federal law and the Constitution, and disputes where a corporation was a party, found their way into the United States courts.[1] Many of these suits involved negligence claims and land disputes, questions which in the past had been matters of purely local concern.[2] These new accessions to the jurisdiction of the United States courts were profound and highly visible. In the ten-year period beginning in 1876, for instance, the case-load of the lower federal courts where the United States was not a party more than doubled from 14,397 to 31,455.[3]

Many Americans came to view this expansion of federal judicial power with suspicion and contempt. In particular, farmers of the West were not enamored of the ascendancy of the federal courts.[4] Many were convinced that emerging national corporations were behind the movement to broaden federal court jurisdiction. The flight of railroads, insurance companies, and other corporate concerns from the state courts to the bastions of the federal system led the editors of The Western Jurist, a contemporary law review, to express the widely held view that the federal courts often impeded rather than furthered the interests of justice:

> The contrary purpose of the more modern legislation by Congress, to develope (sic) to the fullest extent all the judicial power with which the Federal Government has been clothed, has already resulted in much of evil to the country and in untold expenses and annoyances to litigants and jurors, and often in the practical denial of justice . . . . These tribunals are practically foreign and work a denial of the right to a trial by jury of the vicinage. The costs of litigation in the Federal Courts are largely in excess of the costs in the State Courts; and multiply them as much as is possible, and they can never be brought home to all the people, as are the State tribunals. Hence the litigants, jurors and witnesses in the Federal Courts are dragged away from their homes and forced to appear, and often subjected to severe and cruel tests, among those who are strangers to them.[5]

Another spokesman for the West, Congressman Charles G. Williams of Wisconsin, was even more vitriolic in his criticism of the federal courts. He complained that "the cormorants in human form who have swarmed over the country and swindled the people by the sale of county and town rights, of bogus patents for drive wells, automatic gates, and almost every other patentable implement the farmer or any one else uses, should not be allowed, by transferring notes and obligations thus obtained, to their pals in other states, to use the Federal courts to complete the swindle . . ."[6]

The agrarians were correct in believing that large corporate interests usually preferred to litigate in the federal courts. Since the Civil War, these corporations, which were usually headquartered in the East, met with

increased hostility from western legislatures and courts. They welcomed the opportunity to present their cases before the life-tenured judges of the federal bench whose appointments were often secured through political pressure by corporate officials. Federal judges could temper the effects of anti-business state laws or ignore them altogether.[7] As one historian has recently noted, the expanded jurisdiction of the United States courts allowed federal judges to devise a uniform national policy toward interstate commerce which was favorable to business development.[8]

Of course Congress and not the judiciary was primarily responsible for this widening of the scope of federal court authority. In 1875, it enacted a statute which gave litigants the option of filing or removing a whole new class of actions to the circuit courts. The Act of March 3, 1875 for the first time granted United States courts original jurisdiction over federal questions--that is, over cases arising under federal law or the Constitution. It also allowed for the wholesale removal of federal questions from the state courts.[9] This jurisdictional provision, supplemented by an expansive reading by the United States Supreme Court, resulted in the corporate exodus from the state courts which embittered westerners were powerless to stem.

Curiously, the Act of March 3, 1875 was passed after

only superficial congressional debate. This, the most significant jurisdictional statute since the Judiciary Act of 1789, was enacted on the last day of the legislative session and received only passing notice in the press. Historians have long puzzled over the motives of the bill's sponsors. One commentator has referred to the act as "sneak legislation."[10] No one has established that national corporations, such as the railroads, supported the measure, but they doubtlessly benefited from its passage.

While no direct evidence links the 1875 Act with national corporate interests, the events surrounding a little-known incident in the late 1860s reveal that congressmen were well aware of the advantages these interests might gain if they could litigate claims by and against them in federal courts. The incident involved the construction of the transcontinental railroad. During the sixties, Congress for the first time subsidized private enterprise on a grand scale to facilitate the building of the railroad. The Union Pacific Railroad Company, a federally chartered corporation, was one of the companies charged with responsibility for completing the line.

From 1867-1869, this first great national corporation was threatened with imminent financial ruin in the courtroom of a corrupt New York Supreme Court judge. The crisis developed when James Fisk, Jr., a notorious Wall

Street power broker, attempted through a series of injunctions to seize control of the railroad's management. Congress responded to the "Fisk Raid" by enacting three separate statutes to protect the railroad. One of these laws, the Removal Act of 1868, allowed federally chartered corporations to remove suits filed against them from state to federal courts.[11]

The subject of this study is the Fisk Raid, the Removal Act of 1868, and their combined effect on the balance between state and federal judicial power. The history of the Fisk Raid is intriguing for a number of reasons. First, it reveals that the first congressional act permitting corporations to elude the jurisdiction of the state courts was not intended to accomplish the wholesale removal of cases to the federal courts. Ironically, the Removal Act of 1868 was not enacted to shield the transcontinental railroad from harassment in the state courts of the West, but to deal with a specific occurrence in a New York court. It was only after the Fisk Raid that railroad lawyers realized the full potential of the act and attempted to remove a multitude of suits against the Pacific railroads to federal forums. Second, the circumstances surrounding the raid illustrate how the inexperience of Congress led to the passage of an act which had the unforseen consequence of widely expanding federal court authority. Other scholars have detailed the naivete of Congress in financing the Pacific railroads. The same can

be said of its handling of the Fisk Raid. Despite the misgivings of some of its members, Congress hastily passed the 1868 Act without understanding its potential ramifications on the balance of power between the states and the federal government. Finally, as has been noted, in the years following the raid, railroad lawyers increasingly tried to use the 1868 Act to remove a variety of claims from state to federal courts. As Congress was considering the 1875 jurisdiction act, its members thus knew the advantages which federally chartered corporations enjoyed when they litigated in federal court. They knew that state court judges and juries had at times interfered with national business and transportation. It is reasonable to believe that the experience of the Pacific railroads was on the minds of some congressmen when they broadly expanded federal court jurisdiction in 1875. While the Removal Act of 1868 was not enacted to effect a sweeping revision of federal judicial power, the mood of Congress changed over the ensuing years. By 1875, Congress was conscious of the role the federal judiciary could play in promoting not only interstate transportation but interstate commerce generally.

This study is divided into a number of sections, some of which include background information necessary for an understanding of the issues involved in the Fisk Raid and the congressional response. Part I is intended to acquaint the reader with the parameters of the federal

question jurisdiction of the United States courts prior to 1868. It illustrates how Congress increasingly relied on removal statutes as a way of extending the power of the federal courts to confront specific problems of national significance which the state courts either had failed to address or contended with inadequately. Part II explores the development of a national railway policy. Included are a brief history of the Union Pacific and a discussion of its management problems in the years preceding the Fisk Raid. Part III is the story of the raid itself. The relationship between events in the New York courts and the responses of Congress are examined. Together, they dispell the suspicion that in 1868, Congress intended to make sweeping changes in the state-federal balance of judicial power when it enacted the Removal Act. Part IV discusses how the 1868 Act was almost immediately seized upon by railroad lawyers and employed for purposes far different than those Congress originally intended. Finally, in the conclusion, the railroads' experience with the 1868 Act is seen as the background against which Congress considered the 1875 Act. By 1875, congressmen were fully aware of the benefits which corporations gained when they litigated their claims in federal forums. Many recognized that the federal courts could play an important role in the orderly operation of a national economy.

PART I. The Emergence of a Selective Federal Question Jurisdiction

In the decades preceding the Civil War, the potential federal question jurisdiction of the inferior courts of the United States largely lay dormant.[12] Although the United States Constitution extended federal judicial power to cases arising under the Constitution and the laws of the United States,[13] Congress was ill-disposed toward granting inferior courts such authority. The cornerstone of the federal judiciary through the first half of the nineteenth century, the Judiciary Act of 1789, made no provision for inferior court federal question jurisdiction. The circuit courts were designed chiefly to entertain suits between citizens from different states, while the district courts became the nation's admiralty courts.[14] Though the United States Supreme Court was the final arbiter of federal questions, such matters could only reach it by writ of error to the highest court of a state or to a federal circuit court.[15] This limited inferior court jurisdiction reflected the provincial interests which predominated during the early national period.

While the limiting of the federal question jurisdiction of the circuit and the district courts was certainly the rule, Congress sometimes did make exceptions when confronted with unusual circumstances. Invariably, these exceptional cases arose when a state or section attempted to frustrate

an overriding national purpose. In these instances, Congress endowed the inferior courts with a broadened federal question jurisdiction as a means of circumventing state court intransigence.

Perhaps the most celebrated example of this propensity concerned the Second Bank of the United States. The charter of the bank provided that it could "sue and be sued, plead and be impleaded, answer and be answered, defend and be defended . . . in any Circuit Court of the United States."[16] Congress anticipated that the bank might expect an unfavorable reception in some state courts, particularly in the South and West, and therefore afforded it a more congenial forum. The jurisdiction of the circuit courts was broadened to encompass cases involving this federally chartered corporation, and the United States Supreme Court obligingly sustained the constitutionality of the grant.[17] This expansion of inferior court federal question jurisdiction through the bank's charter was a unique means of protecting this national venture.

Through the Civil War, Congress more commonly broadened federal question jurisdiction by enacting removal statutes. These acts allowed litigants in selected cases to divest state courts of jurisdiction and remove actions to federal forums. Removal made its first appearance in cases concerning diversity jurisdiction.[18] The Judiciary Act of 1789 permitted a defendant who was a citizen of a state other than

that in which a suit was brought to transfer the action to the appropriate circuit or district court.[19] The underlying rationale for removal in diversity cases was to eliminate potential prejudice against non-resident defendants which one might expect in state courts.

Congress soon recognized that removal could also be an effective way of circumventing state courts which might be biased against national policy. Removal statutes were thus enacted in the midst of sectional crises when, due to political pressures, state courts could not, or would not, follow federal law. This genre of removal statutes first appeared in 1815 when New England merchants threatened to frustrate the Madison administration's policy restricting trade with belligerents. Congress passed an act prohibiting such intercourse and, anticipating harrassment of federal customs officials in the state courts, authorized these officers to remove civil and criminal actions to the federal circuit courts.[20] A similar scenario occurred during the Nullification Crisis of 1832-33. Congress stepped in to protect customs officials who were enforcing the Tariffs of 1828 and 1832 from state court persecution. The Force Act of 1833 provided that civil and criminal actions against persons who were exercising duties as customs officers were removable to the federal courts.[21]

Congress passed removal statutes with increased frequency during the 1860s. This phenomenon reflected its

determination that state courts would not frustrate the war effort nor undermine its sweeping new civil rights program. In 1863, Congress passed the Habeas Corpus Act, which allowed federal officers or persons to remove to federal courts suits for wrongs done in furtherance of presidential or federal authority.[22] This legislation confirmed Lincoln's suspension of the writ of habeas corpus, and was seen as a means of neutralizing actions which might be brought in state courts against those who administered national policies. When Congress passed its first income tax law, it took measures to assure the act would not be emasculated in the state courts. The Internal Revenue Act of 1866 provided that any state court case challenging the constitutionality of the law might be removed to federal court.[23] Again, a countervailing national purpose had prompted Congress to expand federal inferior court jurisdiction at the expense of the states.[24] Likewise, in the civil rights area, members of Congress who promoted this new legislation were acutely aware that their revolutionary laws would find an unsympathetic reception in the courts of many states. For this reason, civil rights laws, beginning with the Act of 1866, authorized plaintiffs to transfer their cases to federal courts.[25]

In sum, during the years preceding passage of the Removal Act of 1868, Congress tended to expand selectively the federal question jurisdiction of the United States

courts via removal. This was by no means a movement to throw open the doors of the federal courts by a general broadening of their jurisdiction; rather, expansion occurred in fits and starts. Uniformly, however, the impetus for these changes was the protection of a special national policy which the state courts could not be trusted to defend.

Part II: Congress and "Its" Railroad

A. The Creation of a Federally Subsidized Line

The vision of a transcontinental railway linking the East and West coasts preoccupied the nation even before the great migration to the California goldfields in 1849. As vast numbers of Americans moved westward and as railroad technology improved, many and diverse interests promoted the construction of an overland route to the Pacific. Merchants and farmers saw the railroad opening new markets for their products. Military leaders, aware of the isolation of California and the western territories, sought to speed the cross-country transportation of troops and war materials. Indeed, Americans in general viewed the bridging of the western expanse as an essential step to fulfilling our national destiny.[26]

Of course, there were monumental obstacles to the building of a transcontinental railroad. Confronting construction crews were hostile Indians, vast deserts, and the immovable Rocky Mountains. American resources and ingenuity would be tested to the limit if the project were to be completed. Not the least of the problems was the more mundane question of financing. As the United States entered the second half of the nineteenth century the prospect of funding such a major railroad enterprise was, at best, bleak. While Americans might rally to the

call for a transcontinental railway, they were unwilling to risk their own dollars to pay for it. During the previous three decades, when railroads were developed east of the Mississippi, many people had learned the hard way not to trust railroad promoters.

The early railroads were built with monies largely supplied by the communities which they were intended to benefit. State legislatures, through land grants and the delegation of the power of eminent domain, had provided the roads with cheap land on which to lay their rails. Local farmers and merchants mortgaged their property to purchase bonds for construction; when many early railroads failed, the people who hoped to profit from their building often suffered financial ruin.[27] Not surprisingly, by the 1850s, railroad promoters were viewed with suspicion. Many states amended their constitutions to prevent subsidies to railroads; the era of state subsidization gave way to a period of skepticism and regulation.[28]

Even had there not been a dramatic change in attitude toward local subsidization, however, it is doubtful that the transcontinental railway could have been completed with conventional financing. Most of the land west of the Mississippi was, after all, uninhabited, and few localities existed which could contribute substantially to the funding effort. More important, the construction promised to be an engineering challenge which would require vast sums of

money. Bridging rivers, carving routes through mountains, and supplying an enormous labor force demanded capitalization which most promoters were neither able, nor inclined, to risk.[29] Railroad enthusiasts thus turned to a previously untapped resource to subsidize the transcontinental railroad: the federal government. During the decade before the Civil War, they found a potential partner favorably disposed to sharing the cost of the great venture.

Congress first expressed interest in an East-West linkup in 1853 when it authorized Secretary of War Jefferson Davis to send survey teams into the wilderness to explore the feasibility of the project. The surveyors mapped out five potential routes, which Davis presented to Congress in 1856.[30] After complex political and sectional maneuvering, Congress finally entered the fray.[31] During the dark days of 1862, while the Union war effort lagged in a seemingly perpetual stall, Congress entered the railroad business.

The Union Pacific Railroad Company was chartered by an act of Congress on July 1, 1862.[32] The enabling act was unique in that it not only established the company's corporate structure, but also included a series of land grants and subsidies which helped underwrite the project. The act created a group of 162 named commissioners, who were authorized to offer for subscription 10,000,000 shares of capital stock at $1,000 per share. Subscribers were required to pay the par value of each share, 10 percent

at the time of subscription, with the balance due in semiannual installments of 5 percent each. When 2,000 shares had been subscribed and 10 percent of the purchase price paid, the subscribers were authorized to elect officers and a board of directors. The United States granted the company tracts of land along the line. Whenever a prescribed number of miles of the road were completed, the government issued bonds to the company in increments fixed by the statute. These bonds were, in effect, a loan to the company, for it could sell them on the market. In return, the United States received a first mortgage on the company's land and property. The railroad was to pay 5 percent of its net yearly earnings on the obligation, and also received credits for work done for the government.

Much to the chagrin of many congressmen, investors did not rush to purchase Union Pacific stock. Though the minimum subscription was filled and the company officially organized on October 29, 1863, a number of factors mitigated to steer financiers away. The Civil War had intervened to create many more lucrative investment options. Additionally, many inverstors believed the government subsidies were inadequate and that the venture was basically unsound.[33] As a result, the company faced bankruptcy from its inception.

In 1864, at the behest of the company's officers, Congress amended the Act of 1862. This new legislation doubled the size of the land grant and conveyed the real

estate to the company free of restrictions. The Union Pacific could issue its own bonds, and the mortgage of the United States on the company's holdings was subordinated to that of the Union Pacific bankholders. The par value of each stock was lowered from $1,000 to $100, and the bond offerings were made more appealing--all in an effort to attract more private investment.[34]

The railroad's second trip to the trough helped maintain its solvency but did not stimulate the influx of investments its supporters in Congress had envisioned. The Acts of 1862 and 1864 do reveal, however, that despite substantial opposition, the Union Pacific was a favored child of Congress.[35] Though the company surely did not possess a carte blanche, its officials nonetheless knew they might find many a sympathetic ear in the halls of Congress.

B. Promoters and Profiteering: 1862-1867

During these formative years, the Union Pacific was guided chiefly by its vice-president, Thomas Clark Durant. Durant, a native of Massachusetts, was a medical doctor by training, but had abandoned his practice to pursue a more promising career as a stock market speculator. Before the Civil War, his search for profits led him to promote a number of midwestern railroads. When the idea of a government-subsidized line to the Pacific was bandied about, he showed an immediate interest. He purchased

Union Pacific stock as an original subscriber and thereafter worked feverishly to promote the company.[36] Durant, in fact, is credited with engineering the congressional adoption of the Union Pacific Amendments of 1864.[37]

It was also Durant who devised the scheme of constructing the railroad through a company owned and operated largely by the stockholders of the Union Pacific. The construction company which he purchased to achieve this end was the now infamous Credit Mobilier of America. The Credit Mobilier was originally chartered in 1859 under a different name by the the State of Pennsylvania.[38] Durant acquired the company on March 3, 1864, and became its president.[39] Soon the offices of Credit Mobilier were housed in the same building as those of the Union Pacific at 20 Nassau Street in New York City.[40]

Durant's use of a "dummy" construction company to build the Union Pacific Railroad was by no means innovative; other roads before this time were constructed by similar means. A construction company, owned and controlled by the stockholders of a railroad, served a number of useful purposes. First, it provided limited personal liability (to the extent of the par value of the construction company stock) for the promoters of the railroad. Second, it allowed the construction company to accept and sell the railroad's bonds for the services it would render and thereby raise needed capital. Finally, and most important,

it allowed the railroad stockholders to receive the gains which would be made through construction; by, in effect, hiring themselves rather than outsiders to do the work, they chalked up substantial, additional profits. The Credit Mobilier became a means of keeping construction profits in the family of Union Pacific shareholders.[41] In a few, short years, the nation would react adversely to this system whereby the overlapping directorates of the Union Pacific and Credit Mobilier transacted business with themselves to their own personal advantage. The public outcry would result in two congressional investigations of what were then perceived as excessive profits made at government expense.

The directors of the Union Pacific executed their first major construction contract in 1864; not surprisingly, the Credit Mobilier came to hold it. This contract was originally made with one Herbert M. Hoxie. Hoxie, a friend of Durant's, was no more that a "straw man," who shortly assigned his contract to the Credit Mobilier.[42]

Even after the passage of the 1864 amendments and the incestuous agreement with the Credit Mobilier, construction of the Union Pacific proceeded inauspiciously. Under-capitalization of the railroad remained a major problem which continually threatened the viability of the project.[43] To remedy the lack of funds, Durant and his cohorts entered into maneuverings which would substantially change the

management of both the Union Pacific and the Credit Mobilier. In 1865, they approached two brothers, Oakes and Oliver Ames, and suggested that they consider joining the venture.[44]

Thomas Durant was correct in believing the Ames brothers of North Easton, Massachusetts, could provide the financial shot in the arm the Union Pacific so sorely needed. Oakes and Oliver Ames were established capitalists who had the money to invest in a promising enterprise.[45] They had inherited their father's successful Ames Shovel Works, which manufactured farm implements. This business had quickly expanded as the frontier opened and the demand for tools increased. Oakes Ames had tinkered with railroad promotion in Iowa before and during the war and already had his own vision of participating in a transcontinental system.[46] Furthermore, the Ameses had many wealthy business acquaintances who might be willing to follow their lead and invest in the Union Pacific. Oakes Ames was also attractive to Durant for another reason. Ames was a congressman and he served on the House Pacific Railroad Committee.[47] One can speculate that Durant believed a friendly influence in Congress could only enhance the company's prospects if future legislation were ever needed.

The Ames brothers, not surprisingly, were amenable to the overtures of Durant and others in the Union Pacific management. They invested heavily in the railroad and in the Credit Mobilier; as expected, they attracted other

New England capital.[48] Before long, the Ames faction maintained a controlling interest in the stock of each company.[49]

Durant realized too late, however, that the management philosophy of his new investment partners sharply conflicted with his own. A dispute centering on the ultimate goal of the venture developed which foreshadowed the events leading to the Fisk Raid. Durant viewed the construction of the transcontinental railway as the principal end to be achieved. He hoped to profit from building the line, not from running it. Once the railraod was completed he would sell out and let others see to its operation. The Ames faction, on the other hand, was not nearly so short-sighted. While they expected to profit from construction, they also intended to gain from running the railroad. They were not preoccupied with short term profits, but rather envisioned developing a sound transportation system.[50]

Conflicts over such basic management objectives were inevitable, and cracks in the Durant-Ames alliance already appeared by 1867. In November, 1866, Durant had attempted unilaterally to execute a new construction contract for the Union Pacific.[51] Durant made his agreement not with the Ames-dominated Credit Mobilier, but with another contractor. When the New Englanders learned of Durant's maneuvers, they acted quickly to counter his gambit. In January, 1867, while Durant was absent from New York, the Union Pacific

Board of Directors rescinded Durant's construction contract and extended the Hoxie contract, which was held by the Credit Mobilier.[52]

Over the next ten months, the discordant factions engaged in an intense struggle for control of the Union Pacific. Realizing that he could not wrest control of the railroad from the Ameses by force of shareholder votes, Durant turned to the New York courts to accomplish through injunction what he could not by election. In a series of lawsuits, Durant sought to block any construction agreements which would enure to the benefit of the Credit Mobilier.[53] His efforts were more than marginally successful. Various injunctions issued by the Supreme Court for the State and County of New York through the early summer of 1867 prevented the Union Pacific from contracting to build its line.[54]

The Ames faction responded with determine to Durant's obstructionist tactics. On May 18, 1867, at the annual meeting of the Credit Mobilier, they removed Durant as president and director of the company. Sidney Dillon, a supporter of the Ameses, was placed in his stead.[55] As the annual meeting of the Union Pacific Railroad scheduled for October 2, 1867, in New York approached, the New Englanders planned to sweep Durant and his backers from positions of authority in the railroad. Amidst a growing animosity within the company's family of shareholders, the Durant and Ames factions braced for the October confrontation.

C. Prelude to the Fisk Raid

Irony abounds in history, and so it was that James Fisk, Jr.'s, plan to seize control of the Union Pacific Railroad was inspired, at least in part, by the leader of one of the competing factions--Thomas Clark Durant. Though Durant steadfastly denied the charge, the evidence strongly suggests that he and an ally, Henry S. McComb, induced Fisk to attempt to purchase 20,000 shares of Union Pacific stock and thereby supplement Durant's forces in the October 2nd election contest.[56]

The 32-year-old Fisk had already attained considerable notoriety before he was lured to the Union Pacific. He epitomized the money-hungry Wall Street speculator, who exhibited a brand of cut-throat capitalism, the image of which would be indelibly impressed in the memories of generations of corporate reformers. Fisk originally hailed from Vermont. As a boy he left home and joined the circus, where he acquired the questionable skills of a carnival barker. Upon his return to Vermont, he put his talents to work as a highly successful travelling peddler.[57] Before the Civil War, Fisk moved to Boston and found employment as a jobber for a brokerage firm. He avoided wartime conscription, and while others fought,Fisk earned large profits by arranging government purchasing contracts. By 1866, he had moved to New York, founded his own brokerage company, and entered the nation's most powerful financial community. Together with his business partner, Jay Gould,

Fisk rapidly amassed a personal fortune.[58]

Fisk moved through New York's ostentatious social circles with a bawdy grandeur that betrayed his nouveau riche aspirations. Short and rotund, he accented his two hundred pound plus frame by wearing loud, gawdy suits. His handle-bar moustache, diamond tie pin, and long cigars were familiar sights about town. Fisk pursued pleasure with the same vengeance as he did money; his reputation as an inveterate womanizer was widespread. From all accounts, he was perhaps the most unsavory of the detestable lot who wielded power on Wall Street during the time.[59]

An episode which occurred during the late 1860's illustrates Fisk's peculiar sense of business ethics. Over a number of years, he and his associates had struggled against Cornelius Vanderbilt for control of the Erie Railroad. When Vanderbilt attempted to corner the market on Erie by buying up its stock, Fisk and Gould bilked him out of millions of dollars by printing a torrent of worthless Erie securities. Vanderbilt eventually relented, and "Prince Erie," as Fisk was dubbed by the New York press, together with Gould, set out to pillage the Erie line. Fisk and Gould nearly doubled the shares of Erie stock; instead of plowing the new capital back into the railroad, however, they used much of it for reckless speculation. The Erie was left in shambles.[60] The road deteriorated and its stock was eventually banned from trading on the

market. Small wonder that the Ames faction hoped to impede any sortie by Fisk intended to gain for him a foothold in the Union Pacific's management.

Fisk's entry into the Union Pacific fray was cast against the background of the Durant-Ames power struggle. In August, 1867, Oakes Ames proposed to the railroad's executive committee that he would personally contract to build a large section of the line, thereby bypassing the Credit Mobilier. Ames, who was anxious to get on with the work, believed his plan, through which all Union Pacific shareholders would receive a percentage of the profits, would be universally acceptable. The executive committee referred the contract to the full board, to be elected on October 2.[61]

As the election approached, Durant made a final, covert move to shore up his slipping control over the Union Pacific. He and McComb encouraged Fisk, who actually owned six shares of the company's stock, to attempt to purchase an additional 20,000. Fisk made his "subscription" on September 21, 1867.[62] When the New Englanders learned of this gambit by Durant, they also "subscribed" to an additional $50,000,000 in shares.[63] Both offers were ultimately dishonored since neither was accompanied by the full par value as required by law; additionally they were made immediately before the election in violation of the company's bylaws.[64] Though neither subscription was a

bona fide purchase, the Fisk offer was to reappear shortly to haunt the Union Pacific's management.

The October shareholders' meeting may be charitably described as a fiasco. Both factions arrived, ready to do battle with the other. Benjamin F. Butler, whom some members of the Ames faction had retained as attorney, has left a description of the atmosphere as the meeting opened:

> I went to New York three days, if I recollect right, certainly two days, before the election took place. I then found that both sides had gone before Judge McCunn, now dead, and had got injunctions against each side voting, each side alleging that the stock held by the other was illegal; and it seemed to be pretty clear that there could be no election without whoever voted on either side, in violation of the injunction, going to jail. That matter was dealt with at very considerable length and at the day of the meeting neither side would vote. We held legal disputations in the matter, one way and the other, until the hour of luncheon came about, about one o'clock. It then occurred to me that there must be a way to get out of that difficulty; and thereupon I went with a gentleman and found Judge McCunn, whom I had known before. I stated to him the dilemma we were in; that we were in a condition not to have any vote because both sides were enjoined, and I suggested to him to modify the injunction as against us (a copy of which I carried in my hand) so as to allow us to vote, subject to all questions to be raised on the illegality of it. Judge McCunn did so far modify the injunction as to allow us to vote. I thereupon went back and advised my clients to hold an election. It was threatened pretty loudly on the other side what would happen if we voted in defiance of the injunction. I told them that I would take the responsibility, that they need not trouble themselves about me, and we voted the election.[65]

Since neither group could agree to the identity of the lawful shareholders, each held its own balloting, "the election

being carried on in two polls, with two sets of inspectors, in the same room; one ticket representing the old board, and the other that of Mr. Alley and his friends."[66] For a short time, at least, there were two sets of officers and directors for the single railroad.

The protagonists finally reached a compromise on October 4.[67] The October 2 election was ruled null and void and a new board, giving the Ameses a one-vote majority was elected. On the executive committee, each side was equally represented. Most importantly, a "Tripartite Agreement" among Oakes Ames, a Union Pacific group known as the Seven Trustees, and the Credit Mobilier was reached. Under this agreement, the Oakes Ames construction contract was assigned to the Seven Trustees. The profits from construction were then to be distributed to the interested parties according to a formula acceptable to all. The shareholders of the Union Pacific approved this agreement, and the power struggle ended.[68]

The Union Pacific's internal feuding did not go unnoticed in Congress; rather, it resulted in a legislative change which was to bear on the Fisk Raid and is intriguing in its own right. Among the provisions of the 1864 Pacific Railroad Amendments was a requirement that annual company elections be held "on the first Wednesday of October next, at the office of said company in the city of New York . . ."[69]

The injunctions and counter injunctions issued by the New York state courts during the October, 1867, row were particularly disturbing. Had the parties not reached an agreement, there was good reason for the Ames faction to be leery of litigating its claims before the New York judiciary. The New York City courts had already developed a reputation for corruption.[70]

Before Congress recessed for the Christmas holidays in December, 1867, Representative Henry Laurens Dawes of Massachusetts introduced a joint resolution changing the date of the annual stockholders meeting from October to March and allowing the electors to choose the site of the following year's meeting.[71] Dawes presented his resolution on December 16; it was debated immediately. The Massachusetts Republican's opening comments failed to disclose the fact that the resolution was related to the power struggle.[72] After debate over a non-related amendment, Representative James Garfield of Ohio asked Dawes whether his bill concerned the Union Pacific's recent internecine struggle:

> I understand that there has been a serious difference of opinion--not to use a harsher term--perhaps we ought to call it a very severe quarrel--in the board of directors in reference to the management of the affairs of this railroad; as the gentleman from Massachusetts suggests, it might well be called the "recent unpleasantness" in connection with this road. I desire to know whether the proposition here offered has any relation to that quarrel and makes us in any way a party to it--whether we take sides with either party to that quarrel?[73]

Dawes protested that he knew nothing of the conflict: "I am frank to say that I know nothing about the quarrel, and I do not represent any one party."[74] After this debate, the measure passed the House with minor amendments, was approved in the Senate, and became law on December 20, 1867, only four days after it was introduced.[75]

There is reason to suspect that Representative Dawes may not have been as candid with his colleagues as he professed. In November or December, 1867, Dawes received ten shares of Credit Mobilier stock from Oakes Ames. These shares, which Dawes purchased at par, but did not fully pay for until mid-January, 1868,[76] were worth three to four times their par value by February, 1868.[77] Dawes therefore profitted from Oakes Ames's "tip," and the Ames faction intended to benefit from Dawes' December 16 resolution. One need not be overly suspicious to conclude that the purchase and resolution were related.

In any event, as 1867 drew to a close, the railroad's position had stabilized. The feuding had ceased, at least temporarily; a construction contract had been executed; and the infusion of new capital meant that the great work of building the railroad could proceed.

PART III: The Fisk Raid

The first months of 1868 were a period of relative tranquility for the Union Pacific. Once the Durant-Ames breach had been mended, there was little present thought of power struggles--or of James Fisk, Jr. Fisk's raid of the Erie continued through the first half of 1868, and of course any railroad investor was aware of his maneuverings. There is no reason to believe, however, that the Union Pacific management had any particular fears of Fisk. At the company's March, 1868, annual meeting in New York, the shareholders decided to meet again in the same city the following year. The company chose not to exercise the option granted in the Dawes resolution of the previous December to change the location of the next year's annual meeting. Apprehension over New York had subsided, and the Union Pacific headquarters remained in the nation's financial capital.

Yet Fisk had not forgotten the Union Pacific.[78] On July 2, 1868, Fisk, Jay Gould, and their attorneys David Dudley Field and Thomas G. Shearman entered into a legal settlement which sealed Fisk and Gould's takeover of the Erie Railroad. His conquest of the Erie, however, had not satiatied Fisk's lust for power and fortune; it had only whetted his appetites. Fisk recognized the potential gains he might realize from the federally subsidized

Union Pacific. On the very day that he secured legal control over the Erie, Fisk moved against the Union Pacific.[79]

A. New York: July, 1868

Fisk's strategy can be quickly summarized. As a holder of six Union Pacific shares and a questionable claim to the additional 20,000 which he attempted to subscribe in September, 1867, he would file a shareholder's suit against the Union Pacific. While the case was pending, he hoped to bring the railroad's construction to a standstill through injunctions prohibiting the transfer of Union Pacific stocks, bonds, and other assets. The company would thus be forced to allow him to share in the venture, buy him off to settle his claim, or face legal and financial ruin in court.

Fisk had reason to believe that his raid of the Union Pacific would be successful. He was represented by Field and Shearman, two of New York's premier lawyers, who had performed admirably, at least from their clients' perspective, during the Erie takeover. More important, the judge who would hear Fisk's claim was already in the mogul's back pocket. Justice George G. Barnard of the Supreme Court for the State and County of New York was a member of the infamous Tweed Ring. A poker-playing crony of Fisk, Barnard had already done Fisk's bidding during the Erie raid, and Fisk and Gould had rewarded the judge

for his trouble with blocks of Erie stock.[80] Rather than serving as an arbitrator in the dispute between the Union Pacific and Fisk, the New York Supreme Court judge could be counted on by the latter to help him complete the takeover.

Fisk's attorneys filed his action on July 2, 1867. He joined as defendants the Union Pacific, the Credit Mobilier, and the officers and board of directors of the railroad. Edwin D. Morgan and Oakes Ames were also sued in their capacities as trustees of the holders of Union Pacific bonds. Fisk prayed for a declaration that he was owner of the controversial 20,000 shares and for an injunction which would freeze all Union Pacific transactions and order the repayment of all monies paid under the Credit Mobilier and the Oakes Ames contracts.[81] The following day, Justice Barnard ordered the defendants to show cause at noon on July 21 why the injunctions should not be granted.[82] Six days later, on July 9, Justice Josiah Sutherland, a colleague of Barnard, ordered Sidney Dillon, the railroad's president, and Benjamin C. Ham, a director, to give depositions before a court appointed referee.[83] The depositions were ostensibly intended to help Fisk's attorneys prepare for the injunction hearing. They would also, however, have the complimentary effects of airing the railroad's affairs in public and granting Fisk access to the company's records and negotiable securities.

The railroad's officials, however, had no intention of keeping their appointments with either the referee or Justice Barnard. Although David Dudley Field obtained an injunction from a third justice, Albert Cardozo, prohibiting the defendants from removing Union Pacific books, papers, or property from New York State, Dillon, Ham, and Thomas C. Durant absconded.[84] On July 21, when the clerk called the case of Fisk v. The Union Pacific Railroad et al., Justice Barnard's courtroom was devoid of defendants. The judge overruled a motion by Charles Tracy, the defendants' attorney, which sought to vacate the deposition order. He continued the injunction hearing until August 4, and ordered Dillon, Ham, and Durant to appear in his courtroom the next day for their depositions.[85] When the three failed to appear the following morning, Barnard issued contempt orders bailable in the amount of $10,000 each. The New York press speculated that the contemnors would soon be confined in the Ludlow Street Jail.[86] In New York City, Fisk had plainly won the first round.

B. Washington, D.C.: July, 1868

The promoters of the Union Pacific, however, had no intention of sitting idly by while being bullied by Fisk and Barnard in a New York court. In a letter to the railroad's chief engineer, General Glenville M. Dodge, Union Pacific president Oliver Ames expressed the management's

determination to deal with Fisk:

> While we were out on the Road some injunctions were served on the Co. for Black Mail purposes and the Ex. Committee were called together and some very strong action taken to head off injunctions.[87]

The "strong action" was a plea to Congress for immediate help. Anticipating that Fisk would have as much "justice" as his money could buy, they worked to divest Barnard of his jurisdiction. The congressional relief they requested was the authority to remove the suit against the Union Pacific to federal court.

The Second Session of the Fortieth Congress ranks among the most tumultuous in American history. During the late winter and early spring, the attention of both houses was drawn to the Senate's impeachment trial of Andrew Johnson. Bitter debates over the readmission of a number of former Confederate states further sapped the energies of many congressmen. To make matters worse, the summer of 1868 was particularly hot and humid. Thus, by July, most members were anxious to adjourn and return to their homes. They planned to conclude the session before the end of the month, and by mid-July, they were working at a feverish pace to complete their duties. Despite these pressures, however, Congress responded with resolve to the situation in New York. In retrospect, it is indeed difficult to imagine how it could have been more accomodating. In the

short span of seventeen days, the House and Senate passed the Removal Act of 1868--a statute which the railroad's promoters at least believed would finally insulate them from the likes of Fisk and Barnard.[88]

Roscoe Conkling, a New York Republican who generally opposed the Tweed Ring, asked and received the unanimous consent of the Senate to introduce the legislation, Senate Bill No. 610, on July 10, 1868. The bill was immediately read twice, referred to the Judiciary Committee, and ordered printed.[89] Three days later, Lyman Trumbull, Chairman of the Senate Judiciary Committee, reported the bill to the full Senate, with minor changes.[90] The bill, as finally enacted, related to federally chartered corporations and read as follows:

> That any corporation, or any membership thereof other than a banking corporation, organized under the law of the United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefore, verified by oath, either before or after issue joined, stating they have a defence arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such court on the first day of its session copies of all process, pleadings, dispositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as are required to be done by the act entitled

> "An act for the removal of causes in certain cases from State courts," approved July twenty-seventh, eighteen hundred and sixty-six; and it shall be thereupon the duty of the court to accept the surety and proceed no further in the suit; and the said copies being entered as aforesaid in such court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process, and all the provisions of said act in this section referred to, respecting any bail, attachment, injunction, or other restraining process, and respecting any bond of indemnity or other obligation given upon the issuing or granting of any attachment, injunction, or other restraining process, shall apply with like force and effect in all respect to similar matters, process, or things in the suits for the removal of which this act provides.[91]

The Removal Act of 1868 was general, not special legislation; no mention was made of the Union Pacific Railroad. The act's history, however, leaves no doubt that the bill was passed in response to Fisk's suit.

The only surviving debates over the measure occurred on the Senate floor. Senator Trumbull, the bill's reporter, clarified that its only purpose was to stymie state interference with the construction of the transcontinental railway:

> It has no reference in terms to the Pacific Railroad or any other railroad, but I suppose it had its origin, perhaps, in suits that are being instituted against the Pacific Railroad Company in the city of New York or elsewhere, by way of injunction restraining their operation. This has become a great evil in the country. The directors of our great lines of railroad . . . are being frequently enjoined by some inferior judge in the city of New York against going on with these great works; and though this bill does not reach to the cases of corporations created by the

> States, we did suppose that it was competent for the United States to protect its own corporations organized under its authority from operations granted by some recorder or unfair judge in the city of New York by authorizing the company to take such cases into the United States courts for adjudication.[92]

Senator George F. Edmunds of Vermont, who voted for the bill, voiced approval that it was general legislation. He noted that he did not "wish to be considered as either approving or disapproving of the special object which this bill is supposed to have in view."[93]

A number of years later, testimony before the congressional committees investigating the Credit Mobilier scandal also revealed that the Removal Act of 1868 was designed to protect the railroad. These subsequent statements are reliable because they were made by the railroad's promoters who were then accused of influence-buying in Congress. It was clearly against their interests to admit they had attempted to sell Credit Mobilier stock to congressmen who voted on the measure. John B. Alley, the former congressman from Massachusetts who once chaired the House Standing Committee on the Pacific Railroad and was an Ames faction Union Pacific Board Member, testified in response to a question from Representative McCrary that "the Fisk raids, etc. occasioned the Company to go to Congress to keep itself out of the New York courts."[94] Likewise, Oakes Ames, who was a member of the Fortieth Congress,

stated: "The only thing I have ever asked [of Congress] was the removal of the office from New York to Boston in order to get rid of the injunction of James Fisk and others, granted by Judge Barnard's court, and the right to transfer such causes to the United States courts."[95]

Senate Bill No. 610 passed the Senate on July 18, 1868, by a margin of 30-12, with 20 members absent, and was sent to the House the same day.[96] The measure was referred to the House Judiciary Committee and was passed by the House on the last day of the session, July 27, 1868.[97] There is no record of any debate in the House. Since it was considered at a time when congressmen were scrambling to adjourn, the absence of debate is not surprising.

As the members of the Fortieth Congress adjourned, they had reason to believe the building of the transnational railroad could now proceed without the interference of Justice Barnard. By expanding the removal jurisdiction of the inferior federal courts, they provided the Union Pacific with the means of escaping the New York Supreme Court. The initiative now belonged to the company and its lawyers. They had only to go through the mechanics of the removal procedure to achieve their release.

C. New York City--March-April, 1869

One can only imagine Charles Tracy's feelings of relief and vindication when he walked into the clerk's office of the New York Supreme Court on July 31, 1868, and filed the defendants' petition for removal to the United States Circuit Court for the Southern District of New York.[98] The Removal Act of 1868, which, after all, had been passed only four days earlier for the benefit of his clients, was an impressive trump card. Tracy had every reason to believe that his carefully drafted petition, accompanied by the proper surety bonds, would finally neutralize Justice Barnard and his colleagues. It only remained for the New York court to transfer physically the case file to the circuit court. Tracy's elation was short-lived, however. To his dismay, he learned the transfer was not completed; instead, Justice Cardozo stayed the proceedings and scheduled a show cause hearing on the removal issue. He allowed Fisk's lawyers to depose the defendants so the plaintiff might resist the transfer.[99]

At this point, developments in the Fisk case, which had been moving at breakneck speed suddenly slowed. The removal hearing was scheduled, then continued, on a number of occasions.[100] Whether the protagonists engaged in settlement negotiations is unknown. It was not until December 15, 1868, when a hearing was finally held before

Justice Barnard. Barnard took the removal question under advisement rather than deciding it immediately.[101]

With the coming of the new year, matters once again intensified. The company's annual meeting, set for March 10, 1869, was rapidly approaching and Justice Barnard still had not issued an order respecting transfer. At this point one of the more bizarre incidents of the Fisk Raid occurred. James Fisk, Jr., approached the defendants and presented them with a choice: they could buy him off by settling the case or face financial ruin in the New York court. There is ample evidence of Fisk's overture to the railroad's directors. During the Poland and Wilson Committee hearings, a number of persons testified about the incident. The recollections of John B. Alley were the most vivid:

> I was in Mr. Cisco's office one day about the time that they were after Mr. Oliver Ames, at the time of the Fisk raid, as we call it. Mr. Cisco was treasurer of the company at the time. While sitting at his table, Mr. Fullerton and Mr. Tracy, counsel to the company, and Mr. Bushnell came in and spoke to Mr. Cisco and said that they would like to say a word with him. They went up to one corner of the room and whispered together. I did not hear what they said. Then they called Mr. Oliver Ames and he went up. Mr. Oliver Ames came back to me and said that Mr. Fullerton and Mr. Tracy said that the suit could be settled for $50,000. Mr. Ames said that it was outrageous to blackmail us in that kind of a way. I told him I thought so too, and said I,"so far as I am concerned I never will give it my approbation, and I advise you to have nothing to do with it."[102]

The testimony of Oliver Ames and Cornelius Bushnell corroborated Alley's statement.[103] While Alley maintained

that he opposed any payment to Fisk, company records show that the payoff was made. An executive committee treasurer's entry dated Feb. 26, 1869, plainly states:

> In reference to the questions propounded by the executive committee of the company, February 25, I have to report first, the check for the $50,000 referred to was given on the order of Mr. Ames, president, and Messrs. Bushnell and Alley--said to be for legal expenses.[104]

Alley conceded before the Wilson Committee that the $50,000 had been paid but without his consent or that of Oliver Ames.[105] Ames concurred that the payment was made but was less certain about his opposition, stating "I did not give any special consent or dissent."[106]

What became of the $50,000 is a mystery. No one could testify Fisk actually received the money, but the railroad officials assumed he had. John B. Alley suspected that a portion of the payoff went to Justice Barnard but could not substantiate this hunch.[107] What is certain is that Fisk did not dismiss his suit. According to Alley, the company's lawyers stated "that it [the money] was paid to Fisk; and that Fisk agreed to withdraw the suit, and settle the whole thing; but that for some reason or other he did not choose to do it, and, to use their expression, 'went back on them.'"[108]

March and April, 1869, witnessed the culmination of the Fisk Raid. Through the offices of Justice Barnard, Fisk succeeded in disrupting the company's election,

running its directors out of New York, and seizing, though only temporarily, control of the Union Pacific's offices. By a quick series of orders and injunctions, the New York Supreme Court drove Congress's railroad to its knees. Once again, it would take an act of Congress to free the road from the clutches of the New York judiciary.

The first hint that all was not right came shortly after March 6, when the defendants received a supplemental complaint from Fisk's attorneys. Fisk asked the New York Supreme Court to enjoin the company election scheduled for March 10. What the company officials could not have known was that Barnard had already denied their petition for removal on March 4. This order, though dated the fourth, was not entered in the court's records until March 13.[109]

On March 9, Barnard took a critical step, one which would return to haunt him later in his career. That day, he entered an ex parte injunction prohibiting the Union Pacific's March 10 election. The order was made without notice to the defendants; they were not to learn of it until the following morning when they met to vote at 20 Nassau Street.[110]

The New York Sun, in an item headed "Prince Erie's War Dance: The Scalping of the Shareholders of the Union Pacific," recorded the imbrogilio that was the company's annual meeting. The shareholders, worth "in the aggregate

over $200,000,000," began the balloting after 10:00 A.M. The voting proceeded at a leisurely pace, until James Fisk, Jr., appeared to vote his 20,000 "shares." Company monitors informed Fisk he was not a lawful shareholder, and he obligingly left the building without incident. Around 2:00 P.M., however, with the voting almost completed, Justice Barnard's injunction was delivered. The company officials chose to ignore the order and the voting continued. The Sun described what happened next:

> Suddenly a noise was heard on the stairs without. A moment of suspense followed. Then the doors were flung open, and a posse of Sheriff's officers entered armed with warrants for the arrest of Oliver Ames . . . Sidney Dillon . . . Thomas C. Durant, Cornelius S. Bushnell, John Duff, John B. Alley, John F. Tracy, and Oakes Ames. The arrests were made for contempt of court in having violated Judge Barnard's injunction . . .[111]

Those arrested later posted bond and were released from custody. Oakes Ames claimed congressional immunity and left New York on the midnight train to Washington. Fisk, in the meantime, gloated over his coup:

> During the afternoon, Prince Erie sat in his private office, in Broad Street, placidly smoking a cigar, and seemingly totally unconcerned as to the public stir created by his action. Occasionally a terrified friend called him and endeavored to learn the cause of the rumpus. A short talk and a lively laugh would follow, and the friend would depart satisfied with his interview.[112]

Alley and Bushnell both claimed that Fisk made still another request for a blackmail payment on the day of the election, but that it was refused. Alley stated:

> Fisk came to me the very day the injunction was put on and said, "I will agree to settle this thing for $100,000, and relieve you entirely." I said to him that never with my consent should the company pay a dollar in any such way . . . He replied, "It is a mere matter of dollars and cents, and if your company does not do it I will damage you a million." I said to him I did not care what the consequence was, the company would never with my consent pay him anything whatever.[113]

Undaunted by the company officials' adherence to principle, Fisk pushed on with his assault. On March 11, he filed affidavits reminding the court that Ham and Dillon had failed to appear for depositions the previous summer. He asked and received a second injunction on March 12, which prohibited the defendants from removing from the state any stocks, bonds, money, or other property of the Union Pacific or Credit Mobilier. In this second order, Barnard scheduled a hearing for the first Monday in April to consider whether a receiver should be appointed for the Union Pacific.[114]

Four days later, Fisk submitted another affidavit which claimed the defendants were violating the March 12 injunction. Barnard responded on March 18 with perhaps his most outrageous ex parte injunction. He placed the Credit Mobilier and bonds held by the Union Pacific in the hands of a receiver. The person entrusted with the property of both companies was William M. Tweed, Jr., the son of the notorious "Boss" Tweed of Tammany Hall. Charles Tracy opposed the receivership during a March 20 hearing. He

argued that Justice Barnard no longer had jurisdiction over the action since it had been removed to federal court. His plea fell on deaf ears, as Barnard continued the receivership.[115] Two days later Fisk filed a second supplemental complaint which, in effect, asked that the receiver be allowed to transact the entire business of the Union Pacific. Again, Barnard substantially complied with this request through another injunction dated March 23.[116]

Tracy, in the meantime, continued working to remove the case to the federal circuit court. He filed a second petition for removal, this time with a Judge E. H. Rosekrans. Rosekrans, who did not preside in New York County, approved the removal. Barnard promptly vacated this order, and for a while each judge countermanded the other's decrees. Barnard ultimately triumphed in this exchange.

The crisis finally reached its climax on March 30, 1869. On that date, Justice Barnard ordered the receiver to take possession of the property described in his previous orders. He authorized Tweed to enter the offices of both companies and open the Union Pacific's safe "by any means in his power."[117]

The assault on the Union Pacific's safe at 20 Nassau Street by Receiver Tweed was a fitting end to a farcical affair which had kept most New Yorkers, save the shareholders of the railroad, amused. Company officials refused to

surrender the safe's combination, so Tweed and his workmen were forced to demolish it with sledgehammers. The New York Sun graphically told of the attack on this "colossus clenched." For almost a day, the vault stood as the embodiment of the Union Pacific's resistance to New York's corrupt establishment. But Receiver Tweed and his gang ultimately triumphed and the safe was breached. Their efforts were hardly rewarding, however; company officials had removed the contents and the safe was virtually empty.[118] Apparently, a disgruntled Fisk employee informed C.S. Bushnell, a member of the railroad's executive committee, when the injunctions would be served, and Bushnell spirited away the Union Pacific's books and holdings.[119]

The remaining proceedings in the New York Supreme Court were of little moment. Though Barnard continued his harassment of company officials, most had wisely fled the jurisdiction. Another factor militated against further interference by Justice Barnard. On April 6, Judge Blatchford of the United States Circuit Court ruled that the action had been transferred to federal court, rendering the state court proceedings null and void.[120] And finally, Congress once again acted to help the Union Pacific. On April 10, 1869, it passed a joint resolution authorizing the company to hold a new election in Boston on April 22 and to move its offices from New York City.[121] Before the month was out, the Union Pacific bid a final adieu to Nassau Street and Justice Barnard.[122]

D. Washington, D.C.--March-April, 1869

A joint congressional resolution allowing the Union Pacific to leave New York was seen by the company's promoters as a logical means of breaking the impasse in state court. Congress had accommodated the railroad in 1867 and 1868 by enacting favorable legislation in the face of threatened interference; the spectre of a corrupt judiciary seizing the transcontinental railroad had now actually materialized. The railroad's directors who traveled to Washington following the March 9 injunction hoped that Congress would help them again. They could show that every day Barnard's order remained in force, the company lost huge sums of monies from potential bond sales.[123] The company's standing in the financial community was at a low ebb--and slipping rapidly.

The directors did get their special legislation on April 10 but they had little reason to feel smug. For along with the transfer authorization, Congress also demanded an attorney general's investigation of the company's finances.[124] Fisk's suit had alerted Congress to the relationship among the Credit Mobilier, the trustees of the Oakes Ames Contract, and the Union Pacific. Additionally, another suit charging Oakes Ames with congressional influence-buying had been filed in Pennsylvania against the Credit Mobilier in November, 1868.[125] As the Credit Mobilier scandal deepened, the congressional mood toward the Union

Pacific quickly changed from accommodation to suspicion. Few congressmen doubted that Fisk and Barnard were rascals; still, they were troubled by the allegations of Fisk's complaint. The relationship of the Union Pacific to the Credit Mobilier dominated the debates and was reflected in final draft of the joint resolution.

Ohio's John A. Bingham introduced H.R. No. 6 on March 15, 1869, shortly after the first session of the Forty-First Congress convened. This measure, which simply scheduled a new election in Boston and allowed the company to relocate its office, was briefly debated, approved, and sent to the Senate.[126] In the Upper Chamber, however, the resolution met with a quite different reception. Though most senators agreed the bill was necessary to protect the nation's interest in the road, they also expressed their disenchantment with the unfolding scandal. Western senators, who favored the rival Central Pacific Railroad, pressed for an investigation.

Senate debate of the joint resolution continued sporadically over a five day period, beginning April 5, 1869.[127] Senator William Morris Stewart of Nevada began the assault with a lengthy broadside against the Union Pacific. After detailing the times Congress had already placated the company's needs, Stewart questioned the motive behind the current resolution. Was it merely intended to skirt a corrupt tribunal, or was there a sinister purpose?

> Mr. Fisk alleges that he is a stockholder of the road, and that this "ring" inside have (sic) absorbed the profits, and he wants an account made to show his share of the profits. He asserts that the Credit Mobilier have made contracts with themselves, being also the trustees of the Union Pacific Road, so as to absorb the entire Government bounty, and have made dividends among themselves . . . He even goes so far as to charge that members of Congress are interested in this thing . . .
> . . .
> If it be true that they have made these enormous dividends, if it be true that they have been mixed up with the Credit Mobilier in an unfortunate manner, there should be something more done than to pass a law allowing them to change their place of business.[128]

Stewart continued his speech on April 6, disclosing the details of the Tripartite Agreement and Oakes Ames' interest in the Credit Mobilier. He endorsed an amendment by Senator Garret Davis of Kentucky which called for a probe of the Union Pacific's finances.[129]

Stewart's counterpart from Nevada, James W. Nye, joined the fight for an investigation. Relishing the opportunity to embarrass the Union Pacific, Nye urged that Justice Barnard be permitted to sort out the truth:

> Why are the Union Pacific Company afraid of Judge Barnard? Sir, the party that is just and right fears no tribunal . . . I repeat, honest men and honest companies are not afraid to exhibit their books and doings to an enlightened and intelligent world, and to a corrupt or just tribunal. If their proceedings stand stamped with truthfulness upon their books, they need not fear the most corrupt judge in the world.[130]

Interestingly, Fisk himself may have provided the senators details of the construction contracts. The

New York Sun reported on March 31, 1869, that Fisk's lawyers lobbied in opposition to the joint resolution:

> Mr. Fisk's attorneys are resisting in the Senate the House resolution to allow the Union Pacific Railroad to hold an election for Directors here, and to remove their office from New York City. Mr. Fisk has issued a pamphlet containing an ex parte statement of his case, and suppressing the fact that his allegations have all been denied in Court. He concludes as follows: "Let Congress hold hands off, and directly remit the defendants to New York Courts for their remedies."[131]

When the debate finally ended and the final vote was cast, Congress granted the Union Pacific's plea to allow it transfer its offices from New York. The victory, however, was decidedly hollow. For attached to the original resolution were a number of amendments which boded ill for the company's promoters. Foremost was one authorizing the attorney general to investigate the finances of the Union Pacific Railroad.[132]

Part IV: The Legacy of the Fisk Raid

The shareholders of the Union Pacific Railroad Company assembled on April 22, 1869--in Boston--to elect officers and a board of directors. To the relief of the railroad's management, James Fisk, Jr., did not attend the meeting. Once installed, the new board's first order of business was to move officially the railroad's general office from New York to Boston. Henceforth, the company's headquarters was 114 State Street, Boston.[133] By severing its ties with New York, the company's management permanently avoided the jurisdiction of Justice Barnard. The Fisk Raid had failed and the crisis passed.

No one profited financially from the Fisk Raid. While the Union Pacific's management ultimately triumphed, the railroad was still clearly the biggest loser. It sustained serious, though not fatal, losses when Fisk disrupted trading of its stocks and bonds on the New York market. Company officials estimated that the Union Pacific lost millions during the spring of 1869.[134] And although Fisk managed to finagle the $50,000 "settlement" payment from the railroad, this amount was a pittance compared to the fortune he would have realized had his raid been successful. His dreams of a take-over similar to his successful raid of the Erie Railroad dissipated as the Union Pacific abandoned its New York City headquarters.

In the years following the Fisk Raid, the fates were rather unkind to many of the principal protagonists. The

details of the Union Pacific's construction contracts made public by Fisk's lawsuit and a subsequent action against the Credit Mobilier led to two congressional investigations. In 1873, the House of Representatives officially censured Oakes Ames for selling Credit Mobilier stock at reduced prices to members of Congress. Ames returned to his home in North Easton, where he died, a broken man, the following year.[135] The corruption of Justice George G. Barnard cost him his judicial office. On August 19, 1872, the New York General Assembly convicted him of twenty-five of thirty-seven offenses set out in a bill of impeachment. Four of the counts for which Barnard was adjudged guilty stemmed from his actions in Fisk v. Union Pacific Railroad Company.[136] Perhaps Barnard's disgrace was tempered by the generosity of his friends whom he had helped over the years. At his death in 1879, Barnard's estate included over one million dollars in stocks and bonds, many from companies once dominated by Fisk and Jay Gould.[137]

Retribution was not mitigated, however, for James Fisk, Jr. In January, 1872, he was shot by a former business associate who had stolen the affections of Fisk's mistress. Fisk lingered in misery for a day before succumbing to his wounds.[138] He died never fully realizing the political repercussions of his raid or of his revelations about the Credit Mobilier. Recalling the questionable exploits of Fisk during his short lifetime, the editors of the New York Times concluded that "the natural consequence

of a vicious life has happened."[139] Fisk's demise marked the end of his struggle against the Union Pacific. His lawsuit against the railroad dragged on for a number of years in federal court, but his widow finally settled the estate's claim for $20,000.[140]

Although the Fisk Raid was soon forgotten, one congressional response it had generated--the Removal Act of 1868--came to play an important role in American railroad development. It will be recalled that the Removal Act had little bearing on the specific problem it was designed to remedy. By the time Fisk's case was removed to federal court, the raid had substantially run its course. It was the Act of April 10, 1869, which permitted the company to transfer its headquarters to Boston, not the Removal Act, which finally frustrated Fisk's plans. The railroad's attorneys simply failed to use the Removal Act to their clients' advantage until Fisk had already inflicted considerable damage.[141]

Ironically, while the Removal Act of 1868 never really accomplished its intended aim, almost immediately after its passage, corporations began employing it toward an end which Congress had specifically disclaimed--the wholesale removal of suits against federally chartered corporations from state to federal courts. During the torrid summer of 1868, when the Removal Act was sailing through Congress, a number of senators from the West expressed concern over the bill's possible effects. Senator Cornelius Cole of California wondered whether the act could be applied

beyond the circumstances of Fisk's case to divest generally state courts of their jurisdiction.

> In my judgment this is virtually denying to any person having a cause of action against a railroad company chartered by the United States his remedy in any State court, and it seems to me that it will be an outrage upon any person that has a cause of action against one of these railroad corporations . . . It is broader in its operations, I believe, than appears from what has been stated.[142]

In a similar vein, Senator Thomas A. Hendricks, a Democrat from Indiana, prophetically cautioned that the courts could give the bill's provisions an expansive interpretation:

> If the courts will stand by the letter of that provision there is not so much damage to be apprehended; but if the courts shall go so far . . . as to say that this law is intended to protect corporations created by the laws of the United States in all of their litigations; in other words that simply because a corporation has been created by the United States, therefore its cause may go to the courts of the United States, it will be a very dangerous construction.[143]

The bill's reporter, Senator Lyman Trumbull of the Judiciary Committee, assured the skeptics that there was "nothing covert in the bill" and that their suspicions were unfounded. That the measure passed the Senate by more than a two-to-one margin suggests Trumbull succeeded in convincing his colleagues of the bill's innocent designs.[144]

Despite Trumbull's assurances, the worst fears of Cole and Hendricks were shortly realized. Beginning in 1869, lawyers for federally chartered railroads relied

on the Removal Act of 1868 in their attempts to transfer a variety of suits against their clients from state to federal courts. Often, the federal courts accommodated their requests. Some United States courts interpreted the act liberally, so as to encourage removals. Their decisions favored the railroads in two ways: first, the courts generally rejected purely procedural challenges by plaintiffs that were designed to frustrate removals; second, and more important, they construed the act broadly to allow a federally chartered corporation to remove any suit against it to a federal forum. The mere fact that a company possessed a federal charter was held to create a federal question for jurisdictional purposes, regardless of the nature of the plaintiff's substantive claim. Railroads were thus able to transfer tort claims, contract suits, land disputes, and other traditionally local matters to the federal system. Through the Removal Act of 1868, a federal charter became a carte blanche by which a company could completely elude the jurisdiction of the state courts if is so chose.

The federal courts liberally interpreted the Removal Act's procedures to guarantee that plaintiffs could not easily evade their authority. While they expanded federal authority at state expense, most did not deviate significantly from earlier court constructions of other removal provisions. District Judge Blatchford disposed of many

of these procedural challenges in his first opinion in Fisk v. Union Pacific Railroad Company.[145] He held that Fisk's entire suit, not just those portions concerning federal law, must be removed to federal court. Otherwise, plaintiffs could simply join non-federal with federal claims, thereby allowing state courts to retain partial jurisdiction and thus frustrate the benefits of removal. For the same reason, defendants who could not themselves petition for removal under the statute would have their cases transferred to federal court if a co-defendant was a federally chartered corporation or one of its members. Any member of the corporation, including shareholders, could petition for removal, and once removal was requested, the state court was immediately divested of all jurisdiction over the case.[146] Other courts allowed defendants to file for removal by only generally stating their grounds for transfer. One could merely claim he had a defense arising under the Constitution or federal law without specifically detailing the nature of the defense.[147] Challenges to removal petitions could not be made by motion, but only upon proof at the time of trial.[148] In sum, most courts gave petitioners for removal the benefit of the doubt when procedural questions arose so as to make transfer easily available to those claiming the law's protection.

Lower federal court decisions considering the substantive types of actions which were removable, however, would have

a more far-reaching effect on the balance between state and federal judicial power. On its face, the Removal Act of 1868 appears to have established two prerequisites for removal: first, the petitioning party must have had the status to apply for removal by possessing a federal charter or by having membership in a federally chartered corporation; second, the petitioner must have asserted "a defense arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States."[149] Despite this unambiguous language and the expressed intent of the act's Senate sponsor, railroad lawyers attempted to remove cases to federal court when their clients fulfilled only the status requirement. Their perserverance was rewarded when a Supreme Court justice, sitting as a circuit judge, held that the mere fact that a company possessed a federal charter was sufficient to warrant removal.

As early as 1873, lawyers for the Union Pacific attempted to remove a case from a state court simply because the company possessed a federal charter. This first effort to secure an expansive reading of the 1868 Act proved unsuccessful. In Magee v. Union Pacific Railroad Company, a plaintiff had sued the railroad in a Utah territorial court for negligence.[150] Citing its congressional charter, the company moved to transfer the suit to federal court. The federal district judge who considered the removal petition

found it deficient and remanded the case to the territorial court. In an opinion which reflected the concerns raised in the Senate debates, the judge held that removal depended not only on the character of the party defendant, but also upon the nature of the defense. Since the railroad's defense to the negligence claim did not arise under a federal law or the Constitution, removal was improper.[151]

Soon after Magee, however, in a suit filed in a Nebraska state court, railroad attorneys reasserted their demand for a broad reading of the Removal Act. In this case their arguments prevailed. Justice Samuel Miller considered a factual situation which in all respects resembled that of Magee, but he reached precisely the opposite result. In Turton v. Union Pacific Railroad Company, Miller found that removal was proper despite the fact that the railroad had raised no federal defense. Although the justice's terse, two sentence opinion was hardly an exposition on the merits of the opposing party's points of authority, the railroad lawyers rightfully hailed the decision as an important victory. Federally chartered railroads continued to press for removals and based their petitions on the authority of Turton.[152]

Over the next ten years, attorneys for federally chartered railroads took full advantage of the Removal Act of 1868. They skillfully relied on the act, the Turton opinion, and a subsequent removal provision of the Act of March 3,

1875, to transfer a host of negligence claims and land disputes to the federal courts. Eventually, the United States Supreme Court was asked to determine if the mere fact that a company possessed a federal charter was sufficient to create a federal question for jurisdictional purposes. When it answered this query in the affirmative in the Pacific Railroad Removal Cases, the Court sanctioned the railroads' flight to the federal courts at the expense of state court power.[153] The railroads and a sympathetic federal judiciary had taken an act intended as special legislation and used it as a means of substantially altering the state-federal judicial balance. What had begun as a solution to a local problem in New York ultimately resulted in the undercutting of state judicial authority in the western states.

Conclusion

When the Union Pacific joined with the Central Pacific at Promontory, Utah, on May 10, 1869, the first transcontinental line was completed. The operations of these two huge railroad companies spanned many of the states and territories west of the Mississippi River. Their assets, which included track, rolling stock, and vast land holdings obtained through federal grants, were spread through numerous jurisdictions. These railroads assumed a critical role in the economic and social life of each community they touched.

For the Union Pacific, Promontory symbolized a beginning rather than an end. In subsequent years, the railroad grew as it expanded into new areas. It purchased or created additional roads which served as feeder or branch lines to its main route. These railroads were organized under the 1862 and 1864 Pacific Railroad Acts or other federal legislation.[154] They received federal charters and, like the Union Pacific, qualified under the 1868 Act to transfer suits against them from state to federal courts. Like the Union Pacific, these minor companies relied on the Removal Act to elude hostile state court judges and juries.[155]

The experience of the Union Pacific and its sister companies was not lost upon Congress. The Congress which enacted the Removal Act of 1868 had done so with a limited purpose--to rescue the Union Pacific from the clutches of James Fisk, Jr., and Justice Barnard. Like its predecessors

during the first half of the nineteenth century, the 1868 Congress had relied on a removal statute to accomplish what it viewed as a short-term goal. It expanded the federal question jurisdiction of the lower United States courts to meet a specific problem, not to make a major alteration in the federal system. It was the railroads' lawyers who later realized the full potential of the act and used it to their clients' advantage. By 1875, however, members of Congress were not nearly so naive. They, too, were now aware of the potential power of the federal judiciary. The experience of the Pacific railroads in the federal courts of the West was generally recognized, especially by the many congressmen who were lawyers.[156] During the debates over the 1875 Act, which for the first time granted lower federal courts original jurisdiction over federal questions, some legislators voiced their desire to significantly alter the balance between state and federal judicial power. Although these debates chiefly concerned the diversity jurisdiction of the United States courts, they do reveal a new attitude by some members toward the role of the federal courts in the nation's economic system.[157]

The comments of Senator Mathew Hale Carpenter of Wisconsin are the most enlightening. Carpenter, an attorney who at times represented railroad interests, was the bill's Senate sponsor. In fact, he claimed to have rewritten the bill "three times end to end" when it was before the Senate Judiciary Committee.[158] Carpenter also successfully led the

floor fight to defeat amendments which would have emasculated the bill and served as a member of the House-Senate Conference Committee which produced the final version.[159] While turning back one proposed amenment, Carpenter made a number of telling remarks about his view of how American society had drastically changed in recent years:

> The act of 1789 was undoubtedly a wise act for that time; but the thirteen States which then constituted the Union have grown now to thirty-seven; our commerce that was streaming up and down the Atlantic coast crosses the continent; our people have become totally changed in their methods of doing business; we are a roving, traveling people; the New Yorker is as much at home in California as he used to be in Massachusetts; he does not feel farther away from his fireside when he sits down by the billows of the Pacific than he used to when he was at Cape Cod, and in fact he is not, because he can return as quickly. The whole circumstances of the people, the necessities of business, our situation, have totally and entirely changed.[160]

In Carpenter's view, the nation's legal system, too, must be adapted to meet the needs of expanding interstate business and transportation concerns. The Constitution authorized this change and it was the duty of Congress to meet the challenge. "The time has now arrived it seems to me," he stated, "when Congress ought to do what the Supreme Court said more than forty years ago it was its duty to do, vest the power which the Constitution confers in some court of original jurisdiction in civil cases, and there it properly belongs."[161] Soon after Carpenter's comments the bill passed the Senate by an eleven vote margin and an amended version was adopted by both Houses.[162]

One can speculate that the experience of corporations such as the Union Pacific in the federal courts contributed to Congress's decision to make its sweeping expansion of the lower courts' federal question jurisdiction in 1875. A strong case can be made that the elusive history of this "sneak legislation" was set against the backdrop of the Pacific railroads' struggles to flee the jurisdiction of the state courts. The Removal Act of 1868 plainly began the exodus to the federal courts. The railroads' experience illustrated that the federal courts could provide a more congenial forum for resolving questions of interstate proportions when local biases affected the judgment of the state courts. By assuming a more active role in dispute solving, the federal courts could facilitate the development of interstate transportation and other facets of national commerce.

The 1875 Act, of course, did give the federal courts this critical responsibility for overseeing the nation's commercial life. Federally chartered corporations benefited since they could now rely on their charters to originate their own claims in the lower United States courts. This expanded jurisdiction was significant even for companies possessing state charters. They, too, could originate suits in or remove claims against them to federal courts so long as a question involving federal law or the Constitution was presented. Soon after the passage of the 1875 Act, this latter type of case quickly found its way into the federal system.[163]

By the 1880s, changes in the scope of the United States courts' federal question jurisdiction had completely altered the balance of power between state and federal judiciaries. This new jurisdiction, coupled with a liberalization of the rules governing diversity cases, allowed the federal courts to assume a dominant role over interstate business activity. These revisions diminished the importance and prestige of the state courts. The trend toward centralization inspired the previously mentioned backlash among western agrarians who demanded a return to the old order. Many could not understand how such fundamental changes had occured in such a short span of time. Even then, most had already forgotten the Fisk Raid, the Removal Act of 1868, and the origins of their predicament.

Endnotes

[1]William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1875," American Journal of Legal History 13 (1969): 333-59; Stanley I. Kutler, Judicial Power and Reconstruction Politics (Chicago: The University of Chicago Press, 1968), 143-60. Harold M. Hyman, A More Perfect Union (New York: Alfred A. Knopf, 1973), 245-62.

[2]The Western Jurist, 16 (January, 1882): 16-17.

[3]Reports of the Attorney General for the year 1876 and 1886.

[4]Tony Allen Freyer, Forums of Order: The Federal Courts and Business in American History (Greenwich, Conn.: JAI Press, 1979), 124; Wiecek, "Federal Judicial Power," 333.

[5]The Western Jurist, 10 (April, 1876): 203. (Emphasis in original.)

[6]The Western Jurist, 14 (April, 1880): 150.

[7]Freyer, Forums of Order, chs. 4-6.

[8]Ibid. Freyer examines the effect of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) on the development of a uniform commercial law.

[9]18 Stat. 470 (1875).

[10]James H. Chadbourn and A. Leo Levin, "Original Jurisdiction of Federal Questions," University of Pennsylvania Law Review 90 (April, 1942): 643; Felix Frankfurter and James M. Landis, The Business of the Supreme Court (New York: Macmillan, 1927), 65.

[11]15 Stat. 226 (1868)

[12]The circuit and district courts comprised the inferior courts. Act of September 4, 1789, §§ 3-4, 1 Stat. 73, 73-75 (1789).

[13]United States Constitution, article III, section 2, clause 1.

[14]Frankfurter and Landis, Business, 12.

[15]Act of September 24, 1789, 1 Stat. 73 (1789).

[16]Act of April 10, 1816, 3 Stat. 266, 269 (1816).

[17]Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

[18]Diversity suits are those between citizens of different states.

[19]Act of September 24, 1789, 1 Stat. 73 (1789).

[20]Act of February 4, 1815, 3 Stat. 195 (1815). Similar laws were later enacted. Act of March 3, 1815, 3 Stat. 231 (1815); Act of March 3, 1817, 4 Stat. 632 (1817). Frankfurter and Landis, Business, 11, fn. 22.

[21]Act of March 2, 1833, 4 Stat. 632 (1833).

[22]Act of March 3, 1863, 12 Stat. 756 (1863). Hyman, A More Perfect Union, 245-56.

[23]Act of July 13, 1866, 14 Stat. 98 (1866).

[24]See Kutler, Judicial Power, 147-48, for a discussion of these statutes.

[25]Act of April 9, 1866, 14 Stat. 27 (1866). See also, Kutler, Judicial Power, 148-53.

[26]Nelson Trottman, History of the Union Pacific (New York: Ronald Press), 3.

[27]For an excellent discussion of early railroad financing problems, see Robert S. Hunt, Law and Locomotives (Madison: State Historical Society of Wisconsin, 1958), 44-65.

[28]Ibid., 38.

[29]Charles Edgar Ames, Pioneering the Union Pacific (New York: Appleton-Century-Croft, 1969), 9-10.

[30]10 Stat. 219 (1853). For a general background of the planning of the railroad, see Trottman, History, 4-6.

[31]See Ames, Pioneering, and Trottman, History, for a discussion of the sectional struggles over the railroad's location.

[32]12 Stat. 489 (1862). See also Trottman, History, for a concise summary of the act.

[33]Ames, Pioneering, 11-17.

[34]Act of July 2, 1864, 14 Stat. 356 (1864).

[35]Not all congressmen favored the increased subsidies. Representatives of the far western states protested further assistance to the Union Pacific, since they sought favors for Leland Stanford's Central Pacific Railroad which was building eastward. The dispute between the competing lines intensified during the decade. Grenville M. Dodge to Henry S. McComb, March 16, 1868. Henry S. McComb Papers, Accession 474, Eleutherian Mills Historical Library (hereinafter cited as McComb MSS).

[36]Dictionary of American Biography, s.v. "Durant, Thomas Clark."

[37]Ames, Pioneering, 27-33.

[38]The Credit Mobilier of America was originally chartered as the Pennsylvania Fiscal Authority. The Pennsylvania legislature authorized the authority's creation on November 1, 1859, and letters of patent were issued on June 1, 1863. 1860 Pa. Laws 896. Copies of the special legislation and letters of patent are among the McComb papers.

[39]Ames, Pioneering, 46-49. The company's name was changed to the Credit Mobilier of America by an act of the Pennsylvania legislature dated March 26, 1864. 1864 Pa. Laws 97. McComb MSS. Durant copied the name from a French construction company at the suggestion of a friend. Ames, Pioneering, 47.

[40]Ames, Pioneering, 48.

[41]Ibid., 50.

[42]Ibid., 41-45.

[43]Ibid.

[44]Ibid., 105-11.

[45]Dictionary of American Biography s.v. "Ames, Oliver;" "Ames, Oakes."

[46]Ames, Pioneering, 77-89.

[47]Oakes Ames was first elected to the House of Representatives on November 4, 1862.

[48]Among those who invested was John B. Alley, a former congressman from Massachusetts. Alley, who once chaired the House's Pacific Railroad Committee, served as a Union Pacific Board Member from 1866-1871. Union Pacific Railroad Company Official Register, Manuscript notes of Charles Edgar Ames, Baker Library, Harvard University (hereinafter cited as Ames MSS).

[49]Ames, Pioneering, 187-88.

[50]Trottman, History, 32-35.

[51]This contract was negotiated with one L.B. Boomer of Chicago. Ames, Pioneering, 151-52.

[52]Ibid., 163.

[53]Durant sought an injunction on January 22, 1867, to prevent the extension of the Hoxie Contract. An injunction was issued by Judge George G. Barnard of the Supreme Court for the County and State of New York. Durant obtained an injunction from the same court on May 21, 1867, to prevent the Ames faction from executing a construction contract with J.M.J. Williams. Both actions were styled Thomas E. Durant v. Union Pacific Railroad, et. al. McComb MSS. Charles E. Ames writes that Durant filed a third suit to block a second contract with Williams in June, 1867. Ames, Pioneering, 171. The purpose of each suit was to prevent the railroad from executing any contract which could enure to the benefit of the Ames-dominated Credit Mobilier.

[54]Oliver Ames to Grenville M. Dodge, May 25, 1867. Grenville M. Dodge Papers, Iowa State University Library (hereinafter cited as Dodge MSS). This letter illustrates Ames's concern over Durant's legal maneuverings:

> "The ejectment of Durant from Pres. of Cr. Mob. has raised the very Devil in that amiable Gent. and he has come down upon us with injunctions and proposes to visit us with every form of Legal Document to keep us honest."

[55]U.S. Congress. House Committee Report No. 77, 42nd Cong., 3rd sess. (Serial No. 1577), 4 (1873) (hereinafter cited as Poland Report).

[56]Poland Report, 420-21 (Testimony of John B. Alley). Henry S. McComb, a manufacturer from Wilmington, Delaware, was a member of the railroad's board of directors. He later played a principal role in bringing the Union Pacific-Credit Mobilier relationship to public light. In Nov., 1868, he filed a suit against the Credit Mobilier in Pennsylvania in which he revealed the construction scheme. His charge before the House in 1873 that Oakes Ames traded Credit Mobilier stock for congressional favors led to Ames's censure by the House. Ibid., 2-15.

[57]There are two popular biographies of Fisk: W.A. Swanberg,Jim Fisk: The Career of an Improbable Rascal (New York: Charles Scribner's Sons, 1959) and Robert H. Fuller, Jubilee Jim (New York: Macmillan Company, 1928) (a biographical novel). See also "Sketch of James Fisk, Jr.," New York Times, January 7, 1872, p.1.

[58] "Obituary of James Fisk, Jr.," New York Times, January 8, 1872, p.1, col.6.

[59]Ibid.

[60]Frederick C. Hicks, High Finance in the Sixties (1929; reprint, Port Washington, N.Y.: Kennikat Press, 1966); Matthew P. Breen, Thirty Years of New York Politics (1899; reprint, New York: Arno Press, 1974).

[61]Ames, Pioneering, 182-86.

[62]Oliver Ames noted this subscription in his diary on September 21, 1867:

"Telegram from New York that Durant had subscribed for 20,000 shares of UPR stock."

Ames MSS.

[63]The counter-subscription was recorded in Oliver Ames's diary on September 25, 1867:

"Was made today a stock subscription on books of the UPRR by Mr. Alley and others of 50,000,000 & which places our stock where it cannot be over (word unintelligible). Durant party greatly surprised at the extent of subscription and amt. of money used."

Ames MSS.

[64]Ames, Pioneering, 187.

[65]U.S. Congress. House Committee Report No. 78, 42d Cong., 3rd sess. (Serial No. 1577), 685 (1873) (hereinafter cited as Wilson Report). (Testimony of Benjamin F. Butler.) Interestingly, Butler also stated that after the October election, Fisk attempted to retain him to sue the Union Pacific. Butler refused the offer. Ibid., 685.

A copy of one of the suits filed to prevent Fisk, Durant, and others to vote the shares they "subscribed" on September 21, 1867, can be found in the McComb papers. It is styled Charles Gould v. Union Pacific Railroad.

[66]Poland Report, 374. (Testimony of Thomas C. Durant).

[67]Portions of the compromise were noted in Oliver Ames's diary on Oct. 4, 1867:

"Agreed to a compromise Board of Dirs. voted out Dix, McCormick, and Lumbard and Tuttle resigned and put in their places Bates, Glidden, Dexter & J.B. Alley."

Ames MSS.

[68]Ames, Pioneering, 188-92.

[69]Act of July 2, 1864, 13 Stat. 356 (1864).

[70]See generally Hicks, High Finance.

[71]Congressional Globe, 40th Cong., 2d sess., 1867, 210.

[72]Ibid., 211.

[73]Ibid., 212.

[74]Ibid.

[75]Ibid., 399.

[76]Poland Report, v.

[77]Ibid., ii. Dawes later resold the stock to Ames in October, 1868, after details of the Credit Mobilier Construction arrangement were publicized. Ibid., v.

[78]Fisk left no personal papers which could throw light on why he became obsessed with seizing control of the Union Pacific. The Ames faction believed Fisk wanted revenge against Durant for the latter's breach of an agreement made during the fall, 1867, election crisis. A letter from Oliver Ames to Grenville M. Dodge dated July 27, 1868, expressed this conviction:

> "Jas. Fisk the fellow who figured in the Rock Island and Erie RR controversy and made a good deal of money out of them and is also one of the parties Durant got in to subscribe to 2,000,000 of our Stock last fall and got out injunctions then for Durant in his fight against the Road. He now claims that Durant & Bardwell [a member of the Durant faction] agreed to pay him expenses and can't come up and he will now get what he can. He has served an injunction [John J.] Cisco [the Union Pacific's treasurer] and will serve one on me if he gets a chance to tye [sic] up the Road and do every possible thing he can to annoy us and make us pay him a liberal sum to withdraw his suits."

Dodge MSS.

[79]Swanberg, Jim Fisk, 69.

[80]Ibid., 91-92.

[81]Assembly of the State of New York, In the Matter of the Impeachment of George G. Barnard (Oswego, New York: R. J. Oliphant, 1875), 932-37.

[82]Ibid., 1032-1033.

[83]Ibid., 1428.

[84]Ibid., 1429; New York Times, July 22, 1868.

[85]New York Times, July 22, 1868.

[86]New York Sun, July 24, 1868.

[87]Oliver Ames to Glenville M. Dodge, July 26, 1868. Dodge MSS.

[88]Act of July 26, 1868, 15 Stat. 227 (1868).

[89]Congressional Globe, 40th Cong., 2d sess., 1868, 3901.

[90]Ibid., 3983.

[91]15 Stat. 227 (1868).

[92]Congressional Globe, 40th Cong., 2d sess., 1868, 4198.

[93]Ibid. The "special object" was assisting the Union Pacific.

[94]Poland Report, 105.

[95]Ibid., 39.

[96]Congressional Globe, 40th Cong., 2d sess., 1868, 4199.

[97]Ibid., appendix, 562-63.

[98]Assembly of New York, Impeachment, 938-42.

[99]Ibid., 943.

[100]Ibid., 944, 1439. Apparently, attorneys for both sides requested continuances and Justice Barnard ordered others himself.

[101]Ibid., 944-45. Field and Tracy argued their respective cliams on December 15 and 16, 1868. Barnard took the matter under advisement on December 17.

[102]Wilson Report, 316-17.

[103]Ibid., 46, 296.

[104]Ibid., 295.

[105]Ibid., 317.

[106]Ibid., 295. A letter from Oliver Ames to Grenville M. Dodge dated July 27, 1868, reveals that Fisk requested the settlement soon after he filed his suit. Dodge MSS.

[107]Wilson Report, 317.

[108]Ibid., 106.

[109]Assembly of New York, Impeachment, 946-48, 950-51. According to Field's office register, he learned of the denial of the removal on March 5, four or five days before Tracy. Ibid., 1439.

[110]Ibid., 948-49, 951.

[111]New York Sun, March 11, 1869.

[112]Ibid.

[113]Poland Report, 421; Wilson Report, 47-48.

[114]Assembly of New York, Impeachment, 953-58.

[115]Ibid., 966-69, 971-72.

[116]Ibid., 980-83.

[117]Ibid., 984-99.

[118]New York Sun, April 3, 1869; New York World, April 3, 1869.

[119]Oakes Ames to Grenville M. Dodge, May 2, 1869. Dodge MSS.

[120]Fisk v. Union Pacific Railroad, 9 F. Cas. 149 (C.C.S.D.N.Y. 1869) (No. 4, 827). The original court file is stored in the National Archives, New York Area Branch. The case number is Equity #4-148.

[121]16 Stat. 56 (1869).

[122]New York Sun, April 23, 1869.

[123]Poland Report, 106 (testimony of John B. Alley).

[124]Act of April 10, 1869, 16 Stat. 56 (1869).

[125]Oakes Ames to Grenville M. Dodge, May 2, 1869. Dodge MSS.

[126]Congressional Globe, 41st Cong., 1st sess., 1869, 77.

[127]Ibid., 502-05, 532-51, 667-77.

[128]Ibid., 503.

[129]Ibid., 533, 536.

[130]Ibid., 549

[131]New York Sun, March 31, 1869.

[132]Act of April 10, 1869, 16 Stat. 56 (1869).

[133]New York Sun, April 23, 1869; letter from Oakes Ames to Grenville M. Dodge dated June 2, 1869. Dodge MSS.

[134]Wilson Report, 47-48 (testimony of C.S. Bushnell).

[135]Ames, Pioneering, 527.

[136]Assembly of New York, Impeachment, xii-xiv, clxxxvii-clxxviii.

[137]Swanberg, Jim Fisk, 91,293.

[138]"James Fisk, Jr. Dead," New York Tribune, January 7, 1872, p.1.

[139]New York Times, January 7, 1872, p.1., col. 1.

[140]Ames, Pioneering, 327

[141]Entries in Oliver Ames's Diary on March 13 and March 16, 1869, reveal he had doubts about Tracy's handling of the suit. The railroad later retained other counsel to take over the case. Ames MSS.

[142]Congressional Globe, 40th Cong., 2d sess., 1868, 4198.

[143]Ibid., 4199.

[144]Ibid., 4198, 4199.

[145]9 F. cas. 149 (C.C.S.C.N.Y.1869) (No. 4,827).

[146]Ibid., 151-52, 154, 155.

[147]Jones v. Oceanic Steam Navigation Co., 13 F. Cas. 997 (C.C.S.D.N.Y. 1873) (No. 7,485).

[148]Kain v. Texas and Pacific Railroad Co., 14 F. Cas. 77 (C.C.E.D. Tex. 1875) (No. 7596).

[149]15 Stat. 227 (1868).

[150]16 F. Cas. 390 (C.C.D. Nev. 1873) (No. 8,945).

[151]Ibid., 390-91.

[152]24 F. Cas. 391 (C.C.D. Neb. 1875) (No. 14,273). Miller's decisions interpreting the Removal Act of 1868 are puzzling. The Turton opinion sanctioned removal. In Bauman v. Union Pacific Railroad Co., 2 F. Cas. 1043 (C.C.C.D. Neb. 1875) (No. 1,117), he held that a section of the railroad's charter authorized removal. See also Smith v. Union Pacific Railroad Co., 22 F. Cas. 694 (C.C.D. Neb. 1872) (No. 13,121). Yet Miller dissented with Chief Justice Waite in the Pacific Railroad Removal Cases, 115 U.S. 1, 24. Though the latter case turned on the removal provisions of the 1875 Act which broadened the federal question jurisdiction of the United States Courts, the substantive

issue was identical.

John F. Dillon, attorney for the railroads in the Pacific Railroad Removal Cases, took full advantage of Turton, despite Miller's change of heart. Record, "Argument Against Motion to Dismiss," 35-38.

[153]115 U.S. 2, 11 (1885).

[154]Trottman, History, 117.

[155]The Kansas Pacific and Texas Pacific Railroads, for instance, were parties in the Pacific Railroad Removal Cases.

[156]Freyer, Forums of Order, 118-19, n. 40; 111-12.

[157]Congressional Record, 43rd Cong., 2d sess., 1874, 4979-88.

[158]Ibid., 4984.

[159]Ibid., 2168, 2240.

[160]Ibid., 4986.

[161]Ibid., 4987.

[162]Ibid.

[163]Gold-Water and Washing Co. v. Keyes, 96 U.S. 199 (1877); Railroad Co. v. Mississippi, 102 U.S. 135 (1880).