

Doing Justice for **150 Years**

The year 2003 marks the 150th anniversary of the Wisconsin Supreme Court. In honor of this important occasion, individuals and organizations from around the state have joined together to plan a variety of events and publications. This issue of the *Wisconsin Magazine of History* helps to begin the celebration with an article by Wisconsin Supreme Court Justice Ann Walsh Bradley and Attorney Joseph A. Ranney, a noted legal historian and scholar, on our



Supreme Court's strong

tradition of independence. An independent judiciary dispenses justice fairly, impartially, and according to the rule of law, regardless of pressure from outside influences. Judicial independence is the cornerstone of our democracy and depends ultimately upon the courage of individual judges.

Also running in this issue is a photo essay showing elements of the capitol restoration. The Supreme Court Hearing Room, considered among the most



beautiful in the nation, is now returned to its original glory. One of the murals in the courtroom depicts Judge James Duane Doty's trial of Chief Oshkosh. After reading Patrick Jung's story about Judge Doty that follows, you might consider visiting the capitol to view this mural and to spend time



Richard G. B. Hanson II

enjoying the Supreme Court Hearing Room. This working courtroom belongs not to the judges and the lawyers, but to all the people of the state. We welcome you to visit.

—Shirley S. Abrahamson
Chief Justice

Artist Kenyon Cox completed four mosaics for the capitol rotunda symbolizing the functions of state. “Justice” is the most unconventional composition; the figure of Justice is usually depicted as blindfolded, holding aloft the scales of justice. Here Justice is seated on a lion throne and stares straight ahead as she contemplates the scales, which seem to descend from heaven.

Editor’s note: To learn more about the celebration of the Supreme Court’s 150th anniversary, visit www.courts.state.wi.us/supreme/history_supreme.htm.



Judge James Duane Doty and Wisconsin's First Court

The Additional Court of Michigan Territory, 1823-1836

By Patrick J. Jung

“W isconsin” as a legal entity dates from 1836, when the name, or variations of it, first referred officially to the Wisconsin Territory, a region of land that includes its present-day perimeters in addition to lands west. The region that seventeenth-century French explorers called “Ouisconsin” had been home to native tribes, a nucleus of fur traders, and a growing trickle of settlers, speculators, and adventurers long before the Wisconsin Territory was

named. These people lived within the legal jurisdictions of the Northwest Territory (from 1788), Indiana Territory (1800), Illinois Territory (1809), and Michigan Territory (1818). Each of these vast, sparsely populated territories was administered by a governor, a secretary, and judges appointed by the federal government. Following the War of 1812, which put an end to British claims and influence over the Old Northwest, this handful of federal appointees exercised an ever-increasing authority



James T. Potter

Painted around 1914 by Albert Herter, this mural of the trial of Menominee Chief Osbkosh adorns a wall of the Wisconsin Supreme Court Hearing Room. Chief Osbkosh (standing with his arms crossed) and Judge James Doty (seated, right) are represented as traditional Indian and American figures. The men surrounding Doty and Osbkosh are the trial's jurors, most of whom were Métis or married to Native American or Métis women.

over virtually all aspects of life in America's westernmost lands: military affairs, trade, treaties, commerce, taxation, and—not least—criminal and civil law. Before “Ouisconsin” (referred to as “Wisconsin” throughout this article) had a capitol building or a university, paved roads or harbor improvements, it had a federal judge who embodied the full power of the government and laws of the United States.

Wisconsin acquired its first federal court in 1823 when Congress created the Additional Court of Michigan Territory. The court existed for thirteen years and became an important institution in the lives of the territory's inhabitants, the vast majority of whom were Indians and mixed-blood Métis of predominantly French Canadian and Indian descent and most of whom maintained a livelihood through the fur trade. The

court played a dual role in the lives of the native and Métis people. As an alien form of law, it was a disruptive element in their lives, yet it provided a legal venue to challenge the martial law that callous federal Indian agents and army officers often imposed on fur traders and native people. The ability to challenge effectively was particularly promising under the court's first judge, James Duane Doty. Those Indians and Métis who appeared before the court found in Judge Doty an advocate for their rights who worked tirelessly to ensure that they received justice.¹

Doty's stance was a surprising one, and he differed greatly from his predecessors on the frontier bench. Prior to the Additional Court, the region had experienced only the dimmest influence of French, British, or American jurisprudence. From about 1660 to 1763, French military commanders stationed in the region acted as civil magistrates. After 1763 the British similarly established a fleeting legal presence and appointed only a few of the resident fur traders as justices of the peace. The United States, after taking full control of the region in 1796, followed this same practice. The most colorful justice of the peace was Charles Reaume of Green Bay, who served under both Britain and the United States. Reaume's actions demonstrated his cavalier attitude toward dispensing justice. He possessed books on English and French law, but he reportedly never read them and instead based his legal decisions solely upon his convictions and the customs of the inhabitants. During proceedings, he wore the fancy red coat that he had received from the British, even after he accepted his appointment from the United States in 1803. He frequently sentenced wrongdoers to cutting his firewood, fixing his fence, and tending his garden. All fines that he assessed found their way into his pocket, and he was known to favor litigants who provided him with whiskey during hearings. Although his lack of formal training and his frequently whimsical decisions could hardly be considered justice, Reaume's unpretentious methods were well suited to Green Bay's close-knit Métis community.²

When the French regime began to take hold in 1634, small numbers of French Canadian, and later British, fur traders had settled in the region and married native women. The new society that emerged from these unions, the Métis, had a unique culture that blended French Canadian and Indian customs. By the early nineteenth century, the Great Lakes region had dozens of Métis villages varying in size from fewer than twenty persons to several hundred in places such as Detroit, Mackinac Island, Green Bay, Prairie du Chien, and Milwaukee. Virtually everyone in these settlements made their living through the fur trade, which was dominated by a network of large, thoroughly interrelated Métis family groups such as the Grignons, Cadots, Vieaus, and Lawes. Their distance from the French, British, and American centers of power at places such

as Quebec, Montreal, and Washington, D.C., meant that the Métis were generally self-governing in their daily affairs.³ Complex legal systems rooted in western concepts of individual justice were in opposition to the communal nature of Métis society, which favored customary institutions such as those developed by Judge Reaume.

The situation changed after the War of 1812 with the influx of American soldiers and federal Indian agents, and the Métis residents realized that they needed to work within the more structured institutions that were replacing their informal system of justice. The first occurrence came in 1818 after Congress declared present-day Wisconsin a part of Michigan Territory. The territorial government established county courts in the three new counties it created: Michilimackinac County with the county seat at Mackinac Island; Brown County with the county seat at Green Bay; and Crawford County with the county seat at Prairie du Chien. However, the county courts had limited powers and could not try capital cases or civil cases where the sum exceeded a thousand dollars. Important criminal and civil cases therefore had to be heard before the Supreme Court of Michigan Territory, in faraway Detroit. Wisconsin's Métis residents saw the need



By the early nineteenth century, native people throughout the Great Lakes region had engaged in the fur trade with Europeans and Americans for two centuries, as depicted in this sketch that George Catlin included in his Letters and Notes on the Manners and Condition of the North American Indians.

WHS, CF 5587

for a court in their counties that had full criminal and civil jurisdiction. The several petitions they sent to Congress between 1821 and 1823 resulted in the creation of the Additional Court of Michigan Territory, which had full jurisdiction in criminal and civil cases involving territorial and federal law.⁴

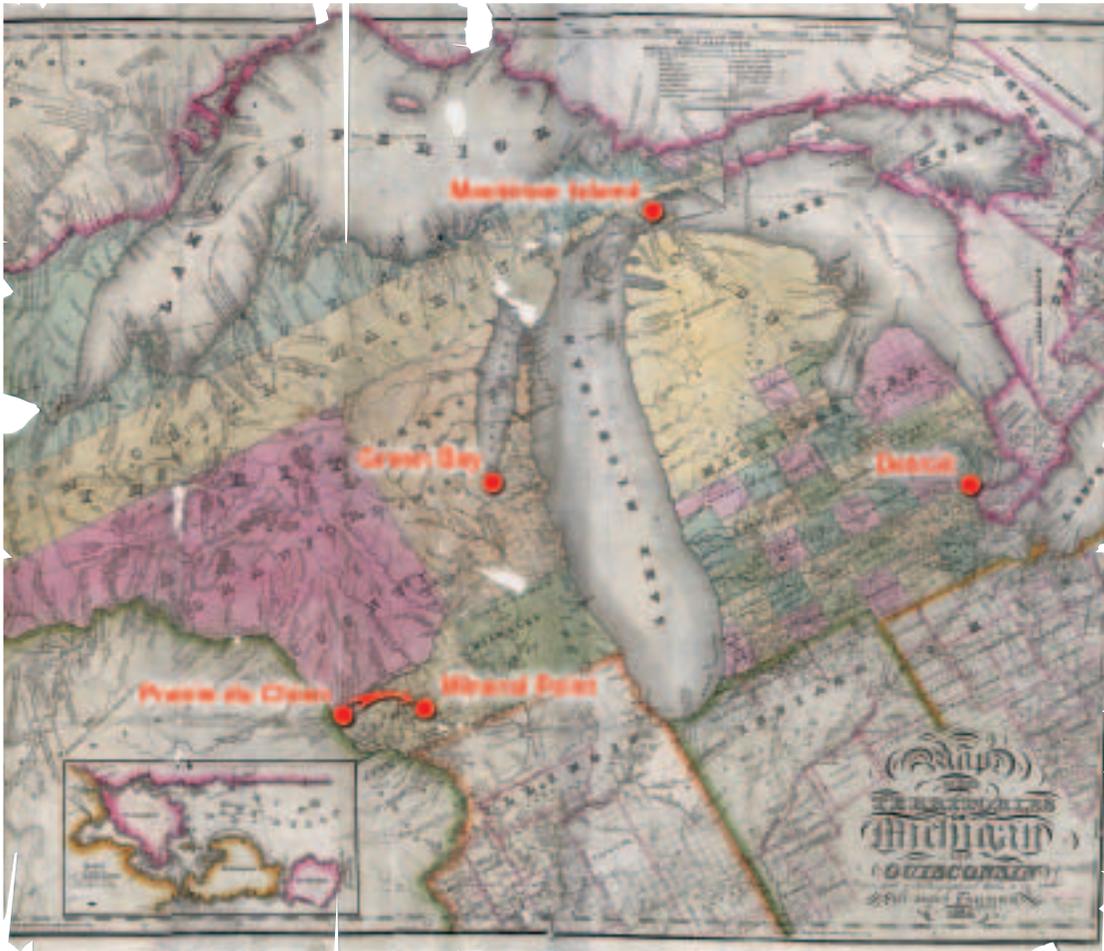
The Additional Court rotated among the county seats of Michilimackinac, Brown, and Crawford Counties. (After 1830, Congress transferred the western session of the court from Crawford County to Mineral Point, the county seat of Iowa County, which was created due to heavy white settlement in the

WISCONSIN HISTORICAL SOCIETY SPONSORS

Accurate Business Service
 ADMANCO, Inc.
 Advertising, Boelter & Lincoln
 Aid Association for Lutherans
 Alliant Energy Corporation
 Alpha Consulting Group
 Appleton Papers, Inc.
 Robert W. Baird & Associates
 Banta Corporation Foundation, Inc.
 The Baraboo National Bank
 Beyer Construction
 Chem-Al, Inc.
 The Coburn Company, Inc.
 J. P. Cullen & Sons
 CUNA Mutual Group Foundation, Inc.
 Custom Tool Service, Inc.
 Drum Corps. World

Grunau Project Development
 IDS Sales & Engineering
 Innovative Resources Group
 Jackson County Bank
 Kohler Company
 Lands' End, Inc.
 M&I Bank of Southern Wisconsin
 Madison Gas and Electric Foundation
 The Manitowoc Company
 The Marcus Corporation Foundation, Inc.
 Marshall & Ilsley Foundation, Inc.
 Marshall Erdman and Associates
 Mead & Hunt
 Mead Witter Foundation
 Michael Best & Friedrich
 Nelson Foundation
 Northern Lake Service, Inc.
 Northwestern Mutual Life Insurance Company

Pleasant Company
 The Printing Place
 QTI Group
 Racine Federated, Inc.
 Rural Insurance Companies
 C. G. Schmidt Construction, Inc.
 Sensient Technologies
 Sheboygan Paint Company
 Stark Company Realtors
 Sub Zero Foundation
 Twin Disc, Inc.
 U.S. Bank-Madison
 Voith Fabrics
 Webcrafters-Frautschi Foundation, Inc.
 Windway Foundation
 Wisconsin Physicians Service



WHS Archives, D GX902/1835; graphic by Joel Heiman

Although this map of the Territories of Michigan and "Ouisconsin" reflects a later time period than that of the Additional Court, the distance from the settlements to far-off Detroit made justice less than accessible. The arrow indicates the shift in the Court's location from Prairie du Chien to Mineral Point.

lead-mining region of southwestern Wisconsin.) President James Monroe appointed twenty-three-year-old Detroit lawyer James D. Doty as the judge of the Additional Court in February 1823. Doty had arrived in Detroit five years earlier from his home in upstate New York and become the clerk of the territorial supreme court. There he caught the attention of Lewis Cass, the governor of Michigan Territory, who lobbied President Monroe for Doty's appointment as the judge of the Additional Court. Doty was a wise choice, for he had accompanied Cass on his famous expedition around the upper Great Lakes in 1820 and was familiar with the territory and its inhabitants. For Doty, the appointment brought an immense amount of responsibility and prestige, and it paved the way to what would be an impressive career as a land speculator, territorial governor, and member of Congress.⁵

In addition to the Métis, Indians of various Algonquian- and Siouan-speaking tribes populated Doty's jurisdiction. Doty was

familiar with both societies because his earlier residence at Detroit had acclimated him to the cultures of the Great Lakes Indians and their Métis neighbors. His views concerning Indian societies were particularly progressive for his day. Most white Americans in the early nineteenth century considered Indians "savages" who had not attained the high degree of "civilization" that characterized white society, but Doty believed that Indian communities had their own systems of law that had to be respected. He asserted that since Indians were not recognized members of American society, they should not be subject to its laws. He believed that subjecting Indians to American law would be "tyrannical and unjust" and that to "compel [the Indian] to submit to regulations of which it is impossible he should know anything" would be akin to "punishing the blind because he cannot see, or the deaf that he does not hear."⁶

Doty's reluctance to interfere in Indian affairs was stymied by the fact that federal laws held Indians accountable for certain

crimes despite the fact those same laws did not consider native people to be United States citizens. An example is the case of Chief Oshkosh of the Menominees, who appeared before the Additional Court in 1830 to answer to a charge of murder. Oshkosh and two other Menominees stabbed and killed O-ke-wa (or Antoine, as he was also known), an Indian slave identified as a Pawnee who had lived since childhood with a Métis family at Green Bay. Indian slavery in the Great Lakes was an institution that had emerged under the French. By 1830 Green Bay contained about a dozen Indian slaves, most of whom came from western tribes such as the Osage, Mandan, and Pawnee. Both Indian and Métis owners regarded Indian slaves as having few or no rights, and by Menominee custom a slave's life could be taken for killing a Menominee regardless of the circumstances. While hunting one evening, O-ke-wa accidentally shot and killed a Menominee; he returned the body to the tribe, hoping to receive mercy and forgiveness. In a fit of rage, Oshkosh and two other Menominees, Shawpetuck and Amable, held O-ke-wa under water and stabbed him to death. When the three men later appeared before the court, they refused court-appointed counsel and refused to enter a plea. Judge Doty entered a plea of not guilty for the three men and asked the jury to consider the evidence and render a judgment.⁷

The history of the trial reveals that Doty went to great lengths to assure a fair hearing for the men before him. Juries in the Additional Court were also sympathetic, for while they did not include Indians, they did include fur traders, many of whom were Métis and all of whom were intimately familiar with Indian customs. Of the twelve jurors at Oshkosh's trial, two brothers, Jean Baptiste Grignon and Amable Grignon, can definitely be identified as Métis. Many men at Green Bay, regardless of their ancestry, married Native American and Métis women. Four of the jurors—Jean Baptiste Grignon, Richard Prickett, Pierre Chalifoux, and Dominique Brunette—had Native American or Métis wives. Even jurors such as Daniel Whitney, who was not connected to the Indians by marriage or ancestry, were involved with the fur trade, which required an understanding of native peo-

Indian agents and army officers often flagrantly disregarded the civil rights of the Métis and American fur traders.

ple and their cultures. The jurors' decision reflected that understanding. They told Doty that Oshkosh and his accomplices were guilty, but because they had committed the crime in accordance with their tribal customs, malice aforethought could not be presumed. The jurors believed that this reduced the charge to manslaughter, but because they were unfamiliar with the law in such cases, they asked Doty to render the final verdict. Doty believed that it would have been unjust to undermine tribal customs by uncritically applying white men's laws to Indians. No American citizen had been harmed and the murder had occurred on Indian lands, so technically no federal or territorial statutes had been violated. Doty acquitted Oshkosh and his codefendants.⁸

In several important trials, Indians stood accused of crimes against fur traders, and in such instances juries dominated by fur traders were not so understanding. Yet even in these situations Judge Doty ensured that all Indians tried in his court received fair hearings, even though it was often impolitic to do so.

This was certainly the case several years before Chief Oshkosh's trial when the leaders of the short-lived affair known as the Winnebago Uprising were tried for the murders of seven Métis, a white man, and a black slave in southwestern Wisconsin in 1826 and 1827. The U.S. Army arrested eight Ho-Chunk (called Winnebagoes by white settlers at the time) for the murders, including the leader, Wanuk-chouti, or Red Bird, who died in jail while awaiting trial. The prosecuting attorney dropped the charges against five of the defendants because the evidence against them was scant, but he proceeded against the remaining two prisoners.⁹

The two Ho-Chunk men, Wa-ni-ga and Chic-hong-sic, had been with Wanuk-chouti when he murdered two Métis settlers near Prairie du Chien. Violence among Indians,

To understand Métis culture, it was necessary to understand that the native peoples living in the Great Lakes region represented many cultures and traditions, including those of the Ojibwe. Caa-Tou-See, an Ojibwe, was one of many native people sketched and painted in 1827.

Thomas L. McKenney, *Sketches of a Tour of the Lakes . . . 1827*



whites, and Métis was hardly uncommon in the region, but whereas most acts of violence occurred due to personal quarrels and family feuds, this violence was especially bloody, and the dead and wounded were random victims of Red Bird's tactical actions. Wani-ga and Chic-hong-sic simply had the misfortune of being with Wanuk-chouti at the time. During their trial at Prairie du Chien in 1828, it became evident that neither Wani-ga nor Chic-hong-sic had committed murder. Moreover, both men had tried to dissuade Wanuk-chouti from committing the acts. However, both white and Métis inhabitants of the region had been shocked by the killings and had little interest in extending leniency to the two men. Doty was undoubtedly aware of these sentiments, and he tried, unsuccessfully, to move the proceedings away from Prairie du Chien in order to ensure the two Ho-Chink men a trial far from the inhabitants of the region. Not surprisingly, after deliberating only forty-five minutes, the jury came back with a guilty verdict. Because the two men had been found guilty of a capital crime, Doty had no choice but to enforce the law and sentence them to death by hanging. Still, this was not the end of the matter. The lawyer for the two condemned men filed a motion for a new trial because he believed that the jury had arrived at the verdict despite a weight of evidence to the contrary. Judge Doty agreed, and he suspended the execution of their sentences. There is evidence that Doty intervened to help the two Ho-Chunk receive the pardon that President John Quincy Adams granted them in November 1828.¹⁰

Doty continued to fight for Indians in the Additional Court even after he was no longer judge. He failed to regain appointment to the Additional Court in 1832 and was replaced by a Virginian, David Irvin. Shortly after Irvin assumed the judgeship, the Black Hawk War erupted. The outcome of the war proved to be a replay of the Winnebago Uprising five years earlier. The army arrested seven Ho-Chunk for allegedly murdering several white settlers in the lead-mining region southeast of Prairie du Chien. After their arrest, the seven men languished in the jail at Fort Winnebago for a year and a half



WHS Archives SC 352

Thanks in large part to Doty, the two Ho-Chunk followers of Wanuk-chouti, or Red Bird, who were convicted of murder were pardoned. President John Quincy Adams and Secretary of State Henry Clay signed the pardon, dated November 3, 1828.

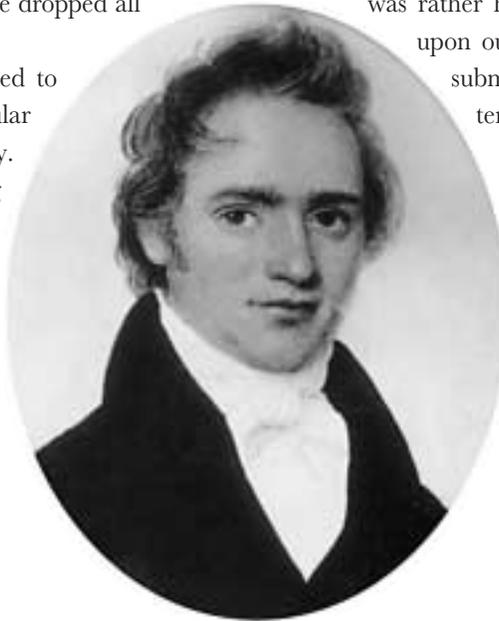
without being charged with any crime. By then Doty had established a private law practice, and he enthusiastically took up their case. He began by having a county judge issue a writ of habeas corpus so that the men could be released from their long and illegal confinement. As he had done during the trial of Wani-ga and Chic-hong-sic, Doty attempted to move the trial—this time from the Additional Court's new location at Mineral Point. However, his efforts soon proved unnecessary. The prosecuting attorney

could not find any white or Métis residents who had witnessed the crimes. No one was even sure if Ho-Chunk people had committed the murders, and no members of the Ho-Chunk community were willing to come forward to testify. Although the prosecuting attorney presented indictments against the seven men in 1833, the case never came to trial, and in 1837 he dropped all charges against the Indians.¹¹

Trials involving Métis defendants tended to be less dramatic, but several cases in particular disrupted the very fabric of Métis society. One of Doty's first priorities upon assuming his judgeship was addressing Métis marriage customs, which were an amalgam of French Canadian and Indian practices that revolved around the exigencies of the fur trade. The most important of these practices was known as *la façon du pays* ("the custom of the country"), by which fur traders entered into short-term contractual marriages with Indian or Métis women without the benefit of clergy. These "country marriages" could be dissolved by the mutual consent of both parties. By territorial law, such unions were illegal and punishable in court as acts of "fornication" and "illicit cohabitation." Doty arrived for his term in Prairie du Chien in May 1824 and heard three cases that involved country marriages. All the men who appeared before the court pled guilty and paid five-dollar fines, which would be about \$65 today.¹²

Soon thereafter, at Green Bay, the prosecution of this crime became something of a high comedy. When Doty arrived there in October 1824, the prosecuting attorney had indicted twenty-eight men for participating in country marriages. So many men were indicted for the crime that one man acted as a witness before the grand jury in eighteen of the cases, was on the petit jury for another, and was later tried for the crime himself. Most of the indicted men were Métis, but a few were American settlers from the East who had adopted the custom soon after their arrival in Wisconsin. The majority of the indicted men simply pled guilty, and Doty gave them fifty-dollar fines, or about \$650 today. However, he was not ignorant of the local nuptial conventions, and his subsequent actions demonstrated his desire to balance the enforcement of the law with respect for Métis customs. He promised the men that he would lower their fines to just one dollar if they produced marriage certificates before the end of the court term. Fourteen of those indicted did so, and Doty subsequently reduced their fines. Doty got his point across, and throughout the counties

under his jurisdiction, the custom of country marriages quickly died out as men sought permanent unions with Indian and Métis women. Ebenezer Childs, a Massachusetts Yankee who had arrived in Green Bay in 1820, was one of the men indicted for this crime. As he noted, "We all thought at the time that Judge Doty was rather hard in breaking in rough shod, as he did, upon our [marriage] arrangements; but we had to submit, and make the best we could of the matter."¹³



WHI(X3)46657;
Courtesy of the Neville Public Museum of Brown County
This portrait of Governor James Duane Doty was taken from a miniature. Doty served as governor of the Wisconsin Territory from 1841 to 1844.

Whatever enmity Doty created with his crusade against country marriages he more than made up for by securing justice for the Métis and the small number of newly arrived American fur traders from the East, all of whom had lived under a system of martial law in the years after the War of 1812. Prior to the Additional Court, army officers and federal Indian agents in the region had enforced the trade and intercourse laws, which required all fur traders to have licenses issued by the federal government, through an Indian agent. The laws also forbade fur traders from giving liquor to the Indians. A failure to abide by these regulations meant that a trader could lose his license and even be arrested. In their zeal to uphold the laws, Indian agents and army officers often flagrantly disregarded the civil rights of the Métis and American fur traders at Mackinac Island, Green Bay, and Prairie du Chien. Federal troops searched packs of goods and cabins without warrants or reasonable cause. In some cases, traders even had their cabins demolished by soldiers because local commanders had heard rumors that they had supplied whiskey to the Indians. At Green Bay, sentries fired upon traders traveling by canoe on the Fox River if they did not stop at the local fort to state their business. One observer at Prairie du Chien noted in 1824 that many of the Indian agents and army officers "consider the people . . . as possessed of no rights, either political or civil . . . there is no law but their word."¹⁴

Indeed, the residents of the territory had only a few generally ineffective means at their disposal to challenge hostile federal officials before 1823. The only legal venues were justices of the peace and the county courts, but these were so limited in their powers that the inhabitants used them only to recover small debts and receive compensation for petty thefts committed by soldiers. For more serious civil cases, traders could bring suit in the Supreme Court of Michigan Territory at Detroit, but the journey to

Detroit was long and expensive, and there was no guarantee that the plaintiffs would win their cases or even have them tried. This changed after Judge Doty arrived in 1823. Doty distrusted both the U.S. Army and the Indian Department, and he loathed the arbitrary justice they dispensed. Moreover, he was good friends with John Jacob Astor, Ramsay Crooks, and Robert Stuart, the principal officers of the American Fur Company. Almost all of the fur traders in the upper Great Lakes region worked for the company, and Astor, Crooks, and Stuart had long bristled at the indignities their traders suffered. In Doty, the American Fur Company had an ally who ended the unopposed reign of the army and the Indian Department.¹⁵

The first case occurred at Green Bay in 1825, when Captain William G. Belknap assaulted an American trader named John P. Arndt and his hired man, Isaac Rouse, for trespassing upon lands near Fort Howard, the military post at Green Bay. In order to keep whiskey vendors away, the post commandant, Major William Whistler, had issued an order that forbade the landing of boats near the fort by civilians. Arndt had a license to operate a ferry across the Fox River, but as the officer of the day, Belknap ordered his guards to arrest Rouse when he landed the ferry on the opposite shore near the fort. A bit later Arndt arrived in a canoe and was also arrested. Arndt and Rouse filed charges for assault and false imprisonment against Belknap and Whistler. The charges against Whistler were later dropped, but a jury found Belknap guilty on both counts. This should not have surprised Belknap, for the jury that heard his case was dominated by Métis fur traders, many of whom had had similar experiences with the local soldiers. Belknap requested that the judgment be overturned since the offense had occurred on military property. Doty, however, ruled that the lands adjacent to the fort were public lands, and he fined Belknap one hundred dollars. The territorial governor later granted Belknap a remission and rescinded his fine, but Belknap and the other officers at Fort Howard learned a valuable lesson. They never again harassed civilians who landed boats near the fort.¹⁶

Army officers and Indian agents in other parts of Doty's jurisdiction suffered similar fates. Two cases in particular illustrate the hefty fines and damage payments that Indian agents and army officers faced in criminal and civil suits. In 1829 an American trader from Green Bay named Daniel Whitney set up a lumber camp on the upper Wisconsin River. The army had recently

established Fort Winnebago at the portage connecting the Fox and Wisconsin Rivers in present-day Columbia County, and the commandant, Major David E. Twiggs, believed that Whitney was violating the law by trespassing on Indian lands. Twiggs sent notice to Joseph Street, the Indian agent at Prairie du Chien, and Street's subagent, John Marsh, took a party of soldiers up the

Wisconsin River and broke up Whitney's camp. Whitney initiated a suit against Twiggs, Street, and Marsh, suing them for three thousand dollars.¹⁷

While the stage was set for a legal cause célèbre, the entire incident ended with little drama. Whitney's case against Twiggs proceeded at Green Bay, but Doty had to dismiss it since Whitney could not prove that Twiggs had given any orders to break up his camp. Meanwhile the case against Street and Marsh worked its way through the Additional Court at Prairie du Chien. Although it is not exactly clear why Whitney dropped the case, there was probably a lack of evidence against the two Indian agents. Not to be outdone, Major Twiggs countered by initiating a criminal suit against Whitney

and his men for trespassing on Indian lands. He brought the charges against Whitney in the territorial supreme court at Detroit rather than the Additional Court because he knew Doty's sentiments regarding army officers and Indian agents. However, the case against Whitney was riddled with legal weaknesses, and the prosecuting attorney in Detroit withdrew the case.¹⁸

Other cases against federal officials met with more success. About the same time that the army destroyed Whitney's camp, a Métis trader from Prairie du Chien named Jean Brunet led a similar logging expedition on the upper Mississippi. Upon hearing of it, Indian agent Joseph Street notified the commandant at Fort Crawford, Major Stephen Watts Kearny, that Brunet had not yet been naturalized as an American citizen and that he was trespassing upon U.S.-protected Indian lands. A party of soldiers went into Brunet's lumber camp, arrested his men, and confiscated the lumber. Brunet immediately initiated a suit against Street and Kearny for false imprisonment and sought two thousand dollars in damages. Street and Kearny argued that, as an alien, Brunet should not have entered Indian country. With predictable deftness, Doty countered by stating that they still would have needed a warrant to arrest Brunet. Moreover, Doty took the position that the Mississippi River was a public highway open to all. Street, knowing that he faced an unsympathetic jury made up mostly of Métis traders, lamented that he had "no prospect of a



WHI(X3)29318
*Chief Oshkosh in 1850, twenty years after
 Doty acquitted the Menominee chief of
 murder.*

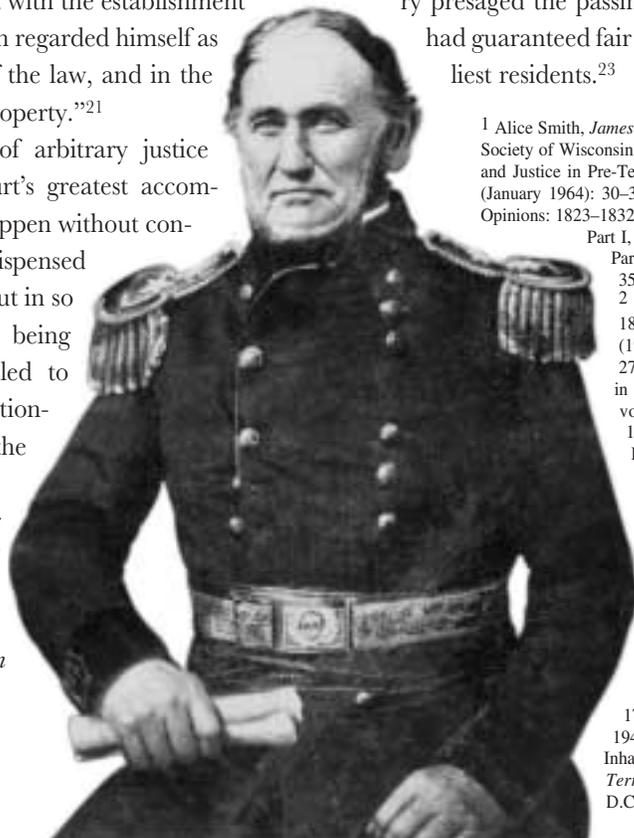
fair trial before the presiding judge . . . and little hope that an impartial jury can be promised at this place,” particularly since it would be composed of “ignorant Canadian French and mixed breed Indians, not one in 20 of whom can read or write.”¹⁹ Not surprisingly, the jury decided in Brunet’s favor and ordered Street and Kearny to pay him \$1,200 plus \$125 for legal costs. In the end, however, Street, Kearny, and even Twiggs suffered no personal financial loss. Congress decided to remunerate Twiggs for the legal costs he incurred in his suit and reimbursed Street and Kearny for the judgment rendered against them.²⁰

Of all the Indian agents and army officers tried in the Additional Court, none ever lost even a single dollar. Every one either had the suits against them dropped or were reimbursed for their losses. However, this did not mean that the Additional Court was ineffective. Quite the contrary: the efforts of Métis and American fur traders to end the era of military tyranny were overwhelmingly successful. Even when Indian agents and army officers had the cases against them dropped or were reimbursed for their fines, they still devoted a tremendous amount of time and energy to fighting legal battles. This often made them reluctant to enforce federal laws governing trade and intercourse in an abusive manner, for the possibility of being prosecuted or sued struck a chord of fear in their hearts. Arbitrary justice quickly began to disappear under the Additional Court’s jurisdiction, and by 1830 such incidents had almost ceased to occur. Henry S. Baird, a lawyer who came to the region prior to 1823, summed up the sentiments of many residents when he noted that with the establishment of the Additional Court, “the citizen regarded himself as really under the protecting arm of the law, and in the full enjoyment of his liberty and property.”²¹

Bringing an end to the era of arbitrary justice proved to be the Additional Court’s greatest accomplishment, although this did not happen without controversy. James D. Doty had dispensed justice as impartially as he could, but in so doing he gained a reputation as being biased and high-handed. He failed to regain his appointment to the Additional Court in 1832, largely because the

As commandant of Fort Winnebago, Major David E. Twiggs brought charges against a trader to the Supreme Court of Michigan Territory in Detroit to avoid Doty and the Additional Court. By the 1830s Doty had gained a reputation for his unsympathetic judgment of army officers and Indian agents.

WHS Archives, PH 1560



army officers who had appeared as defendants in his court lobbied actively to have him removed. Four years later, with the creation of the Wisconsin Territory in 1836, the court ceased to exist. This proved a minor setback for the ambitious and enterprising Doty, who in 1833 won a seat in the Michigan territorial legislature. When Wisconsin became a territory Doty persuaded the legislature in Belmont to establish the capital in Madison—where, by good fortune, he happened to own substantial real estate. Doty went to Congress as a territorial delegate (1838–1841), served a term as governor of Wisconsin Territory (1841–1844), and subsequently served two terms in Congress (1849–1853). Doty’s longings for higher office went unfulfilled, but in 1861 President Lincoln appointed him superintendent of Indian affairs for Utah Territory, where he successfully concluded treaties with the Shoshone and worked amicably with the Mormons. He died in 1865 at age sixty-six.²²

With the organization of the new territory came a reorganization of the courts. The Additional Court’s session at Mackinac Island was transferred to Michigan upon that state’s admission to the Union in 1837, and the court’s sessions at Green Bay and Mineral Point became part of the judicial machinery of Wisconsin Territory. This new court system served a population that was now dominated by white settlers from the East and Europe rather than by Indians and Métis fur traders. It was a population with different customs, different ways of using the land, and different kinds of legal problems. Thus, the creation of Wisconsin Territory presaged the passing of a time when the Additional Court had guaranteed fair and impartial justice for Wisconsin’s earliest residents.²³ ❧

¹ Alice Smith, *James Duane Doty: Frontier Promoter* (Madison: State Historical Society of Wisconsin, 1954), 71–95; Donald Kommers, “The Emergence of Law and Justice in Pre-Territorial Wisconsin,” *American Journal of Legal History* 8 (January 1964): 30–33; James Doty, “Judge James Doty’s Notes of Trials and Opinions: 1823–1832,” ed. Elizabeth Brown, *American Journal of Legal History*, Part I, 9 (January 1965): 17–40; Part II, 9 (April 1965): 156–166; Part III, 9 (July 1965): 216–233; and Part IV, 9 (October 1965): 350–362 (hereinafter cited as Doty, “Notes of Trials.”)

² John Gibson, “Executive Journal of Indiana Territory, 1800–1816,” in *Indiana Historical Society Publications* 3:3 (1900): 97, 110–112; Kommers, “Pre-Territorial Wisconsin,” 27–28; James Biddle, “Recollections of Green Bay, 1816–17,” in *Collections of the State Historical Society of Wisconsin*, 31 vols. (Madison: State Historical Society of Wisconsin, 1855–1931), 1:59–60 (hereinafter cited as *WHC*); James Lockwood, “Early Times and Events in Wisconsin,” *WHC*, 2:105–107; Ebenezer Childs, “Recollections of Wisconsin since 1820,” *WHC*, 4:165–166.

³ Jacqueline Peterson, “The People in Between: Indian-White Marriage and the Genesis of a Métis Society and Culture in the Great Lakes Region, 1680–1830” (doctoral dissertation, University of Illinois at Chicago Circle, 1981), 45–48, 193–233.

⁴ *Laws of the Territory of Michigan*, 4 vols. (Lansing: W. S. George and Company, 1871–1884), 1:184–192, 325–328, 714–718, 2:125–126; Robert Fogarty, “An Institutional Study of the Territorial Courts in the Old Northwest, 1788–1848” (doctoral dissertation, University of Minnesota, 1942), 172–173, 210–216, 253–254, 297–305; Petition by the Inhabitants of Michilimackinac County, 24 July 1821, in *The Territorial Papers of the United States*, 28 vols. (Washington, D.C.: Government Printing Office, 1934–1975), 11:140–141

(hereinafter cited as *TPUS*); Petitions by Inhabitants of the Counties of Mackinaw, Brown and Crawford, 5 November 1821, *TPUS*, 11:162–168; James Doty to Alexander McNair, 18 October 1823, James Doty Letterbook, 1822–1829, pp. 56–57, box 1, James D. Doty Papers, Wisconsin State Archives, Wisconsin Historical Society, Madison (hereinafter this source cited as Doty LB 1, the manuscript collection as Doty Papers, the depository as WHS); *U.S. Statutes at Large*, 3:722–723.

⁵ *U.S. Statutes at Large*, 4:393; Kommers, “Pre-Territorial Wisconsin,” 31–32; Fogerty, “Territorial Courts,” 318–319; Lewis Cass to John Quincy Adams, 5 December 1821, *TPUS*, 11:207; Doty to McNair, 18 October 1823, Doty LB 1, pp. 56–57; James Monroe to Doty, 17 February 1823, *TPUS*, 11:344–345; Adams to Doty, 25 February 1823, Doty Papers, box 1; *U.S. Statutes at Large*, 3:722–723; Smith, *Doty*, 3–70, 256–277, 316–332, 364–374.

⁶ Bernard Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* (Chapel Hill: University of North Carolina Press, 1973), *passim*; Robert Berkhof, Jr., *The White Man’s Indian: Images of the American Indian from Columbus to the Present* (New York: Knopf, 1978), 44–49; Patrick Jung, “To Extend Fair and Impartial Justice to the Indian: Native Americans and the Additional Court of Michigan Territory, 1823–1836,” *Michigan Historical Review* 23 (Fall 1997): 38–40; Smith, *Doty*, 23–24, 82–86; quoted from Doty, “Notes of Trials,” 352–355, 359.

⁷ Francis Prucha, *American Indian Policy in the Formative Years: The Trade and Intercourse Laws, 1790–1834* (Cambridge: Harvard University Press, 1962), 188–203, and *passim*; Patricia Ourada, *The Menominee Indians: A History* (Norman: University of Oklahoma Press, 1979), 79, 85, 235n; Decision in the trial of Osh-kosh, Brown County Criminal and Civil Case Files, 1823–1939, Brown Series 65, box 29, folder 51, University of Wisconsin–Green Bay Area Research Center, Green Bay (hereinafter these records are cited as BS-65, the depository as UWGB-ARC); Depositions of Shawpetuck, 3 June 1830, Moaw-ke-shick, 3 June 1830, Amable Dorocher, 3 June 1830, Inquest into the death of Antoine or Okewa, 3 June 1830, all in BS-65, box 29, folder 51; Brown County Record Book for Criminal Cases, 1824–1844, Brown Series 73, p. 145, UWGB-ARC (hereinafter cited as Brown Criminal Record Book, BS-73); Henry Baird, Notes on the trial of Oshkosh, 5 November 1830, box 6, folder 2, Henry S. Baird Papers, WHS; Augustin Grignon, “Seventy-Two Years’ Recollections of Wisconsin,” *WHC*, 3:256–58.

⁸ Grignon, “Recollections,” *WHC*, 3:197–198, 234–235, 242–243; Mackinac Baptismal Register, *WHC*, 19:88, 91, 93n; Peterson, “People in Between,” 131–32; Brown County Early Marriage Record Book, 1823–1844, pp. 13, 22, 32, 50a, UWGB-ARC (hereinafter cited as Brown Marriage Record Book); Affidavit of Pierre Chellefous to marry LaCenture, an Indian woman, 13 October 1824, Brown County Marriage Records, 1820–1907, Brown Series 50, box 2, folder 1a, doc. 21, UWGB-ARC; P. Grignon to Auguste Grignon, 14 March 1821, *WHC*, 20:193n; Alice Smith, “Daniel Whitney: Pioneer Wisconsin Businessman,” *Wisconsin Magazine of History* 24 (March 1941): 283–304; Bruce White, “A Skilled Game of Exchange: Ojibway Fur Trade Protocol,” *Minnesota History* 50 (Summer 1987): 229–40; Brown Criminal Record Book, BS-73, pp. 145–147; Doty, “Notes of Trials,” 356–62.

⁹ Peter Scanlan, *Prairie du Chien: French, British, American* (Menasha, WI: George Banta Publishing Company, 1937), 129–131, 160–161; Martin Zanger, “Red Bird,” in *American Indian Leaders: Studies in Diversity*, ed. R. David Edmunds (Lincoln: University of Nebraska Press, 1980), 64–87; Smith, *Doty*, 80–83; James Barbour to Cass, 12 November 1827, *TPUS*, 11:1120–21; Joseph Street to Secretary of War, 8 January 1828, Letters Received by the Office of Indian Affairs, Microfilm Publication M-234, reel 696, frame 85, National Archives, Washington, D.C. (hereinafter these records cited as M-234, the depository as NA); Street to Secretary of War, 17 February 1828, M-234, reel 696, frames 90–91; Minutes of the Territorial Circuit Court for Crawford and Iowa Counties, 1824–1833, Iowa Series 74, pp. 54–56, University of Wisconsin–Platteville Area Research Center, Platteville, Wisconsin (hereinafter this source cited as Crawford and Iowa Minutes, IS-74, the depository as UWP-ARC); Thomas Rowland to Cass, 23 August 1828, Records of the Michigan Superintendency of Indian Affairs, 1814–1851, Microfilm Publication M-1, reel 23, frames 217–20, NA (hereinafter cited as M-1); Street to Peter Porter, 26 September 1828, M-234, reel 696, frame 98; Indictment of Mah-na-at-ap-e-kah, 14 May 1827, Indictment of Wau-koo-kah, 14 May 1827, both in Crawford and Iowa County Criminal Case Files, 1824–1836, Iowa Series 20, box 1, folder 84, UWP-ARC (hereinafter cited as IS-20).

¹⁰ Doty to Barbour, 31 January 1828, Doty LB 1, pp. 128–132; Barbour to Attorney General, 22 February 1828, *TPUS*, 11:1172; Thomas McKenney to Cass, 11 April 1828, M-1, reel 22, frames 90–91; Zanger, “Red Bird,” 80; Doty, “Notes of Trials,” 216–223; Crawford and Iowa Minutes, IS-74, pp. 44–47, 54–55; Motion for a new trial, August 1828, IS-20, box 1, folder 20; McKenney to Porter, 27 October 1828, *TPUS*, 11:1207–1208; James Witherell to Cass, 4 November 1828, M-1, reel 23, frames 300–1; Smith, *Doty*, 84, 400n.

¹¹ Joseph Plympton to Acting Assist. Adj. Genl., 3 November 1832, M-234, reel 696, frame 421; Thomas Burnett to William Clark, 30 October 1833, M-234, reel 696, frames 517–519; Doty to Cass, 1 November 1833, M-234, reel 696, frames 528–529; Henry Gratiot to Cass, 17 November 1832, M-234, reel 696, frame 401; Gratiot to Cass, 19 November 1832, M-234, reel 696, frame 396; Gratiot to Cass, 23 November 1823, M-234, reel 696, frame 400; Statement of Enos Cutler, 15 September 1832, Doty to John Lawe, 14 June 1834, Statement of Peter Grignon, 13 June 1834, Writ of *habeas corpus*, 17 June 1834, all in BS-65, box 33, folder 51; Daniel LeRoy to Cass, 4 September 1833, M-234, reel 696, frames 563–565; Doty to Cass, 1 November 1833, M-234, reel 696, frames 528–529; LeRoy to Cass, 4 September 1833, M-234, reel 696, frames 563–565; Cutler to Acting Assist. Adj. Genl., 19 November 1833, M-234, reel 696, frames 523–534; Indict-

The Author



Patrick J. Jung is an adjunct professor of history at Marquette University and a full-time development officer for the Legal Aid Society of Milwaukee. Prior to earning his Ph.D. in U.S. history at Marquette, he served four years as an infantry officer in the U.S. Army. He is currently writing a book-length history of the Black Hawk War.

ment of Haunk-me-nun-kaw, 7 October 1833, Indictment of Koo-zee-ray-kaw and Wee-zee-see-kay-hee-wee-kaw, 7 October 1833, Indictment of Wau-kee-you-skaun and others, 7 October 1833, Indictment of Toago-nah-koo-ho-see-ray-kaw and Nau-say-ree-kay-kaw, 7 October 1833, all in IS-20, box 1, folder 39; Smith, *Doty*, 88–95, 121–132.

¹² Peterson, “People in Between,” 45–48, 193–195, 206–233; Crawford and Iowa Minutes, IS-74, pp. 8–9; John McCusker, “How Much is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States,” *Proceedings of the American Antiquarian Society* 101 (October 1991): 327, 332.

¹³ Docket of Criminal Cases at a Special Session of the Circuit Court, 4 October 1824, Records of the Circuit Court, 1818–1928, Brown Series 106, box 1, folder 4, UWGB-ARC (hereinafter cited as BS-106); Calendar of the Brown County Territorial Court, 1822–1839, pp. 5–33, Doty Papers, box 3 (hereinafter cited as Brown Court Calendar); Brown Criminal Record Book, BS-73, pp. 21–70, 83–84, 93–96; Brown Marriage Record Book, pp. 2–37; McCusker, “Real Money,” 327, 332; quoted from Childs, “Recollections,” *WHC*, 4:166–67.

¹⁴ Jacques Porlier to Cass, 8 June 1822, *TPUS*, 11:243; Petition by the Inhabitants of Prairie du Chien, 24 December 1821, *TPUS*, 11:211–212; Doty to Cass, 6 September 1823, Doty LB 1, pp. 41–49; Childs, “Recollections,” *WHC*, 4:157–161; Henry Baird, “Early History and Condition of Wisconsin,” *WHC*, 2:84; quoted from unknown to Secretary of War, 12 February 1824, Morgan L. Martin Papers, box 1, folder 3, UWGB-ARC (hereinafter cited as Martin Papers).

¹⁵ Baird, “Early History,” *WHC*, 2:87–90; Summons for John Williams, 21 January 1821, Grignon, Lawe, and Porlier Papers, box 15, folder 4, WHS; Minutes of Cases, 1819–1820, BS-106, box 1, folder 15; Michael Dousman versus William Puthuff, in *Transactions of the Supreme Court of the Territory of Michigan, 1805–1836*, 6 vols. (Ann Arbor: University of Michigan Press, 1935–1940), 3:90 (hereinafter cited as *SCMT*); Journal No. 2, *SCMT*, 4:113, 158, 163; John Jacob Astor, et al. vs. John Johnson, *SCMT*, 3:172; Journal No. 3, *SCMT*, 4:294, 349, 369, 394; John Haeger, *John Jacob Astor: Business and Finance in the Early Republic* (Detroit: Wayne State University Press, 1991), 185–243; Doty to McNair, 18 October 1823, Doty LB 1, pp. 56–57; Doty to Commanding Officer of Fort Howard, 27 July 1827, Letterbook and Memorandum Book, 1825–1831, pp. 1–3, Doty Papers, box 1 (hereinafter cited as Doty LB 2); Doty, Memorandum concerning Fort Howard Orders, March 1831, Doty LB 2, pp. 3–5.

¹⁶ Brown Criminal Record Book, BS-73, pp. 71–74, 81–82; Doty, “Notes of Trials,” 156, 163; Doty, Memorandum in the case of John Arndt, Doty LB 2, pp. 6–9; Childs, “Recollections,” *WHC*, 4:180–181; Cass, Remission of William Belknap, 26 May 1826, Martin Papers, box 1, folder 4; Smith, *Doty*, 72–73.

¹⁷ Street to John Marsh, 2 March 1829, Martin Papers, box 2, folder 2; David Twigg to Henry Brevoort, 16 April 1829, M-234, reel 315, frames 68–69; Brevoort to Twigg, 27 April 1829, M-234, reel 315, frames 64–66; Twigg to Secretary of War, 25 May 1829, M-1, reel 25, frames 3–4; Deposition of John Marsh, 5 September 1829, Martin Papers, box 2, folder 2; Daniel Whitney to Martin, 13 June 1831, Green Bay and Prairie du Chien Papers, box 2, folder 2, WHS; Statement of Ebenezer Childs, 18 June 1831, Martin Papers, box 2, folder 4; Childs, “Recollections,” *WHC*, 4:175–180; Francis Prucha, *Broadax and Bayonet: The Role of the United States Army in the Development of the Northwest, 1815–1860* (Madison: State Historical Society of Wisconsin, 1953), 64; Brown County Record Book for Civil Cases, 1825–1844, Brown Series 73, pp. 173–183, UWGB-ARC (hereinafter cited as Brown Civil Record Book, BS-73).

¹⁸ Brown Civil Record Book, BS-73, pp. 173–183; Doty, Trials and Decisions, 1823–1829, p. 229, Doty Papers, box 3; Crawford and Iowa County Record Book for Civil Cases, 1825–1831, Iowa Series 30, pp. 106–112, UWP-ARC (hereinafter cited as Crawford and Iowa Civil Record Book, IS-30); Crawford and Iowa Minutes, IS-74, pp. 59, 74, 85; Notice of discontinuance, 9 October 1829, Crawford and Iowa County Civil Case Files, 1823–1836, Iowa Series 45, box 4, folder 38, UWP-ARC (hereinafter cited as IS-45); Precipe in the case of Daniel Whitney vs. Joseph Street, 24 April 1830, IS-45, box 4, folder 38; Smith, *Doty*, 74–76; United States vs. Daniel Whitney, et al., *SCMT*, 5:206; Daniel LeRoy, Information Brief, 7 December 1829, *SCMT*, 5:385; LeRoy to Cass, 25 December 1829, M-1, reel 25, frame 159; Opinion of Judge William Woodbridge, December 1829, *SCMT*, 5:386–388; Prucha, *Broadax and Bayonet*, 65–66; Smith, *Doty*, 74.

¹⁹ Jean Brunet to Martin, 9 March 1829, Martin Papers, box 2, folder 2; Stephen Kearny to Joseph Brisbois, 28 February 1829, IS-45, Deposition of Samuel Griffith, 9 May 1829, Deposition of Charles Bernier, 9 May 1829, Depositions of Jean Brunet, 13 May and 8 July 1829, Pleas and notices of the defendants, 13 September 1829, Move for arrest of judgment, all in IS-45, box 1, folder 33; Crawford and Iowa Civil Record Book, IS-30, pp. 119–156; Doty, “Notes of Trials,” 231–233; Smith, *Doty*, 75–76; quoted in Street to John Eaton, 22 February 1830, M-234, reel 696, frame 202.

²⁰ Crawford and Iowa Minutes, IS-74, pp. 58, 84, 98; David Irvin, Instructions to the Iowa County sheriff, 26 September 1832, IS-45, box 1, folder 33; Report of the Committee of Claims, 9 April 1832, *American State Papers: Military Affairs*, 7 vols. (Washington, D.C.: Gales and Seaton, 1832–1861), 5:7–10; *U.S. Statutes at Large*, 6:515.

²¹ Prucha, *Broadax and Bayonet*, 66–67; Prucha, *American Indian Policy*, 130–135, 182–183; quoted in Baird, “Early History,” *WHC*, 2:91.

²² Smith, *Doty*, 90–388, *passim*.

²³ Fogerty, “Territorial Courts,” 327–337; Donald P. Kommers, “The Development of the Wisconsin Court System” (doctoral dissertation, University of Wisconsin, 1963), 155–193.