CHAPTER I

THE EARLY DAYS

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A. *BEFORE THE U.S. ACQUISITION*

Prior to the creation of organized territories, the population of the Great Plains and Rocky Mountain regions was varied, sparse, and scattered. Standards of conduct and procedures for enforcing such standards were also varied and were largely functions of the group in which such conduct occurred. Aggrieved disputants had no right of appeal.

A review of the beginnings of law and judicial procedures in the present Tenth Circuit requires the examination of many sources and trends. With the exception of a part of western Wyoming, all the territory in the circuit was acquired from non-British sovereigns after the formation of the United States. The frontier areas did not see the advent of the English common law until they were made subject to United States sovereignty. While early boundaries were often disputed and indistinct, the steps in the expansion of the jurisdiction of the United States over the entire area are significant facts of history. By the Louisiana Purchase of 1803, France ceded to the United States lands including much of the present states of Colorado, Kansas, Oklahoma, and Wyoming. Scholars disagree as to whether the law of Louisiana at the time of the purchase was essentially Spanish or French,[1] but for present purposes the debate is largely academic, since the part of the cession with which we are concerned had few settled inhabitants. At the beginning of the nineteenth century New Mexico and Utah were wholly under Spanish rule, as were parts of each of the other states presently in the circuit. These areas were subject to Spanish law, although, because of their sparse population and remoteness from the seats of government, its impact may have been limited. In 1821 Mexico gained its independence from Spain and acquired sovereignty over the Spanish dominions in North America. The transfer of jurisdiction to Mexico probably produced little change in the government and administration of justice in the remote northern regions.

In 1836 Texas became an independent republic following its successful revolt against Mexico.[2] The area claimed by the Republic of Texas was significantly larger than the present state of Texas and included all of New Mexico east of the Rio Grande, the Oklahoma Panhandle, the southwest corner of Kansas, and an irregularly-shaped strip of land extending across present Colorado and into Wyoming. As with Spain and Mexico, it is unlikely that the law of the Republic of Texas had any real impact on these outlying areas. Much of the territory was without a settled population and Texas' jurisdiction was contested in many of the populated areas. In 1845 Texas was admitted to the Union.[3] The resolution for admission did not define the boundaries of the new state. They were fixed later by negotiation. In 1850, as part of the act creating the territory of New Mexico, the United States proposed that the northern and western boundaries of Texas be placed in their present locations.[4] Texas agreed to the proposal and was paid $10,000,000 for its tenuous claim to the territory relinquished, along with other property surrendered to the United States.

In 1848 the war between the United States and Mexico ended with the Treaty of Guadalupe-Hidalgo.[5] The Mexican cession to the United States included lands in the present states of Colorado, New Mexico, Kansas, Utah, and Wyoming. A further cession by Mexico occurred in the Gadsden Purchase Treaty of

1853.[6] The ceded area includes the southwest corner of New Mexico. Finally, a year earlier than Guadalupe-Hidalgo, the United States had obtained, through treaty with England,[7] that part of Wyoming not ceded in other treaties. Thus, by 1848 the United States had extended its sovereignty over the entire area now comprising the Tenth Circuit.

The extent to which the diversity of pre-American political sovereignty has affected the later development of the law is not clearly definable. On one hand, in some sections certain historical concepts of the law of Spain and France have been appended to and become part of the prevailing common law tradition. At the same time, it may be argued that these non-common law concepts were products of the times and the environment and would have developed in the absence of the Napoleonic heritage. Perhaps the contemporary impact of earlier systems of law was minimal. The law is concerned with people and their rights. Except for parts of New Mexico, the territory of the present Tenth Circuit prior to American acquisition was largely without population. Moreover, the assertions of sovereignty over the region were probably only claims that could not have been enforced by the claimants. As a result, the matter of sovereignty was irrelevant to the daily lives of the people. Ethnic, geographic, and economic communities went their own ways, without regard to assertions of jurisdiction by colonial powers.

Acquisition by the United States probably produced few immediate changes in the controlling community standards. Indeed, the relation of the United States to its newly acquired and undeveloped territory raises many questions. As the sovereign, it had the exclusive right of military occupation, the responsibility to provide military defense, and the power to appoint civil officers. Congress had the power to pass and enforce laws governing the people of the territories, but, in fact, the exercise of this power was restrained. During the middle part of the nineteenth century, the part of the United States "west of the Mississippi and not within the states of Missouri and Louisiana or the territory of Arkansas" was deemed Indian country.[8] This definition included the present states of the Tenth Circuit. Congress extended the criminal law applicable in federal enclaves to the Indian country, except in cases of offenses by an Indian against the person or property of another Indian.[9] This provision of law, with exceptions, continues to the present by virtue of the General Crimes Act as enacted in 1948.[10]

The deficiencies in the above scheme are apparent. Laws enacted by Congress under the General Crimes Act were relatively few and did not purport to be pervasive. They had little application in Indian communities. Also, there was no attempt to provide for civil rights and remedies. Hence, matters not reached by the meager federal law continued to be determined according to pre-existing standards in a framework of pre-existing or improvised procedures.

B. *THE LOUISIANA PURCHASE*

The greater part of the circuit was conveyed in the Louisiana purchase. The Act authorizing acceptance of the ceded lands mandated that the existing government and legal system should control, subject to the direction of the President of the United States, until Congress provided otherwise.[11]

In March 1804 Congress divided the newly acquired lands into two territories.[12] The part of the purchased lands lying south of the 33rd degree of north latitude, the present Arkansas-Louisiana boundary, was called the Territory of Orleans; all north, the District of Louisiana.

The District of Louisiana was attached to Indiana Territory for the purposes of government, and the governor and judges of that territory were empowered to enact laws governing the district, including the establishment of a system of inferior courts. Legal structures for the district and the territory were adopted. Congress also provided for a system of inferior courts, defined crimes and punishments, and enacted rules governing civil and criminal practice.

In 1805 the territory of Orleans became the territory of Louisiana with its own territorial government. The balance of the ceded territory continued to be called the District of Louisiana, subject to the executive, legislative, and judicial power vested in the governor and three judges of the territory of Indiana. Inferior courts were created to sit in the more populous communities along the Missouri River.[13]

In 1812 the District of Louisiana was renamed the territory of Missouri and the territorial government was restructured to include a governor, a legislative council, and a house of representatives, all three of which together composed the general assembly. A system of courts was provided, with sessions to be held at times and places prescribed by the general assembly.[14] There is no record that a court of the territory of Missouri ever sat in a location that is within the present boundaries of the Tenth Circuit.

The Missouri territorial legislature in 1816 declared the Common Law of England and the statutes of a general nature passed prior to the fourth year of James I (1607) to be the law of the territory except where inconsistent with the territorial laws and the statutes of the United States.[15] In 1820 a part of the territory lying east of the present eastern boundary of Kansas was detached and admitted as the state of Missouri.[16] No territorial government was organized for the remainder of the former Missouri Territory. Hence, from 1820 until 1834, although persons in the territory remained subject to federal law and to the residue of the law of the territories of which it had been a part, jurisdiction to enforce those laws and venue to try offenders were not clear.

C. LAW IN THE INDIAN COUNTRY

In 1834 Congress designated the part of the United States west of the Mississippi River, excluding the states of Louisiana and Missouri and the territory of Arkansas, as Indian country.[17] The criminal laws of the United States applicable to federal enclaves were given effect in the Indian country, except they did not apply in the case of crimes committed by Indians against the persons or property of other Indians.[18] Most of the area was attached for judicial purposes to the judicial district of Missouri. However, the area that is south of a line about fifty miles north of the present northern boundary of Oklahoma was attached to the judicial district of Arkansas.[19]

There is a dearth of reports and other sources of information concerning the enforcement of rules of conduct on the pre-territorial frontier. However, from our knowledge of the character and structure of the area's population we can infer there were no institutions bearing an external resemblance to the later judiciary. With the exception of the Spanish-speaking settlements of New Mexico, and a few non-Indians and the immigrant Indians of Oklahoma and Kansas, the population that inhabited the area at any time was composed largely of transients—explorers, hunters, trappers, traders, missionaries, and soldiers. Most of these relied mainly on self-help as a means of keeping the peace and security of their communities. Often the customs of the group

required death or other corporal punishment for infractions of group standards.

The Indian population of the area and their institutions were varied. The Pueblos of the upper Rio Grande had been settled for centuries. The civilized tribes of Oklahoma had been moved from their former homes east of the Mississippi early in the century. Hence, the general comments that follow do not completely describe the systems of justice found in the Indian Territory. They had accepted American legal standards and had integrated American customs with their tribal law. Among the transitory groups of the Plains and Rockies, there was a range of sophistication in the several tribal legal systems. In consequence, any generalization about domestic Indian law must be accompanied with the caveat that it may not be accurate in a particular context.

Usually, the Indian population lived in small, self-governing communities, to which the idea of a separate judiciary would have been foreign. The tribal courts that exist in Indian country today are largely creations of the late nineteenth and twentieth centuries. They were established under the leadership of the Bureau of Indian Affairs and modeled on western judicial systems. The early Indian societies were oral cultures in which patterns of law and order had been developed by consensus and were generally understood but not often articulated. They functioned without need for written laws or other paraphernalia of European and American civilization. In some tribes, disputes were settled by the chiefs or religious leaders. In most tribes, however, policy decisions affecting tribal members evolved by consensus in general council meetings open to all.

The Indian tribes were mainly communal societies in which the concept of private property, as it existed in European law, was unknown. A body of law dealing with property rights would have been superfluous. For individuals who violated the norms of conduct there were no jails, although whipping or execution was sometimes imposed. A common punishment was ridicule. Scorn and laughter was a powerful and effective method of punishing transgressors in the closely knit Indian societies. For serious offenses, restitution was required by the tribal law; for example, a murderer might be required to pay blood money to the victim's family. Informal mediation by tribal leaders was used to end disputes. The landmark case of *Ex Parte Crow Dog*[20] illustrates the divergent Indian and Anglo views of criminal justice. Crow Dog killed a political rival, Spotted Tail. Both were members of the Brule Sioux band. Indian justice moved promptly, and Crow Dog and his family were required to pay Spotted Tail's survivors six hundred dollars, as well as to convey to the survivors several ponies and other items of property. Later Crow Dog was prosecuted in the United States Court for the territory of Dakota for the murder of Spotted Tail and was convicted and sentenced to death. On a habeas corpus appeal, the Supreme Court found that under the then-existing law, the federal courts had no jurisdiction to try an Indian for a crime against another Indian. Commenting on the inappropriateness of applying the white man's standards of behavior to Indians, the Court commented:

> It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[21]

Perhaps the second most significant population group in the organized territory was

formed by the military units stationed at the U.S. Army posts. During the nineteenth century at least seventy-five federal military installations were established in the area that is now the Tenth Circuit. Many existed only a few years, although a few of the frontier posts remain, serving twentieth century military missions. In any case, the number of persons in the military service or subject to military jurisdiction was considerable. Unlike the Indian communities, members of the American army were subject to a code and system of courts that pre-dated the existence of the United States. The first American-written code of military law was the Articles of War prepared to govern the Continental Army in 1775. These articles established a hierarchy of courts-martial and defined their composition and jurisdiction. Although the Constitution expressly empowered Congress to make rules and regulations for the government of the army and navy, Congress executed this power by continuing the system of courts-martial that had been previously established. Thus, the American court-martial is claimed to pre-date the Constitution and to be older than any court of the United States created or authorized by or under that instrument. And it seems probable that the Articles of War was the first system of Anglo-American law to have any effect upon persons who were residents of the pre-territorial West.[22]

Shortly after the beginning of the nineteenth century, the fur trade began to develop in the West. Trading posts were established by the great fur companies, particularly along the major streams. Although there were variations, these posts were generally organized along the same lines. The chief trader, who held a license from the government, was known as the *bourgeois*, usually corrupted to "booshway." "He was all powerful, a little dictator in his domain."[23] Subordinates included *commis*, or clerks, and *voyageurs* or *engages*, who performed the arduous and often dangerous physical tasks of the trade. "They signed engagements for three years in which they promised to obey the *bourgeois*,'to do his will, to seek his profit, avoid his damage and refrain from trading on their own account."'[24] "The *bourgeois* had a responsibility as great as the commander of a frontier military post. Indeed, there was a great deal of similarity between the two, for the *bourgeois* ruled with an almost military discipline."[25] He settled disputes, judged offenders, and fixed punishments for persons who had no available appeal.[26]

The nineteenth century was a time of migrations. Thousands of non-Indians passed through the Indian country en route to further destinations. For self-protection, these travelers usually moved in groups. In each group, the responsibility for maintenance of discipline was vested in a leader. His position might be the result of an election, a proprietary interest in the enterprise, or perhaps an assumption of leadership, but his word was law. Among the migrant mountain men he was called the "booshway," a take-off from the bourgeois of the trading post. On the cattle trail there was the trail boss. The freight caravans were subject to the discipline of the wagon master or boss. The emigrant train might call its leader the captain. In each case the leader's position and authority were not unlike those of the commander of a ship. His power, commensurate with his responsibility, included the power to settle disputes and use such means as were necessary to enforce his decisions.[27]

Undue emphasis ought not to be given to the view that these several groups of migrants were beyond the law and thus law unto themselves. History indicates that although they may have gone beyond the reach of the law's long arm, they were mindful of the law's

existence. In their camps and with their trains, the disciplines they sought to maintain and the procedures they employed were their adaptations of standards prevailing in the communities from which they had come. Indeed, the travelers' knowledge of and respect for society's norms of law and order may have been the strongest deterrent to violations of the emigrants' persons, property, and peace.[28]

D. *LAW IN THE PRE-TERRITORIAL SETTLEMENTS*

Among the pre-territorial populations a variety of legal systems and institutions existed. In a few instances, each unique, a jurisprudence more stable and mature than that in most frontier communities was developed and adopted by or imposed upon the settlers. In the present Tenth Circuit, three of such instances require special mention.

New Mexico. Of the pre-existing judicial systems eventually preempted by the United States, that of Mexico may have been the most sophisticated. "Under Spain, the judiciary had functioned poorly on the frontier, with no level of justice higher than the local courts presided over by alcaldes."[29] The alcalde's decision might be appealed to Guadalajara or Mexico City in certain cases. However, the high cost of travel—both in time and money—prevented most litigants from appealing their cases. "Under independent Mexico change began, but more in theory than in practice."[30]

Under the 1824 Mexican Constitution and later legislation, district courts presided over by judges learned in the law were established even in remote communities and were empowered to hear appeals from the local alcalde and cases involving large sums of money and serious crimes. "Beyond the district courts, appeals could be taken to circuit courts located near the edge of the frontier. . . . Thus only the most serious case would need to be appealed all the way to Mexico City."[31]

In spite of good intentions, the reforms were simply not implemented on the northern frontier. The alcalde, described as "a combination of 'a mayor and a justice of the peace,'" continued as the principal source of local justice.[32] For the lack of higher courts, the governor acted as a court of appeals. This system continued until the end of the Mexican era.[33]

Oklahoma. Much of the area now incorporated into the present state of Oklahoma was granted to several Indian tribes during the early part of the nineteenth century. The tribes were removed from the eastern part of the United States to Oklahoma in a migration, part of which is sometimes described as the Trail of Tears. Known as the five civilized tribes, the migrant Indians carried their institutions to their new homes. Their tribal laws and courts continued to be operative in those parts of the Indian country that became Oklahoma. Other Indian tribes resettled in Oklahoma continued to adhere to their ancient tribal customs and institutions. Hence, the earliest courts in that part of Oklahoma occupied by Indian tribes were tribal courts. Cases involving white parties were outside their jurisdiction and were processed in the federal courts. Originally the Indian Territory was attached to the Western District of Arkansas for judicial purposes. Later jurisdiction was shared by district courts in Kansas and Texas. Finally, in 1889, the Congress constituted the Indian Territory as a federal judicial district and created a judgeship, the holder to function within the district.[34]

Utah. The lands in the present state of Utah were virtually uninhabited until 1847, when the first Mormon pioneers arrived. The territory was then part of Mexico, although a few months later, by the Treaty of Guadalupe-

Hidalgo, it became subject to the sovereignty of the United States. Far removed from the seat of governmental power and resentful at the government of the United States for its failures to protect them from earlier persecution, the Mormons determined to set up their own government. Initially the community was essentially a theocracy, led by officers of the church. It denied the power of the United States to pass laws and to designate administrators and judges for the new settlement.

In 1849 the Mormons organized a provisional government called the "State of Deseret." Generally, it was patterned after other territorial governments created by Congress. The general assembly of the State of Deseret provided for a judiciary of three judges and a court structure similar to that of other mid-nineteenth century territories. None of the three original judges was a lawyer but all were ecclesiastical leaders. The State of Deseret lost its status as a self-governing community when Utah became a territory of the United States in 1850.[35]

1. *General Pre-Territorial Governments*

Although settlement by non-Indians is often presumed to have begun when the organized territories were carved out of the Indian country and the Indian lands placed in the public domain, white occupancy of Indian lands actually began earlier in many instances. Usually the lure was land or gold. The presence of white settlers among the Indians caused embarrassment to the government in its efforts to carry out its treaty obligations to the tribes. Although Congress enacted laws prohibiting such settlements,[36] the illegal entries did not cease. These trespassing settlers were without the protection of government. Moreover, after the territories were organized and settlement legitimatized, territorial governments were often months, even years, in bringing about law and order within their boundaries.

Without the security of organized government and motivated by the need to protect their persons and property, communities of settlers resorted to self-help. Although the settler had taken possession of his land without benefit of law, perhaps in defiance of law, he was by no means an outlaw. Coming from a settled community, he understood the benefits of law and order and the institutions necessary to bring about these results. Hence, communities created their own structures and procedures to achieve justice and stability. These were local, spontaneous institutions, created without statutory authority and speaking with the voice of no sovereign. They were effective because their procedures and policies reflected the virtual consensus of their members. These associations were generally of two types, each adapted to the interest it was intended to foster. Where the settler's interest was in land, his organization might be called a claims association or squatters' court. Where the interest focused on minerals and their production, the association probably would be called a mining district and its dispute-resolving agency a miners' court. These informal tribunals not only filled voids created by the law's lag, but their procedures and policies had an impact on the later, formalized law.[37]

2. *Claims Associations*[38]

While no two of the many claims associations were identical, all followed a general pattern of organization and procedure. The association exercised jurisdiction over a specific area, usually limited to one township. The defined boundaries might vary. One Kansas association limited its membership to those settlers who from the meeting place could point to the smoke from their cabin chimneys. Moreover, membership was open only to those who had legitimately established residency for the stated period of time. Typically, a

three-month period of presence in the area was required. In addition, one had to be a bona fide claim holder before he was entitled to vote.

Each association usually had a constitution, a set of by-laws, a president, a vice-president, and a secretary and claim recorder. The associations were usually controlled by democratic procedures in which all claim-holding members were authorized to vote. The officers' powers were greatly limited. In this respect, the associations represented the purest and most basic form of democracy. A variation was found in those associations where an initial decision in a disputed matter might be made by the chief justice or a jury called by him, with further recourse to the whole membership.

A scholar has described the procedures for establishing a claim:

> There was always the provision that the claimant should file a description with the recorder who would record it for a nominal fee. This procedure was sometimes extended to cover sales, mortgages, and other forms of conveyances—all of this in spite of the fact that the claimant did not have title to the land. . . . Each claim holder was entitled to only a limited amount of land—quite frequently a quarter section. . . . The claim had to be a real home. A continuous residence and constant improvements were invariable among the requirements of the associations.[39]

It was often provided that in the process of deciding disputes "'principles of honor and fairness were to prevail at all times'" or that justice among men was to be the guide.[40] In some cases disputes were settled by the entire membership. More often there was provision for a court, organized generally along Anglo-American lines with jurisdiction to settle disputes over boundary lines and occupancy that might arise between members of the association. Sometimes this jurisdiction was expanded to include all crimes against persons and property.

Enforcement of the claims courts' decrees and judgments were firm, but informal and summary. It is said that if the convicted person were wise, he would leave the territory immediately. Failing to comply with the order, the offender was not only required to relinquish all claims to the land or other property in question, but he might have been beaten, ducked, his personal property taken or destroyed, or his life otherwise made intolerable. The penalty for unyielding disobedience was often, in the language of the day, to be "put over the river." In extreme cases it is reported that "over" did not mean to reach the other side. Few offenders had the hardiness and persistence to resist judgment for long.

The claims tribunals existed without statutory authority. They spoke with the authority of no sovereign, either state or federal. Often their pronouncements were not wholly consistent with the law elsewhere or with standards created by legislatures and courts to govern communities whose problems were different in character. Yet they reflected the basic urge of civilized man to accomplish peace and public justice through law. At the same time, their facilities for the enforcement of standards were meager and primitive. Procedures for the protection of accepted values were rudimentary. In most of the settlers' systems of justice, the idea of the appeal for error had not matured. Hence, the legal devices for processing appeals had not been created.

3. *Miners' Courts.*[41]

The earliest laws governing mineral rights in public lands of the United States were meager. The first federal effort at regulation occurred in 1866, when Congress passed an act which provided, in part, "[T]he mineral lands of the

public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."[42] The mineral lands were limited in their extent. Those who sought to exploit such lands were numerous. "Some of these mining regions were so overpopulated that there was scarcely ground for one in a thousand."[43] In the absence of effectively administered rules, conflicts were inevitable. "Yet in spite of the lawlessness that prevailed," residents of early mining camps were essentially "law-abiding citizens . . . . [T]he greater part of them had come from well-established, orderly, and peace loving communities . . ., and they had by no means lost all sense of justice in their new environment."[44] But they were for a time beyond the reach of established laws. They were engaged in a new and strange occupation, and the land on which they sought and found gold belonged to the government. They were often confronted with personal lawlessness and disorder. Like the settlers on agricultural lands, they were compelled to improvise.

"In the solution of their legal problems the miners relied heavily on their Anglo-Saxon heritage."[45] Rules and regulations that were to govern the mining communities were developed by a democratic process operating in a town meeting setting. As in the claims organizations, there were variations in detail from camp to camp but from experience a uniform pattern emerged.

For example, boundaries of the community were established by community action. In addition, each district elected a group of officers, usually including an alcalde or chief executive, a secretary, and a claim recorder. Also, there was a set of civil officers for the enforcement of rules, including a justice of the peace or other judicial officer and a sheriff or marshal. The mining districts specified the size of claims and the number to be held by a single person, the methods of marking claims, and provisions for right to hold a mining claim based on discovery. Continued working of claims was required for retention of right.

Usually, the miners would establish some kind of court system. In some camps an elaborate judicial system was set up, but in most instances a miners' jury would be called if and when a dispute arose. "Many of the better-organized districts worked out a criminal code with punishments ranging from whipping to banishment or 'such other punishment as the jury may determine.'"[46] In nearly all districts matters of importance decided by the districts' officers might be referred to a meeting of the community for further consideration and determination. The decision on this level was final.

Mining districts were found in most of the western states, including those parts of the Rocky Mountain frontier now located in the Tenth Circuit. Indeed, the codes, rules of practice, and court systems developed in many of the Colorado mining districts were highly sophisticated and served as models for districts created later.

The relatively simple rules developed in the mining camps of the West not only served an immediate need but, in due time, became the basis for the vast and intricate American law of mining. Their contribution to the law did not stop at the limits of mining jurisprudence, though. Many of the mines of the mountains were placer mines. The operation of a placer mine requires substantial quantities of water. Unlike the moist areas of the East and Midwest from which the prospectors had come, the lands of the West were arid. There was

simply not enough water to go around. Hence, the miners were again thrown upon their own resources to work out a system wherein the greatest good could be obtained from the limited amount of water. The miners met this problem in the same way that they had adjusted the conflicting rights of many in the use of a limited number of mines. The doctrine of prior appropriations and limited use of water, as developed and enforced in the mining districts, had a profound impact on the water law of the entire arid West.

E. TERRITORIAL JUDICIARIES

The creation of organized territories heralded the beginning of organized systems of justice. In most cases there were delays in the implementation of organic acts, and informal and customary practices continued to operate. But with the act of Congress establishing a territorial government, the necessity for more mature institutions was recognized. Court organizations were formalized; rules of procedure were standardized; and rights to appellate review within a system of appellate courts were defined.

Territorial governments existed in the different territories for varying periods. One may assume that the impact of the territorial judiciary bore a relation to its length of existence.

The organization of the judicial system in the territories was simple. Under the organic acts of territories in the present Tenth Circuit, each territory initially had three justices appointed by the President for four-year terms.[47] Sitting together, they constituted a supreme court; sitting separately, they acted as district judges. In both capacities they had jurisdiction over cases under United States and territorial law. Appeals went from the territorial supreme court to the Supreme Court of the United States. In 1891 the Circuit Court of Appeals was given appellate jurisdiction over territorial courts, as well as over district and circuit courts.[48]

Chief Justice Marshall defined territorial courts as legislative courts rather than Article III courts.[49] The practical significance of the distinction lay in the tenure of judges and the choice of procedures. When the same court heard territorial and United States cases, must it follow either United States or territorial law consistently, or one or the other according to the individual view of the case?[50] The issue remained open for many years. Territorial judges were removed by the President as were other territorial officers.[51] In contrast, Article III judges cannot be removed except by impeachment.

Financing of territorial justice was simple. Generally the national treasury bore the costs of territorial supreme and district court terms in their entirety. The comptroller of the United States ruled that while engaged in the trials of cases arising under the Constitution and laws of the United States, its expenses should be borne by the national treasury. Often federal cases and territorial cases appeared on the same docket and were heard at the same term, in the same court rooms, and by the same judges. Because of the difficulty or impossibility of apportioning the expense between the territorial and federal governments, the entire cost of the term was usually paid by the federal government.[52]

The territorial judges functioned in both trial and appellate capacities. Each judge was assigned to a district. Sitting alone he tried cases arising in his district. Sitting with the other judges of the territory, he heard appeals from all territorial *nisi prius* courts, including his own. Thus, he participated in the review of his own decisions. As panels of three were

Table I

Length of Territorial Governments

	Date Created	Date of State Admission	Period of Territorial Territory Government
Kansas	1854	1861	7 years
Colorado	1861	1876	15 years
Wyoming	1868	1890	22 years
Utah	1850	1896	46 years
Oklahoma*	1890	1907	17 years
New Mexico	1850	1912	62 years

*Much of Oklahoma had been identified as Indian Territory at earlier dates.

required on appeal, this result was avoided only in those territories where additional judgeships had been created.

The territorial judges appointed by the President were usually nonresidents of the territory. They were political appointees, often selected without regard to their learning, judicial qualification or experience, temperament, or personal integrity. Many were lawyers of no particular distinction who needed remunerative employment and knew someone with political influence. Without personal and professional commitments in their own communities, some were said to be virtual transients, moving as the frontier expanded. Although appointed for four-year terms, they were subject to removal by the President. Hence, the turnover of territorial judicial personnel was substantial. One commentator has written, "The judicial system was one of the weakest parts of the territorial institution." He continues that "territorial judges were selected with no more deference to local feeling than territorial governors and secretaries," and they were subject to removal with equal facility for no more substantial reasons.[53]

The criticisms of territorial courts and judges, often heard, are not universally sound. The territorial courts reflected the top, as well as the bottom, of the pyramid of judicial performance. Many territorial appellate judges were highly competent jurists. Some were excellent stylists. Their opinions were often significant treatises, particularly in the formative stages of the law. Their writings, from premise to conclusion, ranged far and wide over subject matter often unexplored. Farsighted men, impatient with narrow legal logic, they could write for pages without citing a shred of authority. To them the spirit of the law was tempered by what they understood to be the needs of a living society. Their task was not an adherence to the past but a reinterpretation in the light of the current needs of a dynamic society. They demonstrated that the lack of formal legal training and prior judicial experience are not necessarily impediments to effective judicial performance.[54]

Summarizing the weakness of the territorial courts requires three lines of analysis.

Political. Territorial judges were appointees of the President. Selection was often based on politics rather than on judicial fitness. Their purpose as territorial officers was often to further policies of the national administration while maintaining a facade of justice under law.

Tenure. Appointments to the territorial bench were for fixed terms, usually of four years. The competent judge and the people he served had no assurance of his continued tenure

beyond the term for which he was appointed. Moreover, he was subject to removal by the President at any time. Such uncertainty of continued opportunity to serve tended to discourageable lawyers committed to judicial careers.

Structure. It is generally believed that the credibility of the appellate process depends on the opportunity for review of trial court judgments by a panel of detached jurists who can approach the issues of the particular case without the limitations that may arise from a prior determination of the same issue. Territorial appeals were normally heard by three-judge panels. One member of the panel had already decided the case as judge of the trial court whose action was under reevaluation. Thus the litigant's right to review by a panel of unbiased judges may have been frustrated.

The critics of the territorial judiciary often fail to recognize that the coin has another side. These courts represented a stage in the process of institutional growth. It may be inappropriate to judge people who are engaged in pioneering and experimental efforts by standards that have emerged at more mature stages. Some judges were good, some were bad; some judiciaries were weak, some were strong. On the whole, it may be said that the administration of justice in the territories was as good as the times and conditions required or permitted.

Table II

Composition of Territorial Courts[55]

Tenth Circuit Territories

Territory	Year Begun	Year Ended	Judges At Creation	Judges At End	Total (a) Appointed
Kansas	1854	1861	3	3	10
Colorado (b)	1861	1876	3	3	14
Wyoming (c)	1868	1890	3	3	18
Utah (d)	1850	1896	3	4	51
Indian Territory(e)	1889	1907	1	9	19
Oklahoma (f)	1890	1907	3	7	21
New Mexico (g)	1850	1912	3	5	67

Notes to Table II:

(a) These numbers represent the total number of appointments made by the President during the life of each court. A few of those appointed did not actually serve.

(b) Colorado was part of Utah Territory, and subject to the courts of that territory from 1850 to 1861.

(c) Wyoming Territory was created from parts of Dakota, Utah and Washington Territories.

(d) This number does not include the judges of the State of Deseret.

(e) There was no formally organized government for the Indian Territory. The tribal courts exercised general jurisdiction over tribal members only. Matters not within tribal court jurisdiction were handled in adjacent federal judicial districts, as designated by Congress. In 1889 Congress created a federal judicial district for the Territory of Oklahoma and provided for the appointment of one judge. Later the court was reorganized into four districts. Tribal court jurisdiction was abolished in 1893.[56]

(f) Oklahoma Territory included only that part of the present state of Oklahoma that had not been allotted to and occupied by Indian tribes. There were two divisions of the territorial court.

(g) The provisional judges who served during the military occupation are not included.

NOTES

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[1]Yiannopaulas, "The Early Sources of Louisiana Law: Critical Appraisal of a Controversy" in *Louisiana's Legal Heritage* 87-106 (Haas ed. 1983).

[2]See "Declaration of the People of Texas in General Convention Assembled," adopted November 7, 1835, reprinted in 1 H.P.N. Gammel, *Laws of Texas, 1822-1897* (1898).

[3]Joint Resolution, December 29, 1845, 9 Stat. 108.

[4]Act of September 9, 1850, 9 Stat. 446.

[5]Treaty of Guadalupe-Hidalgo, February 2, 1848, United States-Mexico, 9 Stat. 922.

[6]Gadsden Purchase Treaty, December 30, 1853, United States-Mexico, 10 Stat. 1031.

[7]Treaty on Western Boundary of United States, June 15, 1846, United States-Great Britain, 9 Stat. at Treaties, 24.

[8]Act of June 30, 1834, 4 Stat. 729.

[9]*Id.* § 25 at 733.

[10]Act of June 25, 1948, 62 Stat. 757 (codified at 18 U.S.C. 1152).

[11]Act of October 31, 1803, 2 Stat. 245.

[12]Act of March 26, 1804, 2 Stat. 283.

[13]Act of March 3, 1805, 2 Stat. 331.

[14]Act of June 4, 1812, 2 Stat. 743.

[15]1816 Laws of Mo. Terr., ch. 154 (Jan. 19).

[16]Act of March 6, 1820, 3 Stat. 545; Act of March 2, 1821, 3 Stat. 645.

[17]Act of June 30, 1834, 4 Stat. 729.

[18]*Id.* at 733.

[19]*Id.*

[20]109 U.S. 556 (1883).

[21]*Id.* at 571. Congress apparently did not agree with the humanitarian view expressed by the court as it promptly enacted the Major Crimes Act, 18 U.S.C. § 1153.

[22]For a discussion of the history of the Articles of War of the United States, *see* Winthrop, *Military Law and Precedents* 21-24 (2d ed. 1920).

[23]D. Everett, *Vanguards of the Frontier* 2 (1965).

[24]*Id.*

[25]*Id.* at 32.

[26]*Id.*

[27]*Id.* 187-204.

[28]*See* J.P. Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* 3-30 (1980).

[29]D.J. Weber, *The Mexican Frontier, 1821-1846, The American Southwest Under Mexico* 37 (1982).

[30]*Id.*

[31]*Id.*

[32]*Id.* at 38.

[33]*Id.* at 37-38.

[34]For a more complete review of the territorial courts, including those of the Indian Territory, *see* Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139, 262-69 (1967).

[35]C.L. Ashton, *The Federal Judiciary of Utah* x-xii (1988).

[36]*See, e.g.*, Act of March 30, 1802, 2 Stat. 139, 141.

[37]The discussions of claims associations and miners' courts is based upon McGowen, *The Development of Political Institutions on the Public Domain*, 11 Wyo. L.J. 1 (1956). Professor McGowen died several years prior to the publication of this article. In the interim between his death and this publication, the original footnotes were lost. Hence, the article, patently of scholarly dimension, was published without documentation.

[38]*See id.* 5-6.

[39]*Id.* at 5.

[40]*Id.*

[41]*See id.* 8-15.

[42]Act of July 26, 1866, 14 Stat. 251.

[43]McGowen, *supra* note 37 at 10.

[44]*Id.*

[45]*Id.* at 11.

[46]*Id.* at 12.

[47]By 1890 five judgeships had been created in the Territory of New Mexico, Act of February 28, 1887, 24 Stat. 428; Act of July 10, 1890, 26 Stat. 226. A fourth judge was added to the Utah court in 1888, Act of June 25, 1888, 25 Stat. 203.

[48]Act of March 3, 1891, § 15, 26 Stat. 826, 830.

[49]*American Insur. Co. v. Canter*, 26 U.S. (1 Pet.) 242, 256-57 (1828).

[50]2 *Report of the Secretary of the Interior 1880*, 533.

[51]*McAllister v. United States*, 141 U.S. 174 (1891).

[52]3 Dec. 1st Comp. 153 (1882).

[53]E.S. Pomeroy, *The Territories and the United States, 1861-1890* 52-53 (1947).

[54]*See* L.M. Friedman, *A History of American Law* 138-56, 323-25 (1973).

[55]The data shown here were taken from Surrency, *supra* note 34.

[56]*Id.* at 264.