Olympia's Legal Battles to Retain the Capital

by Gerry L. Alexander

Olympia has been Washington's only capital city. But the crown that Olympia has worn over the 156 years since it was proclaimed the provisional territorial capital has not always rested easily, for through the years there have been attempts, both overt and covert, to wrest the seat of government away from Olympia. Many of these efforts cannot be described as serious and were more in the nature of political posturing. However, several were legitimate threats to Olympia's claim to the capital, two of which are particularly interesting to me as a judge who happens to have been raised in Olympia. Both incidents ended up in court and resulted in a judgment in Olympia's favor. The first of these decisions was handed down in December 1861 by the Supreme Court of the Territory of Washington. The other decision, issued almost 100 years later, was by the Washington State Supreme court, on which I now have the honor to sit.

The dilapidated-looking structure, photographed here in the early 1880s, has the distinction of being the site of the first session of Washington's territorial legislative assembly some 30 years earlier. *Courtesy Henderson House Museum, City of Tumwater.*

The elder of the two cases is called, appropriately, the *Seat of Government* case, and it is reported in volume one of *Washington Territorial Reports*. Before describing the issues that were presented in that case, a bit of background will be helpful. When Isaac Stevens arrived in Olympia on that drizzly day in November 1853 bearing his appointment from President Franklin Pierce as the first governor of Washington Territory, he designated Olympia as the provisional capital and the place for the first legislative assembly to meet. This made good sense because Olympia was the metropolis of Washington Territory, containing 200 to 300 of the 4,000 nonnative Americans then living in the territory. Olympia was also centrally situated in western Washington and was the closest port on Puget Sound to the territory's older settlement at Vancouver. Stevens, who by all accounts, was an energetic person, began asserting his gubernatorial prerogatives from his headquarters in Olympia immediately upon his arrival. He quickly divided the territory into legislative and judicial districts, and he called for an election of a territorial legislative assembly to meet in Olympia in February 1854. Importantly, Congress had given this about-to-be-constituted legislative assembly the power to select the territory's permanent seat of government.

The elected legislature did assemble in Olympia that year in cramped quarters it rented from Olympia's founder, Edmund Sylvester, on Main Street (now Capitol Way) in downtown Olympia. Although it did not pass a statute relating to the capital in the 1854 session, Olympians undoubtedly took heart from the 1855 session because the legislative assembly

The territorial capitol building, on the site of the present legislative building, served the needs of the territory and state until 1903. *Courtesy Washington State Archives, Susan Parish Photograph Collection.*

adopted an act establishing the seat of government on ten acres of land in Olympia that had been deeded to the territory by Edmund Sylvester. There was more good news for Olympia's citizens in the legislative session of 1858 when the assembly passed a bill that set up a commission "to superintend the erection of the capitol building at Olympia, the seat of government of the Washington Territory." It even appropriated the princely sum of $20,000 for the building of the capitol on the Sylvester land grant.

The construction of the territorial capitol building did not, however, deter efforts by legislators from other areas of the state to move the capital out of Olympia. In 1860 lawmakers from Vancouver, working with legislators from Jefferson County who wanted the penitentiary for Port Townsend, and others from Seattle who coveted the territorial university for that city, managed to get a bill through the legislative assembly that made Vancouver the capital city. Inexplicably, another statue relating to the location of the capital was passed in the same legislative session. It provided that the voters of the territory were to choose the seat of state government at the next annual election. That bill did not, however, say what effect this election was to have, and it made no reference to the act that purported to move the capital to Vancouver. Significantly, after the legislative session ended it was discovered that both statutes were minus an enacting clause and an indication of the date of passage.

The upshot of all of this was that the issue of the validity of the statue moving the seat of government to Vancouver was squarely presented to the territorial supreme court in the December term of 1861, only the 30th case heard by that court since it was organized in 1854. Now, lest you think these justices had just been sitting around twiddling their thumbs for six years with this puny case load, you should know that the territorial supreme court was comprised of only three justices, a chief justice and two associate justices, all of whom served at the pleasure of the president of the United States. These justices were also the trial judges for the territory and, thus they had to ride circuit around this huge territory to hear trials. Only in December of each year did they assemble in Olympia as a supreme court to hear appeals. An obvious defect in this process was that in most of the cases the court had to consider, one of the justices would be called upon to render a decision on the propriety of his ruling as a trial judge. This problem was not remedied until 1884 when a fourth justice was added to the territorial judiciary and the justices were relieved of the obligation to review their own decisions.

The *Seat of Government* case reached the court in a somewhat unusual manner. It had not been before any of the justices in their capacity as trial judges; instead, the question was presented directly to the justices in their capacity as the supreme court of the territory in a pleading entitled a "plea of abatement of a writ of error." In essence, this was a challenge to the court's jurisdiction to hear any of the cases that it had docketed for the December 1861 term in Olympia, on grounds that Olympia was not then the seat of government. After considering the matter and taking note that the territorial legislature was assembled in Olympia in "an unorganized quorum awaiting the action of the supreme court" and that "the controversy had been passed in review before the court, and occupied more than three entire days in the discussion," the court

rendered its decision. In a well-crafted opinion, a two-member majority discussed the flaws in the challenged statue that purported to move the capitol to Vancouver, and rendered a decision that the statute should be struck down. In an obvious effort not to appear arbitrary, the majority prefaced its conclusion by saying that "a conflict of opinion between the legislature and judicial branches is always to be regretted." It went on to observe, however, that if an act is unconstitutional or wanting in the "requisite elements," the court is "bound to declare it void and of no binding effect."

Now known as the Old Capitol Building, this monumental structure next to Sylvester Park was used as the State Capitol from 1905 to 1928. *Courtesy Washington State Archives, General Subjects Photograph Collection, 1845-2005.*

The court indicated in its decision that it was not unmindful of the Organic Act that Congress had passed in order to establish Washington Territory, which allowed the legislature to establish the territory's seat of government. Nevertheless, it quickly added that the enactment in question had to be struck down because it had no enacting clause, which is basically the words "be it enacted" and it contained no date of passage. In reaching its decision, the majority relied to some extent on the fact that the other act passed by that same legislature, which put the question of the location of the seat of government to a vote of the people, had to be read hand in hand, with the Vancouver act. After doing so the court said that both could not survive. That being the case, it favored a decision that was consonant with the will of the young public, the court taking note of the fact that the election had already been held and that Olympia had won the vote over Vancouver hands down, 1,239 to 639. Seattle, which was then smaller than Olympia, received a paltry 23 votes. For good measure, perhaps looking eastward to the nation's capital, the court pointed out that a lot of public money, $30,000 to be exact, had been appropriated by Congress to build a capitol building in Olympia and that $20,000 of that appropriation had already been expended.

In a final rhetorical flourish the majority justices said, as courts often do today when an act of the legislature is struck down for a technical failing—"if we have erred in refusing to give binding force and effect to this act, consolation remains that it is in the power of Congress, the territorial legislature, or the Supreme Court of the United States to correct the error, and the disappointed are not without remedy."

The majority opinion was written by Associate Justice Ethelbert Oliphant, an appointee of President Abraham Lincoln. He was joined by Chief Justice C. C. Hewitt, another Lincoln appointee, who was the great-grandfather of my former colleague on the Thurston/Mason County Superior Court, Judge Hewitt A. Henry. Justice James Wyche, also an appointee of Lincoln, filed a lengthy dissent in which he chided the majority for its adherence to form over substance and urged the court to carry out the intention of the legislature to move the capital to Vancouver.

In sum, Olympia's claim as the home of the territorial capital was upheld by the slimmest of margins thanks to the fortuity of a missing enacting clause and the absence of a date of enactment. In his book, *Rogues, Buffoons and Statesmen*, Gordon Newell, a noted

Olympia historian, speculated that the flaws in the statute might have been the result of an intentional act of some legislative clerk at the instance of Olympia boosters. History does not record whether that was the case, but if it did happen that way, that unknown person deserves Olympia's undying gratitude.

After the smoke had settled from the lawsuit, Olympia hung onto the capital through the rest of Washington's territorial days. Undoubtedly, the residents of Olympia took additional solace from the fact that at the election of which the citizens of the territory voted to adopt the state constitution, they again voted that Olympia should be the state capital. The newly enacted state constitution also made it very difficult to change the seat of government, requiring submission of the issue to the people and a two-thirds vote of all qualified electors.

When the Wilder and White architectural plan for the capitol campus was adopted early in the 20th century and our beautiful west campus became a reality a few years later, it looked as if Olympia's claim to the capital was unimpeachable. That, however, was not the case, and that leads me to the second of the two capital location cases to reach Washington's highest court, *State ex rel. Lemon et al. v. Langlie et al.* That case is reported at page 82 of volume 45 of *Washington Reports Second*, 247 volumes after the *Seat of Government* case. Unlike the earlier case, it was not the passage of a statute that led to the litigation but rather what can best be described as a gradual erosion of Olympia's position as the capital of Washington. This was manifested in the fact that by the early 1950s 13 state agencies, some of them small commissions like the state boards of pharmacy and accounting and not-so-small agencies like the Game Commission and the Health and Fisheries departments, simply did not have a significant presence in Olympia. Rather, they were headquartered up the highway in Seattle. This de facto relocation of a significant part of state government did not go unnoticed by Olympia's business leaders, and it led four of them—Gerry Lemon, James Frederick "Fritz" Mottman, George Ekland and George Draham—to consult with an attorney and, ultimately, commence an action in Thurston County Superior Court in January 1954 against

Since 1928 the Legislative Building has served as Washington's State Capitol. This image shows the domed structure as it looked ca. 1940. *Courtesy Washington State Archives, Susan Parish Photograph Collection.*

the then-governor, Arthur B. Langlie, and the directors and members of the various departments, boards and commissions that had moved their offices to Seattle.

The petitioners claimed in their suit that the respondents were not complying with the state constitution and the Organic Act, as well as the Enabling Act in which Congress granted statehood to Washington. Consequently, they sought an order of mandate from the superior court compelling the respondents to "return to and maintain at the capital city of Olympia, the principal offices of, together with books and records of the respective state agencies which they constitute. . . ."

One of the attorneys for the petitioners was legendary Thurston County attorney Smith Troy, a native Olympian and the son of pioneer Olympia lawyer Preston Troy. Troy, who as a young lawyer in the 1930s had served as the prosecuting attorney of Thurston County, was our state's attorney general in the 1940s and early 1950s. He capped his distinguished public career by returning as Thurston County prosecutor in the 1970s. Not coincidentally, Smith Troy was the brother-in-law of Gerry Lemon, one of the petitioners. Troy's counsel was John Spiller, an attorney from Seattle who had once served as an assistant attorney general under Smith Troy. The State of Washington was represented by Assistant Attorney General Ralph Davis, who later became president of Puget Sound Power and Light Company. The case was initially heard at the Thurston County Superior Court by Judge Charles T. Wright, a veteran trial judge who had succeeded his father, D. F. Wright, as a superior judge. In later years Judge Wright served on the state supreme court.

After a hearing in March 1854 that lasted less than a full day, Judge Wright issued the requested writ of mandamus. Not surprisingly, the respondents appealed the decision to the state supreme court and the case was heard not long afterward in Olympia at the supreme court's home since 1913, the Temple of Justice. The State's principal argument for overturning Judge Wright's decision was that the seat of government provision in the state constitution, article XIV, only requires the offices of executive departments that existed at the time of the adoption of the state constitution to be in Olympia. Those departments, it pointed out, are enumerated elsewhere in the constitution. Its secondary argument was that the four Olympia businessmen had no standing to maintain the suit.

In a decision authored by Justice Charles Donworth, a Seattle native, a bare majority of the nine-member court swept aside the State's arguments. They concluded that the petitioners had standing as taxpayers and the intention of the framers and the citizens who adopted the constitution was that all executive offices of the state should be maintained at the seat of state government. Justice Matthew Hill, who also hailed from Seattle, wrote a dissent that was joined by three of his colleagues. The result, though, was that by one vote the Olympia businessmen prevailed and the 13 agencies were required to move back to the seat of government, Olympia. Significantly, the Thurston County Superior Court maintained continuing jurisdiction over the agency's compliance with the supreme court's ruling, and under Judge Wright's supervision the offices began moving back to Olympia one by one. Upon doing so each agency filed a certificate of compliance with the superior court.

The dispute was not however, completely resolved by the filing of required certificates. The petitioners challenged the Game Department's compliance with the court's mandate, contending that the department had not established a bona fide headquarters in Olympia. Consequently, they asked Judge Wright to hold the Game Department's director and the members of the Game Commission in contempt. Judge Wright held a hearing on this motion in 1958 and, indeed, found the commission members in contempt of court, concluding that the Game Department's office in Olympia was a "sham, a fraud upon the court, and a calculated attempt to circumvent the lawful order of this court as affirmed by the Supreme Court of the State. . ." Despite this strong judicial language, the judge allowed the Game Department commissioners to purge the contempt by moving the department's headquarters to Olympia within four months. The department did

Looking west on 5th Avenue, Olympia, ca. 1942. *Courtesy Washington State Archives, Susan Parish Photograph Collection.*

so, thus ending the suit and the move of a portion of the state's executive offices from the state capital.

I doubt that Smith Troy and John Spiller ever got sufficient credit for what they accomplished for the citizens of Olympia. I suspect that the same can be said of the four businessmen in whose name the suit was brought. From a purely Olympia perspective, these persons can be viewed as Olympia heroes because the suit undoubtedly contributed to the economic well-being of the Olympia area. More importantly, though, they made certain that the intention of our state's founders, as embodied in the state constitution, was upheld.

In my view, it is unlikely that the future will see similar efforts to move the capital. That is not, however, a certainty because undoubtedly there are some who would prefer to see the capital situated in some other Washington city. Whether such an effort could succeed would depend, in large part, on the resolve of Olympia's citizens to make certain, as did their forebears, that the provisions in the state constitution relating to the location of our state's government are not altered or subverted.

After serving for 20 years as a trial and appellate court judge, Gerry L. Alexander became a Washington State Supreme Court justice in 1994, and has been chief justice since 2000. Growing up in Thurston County, he developed an abiding interest in its history and has served on the boards of several local historical organizations. **This article previously appeared in *Columbia*, Vol. 14, No. 4 (Winter 2000-01). It has been republished with the permission of the Washington State Historical Society.**