Wyoming Law Review

Volume 1 | Number 2 Article 8

January 2001

Westering and the Law

Frederick S. Calhoun

WESTERING AND THE LAW

Frederick S. Calhoun[*]

Westering. John Steinbeck coined the term as a verb to capture the meaning and flavor of the immense migration undertaken by nineteenth-century Americans. They westered, conquering the North American continent, subduing its native population, and exploiting its vast natural resources. But, according to Steinbeck, they westered not to conquer, not to subdue, nor even to exploit. "It wasn't Indians that were important, nor adventures, nor even getting out here," Grandfather told Jody in *The Red Pony*, "It was a whole bunch of people made into one big crawling beast. . . . It was westering and westering. Every man wanted something for himself, but the big beast that was all of them wanted only westering." The beast headed west, devouring land and resources and leaving behind fledgling settlements, until finally the beast reached the ocean and stopped. "But it wasn't getting here that mattered," Grandfather knew, "it was movement and westering."[1]

Westering meant more than simple wanderlust, more than Davy Crockett and his cohorts looking for excitement and adventure, more than John C. Fremont and his cohorts exploring uncharted ground. The urge extended even beyond the fur trappers capturing a living, trading with the natives, and occasionally eastering back to Kansas City or St. Louis or some other river town. "We carried life out here and set it down the way those ants carry eggs," Grandfather explained.[2] From those eggs grew a continental nation, tested by fire, ultimately truly united. Never just mindless wandering or thoughtless crossing, westering meant taming the untamed in order to create something new, to build afresh and begin again, over and over again. Westering was an act of faith, a fundamental belief that life could always get better just over the next rise, just down the next hollow. Westering used hope to challenge despair; struggle to overcome hardship; and movement, constant move-

---

* Frederick S. Calhoun earned a Ph.D. from the Univerisity of Chicago in American history. He was appointed the first historian for the United States Marshal Service in 1984 and held that position for fifteen years. He is the author of *The Law Men: United States Marshals and Their Deputies, 1789-1989* (Smithsonian Institute Press 1990). Mr. Calhoun is also the author of seven other books on various aspects of American history.

1. JOHN STEINBECK, THE RED PONY 99-100 (Viking Press ed., 1986).
2. *Id.*

ment, to triumph. The big beast settled a continent, never quitting or resting until it ran out of ground where Pacific waters lapped the shores. There the westering ended.

The law—and its lawmen—came behind, pulled along by the slipstream of the big beast's westering. Explorers westered first, then the trappers, traders, and goldrushers. Settlers followed, making up the bulk of the westering beast. The law came last, but it provided the necessary ingredient to ensure the conquering would be permanent. The law defined the settlements and guided their growth from sod houses to villages, then communities, territories, and ultimately states. The law meant civilization and order, process and regulation, peace and prosperity.

Understanding frontier law enforcement requires comprehending two separate aspects of the process. First, the evolutionary process through which the frontier went from unexplored lands to territories to states defined various roles for the frontier lawmen. Second, the severe restrictions imposed on federal law enforcement in the states also hemmed in the authority of frontier lawmen. Each role derived from the particular stage the territory had reached. These defining aspects of frontier law enforcement are described in turn.

ENFORCING THE LAW IN THE UNORGANIZED AND ORGANIZED TERRITORIES

Although a few frontier areas—Texas and California, for example—skipped the territorial stage and entered the Union full-blown, most of the frontier followed a strictly marked evolution from territory to statehood. The Northwest Ordinance of 1787 initially outlined the process. The ordinance set forth the procedures for delineating territorial boundaries; appointing a territorial governor, judge, attorney, and marshal; and establishing territorial laws. It designed a system of stages through which each territory had to pass before it could become a state. Each stage had different legal jurisdictions and authorities.

Population density defined the stages. After a few settlers (not explorers or trappers, but people intent on staying put) trekked into an area, the federal government set it up as an unorganized territory. Government surveyors set out the boundaries and the territory was established and named. Federal law prevailed. The president appointed, with the advice and consent of the Senate, a governor, judge, attorney, and marshal. Their authority emanated directly from the national government, with no provision for local self-government.

When the population of free white males reached five thousand, the federal government organized the territory. This meant that the first steps toward democratic self-rule could be taken. It also initiated the process whereby the territory began acquiring more of the duties and responsibilities exercised by the states. The free white males elected a bicameral legislature (except in Utah), which then began promulgating territorial laws. It also created territorial offices and in various other ways began to act of its own authority, though still overseen by a presidentially appointed governor and a presidentially appointed appellate court. When the population gained 60,000 free white males, the territory could apply for statehood. Upon proof of the republican nature of the territorial government, Congress voted to admit it into the Union. Once admitted, the former territory became a state, equal in all respects to its fellow states.

The relationship between the federal government (and its officials) and the territories (and their residents) depended entirely on what stage of development the territory had reached. The territories ranged from total dependence on federal governance to near-total reliance on their own officers and local governments. In a curious way, the process repeated—*sans* a revolution—the national government's transition from colony to nation, from foreign rule to self-government.

In the unorganized territories, Congress established courts to hear cases involving federal laws, the only laws obtaining. Once Congress organized the territory, these courts acted in twin capacities. They continued to sit as federal courts, hearing cases involving federal law. But with the rap of the judge's gavel, they transformed themselves into territorial supreme or district courts to hear cases on appeal from territorial courts involving territorial laws.

The role of the marshals and attorneys corresponded to the role of the federal courts. In the unorganized territories, they enforced all the laws. As the individual territory progressed through the organized stage toward statehood, it assumed more authority. The marshals and attorneys surrendered their authority to territorial lawmen and local prosecutors. By the time the territory reached the brink of statehood, the marshals and attorneys usually concerned themselves solely with the federal courts and federal laws.

Once the territory was organized, the territorial legislature chose who it wanted to execute territorial court orders and uphold territorial law. The legislature could designate the United States marshal to act as an officer of the territorial court, or it could create its own office of sher-

iff for each county. If it picked the latter course, then territorial sheriffs enforced territorial laws; federal marshals executed federal laws.

Attorney General Ebeneezer R. Hoar explained the complicated relationship between federal and territorial jurisdictions to newly appointed United States Marshal Church Howe of the Wyoming Territory. In a letter, dated June 15, 1869, Hoar instructed Marshal Howe that:

> You are to serve all processes directed to you as Marshal by the courts. . . . the Territorial Legislature may provide that all processes issuing from the courts in suits arising under the Territorial laws shall be directed to, and be served by the Sheriff of the county, or his deputy; or it may provide that such processes shall be directed, and be served by the Marshal of the United States or his deputy. It is competent, I think, for a Territorial Legislature to enact laws either way. But the duties of the Marshal, which are beyond the control of the Territorial Legislature, are, to execute all processes issuing from the Supreme or District Courts, while exercising their jurisdiction as Circuit and District Courts of the United States.[3]

Not surprisingly, considerable confusion invested the process. Those who had westered out to a particular territory did not always understand what stage of self-government had been reached. In 1876, for example, Jack McCall shot James Butler "Wild Bill" Hickock in the back of the head. The crime occurred in a saloon in the town of Deadwood, Dakota Territory. Outraged both by the murder and the cowardly way in which McCall accomplished it, the good citizens of Deadwood quickly convened a court, convicted the murderer, and sentenced him to death. On appeal, McCall's attorneys noted that Deadwood lay in the still *unorganized* portion of the Dakota Territory. Consequently, the good citizens there had no lawful authority to hold court, much less sentence a man to hang. The territorial appeals court had no choice but to overturn the unauthorized conviction and order McCall tried in federal court. Ultimately, deputy marshals hanged him.[4]

Most territories chose to create their own law officers as they moved closer to statehood. For example, by the 1870s, some forty years before statehood, the Arizona territorial legislature created the office of

---

3. Letter from Ebenezer R. Hoar, United States Attorney General, to Church Howe, United States Marshal (June 15, 1869) (on file in RG 60, Records of the Department of Justice, AG Instruction Book A2).

4. FREDERICK S. CALHOUN, THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789-1989 151 (Smithsonian Institution Press 1990).

sheriff in each county and the positions of chief of police or town marshal in its cities and towns. Most other territories did the same. Alaska proved the exception. Until its statehood in 1959, the Alaska legislature provided territorial lawmen only in its few cities. United States marshals upheld territorial law everywhere else.

If the legal confusions were not enough, the common practice of adopting joint or concurrent commissions further blurred the distinction between federal and territorial lawmen. Sheriffs and town marshals throughout the American frontier often also held commissions as federal deputy marshals. For example, Pat Garrett (who killed Billy the Kid) and Virgil Earp (of O.K. Corral fame) both held joint commissions.[5] The double office gave the lawmen considerable authority, as well as the chance to make extra money. It resulted in frequently confused and laxly respected jurisdictional lines between local and federal officers. Often enough, they were one and the same man.

The shootout between the Earp brothers, accompanied by Doc Holiday, and their political and personal rivals, the Clantons and McLaurys, represented the most egregious instance of a lawman using his dual authority to suit his own purpose. Virgil Earp was a duly sworn Deputy United States Marshal for the Arizona Territory, but he was also the town marshal for Tombstone. Pressured by United States Marshal Crowley P. Dake to put a stop to rustlers stealing Mexican cattle along the border, the Earps needed some justification for going after the Clantons, whom they suspected—but could not prove—of the rustling. They found it in Virgil's authority as town marshal. As they walked past the O.K. Corral to the vacant lot where their targets were saddling up, they intended to charge the Clanton brothers and their friends with carrying weapons within the city limits—a territorial, not a federal, violation.[6]

Even as the lawmen crossed jurisdictions, so, too, did the outlaws. In committing their holdups and robberies, the outlaws cared little for what laws they violated. They wanted the loot, whether they got it from the mail pouch, railway vault, or a traveler's pocket. As a result, both federal and local lawmen chased after such infamous outlaws as Jesse and Frank James, Butch Cassidy and the Sundance Kid, and Black Jack Ketchum. Often, the lawmen teamed up to ride together, but they wanted the outlaws for different crimes, even though the separate offenses occurred simultaneously. Marshals wanted them for robbing the

5. *Id.* at 150-51, 193.
6. *Id.* at 193-94.

mails or government payrolls; locals wanted them for bank, train, and stagecoach holdups.

The bifurcation in authorities sometimes produced bizarre results. When federal and New Mexico lawmen finally arrested Black Jack Ketchum in the summer of 1899 after a string of violent train and mail robberies, the question arose as to which jurisdiction should try him first. Since the New Mexico Territory provided the death penalty for train robbery and federal law allowed only a prison sentence for stealing the mail, United States Attorney W. B. Childers willingly took a back seat to the territorial prosecutors. Unfortunately for Ketchum, he was the first man convicted under the New Mexico death penalty and, consequently, the first to be executed. This lack of experience had a gruesome result. The hangman chose too long a rope. When it reached its end, snapping the plummeting body to a halt, Ketchum's head popped right off his body.[7]

As if the confusions in legal jurisdictions and authorities between federal and territorial lawmen and the outlaws they pursued were not muddled enough, the transient nature of the professions—lawmen and outlaw—further confounded things. The spirit of westering kept many people on the move, drifting both westward and across both sides of the law. Such infamous outlaws as the Dalton brothers and Billy the Kid each served as deputy marshals. Indeed, after Deputy Marshal Frank Dalton was killed in the line of duty in 1887, his brothers apparently decided they could make more money for the same risk on the other side of the law.[8]

During the 1878-79 Lincoln County War in New Mexico, sheriff's deputies rode with cattleman James J. Dolan's faction while deputy marshals—including Billy the Kid—sided with John S. Chisum. Unable to count on any lawmen, President Rutherford B. Hayes finally had to send in the army to quell the feuding.[9] When Wyoming cattlemen wanted to chase off the small ranchers in 1892, they drafted a gang of Texas deputy marshals to do the chasing. Since those deputies had no

7. Letter from Creighton M. Foraker, United States Marshal, to John W. Griggs, United States Attorney General (Aug. 28, 1899); and letter from W. B. Childers, United States Attorney, to Philander C. Knox, United States Attorney General (May 29, 1901) (both in Record Group 60, Records of the Department of Justice, Year Files 13065/96, National Archives, Washington, D.C. (hereinafter cited as RG 60, Year Files)).

8. CALHOUN, *supra* note 4, at 163; *see also* letter from Jacob Yoes, United States Marshal, to William H. H. Miller, United States Attorney General (Dec. 29, 1892) (on file in RG 60, Year Files 12014/92).

9. CALHOUN, *supra* note 4, at 150-51.

law enforcement authority outside Texas—not to mention any warrants against the small ranchers—their movements through Johnson County were no different than any other outlaw gang scourging the law-abiding community.[10]

In Utah, the disputes between federal and territorial authorities grew out of the territory's religious founding. In March 1855, for example, United States Attorney Joseph Hallman of Utah complained about Governor Brigham Young's attempt to influence the outcome of a federal case. Hallman interpreted the governor's actions as another of Young's "attempts to stretch his power and connect church and state." The interference seemed yet more evidence of the Mormon church's "entire disregard for the Government and its Laws."[11] Throughout the remainder of the nineteenth century, federal officials conflicted frequently with Utah officials and citizens. Much of the tension resulted from efforts to enforce federal laws against polygamy. The disputes illustrated again that federal officials sometimes worked together and sometimes worked at odds with each other.[12]

ENFORCING FEDERAL LAW

Whether on the frontier or back east, enforcing federal law was not and never could be the lone man, badge on his chest, and six gun on his hip. Enforcing federal law and establishing territorial governments required the presence of all the law's officials, from the judges to the attorneys to the marshals. They worked in tandem, for none alone had the wherewithal. Their dependence on each other derived from Constitutional design and congressional distrust of law enforcement. The Founding Fathers understood that enforcing the law was the most chilling power exercised by any government. It included the power to arrest, incarcerate, brand, whip, and even execute those who broke the law. The

---

10. Extensive documentation on the Johnson County War can be found in RG 60, Year Files 6316/92.

11. Letter from Joseph Hallman, United States Attorney, to Caleb Cushing, United States Attorney General (Mar. 1, 1855) (on file in Record Group 60, Records of the Department of Justice, Letters Received by the Attorney General: Utah, National Archives, Washington, D.C. (hereinafter cited as RG 60, AG Letters Received)). *See also* letter from P. K. Dotson, United States Marshal, to Jeremiah S. Black, United States Attorney General (June 22, 1857) (on file in RG 60, AG Letters Received), in which Dotson reports he had been chased out of Utah by armed supporters of Brigham Young.

12. Letter from A. H. Garland, United States Attorney General, to E. A. Ireland, United States Marshal (Nov. 11, 1885) (on file in RG 60, AG Instruction Book T). For an interesting view of the conflict over Mormon marital practices from a polygamist's point of view, see Abraham Cannon, Personal Diaries, (on file at the Utah Historical Society, Salt Lake City, Utah).

Fourth Amendment to the new Constitution proscribed the government from conducting "unreasonable searches and seizures." It protected the individual from any arrest save those by warrant issued "upon probable cause, supported by oath or affirmation."[13]

Congress initially took this injunction quite literally. It allowed its officers little flexibility in upholding the very laws it passed. The governmental powers it distributed were limited and parsed, its officials bound by safeguards and suspicions. By ensnaring its law enforcers in checks and double-checks, Congress ensured that no single official had sufficient power alone to abuse too greatly the rights of the people. Federal law enforcement was forever held in delicate balance against the inalienable rights of a people privileged with freedom.

The Judiciary Act of September 24, 1789, established the equilibrium. It charged the United States Attorneys appointed to each judicial district with the prosecution of "all delinquents for crimes and offences, cognizable under the authority of the United States."[14] They were to pursue this responsibility through legal actions before the courts. Congress specifically restricted federal arrest authority to "any justice or judge of the United States, or by any justice of the peace, or other magistrate."[15] Clearly, of course, Congress did not expect its judges to strap on pistols and handcuffs to take on the rabble and the rousers. Their power was expressed through warrants and judicial process issued directly to the United States Marshals. With the exception of the Secret Service (created in 1865), throughout the nineteenth century, marshals were the only federal officials empowered to lay hands on the accused and haul them before the court. This power, however, derived solely from a lawful warrant issued to them. They were powerless to act without it.

Although any citizen could complain about a violation of the law, providing the probable cause required by the Fourth Amendment fell primarily to the United States Attorneys. As Attorney General Homer Cummings and his assistant, Carl McFarland, pointed out in their history of *Federal Justice*, the United States Attorneys "came to be regarded as responsible for the detection of offenses against both civil and criminal law and for the collection of evidence to support proceedings in the courts—duties very seldom specified in the statutes."[16] This respon-

13. U.S. CONST. amend. IV.

14. Act of Sept. 24, 1789, 1 Stat 91-92 (establishing the Judicial Courts of the United States).

15. *United States* v. *Benner*, 24 F. Cas. 1084 (C.C. E.D. Pa. 1830) (No. 14,568); and *United States* v. *Faw* 25 F. Cas. 1053 (C.C. D.C. 1808) (No. 15,079).

16. HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 366 (The Macmillan Company 1937).

sibility, the authors explained, grew out of the English tradition of law enforcement, which "looked not to permanent officers but to the 'grand jury' of local citizens who of old, sitting in secret session so that culprits might not be forewarned and escape, reported the scandal of the countryside for the consideration of the justices of England."[17]

In addition to working through the grand juries, the United States Attorneys also worked with the customs and revenue collectors, postal inspectors, various types of special agents, and the occasional hired detective, all of whom eventually came to investigate violations of the laws defining their jurisdictions. None of them, at first, could make any arrest except for those crimes actually committed in their presence and only then because every citizen, lawman or not, enjoyed the power of citizen's arrest.

Once the United States Attorney had sufficient evidence to support probable cause, he took his case before some judicial official—judge or commissioner—to obtain an arrest warrant. The judge or commissioner needed particular information before issuing a warrant. The decision had to be founded on some likelihood that the accused might actually be guilty. Such cause had to be given directly to enable the presiding official to "exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty."[18] Neither rumor, hearsay, nor the word of the prosecutor was sufficient. The courts required laying before them "the oath of the real accuser," that is, the citizen or officer who witnessed the crime or collected its evidence.[19] The standard was well below the absence of reasonable doubt imposed on jurors, but it did require the judge to determine some likelihood of the accused's guilt.

"An arrest," one court explained, "is the taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process."[20] The marshals alone had this authority, even, if necessary, using force to accomplish it. Moreover, the marshal had no discretion once the warrant was handed him. As Attorney General Charles Devens, a former marshal, explained in 1878, "[t]he United States Marshal is a ministerial officer and his duty in respect to warrants regularly coming into his hand is not to question their legality but to serve them."[21] The courts wholeheartedly agreed. "There is no ground

17. *Id.* at 366-67.
18. *In re Rule of Court*, 20 F. Cas. 1336 (C.C. N.D. Ga. 1877) (No. 12,126).
19. *United States* v. *Burr*, 25 F. Cas. 1 (C.C. D. Ky. 1806) (No. 14,692).
20. *United States* v. *Steffens*, 27 F. Cas. 1303 (D.C. N.D. N.Y. 1877) (No. 16,384).
21. Letter from Charles Devens, United States Attorney General, to Augustus Ash,

for the idea that a marshal can receive warrants, commanding him to arrest parties therein named, and make no return thereon," Circuit Judge Woods explained in 1879.[22] The marshal was obliged by law and his own oath of office to report either that he had made the arrest, that the accused was not to be found in his district, or that he was opposed by combinations too powerful to resist.

In addition, judicial warrants were not expressions of unbounded power. The Judiciary Act of 1789 limited the reach of arrest warrants to the district or territory wherein they were issued. Felons who fled across district lines could be arrested in the neighboring district only after a judge in the district where the accused was believed to be hiding issued a new warrant. Once arrested, the prisoner was taken before the judge or commissioner, who, once satisfied as to the possibility of guilt, ordered the prisoner's removal to the originating district.[23]

United States Marshal (Sept. 18, 1878) (on file in RG 60, AG Instruction Book H).

22. *United States* v. *Scroggins*, 27 F. Cas. 1000 (C.C. N.D. Ga. 1879) (No. 16,244).

23. *United States* v. *Shepard*, 27 F. Cas. 1056 (D.C. E.D. Mich. 1870); *United States* v. *Thompson*, 28 F. Cas. 89 (C.C. D.C. 1823) (No. 16,484). Attorney General Roger B. Taney once thought otherwise. Eager to apprehend Lieutenant Robert B. Randolph, who escaped to Virginia after assaulting President Andrew Jackson on May 6, 1833, Taney—as he sometimes did—found in the law what he wanted to find. Randolph had been dismissed from the military and apparently blamed the commander-in-chief personally. On meeting Jackson aboard a Potomac steamboat, Randolph took the chance opportunity to tweak the president's nose hard enough to draw blood. Since the attack occurred within the original boundaries of the District of Columbia, it came within federal jurisdiction. Armed with a warrant issued out of the District of Columbia, Taney did not want to waste time obtaining a separate warrant from the federal court in Virginia. "The power to arrest for any offence against the United States," Tany proclaimed, "is given in general terms and so far as respects a judge or justice of the United States it is not even confined to his district or circuit but his warrant would in my judgment run anywhere throughout the United States." *See* Letter from Roger B. Taney, United States Attorney General, to Francis Scott Key, United States Attorney (May 14, 1833) (on file in Record Group 60, Records of the Department of Justice, Attorney General Letterbooks AI, National Archives, Washington, D.C. (hereinafter cited as RG 60, AG Letterbooks AI)); *see also*, 3 JAMES PARTON, LIFE OF ANDREW JACKSON, 486-88 (Mason and Brothers ed., 1860). Randolph was apparently prosecuted for the assault some five years later. *See* Letter from President Andrew Jackson to President Martin Van Buren (Dec. 4, 1838), *in* 5 CORRESPONDENCE OF ANDREW JACKSON 573 (John Spenser Bassett ed., 1931).
Subsequent attorneys general, however, were neither so bold nor so anxious in unlimiting federal authority. "This opinion," Acting Attorney General B. H. Bristow advised in 1872, "has not been adopted in general practice. On the contrary, so far as I am advised it has been dissented from by many able lawyers and its correctness seriously doubted by almost all others. I am not aware that any United States judge has attempted to exercise the power maintained by Mr. Attorney General Taney." Indeed, the leading authority on the jurisdiction and practice of federal courts "entertained an opinion altogether different." The process, Bristow understood, was clumsy and inefficient, the law on the

The reason was simple enough. "The marshal, in making the arrest," Judge J. M. Love of Iowa explained in 1869, "might mistake the man, and remove to a remote state an individual not charged with any offense whatever."[24] Federal practice added yet another precaution. A marshal was only a marshal in the district where he took his oath. Neither his powers nor his authority crossed district borders. As an additional inducement to encourage the arresting district to issue new process, the marshals earned their fees only by serving precepts. Helping out a brother marshal from another district serve his warrants was no way to make a living.[25]

To keep their power within further limits, the marshals were generally (though not always) discouraged from conducting investigations. "It is not deemed the duty of a Deputy Marshal to do merely detective work," one acting attorney general explained to United States Marshal C. W. Ide in 1898.[26] Since they were paid a fee for each type process they served, no one in Washington wanted the marshals detecting crimes to drum up business.

In fact, the Attorney General did not have a corps of dedicated detectives ferreting out crimes wherever they could find them. "Investigation," Cummings and McFarland noted, "as a function of the Department of Justice, was not fully recognized until the opening years of the twentieth century."[27] Indeed, as both authors well knew, the department did not even exist until 1870. Even after that, nineteenth-century attorneys general shied from encouraging their subordinates to become investigators.

In 1881, Attorney General Wayne MacVeigh made clear that

---

subject "by no means satisfactory." No one particularly liked it and previous attorneys general had pleaded with Congress to correct it. But such was the nature of the federal system; clumsiness and inefficiencies inhered within its very structure. *See* Letter from B. H. Bristow, Acting United States Attorney General, to D. T. Corbin, United States Attorney (June 5, 1872) (on file in RG 60, AG Instruction Book C).

24. *In re Bailey*, 2 F. Cas. 363 (C.C. D. Kan. 1869) (No. 730).

25. The fee system was abandoned in 1896 when the marshals and their deputies were finally put on salaries. However, it took another sixty-plus years before their authority was understood to extend beyond the districts to which they were assigned. *See* CALHOUN, *supra* note 4, at 21-22; 137-40; & 142.

26. Letter from Acting United States Attorney General, to C. W. Ide, United States Marshal (July 9, 1898) (on file in RG 60, AG Instruction Book 99). *See also*, CALHOUN, *supra* note 4, at 233-38.

27. CUMMINGS & MCFARLAND, *supra* note 16, at 267. Other departments, such as Treasury and the Postmaster General, did have cadres of detectives to investigate particular crimes, such as counterfeiting, revenue fraud, and postal offenses.

marshals should not conduct investigations. As MacVeigh pointed out to United States Attorney Phillip Teari:

> I do not find however in section 782 of the revised statutes which prescribes the oath which the marshals must take or in section 787 which declares their duties, or in any other provision of the statutes any language which can be construed as requiring of them the service of detectives.[28]

By holding strictly to its various spheres of authority, the government ensured that no single official—judge, attorney, or marshal—became too powerful.

What emerged from this design was a ridiculously naive approach to keeping the law, which, by its very naivete, preserved fundamental freedoms. It severely restricted the authority of federal officials by dividing their powers and splitting their responsibilities. Authority was parsed and divvied in order to compel each official to rely on others. None alone could act beyond a very limited sphere.

The result, too, was a slow process of complaint, examination, warrant, and then arrest. As District Judge Magrath explained in 1858, "[i]n countries which regard the personal liberty of the citizen, wherever laws have been passed for the suppression of crime and the punishment of offenders, it has been found necessary to provide certain preliminaries, operating as safeguards, which must precede either the arrest or the commitment or both."[29] Probable cause and the proper issuance of warrants provided those protections for Americans.

That the fleet felon could easily outpace the slow process of the law struck the courts as far less consequential than ensuring the sanctity of the people's freedoms. "It is possible," one district court admitted, "that by exercising this degree of caution, some guilty persons may escape public prosecution, but it is better that some guilty ones should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge."[30]

---

28. Letter from Wayne MacVeigh, United States Attorney General, to Phillip Teari, United States Attorney (Dec. 20, 1881) (on file in RG 60, AG Instruction Book L).

29. *In re Bates, et al.*, 2 F. Cas. 1015 (D.C. D. S.C. 1858) (No. 1099a).

30. *In re Rule of Court*, 20 F. Cas. 1336 (C.C. N.D. Ga. 1877) (No. 12,126).

FRONTIER DUTIES OF THE MARSHALS

United States Marshals out west or back east were never purely law enforcement officers. Their duties were many and varied and included administrative, executive, and fiduciary responsibilities. As Attorney General Hoar reminded Marshal Howe, their principal job was to execute the processes issued by the federal courts. In addition, marshals handled the courts' money, including salaries; produced its prisoners; rounded up material witnesses; and performed an array of administrative tasks.

As law enforcement officers, the bulk of their work on the frontier derived from federal laws protecting Indians on their reservations, government property, and the United States mails. Across the frontier, United States Marshals and their deputies served as a buffer between Indians confined on reservations and westering whites. The marshals also protected government lands, especially the timber growing there, and went after anyone who stole military supplies or payrolls. The United States mail was also an attractive target for brigands and that, too, generated considerable business for the marshals.

Once the United States Army herded the native population onto reservations and selected lands, the marshals enforced the laws prohibiting what was called "illicit intercourse," that is, selling them liquor, guns, or other contraband. Deputy Frank Dalton, mentioned above, was killed in 1887 trying to arrest a whiskey peddler in the Indian Territory—present-day Oklahoma.[31] The Montana Territory seemed particularly beset with whites intent on trading illegally with the Indians, especially after the Royal Canadian Mounted Police chased the ones it was having trouble with southward. "I have more business arising from violations of the Indian Intercourse laws than in any of the six years while I have been Marshal of Montana," William F. Wheeler reported in June 1875. During the fiscal year ending that month, Wheeler took in $40,000 in forfeitures and penalties related to illicit intercourse. In June alone, he conducted two seizures involving goods worth $6000 and $10,000. "The contest with [the illicit traders] is a constant warfare," he complained, "and considering the very limited means and force at my disposal I have made the business expensive to them."[32]

---

31. Letter from John Carroll, United States Marshal, to Augustus Garland, United States Attorney General (Nov. 30, 1887) (on file in RG 60, Year File 7988/87).

32. Letter from William F. Wheeler, United States Marshal, to Edwards Pierrepont, United States Attorney General (June 22, 1875) (on file in Record Group 60, Records of the Department of Justice, Source-Chronological File: Montana Territory, National

Theft of government property, especially at United States Army posts, occurred quite commonly. Marshal J. H. Burdick of the Dakota Territory reported in the spring of 1874 that one of the major problems in his district was stealing property from the Army fort. "There is a great amount of stealing of Horses, Mules, and Cattle belonging to the Government at points along the Missouri River," Burdick complained. In addition to the loss of the property, these thefts interfered with General George Armstrong Custer's preparations for the spring campaign against the Sioux.[33]

In addition to protecting the government's military stores, frontier marshals—as well as the marshals back east—spent a lot of time chasing after so-called "timber trespassers." The federal government owned most of the land in the west. On a good portion of that land, trees grew. Cutting those trees and selling the timber was both a lucrative crime and, despite the high-intensity labor, also an easy one with which to get away. Because of the vast expanses of the frontier, the marshals could not be everywhere at once. The timber trespassers could easily arrange to be where the lawmen were not.

Sometimes quirks in the law aided the thieves. As an inducement to facilitate construction of the transcontinental railroad, Congress allowed railroad companies to take timber from public lands immediately adjacent to the railroad right of way. Just how close—or far—neighboring plots could be was the subject of considerable interpretation and dispute. During the mid-1880s, Secretary of the Interior Henry M. Teller defined adjacent as anywhere within fifty miles. One enterprising railroad company built five miles of track straight into a Washington state forest, then spent the next several years logging the timber.[34]

Even the best enforcement efforts sometimes produced ironic results. In July 1873, the Fort Hayes, Kansas, commanding officer let a contract to two lumbermen to provision the post with its winter supply of wood. The lumbermen immediately availed themselves of trees growing on government land. Six months later, Marshal William S. Tough ar-

---

Archives, Washington, D.C. (Hereinafter cited as RG 60, Source-Chron: Montana Territory)).

33. Letters from J. H. Burdick, United States Marshal, to George H. Williams, United States Attorney General (Mar. 20 & Aug. 3, 1874) (both on file in RG 60, Source-Chron: Dakota Territory).

34. EVERETT DICK, THE LURE OF THE LAND: A SOCIAL HISTORY OF THE PUBLIC LANDS FROM THE ARTICLES OF CONFEDERATION TO THE NEW DEAL 171-72 (University of Nebraska Press 1970); BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 228-68 (University of Wisconsin Press 1965).

rested the two men for timber trespassing. He seized 150 cords of wood that they had stolen from public lands. As with any goods seized by a marshal, the court ordered the cords sold at public auction. By this time rather desperate for wood, the Fort Hayes quartermaster made sure he was the highest bidder.[35]

The nineteenth century's primitive banking system compelled the citizenry and businesses to send cash and unsecured notes through the post. Naturally, this proved too tempting for brigands and thieves. Robbing the mails and post offices—which also tended to have a lot of cash on hand from the sale of stamps—proved irresistible. Between November 1875 and mid-April 1876, robbers stole the mail from Idaho's North Western Stage Company five times. The marshal and his deputies "labored indefatigably" with local lawmen and Welles Fargo detectives to catch the thieves. In Wyoming, bandits robbed the Black Hills coach company three nights running in June 1877. Thefts in that territory became so common that the governor sought military assistance. "Robberies of the worst character, both of the United States Mails and of private citizens, are still of frequent occurrence in Wyoming," Governor John W. Hoyt advised the Attorney General, "and they are committed at places so remote from the more settled portions of the Territory, as well as by bands so large and desperate that the civil authorities are unequal to the work of breaking them up."[36]

Perhaps Hoyt understood one of the fundamental facts of life challenging the marshals. Despite occasional support and guidance from the Department of Justice for the marshals' collective efforts to rid the frontier of outlaws and thieves, which was about all they got from Washington. That moral support rarely translated into additional resources or funds.

POOR GUIDANCE FROM THE DEPARTMENT OF JUSTICE

In part, the problem originally derived from the loose supervi-

35. Letter from William S. Tough, United States Marshal, to the George H. Williams, United States Attorney General (Feb. 9, 1874); and letter from George R. Peck, United States Attorney, to William S. Tough, United States Marshal (Feb. 1, 1875) (both on file in RG 60, Source-Chron: Kansas).

36. *See* letter from Joseph W. Huston, United States Attorney, to George H. Williams, United States Attorney General (April 26, 1873); and letter from Joseph W. Huston, United States Attorney, to Alphonso Taft, United States Attorney General (Aug. 23, 1876) (both on file in RG 60, Source-Chron: Idaho). *See also*, letter from E. P. Johnson, United States Attorney, to Charles Devens, United States Attorney General (June 28, 1877); and letter from John W. Hoyt, Governor, to Charles Devens, United States Attorney General (Dec. 16, 1878) (both on file in RG 60, Source-Chron: Wyoming).

sion the federal government exercised over its frontier lawmen. Until the 1850s, the attorney general served only as the government's attorney, paid on retainer and expected to have other clients. He (there were no she's until 1993) represented the United States before the Supreme Court and, on request, wrote formal legal opinions for the president and his cabinet. He had no administrative or supervisory control over the United States Attorneys or the marshals, save to give occasional legal guidance to the attorneys on those cases that might rise to the Supreme Court. When the president wanted to issue instructions to his district officers, he did so through the Secretary of State.[37]

Centralization over non-revenue related law enforcement began shortly before the Civil War and consolidated rapidly after it. Beginning about 1853, the president assigned some management of the marshals and attorneys to the attorney general. On August 2, 1861, Congress imposed upon the attorney general full supervision over those officials. Nine year later, in 1870, it bureaucratized this supervision by creating the Department of Justice. Increasingly from that time forward, federal law enforcement gravitated toward a centralized administration with the attorney general the nation's principal law enforcement officer. Still, the execution of that enforcement remained diffused among the judicial districts and territories.[38]

The government compounded its loose supervision by failing to instruct its officers in their roles and responsibilities. Neither the Attorneys General nor, later, the Department of Justice, tried very hard to educate the marshals as to their duties. "When I came into office, no books, papers, or anything else were left for guides to me in the discharge of my duties," Marshal Smith O. Scofield of Missouri wrote on September 11, 1865. "I have been forced to travel a new and very difficult way alone with no chart except statutes covering a period of nearly one hundred years to guide me."[39] Marshal Isaac Q. Dickason, even after four months service as the marshal of the Arizona Territory in 1871, still did not know what his salary was or what fees he could charge.[40] In 1884, Marshal M. C. Hillyer of the Alaska Territory advised the Attor-

37. CALHOUN, *supra* note 4, at 18, 55, & 136.

38. *Id.* at 135-42.

39. Letter from Smith O. Scofield, United States Marshal, to James Speed, United States Attorney General (Sept. 11, 1865) (on file in RG 60, AG Letters Received: Missouri).

40. Letter from Isaac Q. Dickason, United States Marshal, to George H. Williams, United States Attorney General (Aug. 14, 1871) (on file in RG 60, Source-Chron: Arizona).

ney General that "none of the Government Officers here have received any instructions or laws."[41] It was an odd way to run a government.

About all the Attorneys General and the department could offer was to refer the marshals to whatever relevant statutes they could uncover. As Scofield complained, that covered nearly a century of lawmaking. The department offered no instruction book or manual until the late 1890s. In effect, Washington essentially left the marshals to discover for themselves what their duties and responsibilities were. The government did not even provide them a badge symbolizing their authority. Those lawmen who wanted to pin on a tin star had to buy one out of their own pocket.

This is not to suggest that the Attorneys General and the Department of Justice completely ignored the marshals. Each leaped to criticize those marshals who made mistakes or—even worse in Washington's eyes—spent too much money. Indeed, money or, more precisely, the woeful lack of it, was of enduring concern to the department's oversight of the marshals. While spurring the marshals after mail robbers, for example, the department refused to fund cash inducements. Rewards did not come into regular use by the marshals until late in the century, and then only for particularly heinous crimes, such as the murder of a deputy marshal. Prior to that, if the marshals wanted to sweeten the pot, they had to apply to the Post Office to pay for any reward. That, of course, only covered mail robbery.

Succeeding Attorneys General, sounding like some Greek chorus, continually insisted that the marshals keep their expenses down, regardless of the outlaws they might have been pursuing. Eager to have Marshal W. A. Cabell of Texas take up pursuit of some train robbers in June 1887, Attorney General A. H. Garland was just as eager that the marshal "use economy." He could raise a posse and take other steps to catch the robbers, but always Garland reminded the marshal "to keep economy in view" and "stay within reasonable economic limits."[42] Attorney General George Williams told Marshal Tough of Kansas "it is my wish that this illicit traffic with the Indians be broken up." In practically the same breath, Williams added that "at the same time I wish to incur as little expense as possible."[43] The problem with such admonitions, of

41. Letter from M. C. Hillyer, United States Marshal, to Benjamin H. Brewster, United States Attorney General (Nov. 7, 1884) (on file in RG 60, Year File 1016/84).

42. Letters from A. H. Garland, United States Attorney General, to W. A. Cabell, United States Marshal (June 25 & 27, 1887), and to R. B. Reagan, United States Marshal (July 7, 1887) (all on file in RG 60, AG Instruction Book X).

43. Letter from George H. Williams, United States Attorney General, to William S.

course, was that they eventually not only grew tiresome, but they became a disincentive to the marshals to do their jobs. Saving money, not arresting outlaws, always seemed the government's top priority.

THE LAW'S VIOLENT SIDE

The federal government's failure to support its marshals and their deputies had a tragic edge. Perhaps as many as 300 marshals and deputy marshals have been killed in the line of duty since the creation of each office in the Judiciary Act of 1789. A majority of those deaths occurred during the law's westering across the frontier in the last half of the nineteenth century. Over 100 deputies were killed in the Indian Territory alone, serving under the famous "Hanging Judge" Isaac Parker. Working as a marshal was a dangerous, violent business.[44]

Although today's United States Marshals Service has long taken a rather perverse pride in having the largest number of line-of-duty deaths of any federal law enforcement agency, the reason that number grew so large tells quite another story. It was not bravery and courageousness that led many of those men to early deaths—though brave and courageous they undoubtedly were.

Rather, they died for want of training, want of support, and want of proper equipment. We think now somewhat romantically of the marshal drawing forth a posse from the local citizenry to give chase to some thief or hooligan. In reality, such posses—and they were used quite frequently—pitted inexperienced, often poorly armed, farmers and city boys against cold-hearted outlaws all-too accustomed to violence and gunplay. Dare we wonder, then, why the death toll for marshals and their deputies rose so high?

One especially tragic event illustrates the darker side of the posse system. Not only did marshals' posses rely on amateur gunfighters, those posses frequently drew on men who had some vested interest in going after the posse's assigned target. Both New Mexico's 1878-79 Lincoln County War and Wyoming's 1894 Johnson County War relied on possemen who had definite personal interests in the outcome. But the most tragic result of combining amateurs with conflicts of interest occurred on April 15, 1872, in the Going Snake district of the Indian Territory. On that day, eight deputy marshals out of a posse of ten were

---

Tough, United States Marshal (Mar. 21, 1874) (on file in RG 60, AG Instruction Book D).

44. *See* UNITED STATES MARSHALS SERVICE, ROLL CALL OF HONOR, *available at* http://www.usdoj.gov/marshals/rollcall.html.

killed. It remains the largest loss of life for law enforcement officers in a single shootout.

The posse sought the arrest of a Cherokee Indian named Proctor for shooting and wounding a white man named Kecterson. The Cherokee court already had Proctor on trial for murdering Kecterson's wife, an Indian woman. Deputy Marshals Jacob Owens and Joseph Peavey swore in their posse to ride out to the Going Snake district, remove Proctor from the Cherokee court, and bring him to Fort Smith for trial in federal court. Among the men they selected for their posse were two of the dead wife's brothers and two of her cousins.

The Cherokee court convened Proctor's trial in a schoolhouse, which stood alone in a prairie clearing. The school offered an unobstructed field of fire. When the marshal's posse arrived, the deputies saw several armed Indians. Not dissuaded from their task, the deputies dismounted about thirty yards out. They began walking across the open field toward the courthouse.

The Indians opened fire. Among those shooting were the "guards, Jury, lawyers for defense, and [the] prisoner." Fully exposed, with no shelter or hope of cover, the posse withered under the fire. The deputies—finally taking wisdom for the better part of valor—retreated, but not fast enough. Seven died on the open prairie, the eighth died a few hours later. In exchange, the posse killed three of their attackers and wounded six others.[45]

The Going Snake massacre epitomized the tragic consequences of the posse system. Sending inexperienced, untrained civilians, especially when they had some personal stake, in pursuit of armed men, most of whom were ruthless gunfighters, could not have ever been anything but a recipe for disaster. One cannot help but shudder at the thought of common ranch hands and townsfolk in hot pursuit of such hardened outlaws as the members of the Doolin, Dalton, Younger, and James gangs. Those criminals lived and died by their guns. Posse members seemed more to die by theirs.

---

45. *See* letter from H. Huckleberry, United States Attorney, to George H. Williams, United States Attorney General, with enclosures (April 18, 1872); letter from Logan H. Roots, United States Marshal (by Deputy J. W. Donnelly), to George H. Williams, United States Attorney General (April 26, 1872); and letter from Logan H. Roots, United States Marshal, to George H. Williams, United States Attorney General (May 7, 1872) (all on file in RG 60, Source-Chron: Arkansas); *see also, The War in the Cherokee Nation*, NEW ERA (n.d.).

Yet, the law triumphed, albeit clumsily and at great cost in life and limb. Its success depended less on the bravery of its officers, for that too often was offset by their inexperience and lack of support from Washington. Rather, the law succeeded because of the great indomitable spirit of Steinbeck's westering beast, that "whole bunch of people . . . westering and westering."[46]

46. STEINBECK, *supra* note 1, at 99-100.