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FEDERAL LAW ENFORCEMENT AND THE BOOTH CASES

A. J. BEITZINGER*

Early in the evening of April 28, 1859, William T. Carroll, Clerk of the U.S. Supreme Court, went to the White House and delivered a copy of Chief Justice Taney's opinion in *Ableman v. Booth* to President Buchanan. In accepting the document, the worried Buchanan told Carroll that "the Supreme Court and the Executive should stand shoulder to shoulder in such a crisis, that united they might be able to resist the fanaticism of both the North and the South." To that end, he added, he was determined to execute the decrees of the court with all the force and power that the Constitution and laws placed at his disposal.[1]

Buchanan's statement epitomized a policy of cooperation between federal law enforcement officers and judges, which had been prefigured in the administrations of his two immediate predecessors and experienced its most effective defeat in the events leading up to and following directly upon the very opinion he held in his hand.[2] The story of Wisconsin's successful nullification of the fugitive slave law and its defiance of federal judicial authority has been peviously told in terms of the respective histories of the U.S. Supreme Court, the Wisconsin Supreme Court and the Department of Justice, the work of Chief Justice Taney, the development of American Constitutional Law and the local opposition to the law.[3] In this paper, the writer will attempt to treat the episode purely as a law enforcement problem by describing and interpreting the events from the angle of those men most intimately challenged, the federal officers and judges at both the local and national levels.

Federal authority in Wisconsin in the 1850's was represented principally by a district attorney, a marshal and his deputies, a federal district judge and a court commissioner. There were no federal troops which could be called upon for aid. Likewise there was no federal jail; federal prisoners were quartered in the state and county jail un-

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[1] Memorandum of William T. Carroll, appended to original transcript of record of Ableman v. Booth and U.S. v. Booth, 21 Howard, 506 (1859), Office of Clerk of U.S. Supreme Court.

[2] The *Dred Scott* decision in 1857 unquestionably brought greater public disfavor with the Supreme Court in the North. However, because a great conflict of jurisdiction and the alleged preservation of state's rights were involved in the *Booth* cases, the attempt to enforce federal law and court decisions in Wisconsin gave rise to a more effective opposition. Thus not merely the Supreme Court and the Democratic Party were threatened but federal authority itself.

[3] See CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (Bos-

der the custody of state officials. Effective enforcement of the law was predicated upon cooperation by the state authorities and a wholesome popular support.[4]

The administrative link between the law enforcement officials at Washington and the district attorneys throughout the country was then but narrowly defined. Along with the marshals, the attorneys were subject to the instructions of the Solicitor of the Treasury, who directed and superintended the conduct of civil suits involving the United States. The Attorney General had authority merely "to advise with and direct" the Solicitor of the Treasury at the latter's request. As a consequence, in criminal cases, the district attorneys were left with a wide degree of discretion in the fulmillment of their sworn duties. For guidance on policy and legal advice, they generally relied upon previous court decisions and the opinions of the Attorney General.[5]

Due to the dilatoriness of Congress, Wisconsin remained, until 1862, outside of any federal judicial circuit and the district judge was left unchecked. In civil suits below the statutory sum, there was no appeal from his rulings. Because no federal statute then provided for an appeal to the U.S. Supreme Court in criminal cases, a conviction in his court was final—a fact which, in good part, explains the propensity of the state judges to interfere by habeas corpus.[6]

Opposition to federal authority in Wisconsin first flared into open defiance in 1854 over the attempt to enforce the unpopular Fugitive Slave Law of 1850. That act amended the original law of 1793 by vesting, in federal judges and court commissioners, exclusive jurisdiction to determine summarily and without appeal whether a person was a fugitive from labor and service in another state. Attempts to rescue

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ton 1923) Vol. II, 532-539, Vol. III, 58-70, JOHN B. WINSLOW, THE STORY OF A GREAT COURT (Chicago, 1913). HOMER CUMMINS AND CARL MCFARLAND, FEDERAL JUSTICE (New York, 1937), 179-182, CARL B. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT (Boston, 1943), 251-254, CARL SWISHER, ROGER B. TANEY, (N.Y. 1936) 526-533. Vroman Mason, "The Fugitive Slave Law in Wisconsin, With Reference to Nullification Sentiment," *Proceedings of the State Historical Society of Wisconsin* (1895), 117-144, George Carter, "The Booth War in Wisconsin," *Proceedings of the State Historical Society of Wisconsin* (1902), 161-172.

[4] For acts of Congress calling upon state legislatures to provide for the keeping of federal prisoners in state jails and authorizing temporary jails in the event a state either did not comply or withdrew previous authorization, see, 1 *Stat.* 96 (Act of Sept. 23, 1789), 3 *Stat.* 646 (Act of Mar .3, 1821), 4 *Stat.* 632 (Act of Mar. 2, 1833). The Wisconsin Legislature, at its first session, authorized federal use of state jails. Concerning the lack of a sizable federal military force in Wisconsin, see F. K. Bartlett to Caleb Cushing, Jan. 28, 1855, Cushing MSS, Library of Congress.

[5] CUMMINGS AND MCFARLAND, *op. cit. supra* at 143-148.

[6] President Pierce, in messages to Congress in 1853 and 1854, urged a reorganization of the federal judicial system so as to include states like Wisconsin in a circuit. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, Vol. VI, 2750, 2751, 2825. Attorney General Caleb Cushing called the lack of circuit courts in certain areas of the country a "plain violation of the true spirit of the Constitution." Cushing to Pierce, Feb. 4, 1854, 6 A. G. Op. 276, 277.

an alleged fugitive from federal custody were punishable by fine and imprisonment. If a fugitive was rescued or escaped from federal custody, the marshal became subject to the possibility of a civil suit for damages by the claimant owner.[7]

Legal guideposts in the administration of the law and the outlines of a general enforcement policy were pricked out in the early years of the decade. By 1854, Justices Curtis, Grier, Nelson and Woodbury of the U.S. Supreme Court had sustained the constitutionality of the law in charges to juries while on circuit.[8] However, questions regarding protection from retaliatory civil and criminal actions in state tribunals for the mere enforcement of the law and the course to be followed upon state interference by habeas corpus were of more pressing concern to the federal officials. A law passed in 1833 to combat nullification in South Carolina afforded ample protection to federal authorities confronted with obstruction in the enforcement of the revenue laws. The act directly concerned general law enforcement by empowering federal courts to issue habeas corpus when an individual was confined for acts done or omitted in pursuance of federal law.[9] In 1852, Congress supplemented this protection by guaranteeing federal payment of the extraordinary expenses incurred in the execution of the law by ministerial officers.[10] Similarly, by 1854, the Attorney General had announced that when federal marshals were obstructed in the execution of federal law and the question of the constitutionality of the law was put forth in subsequent suits against them, the defense of such suits would be undertaken by the United States.[11] By that time the Attorney General had also advised that it was the right of a marshal, in cases involving fugitives, to answer state writs of habeas corpus by reciting the authority under which the person was held and refusing to produce the body.[12]

Both the Fillmore and Pierce Administrations had demonstrated a determination to enforce the controversial law vigorously. The former went to the extreme of resolving upon indictments for treason of the

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[7] 9 *Stat.* 462-464 (Act of Sept. 8, 1850). See Mason, *op. cit.*, for the story of widespread opposition to the law in Wisconsin. For a consideration of the legal arguments against the law, see Allen Johnson, *The Constitutionality of the Fugitive Slave Acts,* 31 YALE L. J. (1921), 161-182.

[8] For Curtis' charge, see U.S. v. Morris, 1 Curtis C. C. 23 (1851); for Grier's charge see U.S. v. Hanway, Fed. Cases No. 15299 C. C., E. D., Pa. (1851); for Nelson's grand jury charge, see Fed. Cases No. 18261 C.C., S.D. N.Y. (1851); for an account of Woodbury's charge, see SWISHER, ROGER B. TANEY, 482.

[9] 4 *Stat.* 632-635 (Act of Mar. 2, 1833).

[10] 10 *Stat.* 99 (Act of Aug. 31, 1852).

[11] Cushing to Pierce, Nov. 14, 1853, 6 A.G. Op., 220-223.

[12] Cushing to R. McClelland, Dec. 20, 1853, 6 A.G. Op., 237-239. Although this opinion involved a fugitive from justice, it implicitly covered fugitives from labor and service as well.

rescuers of a fugitive slave in Pennsylvania.[13] In May, 1854, Pierce's Attorney General, Caleb Cushing, announced that when a marshal was opposed in the execution of the law, he had the authority to summon to his aid the entire able-bodied force of the area, including the available federal and state armed forces, and that the Federal Government would defray costs.[14] At the same time, Pierce emphatically informed a marshal in Boston who had boldly availed himself of federal troops to prevent a rescue, "Your conduct is approved. The law must be executed."[15]

Almost two months before the Pierce Administration's pronouncements, the Wisconsin episode began. On March 10, 1854, C. C. Cotton, a deputy marshal, armed with a warrant issued by Federal District Judge Andrew G. Miller and aided by Bennammi Garland, a citizen of Missouri, captured the latter's alleged fugitive slave, Joshua Glover, near Racine, Wisconsin. Taken to Milwaukee the next day, Glover was placed in the county jail pending a hearing.[16]

Apprised of these facts, Sherman M. Booth, editor of the Milwaukee abolitionist newspaper, the Free Democrat, mounted his horse and galloped through the streets, stopping at each corner to shout, "Freemen! To the rescue! Slave-catchers are our midst! Be at the courthouse at two o'clock!" Meanwhile, Booth's lawyers persuaded the judge of the County Court to issue a writ of habeas corpus to the deputy marshal ordering him to bring Glover before him immediately and justify his retention.[17]

When the afternoon mass-meeting began, the federal authorities soon became aware of the "law-defying mob" before the court-house. Realizing that no officer could command sufficient force to prevent a rescue of Glover the moment he was taken from the jail, Judge Miller promptly postponed the hearing for two days in order to allow the people time to reflect and the federal officers time to collect force. He also informed an emmissary of Booth that no power on earth could take Glover from his jurisdiction, thus precluding any voluntary compliance with the state writ of habeas corpus.[18]

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[13] WARREN, *op. cit. supra,* Vol. II, 503-505. See also, Fillmore's proclamation of Feb. 18, 1851, calling upon "all well-disposed citizens" and commanding all civil and military persons in the area to aid a federal marshal in Boston to recapture a rescued fugitive from labor and to put down the combination which had affected the "flagitious offense." RICHARDSON, MESSAGES AND PAPERS OF PRESIDENTS (New York, 1897), Vol. VI, 2645, 2646. Fillmore's subsequent report to the Senate on his action can be found in the same volume at 2637-2642.

[14] Cushing to McClelland, May 27, 1854, 6 A, G. Op. 466-474.

[15] Washington Union, May 28, June 3, 1854.

[16] The U.S. Marshal, Stephen V. R. Ableman, was out of town at the time and the duty devolved upon the deputy marshal.

[17] MASON *op. cit. supra,* 124.

[18] J. R. Sharpstein to F. B. Streeter, Mar. 20, 1854, Solicitor of Treasury MSS, National Archives. (Cited hereafter as S. T. MSS) Underscoring the extent

While Miller was vigorously asserting his authority, U. S. District Attorney John R. Sharpstein made a futile atempt to secure aid, going to the point of promising the commander of a federally-armed military battalion that his men would be paid if they obeyed the marshal's requisition. The commander apparently acquiesced but the men in the ranks peremptorily declined to do duty.[19]

At the court-house meeting, a vigilance committee, headed by Booth, was appointed to prevent the "kidnapping" of Glover by the federal authorities. Shortly after Booth finished a fiery speech, in which while advising against violence he declared that if his listeners were of his mind he knew what they would do, the mob, led by one of the committeemen, John Ryecraft, battered down the jail doors, freed Glover and dispatched him to Canada.[20]

Intoxicated with success, the Booth contingent then had Garland, the owner of Glover, arrested for an alleged assault committed upon the negro at the time of the capture. Reacting swiftly, Judge Miller, in pursuance of a broad interpretation of the statute of 1833, promptly freed Garland on habeas corpus—an act which was protested as a violation of states' rights.[21]

District Attorney Sharpstein now moved to bring the rescuers to justice by lodging complaints against ten of the leaders but focusing upon Booth. At his hearing before the U.S. Court Commissioners, Booth cried out that "rather than have the great constitutional rights and safeguards of the people—the writ of habeas corpus and the right of trial by jury—striken down by the fugitive slave law, I would prefer to see every Federal officer in Wisconsin hanged to a gallows fifty cubits higher than Haman's."[22] Unmoved, the commissioner held Booth to bail for his appearance before the district court in its coming July session. Booth advanced bail but, two months later, caused his surety to deliver him to the marshal and request that he be recommitted. Thereupon, the commissioner committed him to the custody of the marshal whence he was placed in the county jail on a charge of unlawfully aiding, abetting and assisting Glover's escape.[23]

That Booth's voluntary surrender was calculated to bring a test

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of the opposition, Sharpstein pointed out that included in the crowd were the acting mayor of Milwaukee, the city marshal, one of the publishers of the Milwaukee Seritinel and two editors of local German newspapers. See also *Winslow, op. cit.* 71.

[19] Sharpstein to Streeter, Mar. 20, 1854, S. T. MSS.

[20] Mason, *op. cit. supra,* 125, 125, and the accounts of witnesses at Booth's trial Milwaukee News, Jan. 12, 1855. At the trial, Booth's counsel declared that the rescue was touched off by the news that Miller would not honor the state writ of habeas corpus. Milwaukee Daily Free Democrat, Jan. 12, 1855.

[21] Sharpstein to Streeter, Mar. 20, 1854, S. T. MSS; Speech of Timothy Howe, reprinted in Madison State Journal, Mar. 2, 1860.

[22] Mason, *op cit., supra* 129.

[23] Transcript of record, Ableman v. Booth, 21 How. 506 (1859).

case involving the constitutionality of the law in the state courts soon became evident. On the day after his arrest, he successfully applied for a writ of habeas corpus to Justice Abram D. Smith of the Wisconsin Supreme Court, a man known to have strong feelings against the law.[24]

When the writ was served upon Marshal Stephen Ableman, the federal authorities were confronted with the question whether to obey or disregard it. Sharpstein, thought that obedience "might be tortured by some into a conception of the right to issue it," while disregarding it "would involve the Marshal in a direct and serious conflict which might result in a bloody strife." Reluctantly he advised Ableman to make a return by producing both the warrant of commitment and Booth.[25]

To Sharpstein's great surprise, Smith, at the hearing, expressed a desire to hear the constitutionality of the law discussed. Booth's counsel, Byron Paine, then occupied a day and a half in a well-prepared argument which had as its premise the Jeffersonian notion that the states possess the right to interpose their authority whenever their sovereign rights are violated by the Federal Government. On this basis, he argued that Congress had no authority to legislate under the fugitive slave clause of the Constitution and even if it did, the act of 1850 was unconstitutional because it denied trial by jury and vested judicial powers in commissioners. Somewhat flustered, Sharpstein followed by giving a hurriedly drawn argument in defense of the statute.[26]

On June 7, 1854, Smith ordered the release of Booth and read a lengthy opinion. Instead of stopping after finding the warrant of commitment defective, he felt impelled as a "sentinel" guarding the rights of the states and the principles of the constitution to adopt Paine's points and declare the law unconstitutional.[27]

After Solicitor of the Treasury F. B. Streeter and Attorney General Caleb Cushing had been informed of Booth's release, Sharpstein, acting for Ableman, successfully petitioned the Wisconsin Supreme Court to review Smith's decision on certiorari. With the approval of President Pierce, he then retained the state's most eminent lawyer, Edward G. Ryan, to assist him in the argument before the state court and to prosecute the rescuers in the federal court.[28]

The case of *Ableman v. Booth* was heard before the Wisconsin

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[24] Joseph Schaefer, "The Booth Case," 20 *Wisconsin Magazine of History*, (Sept., 1936), 91.
[25] Sharpstein to Streeter, June 2, 1854, S. T. MSS.
[26] The arguments of both Paine and Sharpstein can be found in WISCONSIN MISCELLANEOUS PAMPHLETS, Vol. XXVII, Wisconsin Historical Society Library.
[27] For Smith's opinion, see In re Booth, 3 Wis. 1 (1854).
[28] Sharpstein to Streeter, June 2, 3, 1854, Streeter to Sharpstein, June 14, 1854, S. T. MSS; Cushing to Streeter, Sept. 11, 1854, 6 A. G. Op. 713. 714.

High Court late in June, 1854. Paine gave substantially the same argument which he had made before Smith. The federal attorneys maintained that the acts of federal court commissioners were acts of the court and that the jurisdiction of the court could not be ousted, citing grounds of comity, the primacy of the federal judiciary in cases involving the federal constitution and laws, and the lack of power in both federal and state courts to discharge each other's prisoners upon habeas corpus. After arguing that the writ of commitment at most contanied "mere formal inaccuracies," for which Booth was not entitled to habeas corpus, they vigorously defended the constitutionality of the fugitive slave laws of 1793 and 1850.[29]

Finding the writ of commitment defective because it did not precisely state that Booth had aided a fugitive from labor to escape from custody, the Court, on July 19, 1854, unanimously affirmed Smith's decision. In separate opinions, Chief Justice Whiton and Smith declared the law of 1850 unconstitutional while Justice Crawford defended its validity.[30]

Rebuffed, Sharpstein now urged Cushing to appeal the decision to the U.S. Supreme Court on a writ of error in the belief that "a plain and direct decision . . . would be respected, obeyed and enforced even here." He also informed Cushing that thereafter the marshal would not obey state writs of habeas corpus unless so ordered by Washington.[31]

Meanwhile the federal district court had opened its July session. In a vigorous charge to the grand jury called to indict the rescuers, Miller warned that "if the people do not sustain the marshals . . . in the lawful discharge of their official functions, or if courts and juries refuse them legal redress for resistance to process, they will be forced to resort to forcible means."[32]

After the jury indicted Booth and John Ryecraft for aiding, assisting and abetting the escape of Glover, the rearrested Booth applied to the Wisconsin Supreme Court for another writ of habeas corpus. This time, however, the writ was unanimously denied on the ground that jurisdiction had now attached to the federal court and could not be interfered with by state process before a judgment was rendered.[33]

The federal authorities could now claim a momentary victory. The organ of the Pierce Administration in Washington printed a letter

[29] For reprint of U. S. Government brief, see Madison Argus and Democrat, June 30, 1854.
[30] In re Booth, 3 Wis. 1 (1854).
[31] Sharpstein to Cushing, July 22, 1854, Attorney General's MSS, National Archives. (Cited hereafter as A. G. MSS).
[32] For reprint of Miller's charge, see Madison Argus and Democrat, July 6, 1854.
[33] Ex parte Booth, 3 Wis. 134 (1854).

from a Wisconsin correspondent which declared that the state judges, in admitting the exclusive jurisdiction of the United States in cases arising out of the Federal Constitution and laws, had at last recognized a sound principle of law.[34]

On September 11, 1854, Cushing decided to appeal *Ableman v. Booth* to the U.S. Supreme Court. Requesting Streeter to initiate action, he noted that definitive pronouncements were needed on the constitutionality of the act of 1850 and the jurisdictional limits of the state courts in the issuance of habeas corpus for the release of persons held in confinement under federal law.[35] Thereupon, a writ of error was issued by Chief Justice Taney, who ordered a return by the first Monday of the approaching December term.[36]

In November, 1854, John Ryecraft was brought to trial in the district court. The highlight of the trial was Miller's charge to the jury. The doughty judge defended the constitutionality of the law, denied the defense contention that the jury could rightfully judge the law as well as the facts, and proclaimed that attacks on federal officers for the enforcement of the law constituted "the first step towards insurrection." The only real point of law which had been raised by the defense counsel, outside of "higher law" doctrine, put in issue whether the prosecution was bound to plead and prove Glover's slave status. In anticipation of this contention, Ryan and Sharpstein had framed one count which described Glover as a person owing service and escaping therefrom. In overruling the motion to quash, Miller decided no such proof was necessary to substantiate the other counts, and, as a consequence, the federal prosecutors made no proof of the fact upon the trial. Dealing with this matter in the charge, Miller reasserted his position, holding that the indictment revolved about whether Ryecraft aided, abetted and assisted the escape. However, after the jury returned a verdict of guilty and defense counsel moved to arrest judgment on the basis of the claim that Glover's slave status needed to be proven, Miller wavered and decided to write Justices Nelson, Grier and Curtis for their opinions and defer a ruling until January.[37]

Early in January, 1855, Sharpstein entered a *nolle prosequi* to the original indictment of Booth and procured a new indictment charging him with obstructing, resisting and opposing the execution of process

[34] Washington Union, Aug. 6, 1854. See also E. G. Ryan to Cushing, Aug. 18, 1854, A. G. MSS.

[35] Cushing to Streeter, Sept. 11, 1854, 6 A. G. Op. 713, 714. A few days later Cushing wrote to Arthur McArthur asking him, "if there be need," to explain to Justice Smith, a personal friend of his, that the action was in no sense a reflection on him. Cushing to McArthur, Sept. 22, 1854, Cushing MSS.

[36] Transcript of Record, Ableman v. Booth, 21 How. 506 (1859).

[37] Miller's charge is reprinted in U.S. v. Ryecraft, 27 Fed. Cases 918 (1854). See also, Ryan to Cushing, Dec. 11, 1854 and F. K. Bartlett to Cushing, Nov. 26, 1854, Cushing MSS.

and aiding, assisting and abetting Glover's escape. Booth's attorneys then moved that the indictment be quashed on the ground that Marshal Ableman had placed enemies of Booth on the grand jury. After argument Miller overruled the motion and prepared to bring Booth to trial.[38]

Now at total war with the federal authorities, Booth procured a *capias* from the Milwaukee County Court against both Miller and Sharpstein for alleged false imprisonment. Forced to give bail for $5,000 or be imprisoned on the very eve of the trial, Miller asked Cushing to support a bill, which he had recently urged upon the House and Senate Judiciary Committees, to extend to all federal officers the full benefits of the law of 1833. That statute, as mentioned above, for the most part covered only officers enforcing the revenue statutes and provided for the removal of suits against them to the federal courts. "It has come to this," Miller warned, "that the judges and officers must be sustained, or all attempts to enforce the laws on their part will become futile."[39]

Miller's great concern was reflected, a few days later, in his angry charge to the jury in the heated Booth trial. He admonished the jury not to commit "moral perjury" by departing from the law as he defined it. On the basis of advice from the federal judges to whom he had written, he reaffirmed his earlier ruling that the slave status of Glover need not be proven. Resolutely determined to protect the federal law enforcement officers, he pointed out that the rescue made the marshal subject to a civil suit for the value of Glover. He also reminded the citizenry of their duty to aid in the service of process. Leaving no doubt as to his belief in Booth's guilt, he concluded by saying that assuming the credibility of the witnesses, a clearer case of resistance and opposition to process could not have been presented.[40]

After the jury found Booth guilty on the final two counts—aiding, assisting and abetting Glover's escape from lawful custody—Miller denied motions for a new trial and arrest of judgment and sentenced Booth to thirty days in the county jail and a fine of $1,000 and Ryecraft to a ten day term in jail and a fine of $200.

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[38] Milwaukee Daily Free Democrat, Jan. 9, 10, 1854 and Milwaukee Sentinel, Jan. 10, 1854. The first three counts of the new indictment were taken under the terms of the Act of Apr. 30, 1790 (1 *Stat.* 117) and the final two counts were taken under the fugitive slave act of 1850. Booth was not tried earlier because he had been ill. Messenger died before trial.

[39] Miller to Cushing, Jan. 9, 1855, Cushing MSS. Senator Toucey of Connecticut introduced a bill in Congress early in 1855 to permit removals into federal courts of suits instituted in state courts against any federal officer for acts done under authority of federal law. Warren, *op. cit.*, Vol. II, 538.

[40] Miller's charge is reprinted in Milwaukee Daily Wisconsin, Jan. 16, 1855. For evidence that Miller received an answer from the federal judges, see his letter to Attorney General Jeremiah Black, Nov. 25, 1857, Black MSS, Library of Congress.

Popular reaction to the conviction manifested itself in meetings at which fiery resolutions denouncing the fugitive slave law were passed and funds were collected for the further defense of the prisoners. Miller was the butt of much of the criticism with one meeting resolving: "We cannot look on the course of Judge Miller with the least degree of allowance, and . . . we regard him as a disgrace to the name of judge, a tyrant when clothed with a little brief authority, an old Granny and a miserable Doughface."[41]

On January 27, 1855, Booth and Ryecraft, through their lawyers, secured two writs of habeas corpus from the Wisconsin Supreme Court, one of which was served on Ableman and the other on the county sheriff. Ableman made a return in which, without acknowledging the court's jurisdiction, he stated that inasmuch as the prisoners were in the sheriff's custody at the county jail, he could not produce them in court.[42] Three days later, the sheriff took the prisoners to Madison. Some 2,000 people marched along with them to the Milwaukee railroad depot. As they passed Miller's home, they hissed and hooted and a band played "Jordan is a hard road to travel."[43]

After an *ex parte* hearing, the Wisconsin court voted unanimously to discharge both Booth and Ryecraft. Although each judge wrote a separate opinion reaffirming his views on the constitutionality of the law, they all agreed that the district court had no jurisdiction because the counts of the indictments in failing to describe Glover's status, did not set forth an offense punishable by federal law.[44] The decision was inconsistent with the court's previous admission that the federal court had jurisdiction and with an earlier ruling by Chief Justice John Marshall on this jurisdictional point.[45] The most that can be said of the Wisconsin Court's action is that in the absence of a federal right of appeal open to Booth and Ryecraft by writ of error to the U.S. Supreme Court, it chose to regard the federal district court as an inferior court and by assuming alleged errors to be nullities, assimilated a ha-

[41] Mason, *op. cit. supra,* 135, 136.

[42] Transcript of Record, Ableman v. Booth, 21 How. 506 (1859).

[43] Mason, *op cit.,* 136.

[44] In re Booth and Ryecraft, 3 Wis. 144 (1855).

[45] It must be said that in denying habeas corpus to Booth late in the summer of 1854, the Wisconsin Court, although admitting the jurisdiction of the federal court, inconsistently reserved the right to review on habeas corpus after the trial.

In refusing to review a criminal case from a District of Columbia court on habeas corpus in 1829, Marshall declared: "It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error . . . The judgment of the circuit court, in a criminal case, is, of itself, evidence of its own legality and requires for its support, no inspection of the indictment on which it is founded." Ex parte Tobias Watkins, 3 Peters *193, (1829) at *207.

eas corpus hearing to a review on a writ of error. Thus in its two decisions, the Wisconsin Court had, in effect, decided that a state judge could use habeas corpus against the federal courts as a writ of prohibition before judgment and as a writ of error after judgment.

Two days later, Miller opened a session of his court by reading a long statement of the Wisconsin Court's action. Pointing out that even Wisconsin law proclaimed the duty of all sheriffs to retain federal prisoners in their custody until discharged by due course of the laws of the United States, he warned that "if the interposition of this writ from a state is admitted, the effective abrogation of the laws and authority of the United States is apparent." Examining the indictments, he showed that the warrant appended to them adequately described Glover's status. In what appears today as an unanswerable argument, he declared, "if I should commit an error in any proceeding, it is to be regretted; but this forms no ground for a tribunal of the State to discharge a party or convict in this court upon a writ of habeas corpus." Ominously he asserted that it was now possible "that some state or county judge or state court commissioner may follow this precedent, and upon some vague notion of the unconstitutionality of acts of Congress, or of error in the proceedings in this court . . . discharge all the United States convicts and prisoners from the prisons and jails of the State." Deciding not to look upon the state court's action as an attempt to cause a rupture between the state and the United States, Miller generously ascribed it to "local excitement." Because Ryecraft had already served ten days in jail, there was no need to rearrest him. However, Booth still had ten days to serve besides paying the $1,000 fine. Inasmuch as he obviously could not safely be put in a state jail, Miller, who saw no immediate need to provide a temporary place of confinement, decided to refer the matter to Washington.[46]

The next day, Sharpstein informed Streeter that "nothing short of

[46] The writer used a reprint of Miller's charge which he found in the Justice John McLean MSS in the Library of Congress. Miller's apprehensions were not misplaced. A few days after he delivered his remarks, the same Milwaukee County Judge who had issued habeas corpus after Glover's capture, used the same writ to release an individual committed to the county jail on a federal charge of stealing letters from the post office. Apparently the ground of the judge's action lay in the pronouncement by a majority of the members of the Wisconsin Supreme Court in the first Booth case, that the act of Congress authorizing the appointment of court commissioners was unconstitutional. See letter to editor, Milwaukee News Mar. 1, 1855. Sharpstein immediately reported the incident to Cushing, explaining that the individual was promptly rearrested. This made the marshal subject to a suit for damages under the state law forbidding the rearrest of persons so released. Sharpstein further explained that the difficulty lay in the fact that there was no federal jail and that the writ was served on the Sheriff, who in this and other instances, obeyed it. Sharpstein suggested that the marshal be instructed to retain custody of federal prisoners and employ a force sufficient to resist state interference. Sharpstein to Cushing, Feb. 20, 1855, A. G. MSS. For another interposition against federal authority at this time by the Wisconsin Supreme Court, see Bagnal v. Ableman, 4 Wis. 84 (1855).

overpowering force," would awe the nullifiers into submission.[47] Others throughout the nation felt that drastic action would have to be taken. The New York Journal of Commerce for example, characterized the action of the Wisconsin Court as "utter subversion of the powers of the Federal Judiciary," and the Whig New York Express proposed that Pierce, like Jackson before him, make a special communication of the facts to Congress.[48]

Eschewing the Jacksonian approach and the use of force which an immediate rearrest of Booth would have entailed, the legalistic Pierce Administration decided to appeal the Wisconsin decision to the U.S. Supreme Court. Anticipating a refusal of the Wisconsin Court to recognize a writ of error by ordering its clerk not to send up the case record, Streeter ordered Sharpstein, as "a precautionary measure," to obtain an exemplified copy of the record at once from the clerk without any reference to the projected appeal. Sharpstein complied and the unsuspecting clerk readily handed him a copy.[49]

When the writ of error was sent to the Wisconsin Court, the judges decided, in effect, to sever relations with the U.S. Supreme Court by directing the clerk not to make a return or to enter the writ upon the Court's journals or records. Sharpstein promptly informed Streeter that the move was "so intimately connected with state politics that the consideration of one necessarily involves the other."[50] Thoroughly indefensible in law, the Court's action was tantamount to judicial nullification of Section 25 of the Judiciary Act of 1789 which in allowing for such writs of error, had served as the legal basis for federal review of almost 200 cases, including one from Wisconsin, up to that time. Then, again, the court was grossly inconsistent. In 1854, it had assented to a writ of error in *Ableman v. Booth* and Chief Justice Whiton had admitted in his original opinion in that case that the decisions of the federal supreme court were final and conclusive upon all state courts.[51]

In September, 1855, Cushing revealed his strategy in the case, believing that a due respect for the Wisconsin Court demanded that all

[47] Sharpstein to Streeter, Feb. 6, 1855, S. T. MSS. It ought be added at this point that the principal rescuers were tried for rioting in the Milwaukee Circuit Court, under state law, and found not guilty in the spring of 1855. Milwaukee News, Mar. 14, 15, 1855.

[48] Reprinted in Milwaukee News, Mar. 13, 20, 1855.

[49] Cushing to Streeter, Feb. 23, 1855, 7 A. G. Op. 52. Streeter to Sharpstein, Mar. 5, 13, May 4, June 11, 16, Aug. 7, Sept. 29, 1855, Streeter to S. V. Ableman, Apr. 26, 1855. Sharpstein to Streeter, Mar. 28, June 4, Sept. 5, 1855, Ableman to Streeter, May 8, 1855, S. T. MSS.

[50] Sharpstein to Streeter, July 25, 1855, Streeter to Sharpstein, Sept. 29, 1855, S. T. MSS.

[51] The single Wisconsin case was Walworth v. Kneeland, 15 How. 348 (1853). For Whiton's admission, see In re Booth, 3 Wis. 1 (1854) at 63, 64. See also Chief Justice Taney's observation in Ableman v. Booth, 21 How. 506, at 509 (1859).

legal remedies be first exhausted, he deemed it wise to withhold force in the application of the sentence upon Booth until a final settlement was made at the coming term of the federal supreme court.[52] Thus Cushing, in March, 1856, after having earlier secured a postponement of the argument in the first *Booth* case, moved before the Supreme Court that the second *Booth* case be docketed and set down for argument at the next term. However, Taney, speaking for the court, two months later, decided that "in a matter of so much gravity and importance," a rule should first be made upon the clerk of the Wisconsin Court to make a return before the next term. At the same time, because of the similarity of the two cases, he ordered that they be argued together, thus precluding any disposition of the matter at that term.[53] When, in March, 1857, it became clear that the Wisconsin Court would not permit its clerk to comply, the court finally ordered that the copy of the record, which had been sent up by Sharpstein, be received and the cases argued at the next term.[54]

With the onset of the Buchanan Administration, Sharpstein resigned the district attorneyship and the harassed Ableman resigned as marshal because he could not devote full time to duties made "embarrassing and arduous by the constant opposition and resistance to the process and jurisdiction of he court."[55]Patronage difficulties now beset the appointment of new men to these vital positions. Miller, a personal friend and devoted follower of Buchanan, wrote the new Attorney General, Jeremiah Black, praising the appointment of D.A.J. Upham as district attorney and criticizing the nomination of M. J. Thomas, a follower of Senator Stephen A. Douglas, as marshal. Miller was anxious for the appointment of a marshal "who would not intrust dangerous and difficult business to deputies, who in a great measure ag-

[52] Cushing to Pierce, Sept. 7, 1855, 7 A. G. Op. 486.

[53] U.S. v. Booth, 18 How. 477 (1856), Ableman v. Booth, 18 How. 479. (1856). On Feb. 5, 1857, the Wisconsin Supreme Court formalized its verbal order to the clerk not to comply, by placing a written order to that effect in its record. See opinion of Chief Justice Luther S. Dixon in Ableman v. Booth, 11 Wis. 517 (1859). Cushing's motion to postpone argument of the first Booth case is dated Jan. 4, 1856 in the Docket Book of the U.S. Supreme Court; it is likewise listed in the court's Minute Book.

[54] Ableman v. Booth and U.S. v. Booth, 18 How. 506, at 512 (1859).

[55] Sharpstein to Buchanan, Apr. 6, 1857, Ableman to Buchanan, Apr. 29, 1857, A. G. MSS. The *Booth* cases were not the sole cause of Ableman's displeasure. He had arrested one Bagnal on a warrant issued by the federal district court in 1853. After the Wisconsin Supreme Court, in 1855 ,upheld an order of a lower state court releasing Bagnal on habeas corpus, Ableman was fined $1250 in a state court for false imprisonment. Because he rearrested Bagnal after the habeas corpus was issued, Ableman was sued a second time by Bagnal. In December, 1857, Bagnal was induced by the federal authorities to discharge the first judgment; the second cause was barred in March, 1857, by the statute of limitations. Bagnal v. Ableman, 4 Wis. 184 (1855). Sharpstein to Streeter, Mar. 4, 1854, Dec. 29, 1855, Mar. 3. 1856, Mar. 8, 1857, Streeter to Sharpstein, Nov. 29, 1855, Jan. 29, 1856, Streeter to McCelland, Jan. 12, 1856, S. T. MSS.

gravate or cause trouble by their recklessness or mismanagement."[56] Thenceforth, the factional division in the Democracy between the followers of Buchanan and the friends of Douglas added to the already great difficulties of law enforcement in Wisconsin.

In November, 1857, Miller wrote a long letter to Black recounting the history of the *Booth* cases. He related that earlier that year the state legislature had joined the judicial nullifiers by passing a personal liberty law which provided, in part, that judgments recovered against any person for non compliance with the fugitive slave law could not constitute a lien against his property. Under this provision, Booth successfully replevined, in a state court, property which had been seized from him by the marshal in execution of a judgment which Garland, the owner of Glover, had been previously awarded in Miller's court. Miller warned Black that the law would be sustained by the state supreme court. As for rearresting Booth at that time, Miller thought such a move might supply the Republicans with political ammunition. However, if an arrest were required and a safe place of confinement could be found, he saw no need to await the action of the U.S. Supreme Court. Probably with the furor over the *Dred Scott* decision in mind, Miller expressed a wish that a case not involving a slave be the occasion for a decision by the supreme court on the delicate question of conflict of jurisdiction. He revealed that Cushing had expected that such a case would soon come up for review.[57] This revelation appears significant for it probably explains the reluctance of Cushing to press for a prompt review of the first Booth case. It is true that the second adverse decision intervened and logic dictated that the cases be merged. Nevertheless, despite the importunate urgings of Ryan and Sharpstein and the obvious comfort afforded to the obstructionists by the lack of swift action, Cushing chose to move slowly.[58]

As it turned out, a case not involving a slave did not materialize and the *Booth* cases were finally heard by the U.S. Supreme Court on January 19, 1859, after several attempts had been made in Congress to emasculate the Court by repealing Section 25 of the Judiciary Act of 1789.[59] Booth made no appearance, being represented only by a copy of Paine's original argument which had been appended to his

[56] Miller to Black, June 19, 1857, Black MSS, Library of Congress.
[57] Miller to Black, Nov. 27, 1855, Black MSS.
[58] Ryan to Cushing, Jan. 15, 1855, Cushing MSS; Sharpstein to Cushing, Dec. 18, 1854, Feb. 20, 1855, A. G. MSS. In the latter letter, Sharpstein warned against delay in enforcing Booth's sentence and pointed out that the first *Booth* Case, which had already been appealed, involved essentially the same questions as the second case. He predicted that before a review of both cases could be consummated it would become impossible to execute the criminal laws of the U.S. in Wisconsin.
[59] Warren, *op. cit. supra,* Vol. III, 55-58.

return to the citation in 1854. Black appeared for the United States and delivered a blistering indictment of the Wisconsin judges, asking the court to impress upon them that in refusing to send up the record, they were guilty of contempts and that they owed their impunity not to any weakness of the U.S. Supreme Court, but to "the magnanimity of the Government in forebearing to ask for punishment."[60] A few days later the Madison State Journal threw back the challenge, saying, "There will be lively times here, if old Buck's court attempts to punish our Judges for contempt."[61]

On March 7, 1859, Taney, speaking for a unanimous court, reversed both Wisconsin decisions. He vigorously asserted the constitutionality and necessity of the court's appellate jurisdiction, denied the power of state judges and courts to interfere by habeas corpus before or after trial to defeat the jurisdiction of federal tribunals, and pronounced the fugitive slave act constitutional. Most important for law enforcement purposes, was his prescription of the course to be followed by federal marshals when confronted with state writs of habeas corpus. Reaffirming the aforementioned opinion of the Attorney General, he stated that the duty of a marshal entailed making a return informing the judge or court involved, of the authority under which he held the prisoner and refusing to produce the body. If the authority of a state, in the form of judicial process or otherwise, should then attempt to deprive the marshal of the custody of his prisoner, "it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference."[62]

Angered by the decision, the Republican Wisconsin Legislature reacted swiftly by passing a series of resolutions denouncing the action of the court as "an arbitrary act of power . . . without authority, void and of no force," and urging "positive defiance" by the states as the "rightful remedy."[63]

In this same truculent state of mind, a Republican caucus, in March, 1859, ignored the incumbent, Abram D. Smith, and nominated Booth's advocate, Byron Paine, to run against Democrat William P. Lynde for a seat on the Wisconsin Supreme Court. The subsequent campaign, which was marked by attacks on Lynde for his predilection

[60] Pointing out the dire threat to federal authority in the Wisconsin use of habeas corpus, Black, after asking the U. S. Supreme Court to imagine itself listening to arguments of counsel while a county probate judge sat in the audience, exclaimed: "It is not worth while for the counsel to argue the case to you, let them address him; for he is the judge of last resort. You need not charge the jury . . . Charge the judge in the corner; for if you do not convince him, he will mount his habeas corpus and charge down upon you . . . One word of his will paralyze your power." ESSAYS AND SPEECHES OF JEREMIAH S. BLACK (N.Y., 1886), 416-430.

[61] Jan. 24, 1859.

[62] Ableman v. Booth and U.S. v Booth, 21 How. 506 (1859).

[63] WIS. LAWS 1859, p. 247, reprinted in Mason, *op. cit.*, 142, 143.

to practice in Miller's court, reached its nadir with an uncouth assault upon the federal judiciary by the politically ambitious Carl Schurz. Schurz accused the U.S. Supreme Court of procuring the copy of the record in the second *Booth* case in "a miserable sneaking way," and called federal district judges "petty pro-consuls" who meddle in domestic affairs. He was for Paine and states' rights because he did not want to see the "dirty finger marks of Buchanan's Administration" and "Judge Miller's opinions and pretensions" impressed upon the Wisconsin Supreme Court. "People of Wisconsin," he shouted, "we have come to a point where it is loyalty to resist, and treason to submit."[64] Paine went on to win the election handily and when the moderate Luther S. Dixon succeeded to the Chief Justiceship upon Whiton's death later that year, the Wisconsin Court had no member who had participated in the original *Booth* decision and but one, Orsamus Cole, who had participated in the second decision.

In May, 1859, fortune seemed to favor the beleaguered Wisconsin Democrats when Booth was accused of seduction by a fourteen year old girl. His successful prosecutor in the 1855 trial, Edward G. Ryan, jumped at the opportunity to prosecute him in the local circuit court. Calling upon the full measure of his great powers to repay endless indignities heaped upon the federal authorities for the preceeding five years, Ryan proceeded to strip the fiery editor of the last vestige of reputation. Alluding to two confessions allegedly made by Booth before the trial, he declared:

> "If Booth had been innocent, he would have said when arrested by Beck, "Go with me and I will get you bail. You are doing your duty in arresting me. This false charge has been made, but the minute I have been discharged on bail I will meet it. I will demonstrate the malignity, the falsehood of this charge. No enemy shall overthrow me on the pulling complaint of a girl. I have stood in the ranks of war too long for that. I have headed my party when the abolitionists were in absolute personal danger from the ill feeling of the public. I have built that party up through the storms of political warfare. I have faced every sort of assault. I have been assailed by that most terrible of ruthless assailants, Judge Miller, Ableman, of the strong hand, has taken me by the shoulder and led me. I faced the world, defied my enemies, revolutionized the state, and triumphed personally over all my foes. So will I triumph here." That was what Booth would have said if innocent. He knew persecution of old, and knew that it helped him, made his fortune. He delights in persecution. Persecution is profitable to him, politically and pecuniarily."[65]

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[64] For text of speech, see Madison State Journal, Mar. 25, 1859. For criticism of Miller's court during the campaign, see the Mar. 29 and Apr. 5, 1859 editions of the same paper.

[65] *Trial of Sherman M. Booth For Seduction* (Milwaukee, 1859), 273, 274.

Despite the evidence, the jury, possibly influenced by the defense claim that the trial was a "Democratic Conspiracy," could not agree on a verdict and the tarnished Booth was freed.

Meanwhile, the choleric Black provoked an altercation with Chief Justice Taney. Eager to obtain a copy of Taney's opinion in the *Booth* cases, Black, on April 26, 1859, became incensed when one of the aides to the absent clerk of the Supreme Court, William Carroll, informed him that Taney had ordered that no copy be given to any one until after the publication of the official volume of the court reports. Demanding a copy in the name and by direction of President Buchanan and "for the public use in a matter of great and pressing importance," Black wrote a stern protest and asked that it be filed. The distressed assistant clerk then wired Taney in Baltimore and was immediately answered with an order that he give Black a copy. After receiving it, Black requested Carroll to send him the mandates in the cases together with two certified copies of the opinion. Carroll promised to send the mandates but decided to consult with Taney before handing out more copies of the opinion. Rushing to Baltimore, he informed Taney of Black's intransigence and was directed by the Chief Justice to furnish two copies to Black and one to Buchanan. Angered by Black's action, Taney then wrote a letter to Carroll stating that if Black did not withdraw the protest, he would be compelled to file a vindication of order and bring the subject before the court at its next term. He asked Carroll to show the letter to Black and to inform him that in ordering the copies to be handed over, he (Taney) intended that they be used only as an aid in the discharge of official duties and in the confidence that the opinion not be published before it appeared in the official reports. In painful remembrance of the premature publication of Justice Curtis' dissenting opinion in the *Dred Scott* case, Taney was determined that no copy of a court opinion be given to any public officer except upon application to the presiding officer of the court and under the conditions stated above.

In compliance with Taney's directive, Carroll went to the White House and delivired the copy of the opinion to Buchanan, who then made the comments mentioned at the beginning of this paper on the need of close cooperation between the court and the executive in the enforcement of the law. Confronting Black with Buchanan's statement, two days later, Carroll declared that he presumed those were also the views of the Attorney General. Without producing or alluding to Taney's letter, he suggested that Black withdraw his protest because if it were filed, he felt sure than Taney would file a vindication of the order and call the matter to the court's attention. Black then thanked

him for the suggestion and withdrew the protest but not before the careful clerk made a copy of it and filed it away with the case record.[66]

Black's course in this incident may have been dictated by a desire to initiate action to have the mandates filed before the recalcitrant Wisconsin Supreme Court and proceed to the rearrest of Booth. However, he had already waited fifty days since the decision had been rendered and did not act until ten weeks had elapsed after the opinion was published. A more likely explanation of the "matter of great and pressing importance," alluded to in his protest, lies in the fact that on the very day that he filed his complaint, he also addressed a letter to a marshal in Ohio who was anxious for advice as to what course to pursue in the face of a similar interference by a state writ of habeas corpus. Unable to send a full certified copy, Black could only cite Taney's opinion in the Booth cases, while instructing the marshal to decline to produce the prisoners.[67]

On August, 4, 1859, Black sent the mandates to District Attorney Upham and directed him to lay them before the Wisconsin Supreme Court. Authorizing Upham to produce his letter if necessary, he told him that he need not make a motion but merely ask that the mandates be filed and then respectfully leave the subject to the consideration of the court. He further instructed Upham to move in the district court, at as early a day as possible, for the rearrest of Booth. The marshal was to place him where no effort at a rescue could succeed and if another habeas corpus were issued, he was to disregard it and defend himself against all attempts to free Booth. Urging caution, Black advised Upham "to show no wanton disrespect to the judicial or other public authorities of Wisconsin," and to guard against provoking any hostility.[68]

[66] Black to Clerk of U.S. Supreme Court, Apr. 26, 1859; Taney to D. W. Middleton (Telegram), Apr. 26, 1859; Taney to Carroll, Apr. 28, 1859 Memoranda of William T. Carroll, dated Apr. 26-30, 1859. All of the above can be found appended to the original transcript of record in Ableman v. Booth and U.S. v. Booth, 21 How. 506 (1859), Office of the Clerk of the United States Supreme Court. For the story of the altercation between Taney and Curtis over the premature publication of Curtis' opinion in the *Dred Scott* case, and Taney's refusal to give Curtis a copy of his opinion before the publication of the official reports, see Swisher, *Roger B. Taney* ,512-516. In his above-mentioned letter to Carroll, Taney revealed that he allowed a copy of his opinion in the *Dred Scott* case to be given to Governor Walker before it was published in the official reports. He thought this action proper because Walker was about to go to Kansas and needed the opinion in the discharge of his official duties. For a full consideration of Taney's order in connection with the *Dred Scott* and *Booth* cases, see my article, " A Note on Chief Justice Taney and the Publication of Court Opinions," which will appear in the Dec., 1957 edition of the CATHOLIC UNIVERSITY LAW REVIEW.

[67] Black to M. Johnson, Apr. 26, 1859, James Buchanan MSS. Pennsylvania Historical Society. The Taney opinion was published on or about May 20, 1859. See Washington National *Intelligencer,* May 21, 1859.

[68] Black to Upham, Aug. 4, 1859, Atty. Gen. Ltr. Bk. B-2, 219. The Administration paper had already outlined this policy, Washington CONSTITUTION, June 7, 1859.

On September 22, 1859, the same day that Upham presented the mandates to the Wisconsin Court, Harrison Hobart, the Democratic candidate for governor in the coming autumn election, wrote Black and Secretary of the Interior Jacob Thompson requesting a deferral of the rearrest of Booth. Worried over the political effect of such action, he warned that it "would be seized upon by the enemies of the Administration and converted into a fire-brand of trouble and excitement."[69] Marshal Thomas went immediately to Washington to relate in person to Black the political anxieties of the Democrats on the point. Apparently Black was convinced by his blandishments, reinforced as they were by a plea from Thompson, for, an October 3, 1859, Thomas wired Upham from the capital that he was authorized by Black to inform him to use his discretion and that no fault would be found if the arrest were delayed. Upham then decided not to arrest Booth before the November term of the district court, by which time the election would be over.[70]

Judge Miller and his "cut-throat" court loomed large as an issue in the gubernatorial campaign. Hobart was accused of defending Miller's alleged propensity to decide in favor of out-of-state creditors in civil actions. If Hobart were elected, so reasoned the Madison State Journal, the state judiciary would be placed under Miller's control and the state's chief executive would attempt to secure the filing of the mandates in the *Booth* cases.[71] In the face of this attack, Hobart met defeat at the hands of the incumbent, Alexander Randall, who had previously endorsed the nullifying resolutions of 1859.[72]

With the election over, Upham moved in Miller's court for an order to rearrest Booth. However, in view of the great excitement over the John Brown affair and in the fleeting hope that the state supreme court might yet comply with the mandates, the politically sensitive Miller deferred a decision.[73]

Ten days later, after it became known that the Wisconsin Court by an evenly-divided vote had refused to file the mandates, Upham informed Black that trouble, in the form of a writ of habeas corpus could now be expected upon the rearrest of Booth. Warning that the marshal and his deputies might be overpowered and that there was no place in which Booth could be detained, he asked for instructions.[74]

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[69] Hobart to Black, Sept. 22, 1859, Black MSS.
[70] Thompson to Black, Oct. 3, 1859, Black MSS; Upham to Black, Oct. 12, 1859, A. G. MSS.
[71] Sept. 24, 26, 1859. See also the editions of Sept. 30, Oct. 18, 22, 26, 1859 for additional attacks on Miller.
[72] S. S. Gregory, *An Historical Judicial Controversy,* 16 MICH. L. REV. (Jan., 1913), 188.
[73] Miller to Black, Dec. 6, 1859, Black MSS.
[74] Upham to Black, Dec. 16, 1859, A. G. MSS. For the Wisconsin decision, see Ableman v. Booth, 11 Wis. 517 (1859). Justice Paine, having been of counsel

Booth was finally rearrested on Miller's order and placed in the federal custom house in Milwaukee on March 1, 1860. Immediately the Republican press beat the drums of criticism anew. The State Journal, for example charged that the federal authorities were "kindly interposing to arouse the people of the state."[75] In fact, the rearrest of Booth played into the hands of the extremists. Since Booth's denigration at the seduction trial, many Republicans had come to despise him. Similarly, they had also, in good numbers, become cognizant of the anarchical tendencies of their states' rights stand, particularly in view of the possibility that their party might soon control the federal government.[76] Nonetheless, if political capital could still be squeezed out of Booth, and if the federal government was willing to make a martyr of him, they would take full advantage.

Jehu H. Lewis, who, after succeeding Thomas as marshal upon the latter's death late in 1859, had aroused the enmity of the Douglas faction in the appointment of deputies, now outlined his plan of action to Black. Determined not to allow Booth to be freed on habeas corpus, he envisioned that he would be found in contempt of the state court and served with an attachment. In the face of his resistance, the attachment would be enforced by a posse or by state troops. He had evidence that Governor Randall had ordered the commander of the state militia at Milwaukee to hold his troops in readiness to obey his call at a moment's notice. In view of this, plus the ominous possibility of mob action, Lewis resolved to consider the service of habeas corpus upon him as an overt act on the part of the state, after which he would wire the President for military aid. He indicated that local volunteer companies might assist him in the event of an attack on the custom house and revealed that he intended to requisition the St. Louis arsenal for ammunition.[77] However Governor Randall, after learning shortly thereafter that aid might be afforded Lewis, thwarted this design by disbanding the troops involved.[78]

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for Booth, did not sit. Chief Justice Dixon voted to file the mandates, Justice Cole voted to the contrary.

[75] Lewis to Black, Mar. 1, 1860, A. G. MSS; Madison State Journal, Mar. 2, 1860.

[76] For Republican attacks on Booth, see Carl Schurz's comments reprinted in Warren, *op cit. supra,* Vol. III, 65 and the comments in the Aug. 8, 16, 24, 1859, editions of the Madison State Journal. For Republican attacks on the extreme states' rights position, see remarks of Timothy Howe in the Apr. 23, May 7, June 25, 1859 editions of the above paper. See also the Feb. 17, 1860 edition of the same paper for an article justifying the appellate jurisdiction of the U.S. Supreme Court. Chief Justice Dixon appended this article to his opinion in Ableman v. Booth, 11 Wis. 517 (1859).

[77] Lewis to Black, Mar. 5, 1860, A. G. MSS. Concerning opposition to Lewis see M. Steever to Black, Dec. 7, 1859 and Miller to Black, Jan. 2, 1860, Black MSS.

[78] Geo. W. Carter, "The Booth War in Wisconsin," *Proceedings of the State Historical Society of Wisconsin* (1902), 164. Milwaukee Daily News, Mar. 6, 9, 1860.

Fortunately, the anticipated explosion was averted with an evenly-divided Wisconsin Supreme Court refused to grant habeas corpus to Booth.[79] Tension had diminished but was not dissipated when Booth's term of imprisonment expired on March 23, 1860. Unwilling to personally pay his fine and the costs, or have his friends do so for him, he remained confined in the custom house and brought suit against Miller and Lewis for false imprisonment. The harassed Miller asked Black to permit him to hire special counsel to save him the necessity of entering into bonds for a writ of error to the U.S. Supreme Court on a probable adverse ruling in the state courts and to prevent a sale of his property pending the final ruling.[80]

Conscious of the political import of his "martyrdom," Booth remained defiant. Drawing upon his broad experience as an agitator, he wrote a series of incendiary letters which were promptly published in newspapers throughout the state. Maintaining that he had been kidnaped by virtue of a pretended judgment and denied the right to counsel and visits by his friends, he demanded that means be found for his liberation if the laws and courts of the state were to be accounted of any force.[81] By such misrepresentations Booth and his followers were able to confuse and further inflame the public mind.

Late in April, 1860, Black rejected requests from Upham and Miller which, along with a petition from several Milwauke citizens, asked for a remission of Booth's fine. Angrily, Black retorted, "It is almost impossible to believe that the men who used him as their tool and cats-paw for so long a time would desert him now, and leave him to suffer for want of so small a sum as $1,500. The political combination who took advantage of his ignorance and the brutality of his nature to make him defy the law and the authority of his country will hardly slink away from him in this extremity. They applauded his deeds to the very echo; will they not each of them pay a little expense rather than suffer the man who gave them so much pleasure to spend his days in a prison?" Until the application for a pardon attesting to Booth's poverty came in proper form directly from Booth, Black would give no consideration to such pleas.[82]

Public misunderstanding of the cause of Booth's continued deten-

[79] See note attached to report of Ableman v. Booth, 11 Wis. 517 (1859) at 555-558. Early in April a state court commissioner issued a habeas corpus which was served on Lewis. Lewis made a return refusing to produce the body and citing the authority by which Booth was held. No attempt was made to enforce the writ. Madison State Journal, Apr. 5, 7, 1860.

[80] Miller to Black, Mar. 26, 1860 A. G. MSS. For evidence that Booth did not want freedom, see his letter to John Fox Potter, dated Mar. 16, 1860, Potter MSS, Library of Wisconsin State Historical Society.

[81] Carter, *op. cit. supra,* 164, 165. Milwaukee Daily Sentinel, Apr. 16, May 19, 22, 1860.

[82] Miller to Black, Mar. 26, 1860, A. G. MSS; Black to Upham, Apr. 25, 1860, Atty. Gen. Ltr. Bk. B-2397.

tion finally brought Upham, upon Miller's advice, to publish a clarifying letter explaining the legal basis for the confinement and relating that inasmuch as Booth had been shown Black's letter setting forth the steps to be taken to secure a remission of the fine, he remained in prison at his own option.[83]

By the summer of 1860 the unwillingness of the President and Attorney General of the United States to release Booth insured that the question would play a significant part in the presidential election campaign. Miller felt certain that if it had not been for the opposition politicians, Booth would have long since paid the fine or applied for a remission. Likewise, he was convinced that it would now be impossible for the marshal to retain him in his custody. He related to Black that the Lincoln adherents were exploiting the situation to their advantage and the Douglas men were disposed to advance as many complaints as possible against the local functionaries of the Buchanan Administration.[84]

After eight abortive attempts to free Booth, and after an evenly-divided Wisconsin Supreme Court again refused habeas corpus, a forcible rescue was effected by a band of armed men on August 1, 1860. Whisked away to Waupun, Wisconsin, Booth went to the state prison where he was welcomed by the protecting arms of Hans Heg, the state prison commissioner.[85]

The Lincoln and Douglas camps gloated over the embarrassment of the federal authorities. Lewis had wired ahead to Satterlee Clark, a prominent Douglasite, authorizing him to arrest Booth. Encountering Booth, Clark allegedly told him that if Douglas had been president he would have arrested him, but that no one in that region wished to aid men like Buchanan and Lewis, who were prostituting their offices to satisfy Buchanan's desire for revenge and, in the process, aiding the Republican Party.[86] "We trust this will be a lesson to Lewis and all officers of Buchanan," commented a leading Douglasite newspaper.[87]

Beset by tremendous obstacles in the form of a hostile public, an inability to rely on the telegraph lines, and the difficulty of enlisting

[83] Upham to editor, Milwaukee News, July 19, 1860 (clipping found attached to letter of Miller to Black, July 20, 1860, A. G. MSS). See also Milwaukee Sentinel, July 20, 1860. For criticism of Booth's imprisonment, including letters from the prisoner, see the Apr. 16, 24, 26, 28, May 17, 19, 22, 25, June 2, 30, 1860 editions of the Milwaukee Sentinel. Since Ryecraft had not been imprisoned for not having paid his fine, it seemed unjust to many that Booth should be kept in jail after having served his sentence.

[84] Miller to Black, July 20, 1860, Aug. 4, 1860, A. G. MSS.

[85] Lewis to Buchanan, Aug. 3, 9, 1860, Feb. 22, 1861, Miller to Black, Aug. 4, 1860, A. G. MSS. For Booth's story of the rescue, see Booth to editor, Milwaukee Daily Free Democrat, Aug. 6, 1860.

[86] Lewis to Buchanan, Aug. 9, 1860, A. G. MSS; Miller to Black, Aug. 4, 1860, A. G. MSS; Horicon Argus, Aug. 3, 1860.

[87] Horicon Argus, Aug. 3, 1860. Booth gave a different account of the event,

reliable men to aid him, Lewis now dispatched a few deputies to retake Booth.[88] Deputy Francis Henry, on August 3, 1860, sent a note to Heg telling him that he had a warrant for Booth's arrest and asking him to assist in executing the law. When Deputy William Garlick delivered the note at the prison, Heg called Booth into the room and, in the presence of several guards, told Garlick that he could arrest Booth if he chose, but if he were in Booth's place, he would shoot him down like a dog. He added that he himself would fight to the last drop of his blood if an attempt at an arrest were made and that Garlick ought be employed in better business than holding office under the federal government. While this was going on, Booth kept flourishing a pistol around Garlick's head, saying that he would shoot down the first man to lay hands on him. Heg then handed over to Garlick a written reply to Henry's note, stating that Booth was not secreted in the prison but merely visiting with him and at liberty to go when he pleased. As to rendering any assistance in an arrest, he declared: "Allow me politely to say that my force is at present employed in a more profitable and honorable way." However, although Heg later publicly denied it, it apepars that whenever Booth went outside the prison walls, he was under the protective surveillance of at least one prison guard.[89]

That night, Booth, accompanied by two of the omnipresent prison guards, rode in Heg's carriage to Ripon, Wisconsin. There he found refuge in the amply guarded home of one of his rescuers, Edward Daniels, the state geologist. The next evening, Booth was escorted by an armed force of about 200 men, to a hall to give a speech. Deputy Frank McCarty and two aides stationed themselves within supporting distance of each other in the hope of taking Booth. Booth began to speak, declaring truculently, as he looked directly at McCarty, that he would like to see the marshal or deputy marshal who dared attempt to rescue him. McCarty then slipped quietly on the stage, put his hand on Booth and told him he was his prisoner. Booth atempted to draw his pistol but was forestalled by McCarty. The angered crowd then rushed forward shouting, "kill him," "cut him to pieces," and ejected McCarty uncerimoniously from the building.[90]

stating that Clark had attempted unsuccessfully to raise a force to arrest him, and having seen the complexion of things, tried to turn the affair into a joke. Booth to editor, Milwaukee Daily Free Democrat, Aug. 6, 1860.

[88] Lewis to Buchanan, Aug. 3, 9, 1860, A. G. MSS.

[89] Affidavits of Francis Henry and William Garlick, dated Aug. 8, 1860, appended to Lewis' letter of Aug. 9, 1860 to Buchanan, A. G. MSS. Henry's note and Heg's reply are reproduced in the Henry affidavit. Booth told a different story of the events as did Heg, but unlike the statements of the deputies, which were sworn to, their remarks came in letters to newspapers. See Booth to editor, Milwauke Daily Free Democrat, Aug. 6, 1860. Heg to editor, Milwaukee Sentinel, Aug. 6, 1860.

[90] Affidavit of Frank McCarty, dated Aug. 7, 1860, appended to Lewis' letter to Buchanan, Aug. 9, 1860. A. G. MSS. Booth's version, in his Aug. 6, 1860 letter, differs in some details from McCarty's account.

After disposing of McCarty, the meeting, headed by A. E. Bovay who six years before had organized the meeting at Ripon at which the Republican party was born, passed resolutions pledging to protect Booth at all hazards. Three hundred men were enrolled as a league of freedom to serve that purpose. Booth then published a defiant letter recounting the events and proclaiming: "The people are ready to fight and have made up their minds to do it manfully. They will wait no longer for Courts or State authorities, but will protect their own rights and liberties by the strong arm." He warned that "if the Federal hounds continue to pursue and harass free citizens, and threaten, as they have done, to kill them if they resist, they will be shot down in the highways and byways like mad dogs."[91]

On August 29, McCarty was informed that Booth was staying in a private home seven miles from Ripon where he might be captured by surprise. Accompanied by five men, McCarty left Fond du Lac after nightfall and arrived at the location just before daylight. Before they could search the house, the deputies were surrounded by an armed force of 60 or 70 men who expressed their determination to resist process with force. The commands of McCarty, ordering the men to assist him, were met with derision and threats to lynch him. Shortly after McCarty was forced to retreat to Ripon, another federal deputy marshal arrived on the scene with three other men, and was promptly seized by the mob and paraded down the Ripon streets with a yoke on his head.[92]

Lewis, in the meanwhile, had been able, through his deputies, to arrest Daniels and another of the rescuers but was unsuccessful in his attempts to rescue a third, O. H. La Grange. Just as defiant of the law as Booth, La Grange published a letter on August 27, relating that he had decided to spend a season in retirement to consider whether he would submit to arrest. He and his friends had spent several evenings preparing to enlist and organize an army of defense. Wishing to perpetuate his name as a courageaus, unselfish patriot, he believed it his duty to work for the ultimate extinguishment of slavery by lawful means, if possible, but by war if necessary.[93]

Realizing that the combination to resist federal process was far more formidable than previously supposed, Lewis declined to call upon the military aid of the federal government. He believed that such a step would inevitably precipitate a bloody collision and trusted instead

[91] Booth to editor, Milwaukee Daily Free Democrat, Aug. 6, 1860; Carter, *op. cit. supra* 167.

[92] T. L. Mapes to Lewis, Aug. 26, 1860, Lewis to Black, Aug. 29, 1860, J. S. Horner to Buchanan, Aug. 6, 1860, A. G. MSS. McCarty waited in vain for reinforcements for seven hours. The armed force protecting Booth gathered within an hour. Milwaukee News, Aug. 29, 1860.

[93] Upham to Black, Aug. 18, 1860, Lewis to Black, Aug. 27, 1860, A. G. MSS; Carter, *op. cit. supra,* 170.

to strategem. In the process he had to submit to vile indignities and threats of assasination which, at one point, caused him to lose his temper and strike unconscious with a mighty blow of his cane, one of Booth's obnoxious followers, who he believed was about to attack him. As a consequence, he found himself the defendant in civil and criminal actions for assault and battery. Similarly, economic retaliation was visited upon McCarty, who complained to Lewis that the "Black Republicans" had boycotted his grain warehouse.[94]

As the election drew closer, the political usefullness of Booth diminished, along with the furor over the attempts to arrest him. Finally, on October 8, 1860, Lewis captured him from the midst of fifty Republican Wide-Awakes at Berlin, Wisconsin. Experiencing no appreciable resistance, he successfully transported Booth back to the custom house at Milwaukee.[95] Apparently the Republicans believed that at that stage, a rearrest of Booth would be more beneficial to their cause than if he remained free. Whatever their attitude, after Lincoln's election Booth applied to Buchanan for a pardon. Infuriated, Black immediately replied to Upham, who had again urged that the fine be remitted, rejecting the petition. Black complained that Booth's plea contained no confession that his manifest violence constituted an offense against the government and the peace of society. Still inflexibly determined to enforce the letter of the law vigorously, he declared: "The fact that in all this criminal folly and insolence, he has been aided, comforted and abetted by a State Court and by other lawless persons who pretend to justify him, makes the vindication of the law in this particular case absolutely necessary by way of example." Black could not recall any instance when a pardon was ever given, or a fine remitted, "where the poverty of the applicant was incidentally mentioned in a paper filled with insolent expressions of contempt for the law under which he was suffering." Black would honor only a simple verified petition by Booth asserting his inability to pay. On the other hand, a pardon would be granted if it could be shown that Booth was

[94] Lewis to Buchanan, Jan. 28, Feb. 22, 1861, McCarty to Lewis, Jan. 24, 1861, A. G. MSS; Milwaukee Daily Enquirer, Aug. 6, 1860. Lewis' decision against calling for federal military aid was probably influenced by the lack of encouragement from the federal authorities at Washington. He emphasized, in his Aug. 9, 1860 letter to Buchanan, his belief that "a large body of those persons who have been deluded into violations of the law would quietly yield the moment they saw the Government was prepared to enforce its powers." The present writer was unable to find any evidence that the Buchanan Administration contemplated either the sending of federal troops to aid the marshal or the issuing of a presidential proclamation.

[95] Lewis to Black, Oct. 9, 1860, A. G. MSS. Contrary to Lewis, Carter states that Booth was arrested while returning from the political meeting, accompanied only by ladies. Carter, *op. cit. supra*, 171. Thereafter, Booth's wife, writing from Switzerland to the people of Wisconsin, asked: "Have you no pride for yourselves, no grateful regard for your leader, who has spent his life and energies to bring you, as a party, to the stand point you occupy today?" For reprint of letter see Madison State Journal, Nov. 21, 1860.

suffering from a mental disease which impelled him to deny the existence or the obligatory force of the law and to set himself against all of the authorities of the National Government.[96]

As the fateful year of 1861 dawned, a federal grand jury indicted the leaders of the forcible rescue of 1859 along with the principal figures involved in the resistance to the attempts to capture Booth. Lewis promptly arrested them at Ripon but was forced to relinquish them to a group of armed men at the depot. Fustrated again, he reported to Black that the men could not be brought back to Milwaukee "without a strong police or a military force."[97]

On the day before the inauguration of Abraham Lincoln, President Buchanan pardoned Booth.[98] The painful episode closed with the nullifiers victorious and federal authority rescued from further repudiation in Wisconsin by the fact that the Republican party now held the reins of government in Washington.

Thus ended a decade which George Ticknor Curtis decribed as a period wherein "a government popular in its form and accustomed to rely largely on popular submission to its laws, was obliged to make it manifest that it had the strength, irrespective of popular and local feelings, to execute the law."[99] With all its ineptitudes, inflexibility and time consuming legalism, federal law enforcement policy in the Booth imbroglio remains a woeful reminder that in the presence of state and popular hostility the firm and prompt deployment of overpowering force within the framework of adequate administrative machinery, alone can insure the full execution of the law.

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[96] Black to Upham, Nov. 7, 1860, Atty. Gen. Ltr. Bk. B-2, 586. In his fourth annual message on Dec. 3, 1860, Buchanan stated that universal judicial acceptance of the constitutionality of the fugitive slave act of 1850 was marred only by the defection of the Wisconsin Supreme Court. That decision, he continued, "has not only been reversed by the proper appellate tribunal, but has met with such universal reprobation that there can be no danger from it as a precedent." Richardson, *op. cit. supra,* Vol. VII, 3160, 3161.

[97] Lewis to Black, Jan. 28, 1861, A.G. MSS.

[98] Edwin M. Stanton to Black, Mar. 2, 1861, A. G. MSS.

[99] Benjamin R. Curtis Jr., Editor, A MEMOIR OF BENJAMIN R. CURTIS (Boston, 1879), Vol. I, 158.

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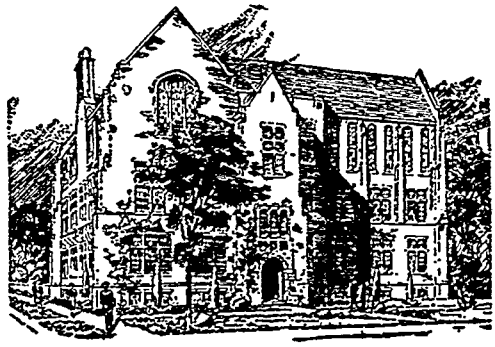

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