

California's Civil War Claims

BY BRAINERD DYER

Union troops to fight the Civil War were raised almost entirely by the State governments in response to calls issued by Federal officials. Some 80,000 State militia responded to Lincoln's call of April 15, 1861, for 75,000 militia, and in the course of the war another fifty to one hundred thousand served "either separately or in conjunction with Federal forces, to garrison fortifications, guard the coastline and Canadian frontier, man lines of communications, protect industrial establishments important for the war effort, guard camps in which Confederate prisoners were held, and protect the Indian frontier."¹ Except for a few thousand men added to the Regular Army and approximately 170,000 enrolled as a result of the conscription acts, the Union armies were composed of volunteers raised by the States, whose officials supervised the recruiting, arming, equipping, and officering of the new regiments. Only when the completed regiments arrived at Federal camps or joined the army at the front did they come under Federal control.²

With this situation in mind, Congress acted promptly to reimburse the States for expenses incurred in raising troops. Three weeks after being called into special session, Congress passed an act which received presidential approval on July 27, 1861, directing the Secretary of the Treasury "to pay to the Governor of any State, or to his duly authorized agents, the costs, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the Treasury."³

Mainly under the provisions of this act, but in part through

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special legislation, twenty-three States—including Virginia and every loyal State but California, Oregon, and Nevada, and two territories (Nebraska and Colorado)—had been reimbursed nearly \$40,000,000 before Congress by act of March 3, 1873, set June 30, 1874, as the final date for the presentation of any claim “against the United States for collecting, drilling or organizing volunteers for the war of the rebellion.” By 1930, as a result of numerous special acts, nearly \$15,000,000 more had been paid to the States. This included half-a-million paid to Nevada in 1929. Since 1930, no additional payments have been made and California remains without reimbursement, and this despite the fact the United States Senate on eight occasions passed bills to pay her claim.⁴

Although the California Legislature, by a concurrent resolution of March 1, 1872, authorized the employment of special counsel to handle the State’s Civil War claim,⁵ her claim was not presented before the June 30, 1874, deadline. Governor Newton Booth promptly appointed attorneys James E. Hale of Placer County and Thomas M. Nosler of San Francisco on a contingent fee basis, they to receive ten per cent of the amount collected.⁶ Under their direction the necessary papers were gathered, boxed, and shipped to Washington where they were stored for over seven years without being examined.⁷

Late in 1879, Captain John Mullan became interested in the California claim. Mullan was a West Point graduate who, after ten years of exploring, Indian-fighting, and road-building in the Pacific Northwest, resigned and settled in California, where he turned to law.⁸ In 1878, he was appointed by the Surveyor-General of California to represent the State in its claim against the United States for five per cent of the net proceeds of the sales of all public lands in California.⁹ For this purpose he moved to Washington, D. C., where he soon became interested in the Civil War claims of Oregon, Nevada, and California, and was appointed to represent the former two States in this matter. When he sought appointment to represent California, however, he learned of the appointment of Hale and Nosler.¹⁰ Shortly thereafter the California Legislature declared ten per cent “totally inadequate as compensation for the services to be performed, and the necessary expenses to be incurred” by Hale and Nosler and authorized the

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Governor to raise their fee to twenty-five per cent. On March 1, 1881, Governor George C. Perkins entered into a new contract with them on these terms.¹¹ Soon after this new contract was made, Hale and Nosler constituted Mullan their agent and attorney to exercise the authority conferred on them by it—an arrangement officially confirmed by the Legislature in a resolution of March 3, 1885.¹²

Mullan was promptly placed in possession of all the warrants, vouchers, and other documents that had so long been boxed-up in Washington. After four years of work, Mullan and his assistants had these papers, and others which he persuaded the California officials to send to him, classified and abstracted. Finally on September 18, 1886, he filed them with the Secretary of the Treasury in support of California's Civil War Claims. The papers filled eight large packing boxes and the abstract twenty-one bound volumes.¹³

During these years, Mullan was also busy working for necessary Congressional legislation. In 1882, when Congress was considering a bill calling for an examination of the war claims of Nevada and Oregon, he persuaded Senator John F. Miller to amend the bill to include California.¹⁴ In the summer of 1886, he helped get through Congress an act permitting the presentation of secondary evidence in support of these claims and a second act appropriating funds to aid the War Department in making the called-for examination.¹⁵

These and other remedial acts passed by Congress in the 1880's, resulted in the appointment of a three-man board of Army officers to examine the claims of California and several other States and "to report to Congress for final action the results of such examination and investigation."¹⁶ In November, 1889, this board reported that California had expended in the course of the war nearly \$3,000,000 on account of militia and volunteers and had paid in interest on money borrowed to meet these expenses more than a million and a half additional.¹⁷ The board was not authorized to make a settlement, but merely to report its findings to Congress. It did, however, take occasion to say that it was impressed with the fact that "throughout the war period the State authorities were animated by an earnest desire to uphold the authority of the national government and to that end left nothing

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undone that it was in their power to do; that in their efforts to raise troops for a frontier service which, however difficult and important, afforded little or no opportunity for distinction and but scant compensation, they were prompt, energetic and on the whole eminently successful; and that both in the training of the militia and the raising and proper support of their volunteers they expended the money of the State without hesitation and without stint."¹⁸

"The California volunteers," the board continued, "rendered most valuable and important service to the Government. They took the places of the regular troops in California, all of which, except three batteries of artillery and one regiment of infantry, were withdrawn to the East at an early period after the outbreak of the war. Without them (and the Oregon and Nevada volunteers) the Overland Mail and Emigrant Routes . . . could not have been adequately protected; and yet it was of the first importance to have these routes kept open and safe, especially as rebel cruisers had made the sea routes both hazardous and expensive." With warm approval the board spoke of the campaigns in Utah, Arizona, and New Mexico conducted by Brigadier Generals James H. Carleton and Patrick E. Connor.¹⁹

A closer look at California's military contribution and expenses during the Civil War shows that about 5,000 men were enrolled in militia companies during 1862 and 1863, and 8,250 during 1864, and that nearly \$500,000 was expended for this purpose. Also, in response to requests or calls from the Secretary of War or the commanding general on the Pacific Coast, 15,725 volunteers were raised and mustered into United States service. These included eight regiments of infantry, two regiments of cavalry, one battalion of six companies of mountaineers, and one native cavalry battalion of four companies.²⁰ These volunteers rendered valuable services not only in California but also in every State and Territory from Colorado to the Pacific and from the Mexican border to Canada.²¹ In connection with the raising and maintenance of the volunteers, California expended nearly \$2,500,000 mainly covered by two items—extra pay and bounties to enlistees. During the first two years of the war, Federal troops in California were paid their thirteen dollars per month wages in gold, but early in 1863, the Treasury Department ordered that henceforth they should be paid in greenbacks. As greenbacks were circulat-

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ing in California at half or less their face value and commodities in the frontier State were selling at high prices, the California Legislature by act of April 27, 1863, authorized the additional payment of five dollars per month in gold to each volunteer. For this purpose the State expended close to \$1,500,000 which it raised by issuing bonds at seven per cent interest but which had to be sold at a discount of over ten per cent.²²

In 1864, the need for new enlistments or re-enlistments led the Legislature to authorize a bounty of \$140.00 to re-enlistees and \$160.00 to new volunteers. This bounty and the extra pay were provided by the State only after conference with and approval by General George Wright, the commanding general on the Pacific Coast, and the amount of the bounty was based on a former act of Congress (June 17, 1850) which had authorized the payment at distant military stations of such bounties equal to the cost of transporting a soldier from New York to the military station where the enlistment took place. In 1864, the cost of such transportation to California was \$160. In accordance with this policy, California expended over \$900,000, which also was raised by the sale of seven per cent bonds at a ten per cent discount.²³

At every stage of California's efforts to recover from the United States government the \$3,000,000 expended during the war and the interest and discount loss on the bonds issued to meet this expense—items which ultimately raised her claim to \$7,500,000—she ran afoul of the Chase regulations, which had been issued by Secretary of the Treasury Salmon P. Chase in July, 1861, to implement the act of Congress authorizing reimbursement of the States. Section 2 of these regulations stipulated that reimbursement would be made "only for expenditures on account of troops, officers, or men that have been or may be mustered and received into, or actually employed in the service of the United States." Expenses incurred in raising and equipping troops for State purposes would not be reimbursed "unless such troops were called out and such expenditures incurred at the request or under the authority of the President or the Secretary of War."²⁴ This regulation affected California's claim for militia expenses, for her militia were not mustered into United States service.

But California maintained that the militia had been organized in response to a letter from Secretary of State William H. Seward

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to Governor John G. Downey of October 14, 1861, in which Seward wrote:

The President has directed me to invite your consideration to the subject of the improvement and perfection of the defenses of the State over which you preside, and to ask you to submit the subject to the consideration of the legislature, when it shall have assembled. Such proceedings by the State would require only a temporary use of its means.

The expenditures ought to be made the subject of conferences with the Federal authorities. Being thus made with the concurrence of the Government for general defense, there is every reason to believe that Congress would sanction what the State should do, and would provide for its reimbursement.²⁵

Governor Downey and his successor, Leland Stanford, did confer with General Wright and the steps taken to enlarge the California militia were taken with his general, if not specific, approval. Whereas California's militia expenses from 1853 to 1860 amounted to only \$43,961.46, militia expenses for the four war years totaled more than ten times that amount. As one Congressional Committee after another reported, California's militia were organized at this time, not primarily in the interest of California, but to assist in placing the State in an attitude of defense and to meet any emergency growing out of the national crisis—to repel any foreign intervention and to suppress any uprising among the large pro-Confederate population of the State.²⁶

Despite these facts and arguments, this section of the Chase regulations was repeatedly brought forward in opposition to California's claim for militia expenses.

Section 8 of the Chase regulations was another stumbling block for California. This section stipulated that "bounties or donations . . . to induce men to volunteer will not be recognized. . . . Voluntary contributions, either by State or local corporations . . . constitute no charge against the United States, and will not be refunded."²⁷ This section was invoked to outlaw California's claim for bounty and extra pay expenses despite the fact that they were incurred after consultation with General Wright and because of the peculiar conditions in California.

Three general observations about the Chase regulations are in order. First, it is by no means clear that they did not narrow the

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responsibility of the Federal government more than Congress intended when passing the 1861 act. That act was passed six days after the first battle of Bull Run; the Union was in peril; and Congress was not pinching pennies. As the United States Supreme Court said in 1896, when upholding New York's claim to be reimbursed for the interest paid on money borrowed to meet the expenses of raising troops during the war—a claim which Treasury Department auditors had rejected:

It would be a reflection upon the patriotic motives of Congress if we did not place a liberal interpretation upon those acts [July 27, 1861 and March 8, 1862] and give effect to what, we are not permitted to doubt, was intended by their passage. . . . Liberally interpreted it is clear that the acts of July 27, 1861, and March 8, 1862, created on the part of the United States an obligation to indemnify the States for any costs, charges, and expenses properly incurred for the purposes expressed in the act of 1861, the title of which shows that its object was "to indemnify the States for expenses incurred by them in defense of the United States."²⁸

A second observation on the Chase regulations is that made by Lieutenant Colonel James Biddle, chief of the United States Board of War-Claims Examiners in 1888, when he reported to the Secretary of War that, in his opinion, the restrictions of the 1861 act as implemented by the Chase regulations "are not equitable ones to apply to the adjustment of the claims of Oregon and California, for the reason that the cost to those States of organizing and maintaining troops was greater than it was in other sections of the United States, and the prices of labor and material on the Pacific Coast, under the then existing laws of supply and demand, were of necessity greatly in excess of the amounts allowed and paid by the United States to her army serving in that locality."²⁹ This point of view was also expressed by the Senate Judiciary Committee in 1950. "The evident fact is," the Committee stated, "when these Treasury regulations, general in character, were issued no consideration was given to the abnormal conditions prevailing in the remote Pacific Coast region. . . ."³⁰

A third observation on the Chase regulations is that although they were issued to implement the act of 1861, and although California was not seeking reimbursement under that act because Con-

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gress had barred any further payments under it as of June 30, 1874, these regulations were nevertheless invoked whenever California sought reimbursement by special act of Congress.

Early in 1888, Captain Mullan fell into disfavor with Governor R. W. Waterman, who revoked all authority to represent California in claims against the United States.³¹ Because of his agreement with Hale and Nosler, he, and eventually his heirs, continued to have an interest in any fee collected by them. In 1903, the California Legislature directed the payment of \$50,000 to Hale and Nosler or their heirs out of any money received from the United States in satisfaction of the Civil War claim. This action complicated all future contracts on this subject made by the State with private attorneys until it was repealed in 1943.³²

During the fifteen years following the 1889 report on California's claim by the board of Army officers, bills to reimburse California were introduced into every Congress, passed the Senate five times, and were given favorable committee reports in the House on four occasions, but no bill for the relief of California was enacted, the main stumbling block being the belief of many House members that California's bill was too large.³³

During the next twenty-five years, there was very little action in connection with California's Civil War claim. In 1906, Congress passed a resolution referring a number of claims, including California's, to the Court of Claims for a finding of fact—despite the fact that the facts in the California case had been determined by the Army board and by several Congressional committees. California counsel filed a petition for a hearing in the Court of Claims, but before any hearing was held, Congress withdrew from the jurisdiction of that court "any claim which is now barred by the provisions of any law of the United States." As California's claim was barred by the act of 1873, the Federal government moved to dismiss the petition for lack of jurisdiction. This motion was overruled by the Court, but in 1917, the case was dismissed for lack of prosecution.³⁴

At about this same time, the spring of 1907, the California Legislature authorized the Governor to enter into a contract with Jackson H. Ralston, a native Californian practising law in Washington, D.C., and his Washington associates, Frederick L. Siddons and William E. Richardson, to handle the Civil War claim on a

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contingent fee of ten per cent on all collected over \$200,000 with Ralston and his associates responsible for the \$50,000 due to the heirs of Hale and Nosler.³⁵ No results were obtained under this contract and by 1929, California's Civil War claim seemed to be dead. But in that year Congress passed an act reimbursing the State of Nevada in the amount of \$595,076.53 for Civil War expenses similar to those of California and made under exactly similar circumstances, Nevada's legislation providing for extra pay and bounties to enlistees having been modeled after that of California.³⁶ With the passage of this act, the California corpse quickly began to show signs of life. On June 19, three and a half months after the Nevada act, the California Legislature passed an act repealing the 1907 measure authorizing a contract with Ralston on a ten per cent contingent fee and substituting therefore authorization to contract with special counsel on the basis of contingent fees not to exceed twenty-five per cent.³⁷ Early in 1930, Governor C. C. Young entered into such a contract with Ralston and two new associates—H. D. W. Dinkelspiel of San Francisco and Charles J. Kappler, a Washington, D.C., attorney who had carried Nevada's claim to a successful conclusion.³⁸ The contract called for the attorneys to receive twenty-five per cent on the first \$1,200,000 recovered and to pay out of that the \$50,000 due to the Hale and Nosler heirs; fifteen per cent on the next \$1,000,000 and ten per cent on any balance. Siddons and Richardson, who had been parties to the 1907 contract, were to be compensated by agreement with the new attorneys.³⁹ Had the full California claim been collected this contract would have rewarded the attorneys with close to \$1,000,000. But by mutual consent this contract was modified in 1932, early in Governor James Rolph's administration, by reducing the fee to fifteen per cent on the first \$2,500,000 recovered and ten per cent on any above that, to a maximum fee of \$500,000 covering all attorneys including Hale and Nosler.⁴⁰

Spurred on by Nevada's success and by visions of a half-million-dollar fee and led by Kappler, the attorneys went to work in earnest. They pushed through the Senate a resolution calling upon the Comptroller General of the United States to report the "balance found due the State of California expended in aid of the United States during the war between the States" and instructed him to include the claim as certified by the Army board in 1889,

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and the interest on State bonds from 1889 to 1929. On August 14, the Comptroller General reported that these two items totalled \$6,462,145.33 and that the balance due was the total amount.⁴¹ Supported by strong favorable reports from the Senate Committee on the Judiciary, bills introduced by Senator Hiram Johnson to pay California this amount passed the Senate in 1931, 1932, 1934, and 1935, without debate or division.⁴² In the House of Representatives, the Senate bill received favorable reports on two occasions, but the bill never came to a vote on the floor. In 1935, the Senate also added California's claim to the Second Deficiency Appropriation Bill, but it was cut out by the House members in the Conference Committee.⁴³

The favorable consideration given California's claim during these years was due primarily to the persistent efforts of Attorney Kappler, who enlisted the support of Senator Johnson and Representatives Phil D. Swing and Clarence F. Lea, and gained the cooperation of Governor Rolph and Rolland A. Vandegrift, the State Director of Finance.⁴⁴ In the depression years, California State officials were especially anxious to recover on their claim. In December, 1931, Vandegrift, in urging Swing to work for the passage of the bill, wrote, "If this bill becomes a law it will go a long way toward solving the financial problems which will confront this state at the beginning of the next biennium, July 1, 1933."⁴⁵ Four months later, Governor Rolph wrote in the same vein to Swing and other California Congressmen saying, "If this bill should be passed at this session . . . the money coming at this time would assist the State of California more on account of decreased revenues than at any time in the past."⁴⁶

The failure to get a bill for California's reimbursement through the House in the years 1930-1935 was due to several influences. One of the most important was the fact that the Federal government needed money just as badly as the California government. Another was the inability or refusal of some Congressmen to understand that the \$3,000,000 worth of interest included in the California claim was not interest on an unpaid claim but interest that California had actually paid on the money borrowed to meet military expenses during the war. Even some who understood this point did not understand why California was still paying interest on \$840,000 worth of outstanding bonds: they did not un-

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derstand why these bonds had not been redeemed long ago.⁴⁷ The failure of California's bill in the House was also due in part to the fear that its enactment would lead to the reopening of the claims of other States and additional drain upon the Treasury. The publicity given the large amount of Federal money received by California out of relief funds may also have reduced sympathy for the payment of an old Civil War claim.⁴⁸

In the judgment of Attorney Kappler, one other influence that contributed to the defeat of bills for the relief of California in these years was a protest against the large contingent fees for the private lawyers stipulated in the State's contract—a protest which Charles A. Son of Los Angeles filed with the House Judiciary Committee on behalf of the Los Angeles Lawyers' Club.⁴⁹ Representative William I. Traeger shared this view and in May, 1934, wrote to Son urging him to withdraw the protest.⁵⁰

In December, 1931, while the terms of the 1930 contract with Ralston, Dinkelspiel, and Kappler still stood, the Directors of the Los Angeles Lawyers' Club adopted resolutions protesting against the fees as too large and sent copies thereof to the Governor and to the California Congressmen.⁵¹ A month later, January 21, 1932, in his office at Sacramento, Rolph heard Son's complaints. Present also were State Attorney General U. S. Webb, Vandegrift, Ralston, Martin J. and John Dinkelspiel, who had taken over the interests of their deceased father in the contract, and several newspaper reporters. At the conclusion of the conference, the Governor announced that he regarded the contract as binding and that it would be upheld by the State.⁵² A report of this conference was submitted to the House Committee on the Judiciary in an attempt to offset the influence of Son's protest, but the influence of that protest continued, as is evident from Traeger's letter to Son of May 1, 1934.

Despite Governor Rolph's statement that the contract would stand, it was one month later, February 23, 1932, that the contract was modified by mutual consent, cutting the maximum fee from \$1,000,000 to \$500,000.⁵³ If Son was informed of this, it did not satisfy him, for he had urged a fee of \$50,000, including the rights of the Hale and Nosler heirs.⁵⁴

Another important change in the contract was made in 1934—not in the fees, but in the parties to it. When Mr. Swing retired from Congress in 1933, Kappler urged that he become associated

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with the attorneys working for California's reimbursement.⁵⁵ This was worked out and early in 1934, the State entered into a new contract with Kappler, Ralston, and Swing.⁵⁶ Although the Dinkelspiels were no longer party to the contract, by agreement with Kappler, Ralston, and Swing they retained a right to eighteen and three-fourths per cent of any fee collected, the same percentage that Swing and Ralston were to receive. Ralston at this time was seventy-seven years of age and was no longer taking an active part in pressing the claim. Thus, the primary responsibility fell to Swing and Kappler—and particularly to Kappler who was on the ground in Washington and had a forty-three and three-fourths per cent interest in the fee.⁵⁷

In the years immediately after 1935, no progress on the California claim was made. The large lawyers' fees and the financial condition of the government still caused opposition. In addition, Senator Johnson who had introduced bills to reimburse California on at least five occasions joined the opposition. Repeated efforts by Kappler to get a conference with him failed and Kappler sought the aid of Representative John F. Dockweiler, but he could get no conference with Johnson either. When Dockweiler encountered the Senator in the Capitol corridor and urged his support of the claim, Johnson answered that he was through with it, "that he did not intend to have his friends use him; that he had kept his skirts clean for 73 years and did not propose to do anything that might soil them at this time of his life."⁵⁸ Apparently he had joined those who saw something corrupt about the possible \$500,000 fee.

Swing came to believe that there was no chance of success until Johnson passed from the scene,⁵⁹ or at least until California had one new senator. "Nobody can do anything with Johnson," he wrote to Kappler, "as he is of that stubborn type who pulls back the harder the more you try to push him." Senator Sheridan Downey, he thought might be persuaded to take the lead, but "the weakness of Downey," he said, "is that he is at outs with the Administration nearly as much as Johnson is."⁶⁰

Clarence Lea and Senator Downey introduced bills for the relief of California in the 76th, 77th, and 78th Congresses, principally to keep the claim alive, for the heavy military expenses of the Federal government, which began well before Pearl Harbor, further reduced California's chances of reimbursement.⁶¹

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In the summer of 1943, Kappler was startled to receive from California's new Governor, Earl Warren, a letter saying that thirteen years was a reasonable length of time in which to carry out the contract for the recovery of California's Civil War claim, that nothing had been accomplished, and that unless the claim were collected within ninety days "the contract will be deemed cancelled and annulled" and the matter placed in the hands of the Attorney General of California.⁶²

Kappler, Swing, and Martin Dinkelspiel promptly went to work to educate Governor Warren. Swing sent him a six-page letter giving the history of the case and taking issue with the statement that nothing had been accomplished.⁶³ Dinkelspiel, who like his father was a friend of Warren, conferred with him and the new State Attorney General, Robert W. Kenny. He found both Warren and Kenny opposed to the State's employment of private lawyers and both convinced that the large contingent fees for private lawyers stood in the way of California's collecting.⁶⁴ Even the 86-year-old Ralston joined in the conferences, receiving Kenny and Dinkelspiel in his Palo Alto home.⁶⁵

For three years, negotiations between the contract attorneys and Warren and Kenny continued, with the State officials threatening to cancel the contract unless the maximum fee were cut to the \$50,000 that Charles A. Son and the Lawyers' Club had urged and with Dinkelspiel and Ralston threatening to take legal action against the State if the contract were cancelled.⁶⁶

Although the 1929 act of the California legislature under which the contracts of 1930, 1932, and 1934, had been made set no minimum fee, but only a twenty-five per cent maximum, Governor Warren sought an amendment of that act authorizing him to make a new contract. Such a bill passed the special session of the Legislature in 1946, and received Warren's approval on March 7.⁶⁷ By the close of the year, a new contract providing for a contingent fee of six per cent up to a maximum of \$140,000 had been agreed to,⁶⁸ but it was not signed. On January 1, 1947, Kenny was replaced as Attorney General by Fred N. Howser and nothing more was heard about a new contract. Instead, Dinkelspiel sought from Howser and received over the signature of the Assistant Attorney General, J. Francis O'Shea, an opinion upholding the validity of the 1934 contract despite the March, 1946, act of the Legislature.⁶⁹

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Apparently it was Kenny more than Warren who was insisting on a revision or cancellation of the contract.

So with the nation enjoying more normal times and with the opinion of O'Shea to support them, the contract attorneys resumed their efforts to get California reimbursed for her Civil War expenses. The last of the State bonds issued in connection with these expenses had been retired in 1945, and California's claim now totalled \$7,561,508.15.⁷⁰

By 1947, Kappler and Ralston were dead, leaving only Swing with any responsibility under the 1934 contract to push the claim. He sought new associates and, with the approval of the heirs of Kappler and Ralston, entered into an agreement with Martin J. Dinkelspiel, Howard C. Ellis of San Francisco, and Robert F. Klepinger, a successful Washington, D.C., claims attorney. Now there were four attorneys and the Kappler and Ralston estates, as well as the Hale and Nosler heirs, to share any fee collected. In addition the Ralston estate was obligated to satisfy Ralston's early associates, Richardson and Siddons. As Siddons was no longer living, it was his estate that was involved.⁷¹ Although the California Legislature had repealed in 1943, the act of 1903, assigning \$50,000 to the heirs of Hale and Nosler,⁷² the 1934 contract under which Swing and his new associates were operating, called for the payment of this sum to the heirs, and Swing's agreement with his associates provided for the division of a maximum of \$450,000 rather than \$500,000.⁷³

In February, 1949, Franck R. Havenner, a member of the House of Representatives from the Bay region, possibly coached by Dinkelspiel and Ellis, introduced a bill to refer California's Civil War claim to the United States Court of Claims. In amended form, this bill passed the House without debate or division, July 27, 1950.⁷⁴ Two months later, having been warmly endorsed by the Senate Committee on the Judiciary, the bill passed the Senate—also without debate or division—and was signed by the President.⁷⁵

Swing and his associates were delighted. At last success was at hand. To Dinkelspiel, Swing wrote, "I am greatly surprised and overjoyed at the success you have made in pressing our claim . . . you have done the impossible and I am deeply grateful to you."⁷⁶ Dinkelspiel believed that it "should not be too difficult" to prove

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California's claims in the Court.⁷⁷ By January, 1951, Swing was optimistically worrying about how State Treasurer Gus Johnson should make out their check in view of the death of Kappler and Ralston, and Dinkelspiel conferred with Johnson on this matter.⁷⁸

With unusual speed, the petition for the Court of Claims was prepared and filed, November 8, 1950,⁷⁹ but it was not until a year later, September 26, 1951, that Commissioner Roald A. Hogen-son held a preliminary hearing on the petition. Thereafter, there was additional delay while the F.B.I., at the request of the Department of Justice, audited the books and records of the California State Treasurer and the General Accounting Office checked old records to determine whether California was asking for anything not paid to other States. It was November, 1952, before the Federal government attorneys were ready to proceed and a full hearing was held with Swing, Dinkelspiel, Ellis, and Klepinger all present. To their surprise, the Federal government contended that the law of 1861 and the Chase regulations still governed and that these did not permit reimbursement for bounties or extra pay, items which had been denied to twelve other States. Swing and his associates argued that the 1950 jurisdictional act made no reference to the act of 1861, and that the bounty and extra pay items were included in the Comptroller General's report of 1930, which report was included in the 1950 Committee report recommending the passage of the jurisdictional act.⁸⁰

Again there was delay. The filing of the transcript of the November 17 hearing was held up because the Federal government was slow in producing photostatic copies of its exhibits. Then the Federal government asked for and received an extension of time for the filing of its findings, and it was not until December 1, 1953, that the case was argued before the Court.⁸¹ Meanwhile State Attorney General Edmund G. Brown was voicing frequent optimistic predictions of victory and was at least hinting that the credit was due his office.⁸²

In their brief and in their oral argument the California attorneys insisted that Congress, in passing the act referring the claim to the Court of Claims, intended to provide reimbursement to California without reference to the Chase regulations or the act of 1861, for it was this act, narrowly interpreted by the Chase regulations, that had long blocked California's claim; they insisted

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that to pass an act requiring the Court of Claims to apply these regulations to California's claim was to give California nothing—was to pass an act of futility.

They also emphasized that the only criterion stated in the 1950 act was “moneys advanced and expenditures made in aid of the United States during the War Between the States.” The California lawyers argued that, by the 1950 act, Congress confessed liability for the California claim, and that the duty of the Court was merely to check the accuracy of the claim and determine the additional interest on the bonds that should be added to the claim as certified by the Comptroller General in 1930.⁸³

In arguing that the jurisdictional act involved no confession of liability, the Federal government's attorneys pointed out that the bill as introduced by Havenner was amended at several significant points before adoption. California's claim for moneys advanced and expenditures made was amended to read “moneys allegedly advanced and expenditures allegedly made.” All references to the judgment of the Court were amended to read “the judgment, if any.” The Committee amendments also deleted the specific direction to the Court to accept as a basis of computation, and to add thereto certain other items, the 1889 report of the Army board submitted through the Secretary of War. The committee also amended the sentence limiting the defenses allowed to the Federal government. The original bill read: “Judgment under this act shall be allowed notwithstanding the bars or defenses of any counterclaim, laches, or statute of limitation, and without the permission on the part of the government or its representatives to interpose any kind of defense to said claims except to insure accuracy in the computation of said advances and expenditures. . . .” The latter part of this sentence was deleted and it was left to read that judgment should be allowed “notwithstanding the lapse of time, the bars or defenses of laches, or any statute of limitations.”⁸⁴

The Federal government's attorneys introduced records to show that bounties, extra pay, and other items involved in California's claim had been “uniformly disallowed” when presented by other States. As these records covered only fourteen of the twenty-seven loyal States, the California lawyers were not satisfied, but they did not accept the Federal government's invitation to search for the records of the other thirteen. There was no discrimination

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against California, the Federal government's attorneys insisted; "Indeed, if California should recover the expenses claimed, in this action, it will not have received equal treatment, but preferential treatment."⁸⁵

The Government also argued that, even if California's war-time expenses were allowable, much of the interest claimed would not be, for the long continuation of the bonded indebtedness was not necessary to the war effort and was in fact the result of the State's requirement that the State's school fund be invested in State bonds. It was pointed out that most of the interest claimed by California had been paid to its own school fund.⁸⁶

Three months after the oral arguments, March 2, 1954, the Court of Claims rendered a unanimous judgment. In an opinion written by Judge Samuel E. Whitaker, the Court declared: "In construing special jurisdictional acts, it is a well established rule that Congress is not presumed to have intended to do more than to afford a forum for the adjudication of a claim and that it did not intend to confess liability unless that intention is expressed in language not to be misunderstood." The Court found no such language in the 1950 act. The Court emphasized the amendments made to the act by the House Judiciary Committee and further said that if Congress had intended to confess liability "there would have been no use in referring the matter to this Court, for there would have been nothing for us to do except compute the amount of interest the plaintiff is entitled to. . . . Certainly Congress did not mean to ask this Court merely to compute interest."

The Court rejected as unsound the plaintiff's contention that if Congress intended the Court to determine liability under the act of 1861 and the Chase regulations it was futile to refer the claim to the Court. Congress may have had in mind getting a decision on the validity of the Chase regulations which had been upheld by the Court of Claims but had not been reviewed by the Supreme Court, for the 1950 act specifically provided for appeal to that Court. Finally, on the point of liability, the Court declared that if Congress had intended to confess liability, it would have made a direct appropriation.

Having ruled that the 1950 act implied no confession of liability and that the act of 1861 and the Chase regulations were applicable, the Court had no difficulty in throwing out all of California's

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claim except \$24,260 expended for recruiting volunteers. Moreover, the Court was not satisfied with the evidence that most of this was “properly expended” and therefore rendered judgment in California’s favor for \$8,985.15.

In his opinion, Whitaker pointed out that Nevada was the only State that had been reimbursed for the type of expenses claimed by California. “Because Nevada was given this preferential treatment,” he said, “it by no means follows that California should also be given this preferential treatment,” and then added, “we do not believe that Congress intended to accord it such preference.” California should be treated according to the rule, not the exception.⁸⁷

Once again California had lost its claim for reimbursement, but there was still the Supreme Court and the lawyers went to work on their petition for a writ of certiorari. Swing was pessimistic, believing that “the very well written decision by Judge Whitaker will so well impress the United States Supreme Court that our writ of certiorari will, in all probability, be denied.” But he was willing to gamble \$250.00—his share of the cost of filing the petition.⁸⁸

Klepinger disagreed with Swing and said the opinion “smells.” He found two explanations for the adverse decision. One was that three of the four judges were southerners—one from Texas and two from Tennessee—and that they had flaunted an act that was ample in order to prevent recovery for expenses incurred in whipping the South.⁸⁹ The second explanation was the Court’s annoyance with Congress for calling upon it merely to compute interest.⁹⁰ He pointed out that in 1944, in the case of *Pope v. United States*, the Court of Claims had protested against being required by a special act of Congress to make certain simple computations and had held the act unconstitutional on the ground that it sought to impose non-judicial functions upon the Court, but that on appeal to the Supreme Court this decision was reversed and the Court of Claims was required to make the computations.⁹¹ Because of this reversal, Klepinger contended, the Court of Claims could not hold the 1950 act unconstitutional, so it “thumbed its nose at Congress” and sought to reach the same result by misinterpreting the 1950 act. The Court was merely reasserting its position that Congress should not require it to perform such simple duties.⁹²

April 12, 1954, six weeks after the decision of the Court of

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Claims, California's petition for a writ of certiorari was ready for filing.⁹³ It was based mainly on the contention that the Court of Claims had distorted the 1950 act. Two months later, with the new Chief Justice, Earl Warren, taking no part, the petition was denied. Once again, California had lost.⁹⁴ But the lawyers were still not ready to give up. As early as December, 1953—the day following the argument before the Court of Claims—Swing had urged Klepinger to work for amendments to the 1950 act so as to eliminate any application of the Chase regulations.⁹⁵ At the time, Klepinger thought this unnecessary, but immediately following the Supreme Court's denial of the petition for review, he went to work on this matter, drafting the desired amendments and trying to stir up California State officials to stir up California Senators and Representatives to work for the amendments. "California," he wrote to Dinkelspiel, "must make her congressmen and senators realize *she wants her money back*. . . . If the state treasurer and other state officials are silent about 7½ million dollars of their own money, which a court found to have actually been advanced and expended, what are the California senators and congressmen to conclude?"⁹⁶

Efforts to tack such an amendment as a rider to some other piece of legislation in the closing days of the 83rd Congress failed, and bills to accomplish this, introduced into the 84th and 86th Congresses by Cecil R. King, and into the 85th Congress by John F. Shelley, were referred to the House Committee on the Judiciary and never reported.⁹⁷ As the State of California declined to accept the \$8,985.15 awarded it by the Court of Claims in 1954,⁹⁸ the Claim is still pending and Representative King is still pushing it in the belief that "the time is approaching" when Congress will reimburse California for her Civil War expenses.⁹⁹

NOTES

¹Robert S. Cunningham, "The Northern State Militia," *Civil War History*, IV (June, 1958), 107.

²Fred A. Shannon, "State Rights and the Union Army," *Mississippi Valley Historical Review*, XII (July, 1925), 52.

³¹² *United States Statutes at Large*, 276.

⁴¹⁷ *United States Statutes at Large*, 500; *Senate Report No. 2446*, 81st Cong. 2nd Sess., pp. 10-11.

⁵*Statutes of California, 1872*, p. 958.

⁶*Ibid.*, 1881, p. 100.

⁷Report of John Mullan to Gov. George Stoneman, November 1, 1886, in "Statement [Part I] Relative to Unpaid Claims of California Against the United States to Special Joint Committee," printed in *Appendix to the Journals of the Senate and Assembly of the Twenty-eighth Session of the Legislature of the State of California*, (8 vols.; Sacramento, 1889), VIII, p. 49. Testifying before the House Judiciary Committee in 1934, Representative Albert E. Carter stated that the papers were at this time sent to the War Department which held them for a considerable length of time and then forwarded them to the Treasury Department and that the auditors of the Treasury Department rejected the claim on two counts: first, that the expenses for which California sought reimbursement were not proper expenses under the 1861 act, and secondly, because they had not been presented prior to June 30, 1874. *Senate Report No. 2446*, 81st Cong. 2nd Sess., p. 26. This testimony, however, is in conflict with the statement of the Auditor of the War Department in 1896, that the California Claim was first filed, September 27, 1887. *Senate Document No. 227*, 54th Cong. 1st Sess., p. 2.

⁸"John Mullan," *Dictionary of American Biography* (20 vols.; New York, 1920-1937), XIII, 319-320.

⁹William Minis to John Mullan, November 1, 1878, in "Statement [Part I] Relative to Unpaid Claims . . ." *op. cit.*, p. 5.

¹⁰Report of John Mullan to Governor George Stoneman, November 1, 1886. *Ibid.*, p. 49.

¹¹*Statutes of California, 1881*, p. 100; *ibid.*, 1885, p. 237; "Completion [Part III] of the Sworn Statement of John Mullan Relative to the Unpaid Claims of the State of California," in *Appendix to the Journals of the Senate and Assembly of the Twenty-eighth Session of the Legislature of the State of California*, VIII, p. 7.

¹²"Statement [Part I] Relative to Unpaid Claims. . ." *op. cit.*, pp. 7, 12.

¹³*Ibid.*, pp. 50-51. The date, September 18, 1886, is one year earlier than that given by the Auditor of the War Department as the first filing of California's claim. (See note 7, *ante.*)

¹⁴*Ibid.*, p. 50; *Congressional Record*, 47th Cong. 1st Sess., p. 4660.

¹⁵"Statement [Part I] Relative to Unpaid Claims . . ." *op. cit.*, p. 52; 24 *United States Statutes at Large*, 217, 249.

¹⁶²² *United States Statutes at Large*, 111; 24 *United States Statutes at Large*, 217.

¹⁷*Executive Document No. 11*, 51st Cong. 1st Sess., pp. 26-27.

¹⁸*Ibid.*, p. 27.

¹⁹*Ibid.*, pp. 27-28.

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- ²⁰*Senate Report No. 2446*, 81st Cong. 2nd Sess., pp. 29-30.
- ²¹*Ibid.*, pp. 6-7. On the services of California troops during the Civil War, see the two volumes by Aurora Hunt, *The Army of the Pacific* (Glendale, 1951) and *Major-General James Henry Carleton* (Glendale, 1958).
- ²²*Ibid.*, pp. 33-35.
- ²³*Ibid.*, p. 35.
- ²⁴*Executive Document No. 11*, 51st Cong. 1st Sess., p. 58.
- ²⁵*Senate Report No. 2446*, 81st Cong. 2nd Sess., p. 6.
- ²⁶*Ibid.*, p. 29.
- ²⁷*Executive Document No. 11*, 51st Cong. 1st Sess., p. 59.
- ²⁸United States v. State of New York, 160 *U.S.*, 598.
- ²⁹Lt. Col. James Biddle to the Secretary of War, June 22, 1888. *Executive Document No. 11*, 51st Cong. 1st Sess., p. 126.
- ³⁰*Senate Report No. 2446*, 81st Cong. 2nd Sess., p. 48.
- ³¹"Completion [Part III] of the Sworn Statement of John Mullan Relative to the Unpaid Claims of the State of California," *op. cit.*, p. 31.
- ³²*Statutes of California, 1903*, p. 397; *ibid.*, 1943, p. 1021.
- ³³*Senate Report No. 2446*, 81st Cong. 2nd Sess., p. 41; Report of Commissioner Roald A. Hogenson, May 28, 1953, p. 41; *Congressional Record*, 21: 964, 3226, 4656; 23: 23, 125; 25: 211, 1400; 26: 320, 7983; 28: 785, 2329; 30: 45, 53, 156; 33: 91; 35: 130; 38: 14; 40: 6492.
- ³⁴*Senate Report No. 2446*, 81st Cong. 2nd Sess., pp. 45-46; Report of Commissioner Roald A. Hogenson, pp. 45-46.
- ³⁵*Statutes of California, 1907*, p. 938.
- ³⁶*Senate Report No. 2446*, 81st Cong. 2nd Sess., pp. 49-50; 45 *United States Statutes at Large*, 2378.
- ³⁷*Statutes of California, 1929*, p. 1935.
- ³⁸Kappler was a former associate of Senator William M. Stewart of Nevada who had been very active in connection with Nevada's claim. Kappler is known to American historians as the editor of *Indian Affairs: Laws and Treaties* (5 vols.; Washington, 1904-1941).
- ³⁹Phil Swing to Governor Earl Warren, September 30, 1943. Unless otherwise indicated all manuscript sources cited are in the *Phil D. Swing Papers* in the Department of Special Collections, University Library, University of California, Los Angeles. Some are originals and some are copies.
- ⁴⁰*Ibid.*
- ⁴¹*Senate Document No. 220*, 71st Cong. 3rd Sess.
- ⁴²*Congressional Record* 74: 6966; 75: 5967; 78: 3392; 79: 6692.
- ⁴³*Ibid.*, 79: 12647, 12651; Charles J. Kappler to A. E. Stockburger, January 16, 1936.
- ⁴⁴Rolland A. Vandegrift to Phil Swing, December 5, 1931, and December 12, 1932; Governor James Rolph, Jr. to Phil Swing, May 11, 1932; Swing to Rolph, December 19, 1932; Charles J. Kappler to Swing, April 14, 1933.
- ⁴⁵Vandegrift to Swing, December 5, 1931. See also Vandegrift to Swing, December 12, 1932 and February 1, 1933.

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- ⁴⁶Rolph to Swing, May 11, 1932. See also, Rolph to Swing, December 8, 1932.
- ⁴⁷Congressman Clarence F. Lea to Congressman Frank Oliver, May 19, 1934.
- ⁴⁸Swing to Kappler, January 8, 1934.
- ⁴⁹Kappler to Swing, October 5, 1943. Son unsuccessfully sought the Republican nomination for Attorney General of California in 1930 and 1934, losing to U. S. Webb both times. He may well have been seeking to make a political issue out of the fee question.
- ⁵⁰Traeger to Son, May 1, 1934.
- ⁵¹Los Angeles *Times*, December 19, 1931; Swing to Vandegrift, January 28, 1933.
- ⁵²*Ibid.*, January 22, 1932; Swing to Hatton W. Sumners, Chairman of the House Committee on the Judiciary, March 3, 1933; Copy of Memorandum of Conference prepared by Vandegrift, in *Swing Papers*.
- ⁵³Swing to Governor Earl Warren, September 30, 1943; Charles J. Kappler to Governor Frank F. Merriam, June 23, 1934. Although the maximum fee was a sizable one it was not unreasonable in view of the long years of work involved. A ten per cent contingent fee was quite usual, and in the Nevada case the fee was twenty-five per cent.
- ⁵⁴Kappler to Swing, October 5, 1943.
- ⁵⁵Kappler to Swing, April 14, 1933, December 7, 1933, January 6, 1934; Kappler to M. J. Dinkelspiel, July 15, 1933; Swing to Kappler November 29, 1933, and December 30, 1933.
- ⁵⁶Kappler to Governor Frank F. Merriam, June 23, 1934; a photostatic copy of this contract is in Box 3630 of the Finance Administration General Files in the Archives and Central Record Depository, Sacramento.
- ⁵⁷Swing to Governor Earl Warren, September 30, 1943; copy of agreement in *Swing Papers*. In December, 1939, after U. S. Webb's retirement as Attorney General of California he was briefly associated with the contract attorneys with a maximum contingent fee of \$20,000. Kappler to Webb, December 12, 1939; Kappler to Swing, May 22, 1941.
- ⁵⁸Kappler to Swing, May 18, 1939.
- ⁵⁹Swing to Kappler, August 5, 1939.
- ⁶⁰Swing to Kappler, September 8, 1941.
- ⁶¹Kappler to Swing, January 2, 1943; *Congressional Record*, 84: 4282; 88: 9538, 9542; 89: 141.
- ⁶²Governor Earl Warren to Kappler, July 3, 1943.
- ⁶³Swing to Governor Earl Warren, September 30, 1943.
- ⁶⁴Dinkelspiel to Kappler, October 13, and November 16, 1943.
- ⁶⁵Dinkelspiel to Kappler, January 22, 1944.
- ⁶⁶*Ibid.*; Dinkelspiel to Kappler, February 13, 1945; Swing to Dinkelspiel, September 16, 1946.
- ⁶⁷*Statutes of California, 1946-1947*, pp. 140-141.
- ⁶⁸Swing to Kenny, September 29, 1946.
- ⁶⁹Dinkelspiel to Swing, February 13, 1948; J. Francis O'Shea to Dinkelspiel, March 16, 1948.

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⁷⁰State of California v. United States, 119 *Fed. Supp.*, 174. The break-down of this claim was:

Militia	468,976.15
Volunteers, Extra Pay	1,459,270.21
Printing of Bonds	3,000.00
Bounties	900,839.50
Recruiting	24,260.00
Pre-mustering pay to Volunteer Officers ...	23,277.34
Adjutant General's Expense	38,083.17
Adjutant General's office rent	2,639.34
Interest on Bonds	4,323,140.05
Discount Loss	318,022.00

⁷¹Dinkelspiel to Swing, February 2 and April 14, 1948.

⁷²*Statutes of California, 1943*, p. 1021.

⁷³Dinkelspiel to Swing, February 2 and April 14, 1948.

⁷⁴*Congressional Record*, 96: 11235-36.

⁷⁵*Ibid.*, 96: 14657; 64 *United States Statutes at Large*, 1032.

⁷⁶Swing to Dinkelspiel, October 4, 1950.

⁷⁷Dinkelspiel to Swing, September 29, 1950.

⁷⁸Swing to Dinkelspiel, January 2, 1951; Dinkelspiel to Klepinger, January 23, 1951.

⁷⁹Klepinger to Swing, November 8, 1950.

⁸⁰Memorandum for M. J. Dinkelspiel from Robert F. Klepinger, May 21, 1952; Dinkelspiel to Klepinger, November 24, 1952; Dinkelspiel to Attorney General Edmund G. Brown, November 26, 1952.

⁸¹Klepinger to Dinkelspiel, December 29, 1952; State of California v. United States, 119 *Fed. Supp.*, 174.

⁸²*Los Angeles Times*, March 27, 1953.

⁸³A copy of plaintiff's brief, filed July 10, 1953, was kindly made available to me by Mr. Justin G. Turner.

⁸⁴State of California v. United States, 119 *Fed. Supp.*, 174; *Congressional Record*, 96: 11235-36. Mr. Justin G. Turner also made available a copy of the defendant's brief.

⁸⁵Defendant's brief, pp. 99-102.

⁸⁶*Ibid.*, pp. 119-120.

⁸⁷State of California v. United States, 119 *Fed. Supp.*, 174.

⁸⁸Swing to Ellis, March 17, 1954.

⁸⁹Klepinger to Dinkelspiel, September 9, 1954.

⁹⁰Klepinger to Ellis, June 3, 1954.

⁹¹Pope v. United States, 323 *U. S.*, 1.

⁹²Klepinger to Ellis, June 3, 1954; Draft of Petition for writ of certiorari in *Swing Papers*.

⁹³Klepinger to Ellis, April 12, 1954.

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⁹⁴California v. United States, 347 *U. S.*, 1016.

⁹⁵Swing to Ellis, March 17, 1954.

⁹⁶Klepinger to Dinkelspiel, July 22, 1954. See also Klepinger to Ellis, July 23, 1954, and Ellis to Klepinger, November 22, 1954.

⁹⁷*Congressional Record*, 101: 3891, 8896; 103: 5003; 105: 45.

⁹⁸Bert A. Betts, State Treasurer, to Brainerd Dyer, August 14, 1962.

⁹⁹Cecil R. King to Brainerd Dyer, September 11, 1962.