



10-1-2004

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Recommended Citation

Madsen, Gordon A. (2004) "Joseph Smith and the Missouri Court of Inquiry: Austin A. King's Quest for Hostages," *BYU Studies Quarterly*: Vol. 43 : Iss. 4 , Article 5.

Available at: <https://scholarsarchive.byu.edu/byusq/vol43/iss4/5>

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FIG. 1. Austin A. King, photo taken between 1855 and 1865. In 1838, King, as Judge of the Missouri Fifth Circuit Court, presided at the Criminal Court of Inquiry of Joseph Smith and others on charges of treason.

Joseph Smith and the Missouri Court of Inquiry

Austin A. King's Quest for Hostages

Gordon A. Madsen

On November 1, 1838, the Mormon settlement at Far West, Caldwell County, Missouri, was surrounded by state militia troops commanded by Generals Samuel D. Lucas and Robert Wilson. Mormon leaders Joseph Smith, Hyrum Smith, Sidney Rigdon, Parley P. Pratt, Lyman Wight, George Robinson, and Amasa Lyman were taken prisoner, and a court-martial was promptly conducted. General Lucas pronounced a sentence of death on all the prisoners, to be carried out the following morning, November 2, in the Far West town square. General Lucas contended that the infamous order of Missouri Governor Lilburn W. Boggs, issued to drive the Mormons from the state or, in the alternative, to "exterminate them," granted him such authority. Brigadier General Alexander W. Doniphan (fig. 2), to whom the order pronouncing sentence was directed and who was an attorney by profession, refused the order, calling it "cold-blooded murder," and threatened to hold Major General Lucas personally responsible if it were carried out. It was not. Instead, Lucas and Wilson transported their prisoners first to Independence, Jackson County, and then to Richmond, Ray County.¹

On November 4, General John B. Clark, who was the overall commander of the Missouri militia, arrived at Far West. There he joined the approximately 1,600 men of his command to the portion of the militia Lucas and Wilson had left behind. In his report to Governor Boggs, dated November 29, 1838, General Clark stated:

I then caused the whole of the Mormons [except those seven leaders already removed by Lucas and Wilson] to be paraded, and selected such as thought ought to be put on their trial before a committing Magistrate, and put them in a room until the next morning, when I took up



FIG. 2. Alexander Doniphan, photo taken between 1844 and 1860. Brigadier General Doniphan was a friend and defender of the Mormons in Missouri and served as lead counsel for Joseph Smith and other defendants at the Court of Inquiry.

the line of march for Richmond, with the whole forces and prisoners, 46 in number . . . and applied to the Hon. A. A. King to try them. He commenced the examination immediately after the defendants obtained counsel. . . . The inquiry, as you may well imagine, took a wide range, embracing the crimes of Treason, Murder, Burglary, Robbery, Arson and Larceny.²

Thus commenced the Criminal Court of Inquiry before Austin A. King (fig. 1) in Richmond, Missouri, beginning November 12, 1838, and running through November 29. King was Judge of the Missouri Fifth Circuit Court, which included Livingston, Carroll, Ray, Clay, Clinton, Daviess, and Caldwell counties. It was this hearing that

led to the imprisonment of Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin in the jail at Liberty, Clay County (fig. 3), on charges of treason. They were held at Liberty Jail until April 1839, when they were taken to Daviess County and indicted by a grand jury. A change of venue order transferred them to Boone County for trial. While en route to Boone County they escaped.³

At one end of the spectrum concerning the legitimacy of this November 1838 hearing, Hyrum Smith referred to it as a "pretended court."⁴ At the other end, some writers have called it a reasonable hearing, fairly reported; they fully justify Judge King's order to hold the prisoners on charges of treason.⁵ The Joint Committee of the Missouri legislature (which ultimately had the transcript of the evidence published) in the opening paragraphs of its report discounted the evidence as follows:

They consider the evidence adduced in the examination there held, in a great degree *ex parte* [one-sided], and not of the character which should be desired for the basis of a fair and candid investigation.

Moreover, the papers, documents, &c., have not been certified in such a manner, as to satisfy the committee of their authenticity.⁶

To my knowledge, no one thus far has examined the transcript of the evidence in light of the law in force at the time to judge whether or not this Criminal Court of Inquiry met the legal standard of that day in charging the defendants with treason and referring them to a grand jury. This article is an effort to do just that. I will rely primarily upon two printed documents, both of which are records of the Criminal Court of Inquiry. The first, cited as *U.S. Senate Document*, was published by order of the U.S. Senate on February 15, 1841.⁷ It contains only the testimony of the witnesses. The second, cited as *Missouri General Assembly Document*, was printed later that same year pursuant to a resolution of the Missouri Legislature.⁸ It contains the testimonies but is prefaced by correspondence, orders between the militia generals and the governor and others leading up to the hearing, affidavits, and other documents related to subsequent proceedings.

This article is not an effort to explore the causes and circumstances that led to the confrontation and surrender at Far West, but, for those unacquainted with that background, a brief summary should suffice: Mormons began arriving in Missouri in significant numbers in 1833, settling first in Jackson County but soon being driven by the older settlers into neighboring Clay, Ray, and Clinton Counties. When the Missouri Legislature in 1836 created a new county named Caldwell, north of Clay County, Mormons congregated there in what was to be a predominantly Mormon



FIG. 3. Liberty Jail, Clay County, Missouri. Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin (and, for a short time, Sidney Rigdon) spent the winter of 1838–1839 here awaiting a formal trial on charges of treason.

county, Far West being the principal town. Mormons also settled in Daviess and neighboring counties. In August 1838, following a brawl at Gallatin, the Daviess County seat, over an effort to prevent the Mormons from voting in the general election, non-Mormon settlers collected into quasi-military groups and marauded through Daviess and Caldwell Counties, leading ultimately to the surrender of Far West, the court-martial

and Court of Inquiry against Joseph Smith and his companions, and the expulsion of six to eight thousand Mormons from Missouri.⁹

Procedure in the 1838 Court of Inquiry

What was a "Court of Inquiry"? It would be known today as a preliminary hearing. It is the first hearing in a criminal case, conducted before a judge whose duty is to determine whether a crime has been committed and whether there is probable cause to believe that the person or persons brought before the court committed the crime.¹⁰ The parties charged must be present during all stages of the proceeding¹¹ and are entitled to legal counsel, who may cross-examine the witnesses.¹² The prosecutor is obliged to present at least enough evidence to establish the probable cause. He does not need to provide sufficient evidence to convince beyond a reasonable doubt. If the judge determines that the probable cause has been sufficiently shown and that the defendants are sufficiently connected to the alleged offense, he then "binds over" those defendants. If the offense is one for which the law permits a bail, the defendants and their bondsmen are recognized; put under oath and "bound over" to appear before a grand jury or to stand trial in the appropriate court. A written bond in a specified dollar amount is executed at that time by each defendant and his two bondsmen and filed with the court.¹³ If the offense charged is not bailable, the defendants are committed to jail to await grand jury proceedings and/or trial.¹⁴ The judge conducting the Court of Inquiry is required to reduce the testimony presented before him to writing, and the record is required to contain all the evidence, brought out on direct and cross-examination both tending to innocence and guilt.¹⁵

In U.S. courts prior to the Civil War, there were no court reporters, as they are known today. "Shorthand" or some form of condensed or brief writing goes back at least to ancient Greece. Isaac Pitman was the first person to popularize a form of phonetic symbols and abbreviations which came to be called shorthand and which found wide adoption in Britain and America. His *Stenographic Sound Hand* was first published in 1837 in England.¹⁶ There is no evidence, however, that it was in use in Missouri courts by November 1838.

Instead, the process then in use for preserving and reducing to writing testimony at hearings and trials was by *recognizance*. The word had two meanings in the law. Both involved giving a sworn (usually written) statement before a judge. The first was a promise under oath given by a party or a witness in a civil or criminal action agreeing to appear at a future time set for the trial of the matter. The second was the reducing of testimony

to writing, usually after the witness had given that testimony before the judge. The judge, or more often his clerk or designee, would write it, and the witness would read it, swear to its truthfulness, and sign it.¹⁷ If the witness was illiterate, the writing would be read to him and he would subscribe the writing with his mark. Seven of the witnesses in the Richmond Court of Inquiry fixed their "X" to their written testimony.¹⁸

The written testimony must contain testimony that was brought out on cross-examination as well as testimony produced by the prosecutor's questions. In the case of the November 1838 Court of Inquiry, no testimony adduced from cross-examination and no questions from Judge King and answers thereto are in the record. Parley Pratt later testified of one such example of testimony not included in the record:

During this examination, I heard Judge King ask one of the witnesses, who was a "Mormon," if he and his friends intended to live on their lands any longer than April, and to plant crops? Witness replied, "Why not?" The judge replied, "If you once think to plant crops or to occupy your lands any longer than the first of April, the citizens will be upon you; they will kill you every one—men, women and children, and leave you to manure the ground without a burial. They have been mercifully withheld from doing this on the present occasion, but will not be restrained for the future."¹⁹

Originally, fifty-three Mormons, including Joseph and Hyrum Smith, were arrested and transported by Generals Wilson, Lucas, and Clark to Richmond. During the hearing, eleven more defendants were added: five during the testimony of the tenth witness;²⁰ two between the testimony of the seventeenth and eighteenth witnesses;²¹ and two following the testimony of the twenty-eighth witness.²² Morris Phelps and James H. Rollins never were named as defendants but were nonetheless bound over by Judge King's order, discussed below.²³

Forty-one witnesses for the prosecution are named, but both the *U.S. Senate Document* and the *Missouri General Assembly Document* contain testimony from only thirty-eight.²⁴ At the conclusion of the evidence, Judge King made the following order:

There is probable cause to believe that Joseph Smith, jr., Lyman Wight, Hiram Smith, Alex. McRay and Caleb Baldwin are guilty of overt acts of Treason in Daviess county, (and for want of a jail in Daviess county,) said prisoners are committed to the jail in Clay county to answer the charge aforesaid, in the county of Daviess, on the first Thursday in March next. It further appearing that overt acts of Treason have been committed in Caldwell county, and there being probable cause to believe Sidney Rigdon guilty thereof, the said Sidney Rigdon (for want of a sufficient jail in Caldwell county) is committed to the jail in Clay county.

to answer said charge in Caldwell county, on the first Monday after the fourth Monday in March next. It further appearing that the murder of Moses Rowland, has been perpetrated in the county of Ray, and that there is probable cause to believe that Parley P. Pratt, Norman Shearer, Darwin Chase, Lyman Gibbs, and Maurice Phelps, are guilty thereof. They are therefore committed to Ray county jail, to answer said charge, on the second Monday in March next.²⁵

Judge King then found probable cause to bind over twenty-three of the remaining defendants on charges of "Arson, Burglary, Robbery and Larceny" in Daviess County.²⁶ He then found no probable cause against six defendants, having earlier dismissed twenty-three of their fellow accuseds between the testimony of the thirty-third and thirty-fourth witnesses.²⁷ One defendant, William Whitman, was neither bound over nor dismissed in the order but is referred to later in the same document as among the number who were recognized and posted bond.²⁸ Presumably he, too, was actually charged with "Arson, Burglary, Robbery and Larceny" in Daviess County like the others, even though the record is silent.

Trampling the Defendants' Right of Due Process

Law is generally subdivided into two categories: "substantive" and "procedural." Substantive law in the criminal arena is the law that defines and details the elements of a crime and the issues and facts needed to be proved in a trial to secure a conviction. Procedural law is made up of the statutes and rules that control the way the court must proceed in conducting the trial or hearing. Those statutes and rules which protect the rights of the parties involved in trials are also referred to as "due process" and are designed to protect what we call constitutional rights. They are the procedural requirements that guarantee a fair trial to accused defendants in criminal matters. While the U.S. Constitution in its first ten amendments spells out those rights, the individual state statutes and court-adopted rules or practice implement and enforce those fundamental principles enumerated in the Constitution. The statutes cited earlier in this article are examples of the Missouri law in force in 1838 that spell out the constitutional or due process rights of Joseph Smith and his associates mandated for the hearing before Judge King. The substantive law that applies to the hearing will be treated later in this article.

Under the Missouri law then in force, criminal actions were commenced by a party (the "complainant") going before a magistrate (a judge or justice of the peace) and giving sworn testimony about a crime.²⁹ The magistrate then prepared a warrant "reciting the accusation" and issued it to an officer, directing him to arrest the defendant.³⁰ The arrested accused

was then brought before the magistrate by the officer, and the warrant was endorsed and returned to the magistrate.³¹

In the case of Joseph Smith and his associates, none of that procedure was followed. No complainant appeared before a judge or magistrate; no warrant for arrest was ever issued or served on the sixty-four defendants; no written warrant reciting the accusation was furnished to any of them. Sidney Rigdon reported, "No papers were read to us, no charges of any kind preferred, nor did we know against what we had to plead. Our crimes had yet to be found out."³² Lyman Wight corroborated Sidney:

Joseph Smith and myself sent for General Clark, to be informed by him what crimes were alleged against us. He came in and said he would see us again in a few minutes. Shortly he returned and said he would inform us of the crimes alleged against us by the state of Missouri.

"Gentlemen, you are charged with treason, murder, arson, burglary, larceny, theft, and stealing, and various other charges too tedious to mention at this time."³³

Thus it was General Clark and not a magistrate who "made out charges," not in writing, without sworn testimony and without any warrant. One is left to wonder what the other "too tedious" charges might have been or when the defendants were to be given notice of them.

Defendants, who were entitled to be present for all witnesses and to cross-examine those witnesses, were inserted into the hearing at several different points, as noted above.

Motions for separate trials were denied. Sidney Rigdon recalled, "At the commencement we requested that we might be tried separately; but this was refused, and we were all put on trial together."³⁴

Witnesses for the defendants were intimidated and driven off.³⁵ Hyrum Smith recounts the driving off of a defense witness named Allen from the courtroom in the midst of his testimony.³⁶ Cross-examination of witnesses³⁷ and objections by counsel and comments by Judge King are also missing. For example, Parley P. Pratt noted,

This Court of Inquisition inquired diligently into our belief of the seventh chapter of Daniel concerning the kingdom of God, which should subdue all other kingdoms and stand forever. And when told that we believed in that prophecy, the Court turned to the clerk and said: "Write that down; it is a strong point for treason." Our lawyer observed as follows: "Judge, you had better make the Bible treason." The Court made no reply.³⁸

Failure to record objections of counsel and comments of the court leaves an incomplete record to be examined on appeal (or by the Legislature, in

this instance) and can lead to inferences on appeal that the evidence, not being objected to, was properly admitted into the record.

As noted earlier, the right of defendants to be present for the testimony of all witnesses, the right to cross-examine all witnesses, the right to be tried separately, the right to be advised at the outset of the specific charges levied against them, the right to call witnesses to testify on their behalf without intimidation, and the right to make objections during the hearing were all established and guaranteed by *The Revised Statutes of the State of Missouri, 1835* (cited in notes 10–15) as well as relevant provisions of the Missouri and U.S. Constitutions.

When a judge elects to try sixty-four defendants on multiple charges, as Judge King did, the trampling of due process would seem inevitable. Some glaring denials of those rights follow.

Morris Phelps,³⁹ a Mormon, agreed to testify for the state. He was the prosecution's fifth witness, was excused, and then at the end of the hearing was charged with murder along with Parley P. Pratt and three others. Through the whole hearing he was never identified as a defendant, never afforded counsel, never given opportunity to cross-examine a single witness. It would appear that his testimony was not satisfactory to the prosecutors.⁴⁰ One also has to conclude, among other things, that "turning state's evidence" to be granted immunity from prosecution was hardly the same in 1838 Missouri as it is understood today.

James H. Rollins, like Morris Phelps, was never made a defendant throughout the record but was for the first time named in Judge King's order and was bound over with the other twenty-two on the "Arson, Burglary, Robbery, and Larceny . . . in Daviess County" charges. Like Phelps, he was denied all his constitutional due process rights.⁴¹

Sydney Turner, after originally being charged, is never again mentioned in the record—no witness identifies him anywhere doing anything. Nonetheless, like Rollins, he was bound over with the other twenty-two on the same charges of "Arson, Burglary, Robbery, and Larceny."⁴²

Thomas Beck or Buck,⁴³ who was listed as an original defendant, is perhaps the same person who was referred to in Sampson Avar's testimony as "Thomas Rich."⁴⁴ A Thomas Rich is bound over with the "Arson, Burglary, Robbery, and Larceny" group.⁴⁵ These are the only possible references to Thomas Beck in the record. No Thomas Rich is listed as a defendant. But whether it was Beck, Buck, or Rich, there was no incriminating evidence about him to be found.

In sum, the report of the legislative committee, quoted early in this article, that the hearing was "not of the character which should be desired for the basis of a fair and candid investigation"⁴⁶ has considerable basis in

fact as disclosed by the record. It appears that due process was not afforded to those defendants.

Presentation of the Evidence

Sampson Avarad was the founder and self-styled teacher of the Danites, a secret society of Mormons that came into being in the Missouri period. Their original purpose was to cleanse or purge Caldwell County of Mormon dissidents. Danites did carry out some marauding raids in Daviess County.⁴⁷ Avarad was first arrested with the others in Far West but claimed to have become disenchanted with Mormonism and “turned state’s evidence” and was granted immunity.⁴⁸ He was a confessed active participant in the depredations about which he testified.

The main thrust of his testimony was to maintain that he was only acting under the direction of Joseph Smith and the First Presidency of the Church, who, he said, knew about and approved all his activities, thus implicating Joseph Smith, Hyrum Smith, and Sidney Rigdon. He was the prosecution’s first and star witness. His treatment by the prosecution was in stark contrast to that afforded Morris Phelps.

Prosecution witness John Cleminson, a disenchanted Mormon and member of the Caldwell County militia, states that he “went in the expedition to Daviess in which Gallatin was burnt,⁴⁹ as I felt myself compelled to go from the regulations which had been made.” He then names who was “there” but continues:

Of the [Mormon] troops at ‘Diahmon [Adam-ondi-Ahman, which, like Gallatin, is in Daviess County, and was a Mormon town, while Gallatin was predominantly non-Mormon], in this expedition, some were sent on one expedition, and some on another; but all were there mutually to aid and assist each other in all that they undertook or did on that occasion.

When we first went to Daviess, I understood the object to be to drive out the mob, if one should be collected there; but when we got there, we found none. I then learned the object was, from those who were actively engaged in the matter, to drive out all the citizens of Daviess and get possession of their property. It was understood that they [the Missourians] burnt Mormon houses, as well as the houses of the citizens. The burning of the Mormon houses was to bring the Mormons into ‘Diahmon, as I understood it. It was said by some that the Mormons were burning their own houses; and by others, that the mob were burning them; and so much was said about it, that I did not know when I got the truth.⁵⁰

His testimony puts both Edward Partridge and David Pettegrew at Gallatin, but connects them with no specific criminal activity. No other witness puts those two at Gallatin or elsewhere in Daviess County. Both

Partridge and Pettegrew were nonetheless bound over on the "Arson, Burglary, Robbery, and Larceny" charges. Moreover, much of what Cleminson says relates to what he had been told or understood, not what he saw.⁵¹

These illustrations point out the fundamental and pervasive problem with nearly all of the testimony. Virtually none of it connects any named defendant with a specific criminal act.

Analysis of the Charge of Treason against Joseph Smith and Others

We now come to the substantive law. In order to understand the charge of treason that was lodged in the Court of Inquiry, it is necessary to survey the governing laws and statutes and to examine carefully two leading cases that define the crime of treason.

Joseph Smith, Lyman Wight, Hyrum Smith, Alexander McRae, and Caleb Baldwin were bound over to answer to the charge of treason committed in Daviess County. No date or specific set of facts appear in the court's order. Since the only event in Daviess County on which testimony was admitted relating to criminal activities in that county was testimony which described the burning and looting of a store in Gallatin, it is necessary to examine the evidence which connects these men with that event.⁵² First, we must quote the pertinent law. The Missouri statute in force at the time provided:

Every person who shall commit treason against the state, by levying war against the same, or by adhering to the enemies thereof, by giving them aid and comfort, shall, upon conviction, suffer death, or be sentenced to imprisonment in the penitentiary for a period not less than ten years.⁵³

Specific language of statutes (and provisions of constitutions, for that matter) are, over the years, defined and interpreted by opinions of appellate courts. Those printed opinions are sometimes referred to as "case law," and are collectively called the "common law." The common law of England was brought to this hemisphere by the colonial courts and was the foundation of U.S. jurisprudence. Soon enough, the colonists, through the statutes enacted by their respective legislatures and decisions rendered by the judges interpreting those statutes, together with the courts' modifications, adaptations, or rejections of the British precedents both prior to the Revolutionary War and thereafter, created a body of American case law.

Judges and attorneys turn to these accumulated opinions for the meaning of the statutes. The phrases "levying war against the same" and "giving them aid and comfort" were defined by *Blackstone's Commentaries*, a four-volume summary treatise of the British and (in the American Editions)

the U.S. case law. Like Lincoln, a typical nineteenth-century lawyer-to-be living on the western frontier would study *Blackstone*, perhaps apprentice in an attorney's office for a period, and then with the sponsorship or recommendation of his mentor be presented to a court and admitted to the bar. *Blackstone* was the Bible of frontier lawyers and judges.

The Missouri statute quoted above is a restatement of part of the English statute on treason. *Blackstone* summarizes the case law definitions and expansions on that statute:

The third species of treason is, "if a man do levy war against our lord the king in his realm," . . . To resist the king's forces by defending a castle against them, is a levying of war; and so is an insurrection with an avowed design to pull down *all inclosures, all brothels* [original italics], and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government; and an insolent invasion of the king's authority. *But a tumult with a view to pull down a particular house, or lay open a particular enclosure, amounts at most to a riot; this being no general defiance of public government.* So, if two subjects quarrel and levy war against each other, it is only a great riot and contempt, *and no treason.* Thus it happened between the earls of Hereford and Gloucester in 20 Edw. I [1292] who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanor. . . .

"If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," he is also declared guilty of high treason. This must likewise be proved by *some overt act*, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. *By enemies are here understood the subjects of foreign powers with whom we are at open war.*⁵⁴

Earlier in his treatise, Blackstone emphasizes that for a person to be convicted of treason, he must have committed overt acts. After giving several examples, he concludes:

But now it seems clearly to be agreed, that, by the common law and the statute of Edward III, *words* amount only to a high misdemeanor, *and no treason.* [More examples follow.] . . . As therefore there can be nothing more equivocal and ambiguous than *words*, it would indeed be unreasonable to make them amount to high treason.⁵⁵

While the Missouri statute quoted above embodies the common law definition, there are constitutional restrictions imposed by both the United States and Missouri Constitutions which more narrowly define the crime, and Constitutional provisions prevail over statutes treating the same subject.⁵⁶ The U.S. Constitution states:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. *No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court.*⁵⁷

And the Missouri Constitution also states:

That treason against the State can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; *that no person can be convicted of treason unless on the testimony of two witnesses to the same overt act, or on his own confession in open court.*⁵⁸

The above-cited language of the national Constitution was first defined and applied in two pivotal cases that involved Aaron Burr and his associates.⁵⁹ Since those cases provide not only the applicable law but also a number of contrasts and parallels to the Austin King hearing being here discussed, their history deserves careful examination.⁶⁰

The Case of Aaron Burr: The Strict Definition of Treason. Following his duel with Alexander Hamilton and the conclusion of his term as vice president of the United States in March 1805, Aaron Burr (fig. 4) began an odyssey which became known as the "Burr conspiracy." In this plot, as inflated by the press—an inflation aided and abetted by President Thomas Jefferson—Burr allegedly intended to liberate or "revolutionize" Spanish-owned Mexico (which included Texas, New Mexico, Arizona, California, parts of Colorado, Utah, and Nevada), sever and annex the states in the Mississippi valley from the Union, and rule over this grand empire.

Over a period of two years, he enlisted supporters, granted commissions in his proposed army, bought maps of Texas and Mexico, planned



FIG. 4. Aaron Burr. Aaron Burr was tried for treason in 1806 but was acquitted. His trial set a precedent that treason charges must fulfill certain criteria—criteria not present in the case against Joseph Smith and other Mormon leaders. Image created ca. 1899. © Small, Maynard, and Company.

campaigns for invading first Texas and then Mexico, bought arms and supplies, and contracted with Andrew Jackson and his partner to build seven barges to float his troops down the Ohio and Mississippi Rivers to New Orleans, which was to be the staging point to launch the invasion. He attempted, but failed, to obtain financing first from Great Britain⁶¹ and then from France.⁶² His initial group of approximately sixty recruits collected and drilled on an island owned by Harmann Blennerhassett, a loyal Burr associate, which island was situated in the Ohio River on the Virginia (now West Virginia) side opposite the Ohio town of Marietta. While the troops were collecting and drilling, Burr was in Nashville, Tennessee, taking delivery of two barges from Jackson and recruiting some 40 additional volunteers.⁶³

He was betrayed by General James Wilkinson, his chief co-conspirator. Actually, Wilkinson was a triple traitor. Through Burr's influence as vice president, Wilkinson had been appointed both commander of all U.S. troops west of the Appalachian Mountains and governor of the northern unit of the Louisiana Purchase known as the District of Louisiana, headquartered at St. Louis.⁶⁴ He was also a secret agent in the employ of the Spanish government, a fact not proved until after his death.⁶⁵ He first betrayed Burr by sending a letter to President Thomas Jefferson exposing the plot (omitting, of course, his own involvement).⁶⁶ Later, he transmitted U.S. secrets to Spain, and later still, when the Spanish government refused to pay his bill for \$121,000, he turned on Spain as well.⁶⁷

Upon receiving Wilkinson's letter, Jefferson issued a proclamation which was circulated to all civil and military authorities and released to the press. It declared that a treasonous conspiracy was underfoot, ordered any and all conspirators or their supporters to cease on penalty of incurring "all the rigors of the law," and required all "officers, civil and military, of the United States, or any of the states or territories . . . to be vigilant in searching out, and bringing to condign [deserved, merited] punishment, all persons . . . engaged in such enterprize."⁶⁸ Several newspapers had for several previous months been printing rumors of the Burr conspiracy, and these papers trumpeted Jefferson's proclamation as confirmation of their speculations.

Blennerhassett and his sixty started down the Ohio River, Burr and his nearly forty floated down the Cumberland, and the two groups rendezvoused at the confluence of the two rivers on December 27, 1806.⁶⁹ It was there that Burr got confirmation that Jefferson's proclamation had turned public opinion against him. The saga that followed is fascinating, but it is the law that evolved from the expedition that is of concern here.

Two of Burr's associates, Erick Bollman and Samuel Swartwout, who were both couriers of messages from Burr to Wilkinson, were arrested in the West by General Wilkinson, transported to Washington, D.C., and charged with treason and "high misdemeanor," meaning in this case plotting war against a foreign government with which the U.S. was at peace. They were taken before the Circuit Court of the District of Columbia for their initial hearing (equivalent to Judge King's Court of Inquiry), at which they were bound over to stand trial. They immediately thereafter obtained a writ of habeas corpus from the U.S. Supreme Court (figs. 5, 6). The matter was reheard in that court. On the charge of high misdemeanor Chief Justice John Marshall speaking for the court wrote: "That both of the prisoners were engaged in a most culpable enterprize against the dominions of a power at peace with the United States, those who admit the affidavit of General Wilkinson cannot doubt. But that no part of this crime was committed in the District of Columbia is apparent. It is therefore the unanimous opinion of the court that they cannot be tried in this district."⁷⁰ The lower court's bind-over order was reversed and Bollman and Swartwout were discharged.

What Justice Marshall wrote about treason is of principal importance. He first specified the charge: "The specific charge brought against the prisoners is treason in levying war against the United States."⁷¹ After stating the seriousness of the crime and the public excitement it creates, he quoted the Constitution and defined the crime.

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

To constitute that specific crime for which the prisoners now before the court have been committed, war *must be actually levied against the United States*. However flagitious [deeply criminal]; utterly villainous] may be the crime of *conspiring* to subvert by force the government of our country, such conspiracy *is not treason*. To *conspire* to levy war and *actually* to levy war, are *distinct offences*. The first must be brought into operation, by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that . . . it has been determined that the actual enlistment of men to serve *against the government*, does not amount to the levying of war.⁷²

He continued:

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, *if war be actually levied*, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable

FEBRUARY, 1807.

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EX PARTE BOLLMAN AND EX PARTE
SWARTWOUTEX PARTE
BOLLMAN
AND
SWART-
WOUT.

C. LEE moved for a *habeas corpus* to the marshal of the district of Columbia, to bring up the body of *Samuel Swartwout*, who had been committed by the circuit court of that district, on the charge of treason against the United States; and for a *certiorari* to bring up the record of the commitment, &c.

And on a subsequent day *Harper* made a similar motion in behalf of *Erick Bollman*, who had also been committed by the same court on a like charge.*

The order of the court below, for their commitment, was in these words :

"The prisoners, *Erick Bollman* and *Samuel Swartwout*, were brought up to court in custody of the mar-

* On a former day (Feb. 5) *C. Lee* had made a motion for a *habeas corpus* to a military officer to bring up the body of *James Alexander*, an attorney at law at New-Orleans, who, as it was said, had been seized by an armed force under the orders of General Wilkinson, and transported to the city of Washington.

CHASE, J. then wished the motion might lay over to the next day. He was not prepared to give an opinion. He doubted the jurisdiction of this court to issue a *habeas corpus* in any case.

JOHNSON, J. doubted whether the power given by the act of congress, vol. 1. p. 101, of issuing the writ of *habeas corpus*, was not intended as a mere auxiliary power to enable courts to exercise some other jurisdiction given by law. He intimated an opinion that either of the judges at his chambers might issue the writ, although the court collectively could not.

CHASE, J. agreed that either of the judges might issue the writ, but not out of his peculiar circuit.

MARSHALL, Ch. J. The whole subject will be taken up *de novo*, without reference to precedents. It is the wish of the court to have the motion made in a more solemn manner to-morrow, when you may come prepared to take up the whole ground. [But in the mean time *Mr. Alexander* was discharged by a judge of the circuit court.]

This court has power to issue the writ of *habeas corpus ad subjiciendum*.

To constitute a *levying of war*, there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose. Enlistment of men to serve against government is not sufficient.

When war is levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors.

Any assemblage of men for the purpose of revolutionizing by force the government established by the United States in any of its territo-

FIG. 5. The first page of the U.S. Supreme Court opinion in the 1807 case in which *Erick Bollman* and *Samuel Swartwout* were charged with treason. From this time forward, the Supreme Court has held that the term *treason* must be interpreted narrowly.

purpose, all those who perform any part, however minute, or however remote from the scene of action, and *who are actually leagued in the general conspiracy*, are to be considered as traitors. But *there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.*⁷³

He added that Congress and legislatures are at liberty to define and prescribe the punishments for related offenses, but whatever statutes were enacted, they could not rise to "constructive treason." That term refers to a doctrine created by the British jurists as an exception carved from the general classification of criminals as "accessories before the fact" (those who plotted and assisted in a crime before its commission, but who were not present at the time and place where it occurred), "principals" (those who actually committed the crime), or "accessories after the fact" (those who assisted or harbored the principals after the commission of the crime). In England, when a treason was charged, *all* accessories were by construction or definition deemed to be principals. Hence, Blackstone's phrase "in treason all are principals."

In Marshall's view, this doctrine was so repugnant that, to prevent it, the Founding Fathers inserted the definition of treason in the Constitution. Marshall wrote:

The framers of our constitution, who not only *defined and limited* the crime, but with jealous circumspection attempted to protect their *limitation* by providing that no person should be convicted of it, *unless on the testimony of two witnesses to the same overt act*, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a *flexible* definition of the crime, or a *construction which would render it flexible*, might bring into operation. It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be *extended by construction* to doubtful cases; and that *crimes not clearly within the constitutional definition*, should receive such punishment as the legislature in its wisdom may provide.⁷⁴

He thus determined that the Founding Fathers took the prerogative of putting the definition and limitations on the crime of treason in the Constitution while that subject was dispassionately deliberated upon in connection with the Constitution itself, rather than leave it for the states to do so during times when passions might bear sway. Thus he left to Legislatures and courts to define lesser, related crimes, reserving treason exclusively within the Constitution itself.

It is to be emphasized that the court imposed this rule on the lower court while the *Bollman* case was at the initial commitment stage, or the equivalent of the "Court of Inquiry" hearing before Judge King being considered here. The need for the two witnesses of the overt act, by the court's reasoning, is accordingly required at the outset, a matter further developed in the *Burr* opinion, which will be considered next.

Aaron Burr, Harman Blennerhassett, Jonathan Dayton, John Smith (U.S. Senator from Ohio), Comfort Tyler, Israel Smith, and Davis Floyd were also arrested and ultimately taken to Richmond, Virginia, before Justice Marshall sitting as a circuit judge joined by District Judge Cyrus Griffin.⁷⁵ These seven were also charged with treason and high misdemeanor and tried and acquitted of both charges. Since the primary concern here is the language of the *Burr* opinion which modified or clarified the *Bollman* decision, the convoluted twists and turns of the trial are not treated here.

In this connection, however, one issue regarding evidence and procedure needs attention. Repeatedly through the Burr trial, defense counsel, claiming they were following the holding of the *Bollman* appeal, insisted that the "overt act" of making war must be proved *before* evidence of intent or conspiracy could be heard. The court frequently agreed and so instructed the government's attorneys, only to have them ask the court's indulgence promising that the next or soon to be called witness would supply evidence of the overt acts. After some sixteen or seventeen witnesses had testified, the only testimony that smacked slightly of an "overt act" came from Jacob Allbright, a servant of the Blennerhassetts who said that on the night of December 10, 1806, when the Blennerhassett party was hurriedly preparing to depart the island, a General Edwin W. Tupper from Marietta, Ohio, had come to the island, approached a group standing around a bonfire, "laid his hands" on Harman Blennerhassett, and said, "Your body is in my hands in the name of the commonwealth." Immediately "seven or eight muskets" were pointed at the general and one of the circle was heard to say he "would as lieve as not" shoot. "Tupper then 'changed his speech,' wished them 'to escape safe,' and bade them Godspeed." Allbright on further examination "said that the muskets were pointed at Tupper as a joke." Tupper himself was in attendance at the trial but was not called to testify.⁷⁶ Allbright was discredited to some degree by William Love, the witness who followed him, but even if his testimony were unquestionably true, that incident is an exercise in aiding one to resist arrest, not make war. That, however, was the only testimony of any overt act occurring in Virginia (Blennerhassett Island was in Cook County, Virginia, at that time) on which to hang a treason prosecution.⁷⁷ After one more witness following Love, the defendants moved that no more testimony be admitted, since

APPENDIX.

Note (B.)

OPINION

ON THE MOTION TO INTRODUCE CERTAIN EVIDENCE IN THE TRIAL
OF AARON BURR, FOR TREASON, PRONOUNCED
MONDAY, AUGUST 31.

THE question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them.

A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver.

The testimony adduced on the part of the United States, to prove the overt act laid in the indictment, having shown, and the attorney for the United States having admitted, that the prisoner was not present when the act, whatever may be its character, was committed, and there being no reason to doubt but that he was at a great distance and in a different state, it is objected to the testimony offered on the part of the United States, to connect him with those who committed the overt act, that such testimony is totally irrelevant and must therefore be rejected.

The arguments in support of this motion respect in part the merits of the case as it may be supposed to stand independent of the pleadings, and in part as exhibited by the pleadings.

On the first division of the subject two points are made

1st. That conformably to the constitution of the United States, no man can be convicted of treason who was not present when the war was levied.

2d. That if this construction be erroneous, no testimony can be received to charge one man with the overt acts of others, until those overt acts as laid in the indictment be proved to the satisfaction of the court.

FIG. 6. First page of *United States v. Burr*, as it is commonly called. It is actually Appendix B to the U.S. Supreme Court opinion in the case *Ex parte Bollman and Ex parte Swartwout*. Following the court's order granting the defendants' motion to close the evidence for the prosecution's failure to prove an overt act of treason, the matter was submitted to the jury, which returned "not guilty" verdicts. This opinion by the judges holds that clear evidentiary proof of overt action is necessary to sustain a conviction on a charge of treason.

District Attorney Hay finally admitted that among all his remaining witnesses, he had no other evidence of other overt acts occurring on Blennerhassett Island, contending instead that the simple assembling of the men on the island amounted to the overt act of making war. The court asked for argument that then went for days, involving as it did all eight attorneys as well as Burr, speaking as an attorney in his own behalf. During argument, the government's attorneys conceded that no witness had testified that Burr was at Blennerhassett Island, and that during all material times he was in Kentucky or Tennessee, but insisted under the doctrine of constructive treason, which they asserted was in effect in America as in England, that the acts of those on the island were attributable to Burr.

The court then ruled. It granted the motion terminating the taking of further evidence, instructed the jury as to the evidence thus far received and invited them to retire to reach a verdict. The opinion was the longest Marshall ever wrote. It took the whole of the three-hour afternoon session to read. The court adjourned. The following morning, the jury assembled and retired to deliberate. They quickly returned and announced: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."⁷⁸

Marshall consulted with his fellow justices on the Supreme Court several times during the course of the Burr trial, and the *Burr* opinion after it was rendered was attached as Appendix B to the *Bollman* case when both were published, and remains so today in the reports of U.S. Supreme Court opinions.

The pertinent portions of the Burr opinion follow:

It is not deemed necessary to trace the doctrine that *in treason all are principals* to its source. . . . The terms of the constitution comprise no question respecting principal and accessory, so far as either may be truly and in fact said to levy war. . . .

. . . It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it, or who being engaged in the conspiracy fails to perform his part. Whether such persons may be implicated by the doctrine, that *whatever would make a man an accessory in felony makes him a principal in treason*, or are excluded, because that doctrine is inapplicable to the United States the constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to conviction is a question of vast importance.⁷⁹

Marshall then confronted the following language he had written in the *Bollman* opinion: "all those who perform any part, however minute, or

however remote from the scene of action." He acknowledged that counsel in the Burr trial had found it ambiguous and after expanding and explaining that phrase for many pages summarized:

The presence of the party, where presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement take the place of presence, and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law. The mind is not to be led to the conclusion that the accused procured the assembly, by a train of conjectures or inferences, or of reasoning; the fact itself must be proved by two witnesses, and must have been committed within the district.

... To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself.⁸⁰

The advising certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war, than of the actual levying of war. According to the opinion, it is not enough to be leagued in the conspiracy, and the war be levied, but it is also necessary to perform a part; that part is the act of levying of war. This part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act on which alone the person who performs it can be convicted.⁸¹

The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of congress, by two witnesses. *It has not been proved by a single witness.* The presence of the accused has been stated to be an essential component part of the overt act in this indictment . . . and there is not only no witness who has proved his actual or legal presence; but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions, at a different place and in a different state, in order to prove what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blennerhassett's island? No, that is not alleged. It is well known that such testimony is not competent to establish such a fact. *The constitution and law require that the fact should be established by two witnesses, not by the establishment of other facts from which the jury might reason to this fact.* The testimony, then, is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses, in such manner that the question of fact ought to be left with the jury. The conclusion that in this state of things no testimony can be admissible, is so inevitable, that the

counsel for the United States could not resist it. I do not understand them to deny, that if the overt act be not proved by two witnesses so as to be submitted to the jury, that all other testimony must be irrelevant, because no other testimony can prove the act. Now an assemblage on Blennerhassett's island is proved by the requisite number of witnesses, and the court might submit it to the jury, whether that assemblage amounted to a levying of war, but the presence of the accused at that assemblage being no where alleged except in the indictment, the overt act is not proved by a single witness, and of consequence, all other testimony must be irrelevant.⁸²

With all that recital of facts and law, there emerges from the *Bollman* and *Burr* opinions what the law of treason was in America up to and including 1838. Treason consists of making war, meaning some minimal overt act with "force and arms" against the United States proved by two witnesses to the same act, or open confession in court. While the overt act may be "minute" or of small consequence, and at a distance from the scene of action, the party charged must actually perform the act, and be "in league" with the other actors in making the war. He cannot be legally said to be present if he is not actually there and participating. Such "constructive treason" is not a part of American law. To advise or procure treason is in its nature conspiracy, and conspiracy alone is *not* treason. And the overt act must have occurred in the district or jurisdiction where the crime is charged. Finally, the overt act must be proved *before* other corroborating evidence may be received.

The Case of Mark Lynch: Treason against a State. One final legal issue must be considered: Could treason be committed against a state, separate from the national government? More particularly, could such a crime have been committed against a state in 1838?

The case of *People v. Lynch*⁸³ holds the answer. It was a prosecution arising during the War of 1812 between Great Britain and the United States.

Mark Lynch, Aspinwall Cornell, and John Hagerman were indicted for treason against the *state* of New York, charging that they

did adhere to, and give, and minister aid and comfort to the subjects of the said king, &c. by then and there furnishing, supplying and delivering fifty barrels of beef, fifty barrels of pork, fifty hams, one hundred pounds weight of butter, and thirty cheeses, to divers subjects of the said king, &c. in and on board a public ship of war belonging to the said king, &c. then and there lying [in New York harbor], being called the *Bulwark*: the said king, &c. and his subjects, then, and yet being at war with, and enemies of the said state of New-York.⁸⁴

The counsel for the defendants in that case argued that upon the creation of the union, individual states became components of the nation

and treason could only be committed against the nation; otherwise the defendants could, for the same acts be in jeopardy to both the state and the nation. The prosecution argued that there was nothing in the federal constitution that prohibited states from having treason statutes, nor prohibiting them from exercising concurrent jurisdiction, and prosecuting treasonous persons under their own statute.

The New York Supreme Court ruled:

The indictment, containing several counts which are substantially alike, after setting out a state of war between the *United States* and *Great Britain*, declared and carried one under the authority of the *United States*, alleges, that the prisoners, being citizens of the state of *New-York*, and of the *United States of America*, as traitors against the people of the state of *New-York*, did adhere to, and give aid and comfort to the enemy, by supplying them with provisions of various kinds, on board a public ship of war, upon the high seas. It has been attempted, on the part of the prosecution, to support this indictment under the statute of this state, (1 N. R. L. 145,) which declares treason against the people of this state to consist in levying war against the people of this state, within the state, or adhering to the enemies of the people of this state, giving to them aid and comfort in this state, or elsewhere. . . . *Great Britain* cannot be said to be at war with the state of *New-York*, in its aggregate and political capacity, as an independent government, and, therefore not an enemy of the state, within the sense and meaning of the statute. The people of this state, as citizens of the *United States*, are at war with *Great Britain*, in consequence of the declaration of war by congress. The state, in its political capacity, is not at war. The subjects of *Great Britain* are the enemies of the *United States of America*, and the citizens thereof, as members of the union, and not of the state of *New-York*, as laid in the indictment.

. . . Under the old confederation, there was no judicial power organized, and clothed with authority for the trial and punishment of treason against the *United States of America*. It became necessary, therefore, to provide for it under the judicial powers of the several states; no such necessity, however, exists under our present system. According to this view of the subject, it would seem unnecessary to notice the question of jurisdiction; for, admitting the facts charged against the prisoners to amount to treason against the *United States*, they do not constitute the offence of treason against the people of the state of *New-York*, as charged in the indictment. The offence not being charged as treason against the *United States*, the present indictment cannot be supported, even admitting this court to have jurisdiction. We would barely observe, however, that we think the jurisdiction of the state courts does not extend to the offence of treason against the *United States*. The judicial power of the *United States* extends to all cases arising under the constitution and laws of the *United States*. The declaration of war was by a law of congress; and, in consequence of which, it became criminal in the prisoners to afford aid and comfort to the enemy. And the act establishing the judicial courts of

the *United States*, gives to the circuit courts cognizance, exclusive of the courts of the several states, of all crimes and offences cognizable under the authority of the *United States*, except where the laws of the *United States* shall otherwise direct. (1 Sess. 1 Cong. c. 20. sec 11.) In whatever point of view, therefore, the case is considered, we are satisfied that the present indictment cannot be supported. The prisoners must accordingly be discharged.⁸⁵

In addition to holding that treason cannot be committed against a *state*, the opinion gives some additional legal principles. First, from the state perspective it reasserts the proposition cited earlier in this article that the U.S. Constitution and federal statutes relating to treason take precedence over state statutes treating the same subject, and give to the federal courts ("circuit courts" at that time) cognizance or jurisdiction "exclusive of the courts of the several states, of all crimes and offences cognizable under the authority of the *United States*, except where the laws of the *United States* shall otherwise direct." And second, the court in passing acknowledged that it is the prerogative of Congress to declare war, not that of governors or legislatures.⁸⁶

War is the business of nations, not states. Treason is by definition overt acts of "making war" or aiding enemies while war is in progress. As the Blackstone quote first noted above pointed out, while lesser entities ("subjects" in his illustration) may quarrel or war against each other, "it is only a great riot and contempt, and no treason." Missouri did have statutes dealing with crimes lesser than treason that would have been in the nature of insurrection or rebellion, which covered those civil discords that were short of going to war with the sovereign nation.⁸⁷

As the *Lynch* opinion makes clear, treason laws were necessary while New York was a colony, but with the coming of nationhood, treason became the province of the national government. And notwithstanding later states admitted to the union enacted treason provisions in their constitutions and in statutes, as did Missouri, they went unused. Indeed, a number of states in the twentieth century repealed those treason provisions.⁸⁸

Evaluating the Evidence Presented to the Court of Inquiry

With the backdrop of law now in place, we can consider whether the evidence adduced at the Court of Inquiry justified Judge King's order binding over Joseph Smith and his associates for treason.

What happened in Daviess County in 1838? A store in Gallatin owned by Jacob Stollings (not a Mormon) and a home just out of town were burned, and goods were taken from the store, a shop, and some homes.

Livestock and household furnishings were seen being taken into Adam-ondi-Ahman. Later, several Missourians claimed that items stolen from them were found in Mormon homes in Daviess County. Two witnesses identified Alexander McRae and Caleb Baldwin as being in a group who took three guns and two butcher knives from them *four days after* the Gallatin incident.⁸⁹ Other witnesses saw David W. Patten (who all witnesses agree was the commander of the Gallatin raid) and some of his "company" empty the Stollings store and heard Patten instruct someone to set it on fire. No witness claimed to see a person starting a fire in the store. Several stated that they later saw the store burning. No one claimed to see who set the Worthington home just outside Gallatin on fire or when that occurred.

Nine witnesses put Joseph Smith and Lyman Wight in the "expedition to Daviess."⁹⁰ Four name Hyrum Smith as also being in the expedition. Two put Caleb Baldwin in the expedition, and four name McRae. None of the nine witnesses who said Joseph, Hyrum, and Lyman were in the expedition say that any of the three was at Gallatin. One of the three who put Joseph at Adam-ondi-Ahman, Reed Peck (another disaffected Mormon), in his only direct reference concerning Joseph Smith in Daviess County adds:

I heard Perry Keyes, one who was engaged in the depredations in Daviess say that Joseph Smith, jr., remarked, in his presence, that it was his intention, after they got through in Daviess, to go down and take the store in Carrollton. This remark Smith made while in Daviess.⁹¹

Apart from the fact that Peck is reporting someone else's rendition of a purported statement of Joseph Smith, it is a quote of Joseph Smith's *intention*. It was not an observation of an *overt act*. Inflammatory words, but *not* actions.

The second witness who said Joseph was at Adam-ondi-Ahman was Sampson Avard. He testified that at a "council" held at Far West (which is in Caldwell, not Daviess County)

a vote was taken whether the brethren should embody and go down to Daviess to attack the mob.⁹² This question was put by the prophet, Joseph Smith, jr., and passed unanimously, with a few exceptions. Captains Patten⁹³ and Brunson were appointed commanders of the Mormons by Joseph Smith, jr., to go to Daviess. . . . Mr. Smith spoke of the grievances we had suffered in Jackson, Clay, Kirtland, and other places; declaring that we must in future, stand up for our rights as citizens of the United States; and as saints of the most high God; and that it was the will of God we should do so; that we should be free and independent, and that as the State of Missouri and the United States, would not protect us, it was high time we should be up, as the saints of the most high God, and protect ourselves, and take the kingdom. Lyman Wight observed, that,

before the winter was over, he thought we would be in St. Louis, and take it. Smith charged them that they should be united in supporting each other. Smith said, on some occasions, that one should chase a thousand, and two put ten thousand to flight; that he considered the United States rotten. He compared the Mormon church to the little stone spoken of by the Prophet Daniel; and the dissenters first, and the State next, was part of the image that should be destroyed by this little stone. The council was called on to vote the measures of Smith; which they did unanimously. On the next day Captain Patten (who was called by the prophet Captain Fearnought) took command of about one hundred armed men, and told them that he had a job for them to do, and that the work of the Lord was rolling on, and they must be united. He then led the troops to Gallatin, dispersing the few men there, and took the goods out of Stollings store, and carried them to 'Diahmon, and I afterwards saw the storehouse on fire. . . . Joseph Smith, jr., was at Adam-on-diahmon, giving directions about things in general connected with the war. When Patten returned from Gallatin to Adam-on-diahmon, the goods were divided or apportioned out among those engaged; and these affairs were conducted under the superintendence of the first presidency.⁹⁴

There is simply no evidence here that connects Joseph Smith, Hyrum Smith, or Lyman Wight to any overt act or depredation at Gallatin or Adam-on-di-Ahman. Avarð places Joseph at Adam-on-di-Ahman "giving directions about things in general connected with the war," and makes no locus for the "superintendence of the first presidency." The supposed inflammatory words he attributes to Smith were by his account all spoken in Caldwell County, not Daviess. Avarð adds:

I never heard Hiram Smith make any inflammatory remarks; but I have looked upon him as one composing the first presidency; acting in concert with Joseph Smith, jr.; approving, by his presence, acts, and conversations, the unlawful schemes of the presidency.⁹⁵

Avarð tries to make Hyrum guilty by association—"approving, by his presence"—without saying in which county that presence was situated. At the same time Avarð acknowledges that Hyrum not only committed no overt act, he never "made any inflammatory remarks."

Lieutenant Colonel George M. Hinkle, the commander of the state militia at Caldwell County, both disputes and corroborates Avarð's testimony regarding Joseph and Hyrum's "superintendence" and "giving direction" as follows: "Neither of the Mr. Smiths [Joseph and Hyrum] seemed to have any command as officers in the field, but seemed to give general directions." And, "I saw Colonel Wright start off with troops, as was said, to Millport; all this seemed to be done under the inspection of Joseph Smith, jr."⁹⁶ Such words are hardly direct evidence of giving an order, commanding troops, or any other overt act.

To this evidence about inflammatory language must be added the testimony given at the hearing that did not make it into either the *U.S. Senate Document* or the *Missouri General Assembly Document*. As noted in footnote 24 above, the transcript of the King hearing located at the state archives in Jefferson City contains evidence from Robert Snodgrass, George Walton, and Abner Scovil. All allude to statements made by Joseph Smith and/or Sidney Rigdon. Snodgrass said:

Two or three months ago, I heard Joseph Smith Jr. say in Far West. That the time had now come that the Saints should rise & take the Kingdom, and they should do it by the sword of the Spirit, and if not, by the sword of power and further said that they had been trampled on and abused as long as the Lord required it. Sydney Rigdon was present, and said in refference to the dissenters, that if they did not take a hand with them they would set the gideonites upon them, and have them bounding over the plains. He further heard them say that their church was that Kingdom spoken of by Daniel that should overcome all other Kingdoms.

George Walton added:

Soon after the dissenters were driven away from Caldwell county, I was in Far West in Correls store, perhaps the last of June last and heard Jos. Smith say that he believed Mahommet was an inspired man, and had done a great deal of good, and that he intended to take the same course Mahommed did. that if the people would let him alone he would after a while die a natural death, but if they did not, he would make it one gore of blood from the Rocky Mountains to the State of Maine. he further said that he had or would have . . . as regular an inquisition as ever was established, and as good a [illegible] as ever was. this conversation was had when talking about dissenters. I heard Huntington, and Dr. Avar, & I think Mr. Rigdon say that if ever the dissenters returned to Far West, their heads should be their forfeit.

Abner Scovil testified:

In the latter part of June last, I heard Joseph Smith Jr. say that if the people would let him alone he would conquer them by the sword of the Spirit, but if they would not he would beat the plowshares into swords and their pruning hooks into spears & conquer them he would. He said soon after this what do we care for the laws of the land, . . . so long as there is no person to put them in force—after this I had some talk with him. I observed to him that I thought people ought to obey the laws of the land and then he repeated the same thing again.⁹⁷

Here is more testimony about words but no evidence of actions, and the words were all spoken at Far West in Caldwell County, not in Daviess County. And Walton implicates Sampson Avar as making the same

inflammatory remarks that he attributed to Joseph Smith in his testimony quoted above.

Under the standard of the *Bollman* and *Burr* decisions, what does that testimony, giving it full face value, establish? Acts of arson, larceny, and destruction of property, possibly connected to Joseph and the others, but not treason. No "making war"; indeed no gunfire reported by any witness at Gallatin; no "burning of all inclosures, all brothels"; no surrendering of a fortress to enemies of the nation with whom it was at war; no assault on the government; in short, no overt act of war—at Gallatin or elsewhere in Daviess County. Nor were Joseph Smith, Lyman Wight, or Hyrum Smith present at Gallatin during the putative acts, and they cannot have been "constructively present" for the purpose of charging treason because constructive treason is not part of American law. Finally, the inflammatory words charged to Joseph by Avard, whether treasonous or not, were spoken in Caldwell County, not Daviess County, where the offense was charged to have occurred.

For those like LeSueur who have called the events described above the "Mormon war in Missouri," it must be observed there was no war, particularly at the Gallatin stage: Governor Boggs's "Extermination Order" had not yet been issued. Some have claimed the Extermination Order amounted to a declaration of war, but it did not. Boggs crafted it to come as close as possible without being a declaration of war, for the simple reason that he had not the power to declare war. The prerogative to declare war was delegated to the United States Congress at the adoption of the U.S. Constitution⁹⁸ long prior to the creation of the State of Missouri.

Legal Conclusions

The order binding Joseph and the others over for treason thus fails for at least six reasons:

First, the statutorily mandated minimums of due process of law to be afforded the defendants in the proceeding were pervasively disregarded or ignored.

Second, Reed Peck and others attributed to Joseph Smith an expression of an intention. The testimony upon which treason was charged used vague language such as that Joseph Smith and Hyrum Smith "seemed to give general direction" to troops.⁹⁹ Such statements are, at best, efforts to create a basis for "constructive treason." But constructive treason, was, in the *Burr* case, expressly rejected as a chargeable offense in the United States. Words, and words alone, even if they are conspiratorial in nature, are not treason.

Third, there was no armed assemblage making war against the government at Gallatin, not a single gun fired, no destruction of all buildings, no confrontation between armed camps, no overt act of making war.

Fourth, the inflammatory language that Sampson Averd attributes to Joseph Smith was spoken in a county other than the one in which treason was charged.

Fifth, the testimony of two witnesses, as required by the Constitution, was not produced. Indeed, as in the Burr case, no one testified of an overt act of making war at Gallatin.¹⁰⁰ This condition legally makes all the other testimony at the hearing as it relates to treason irrelevant.

Sixth, treason can only be committed against the United States, not against an individual state, as clarified by the *Lynch* case in 1814.

One could argue that we could hardly expect Austin King to be familiar with the *Bollman*, *Burr*, and *Lynch* cases in frontier Missouri, and he must have ruled in ignorance of them. There is, however, some reason to suggest that he was advised of the *Burr* case. In his first communication with Governor Boggs after arrival at Far West, General John B. Clark asked about the appropriate place to try the prisoners:

The most of the prisoners here I consider guilty of *Treason*, and I believe will be convicted, and the only difficulty in law is, can they be tried in any county but Caldwell? if not they cannot be there indicted, until a change of population. In the event the latter view is taken by the civil courts, I suggest the propriety of trying Jo Smith and those leaders taken by Gen. Lucas, by a court martial for mutiny. . . . I would have taken this course with Smith at any rate; but it being doubtful whether a court martial has jurisdiction or not, in the present case—that is, whether these people are to be treated as in time of war, and the mutineers as having mutinied in time of war—and I would here ask you to forward to me the Attorney General's opinion on this point.¹⁰¹

The letter was written November 10, 1838. The governor replied on November 19, while the Court of Inquiry was in session:

SIR:—You will take immediate steps to discharge all the troops you have retained in service as a guard, and deliver the prisoners over to the civil authorities. You will not attempt to try them by court martial, the civil law must govern. Should the Judge of the Circuit Court deem a guard necessary, he has the authority to call on the militia of the county for that purpose. In the absence of the Attorney General, I am unable to furnish you with his opinion in the points requested . . . but the crime of treason, whether it can be tried out of the county where the act was committed, we have no precedent, only that of the case of Aaron Burr, who was charged with the commission of that offence against the United States, at Blennerhassett's Island, in the State of Virginia, and he was tried at Richmond, Va.¹⁰²

Boggs knew of the *Burr* decision and communicated its relevance, at least as he understood it on the question of jurisdiction, to Clark. And since Clark was Boggs's liaison to Judge King, it is not unreasonable to suppose that Governor Boggs's communication was transmitted to Judge King. There were, at the time, in print and widely distributed, sets of law reports which contained the *Bollman*, *Burr*, and *Lynch* opinions. What was available to King is now unknown, but it is significant that Joseph Smith's petition¹⁰³ addressed to Justice George Thompson of the Missouri Supreme Court, dated March 10, 1839, refers to each of the concepts and holdings of the *Bollman*, *Burr*, and *Lynch* cases. While the language of the petition is of the petitioner's making, and not that of attorneys, the legal principles are apparent:

Whereas the said Joseph Smith Jr. did not levy war against the State of Missouri, neither did he commit any overt acts, neither did he aid or abet an enemy against the State of Missouri during the time that he is charged with having done so, and further your petitioners have yet to learn that the State has an enemy, . . . That the prisoner has never commanded any military company nor held any military authority neither any other office real or pretended in the State of Missouri except that of a religious teacher. That he never has borne arms in the military musters (?) And in all such cases has acted as a private character. And as an individual, how then, your petitioners would ask can it be possible the prisoner has committed treason, . . . That the testimony of Dr. Avard concerning a council held at James Sloan's¹⁰⁴ was false. Your petitioners do solemnly declare that there was no such council. That your petitioners were with the prisoner, And there was no such vote nor conversation as Doctor Avard swore to; . . . that the prisoner had nothing to do with burnings in Daviess County.¹⁰⁵

Where did they get those specific ideas, if their attorneys had not used them in court? And if Doniphan and Burnett knew of them, it seems highly likely that the three cases were called to the judge's attention.

Synthesis and Aftermaths

The contrast between the *Burr* case and the Missouri Court of Inquiry brings to light the deprivation of justice suffered by Joseph Smith and his brethren. Aaron Burr and Joseph Smith were both charged with treason. Both faced massive public calumny. Jefferson was actively opposed to Burr, and Boggs was equally so to Smith, albeit Boggs did not take as publicly active a part in the Court of Inquiry as Jefferson did in both the *Bollman* and *Burr* cases. Burr escaped after acquittal by a grand jury, but the judge refused to accept that verdict, and Burr was later recaptured, tried, and acquitted. Smith escaped after indictment by a grand jury and was never

tried thereafter for that offense. Burr, however, was protected by a judge, John Marshall, who refused to be intimidated and applied the law of treason in America, of which he had a principal part in defining in the process. Smith, in contrast, was bound over by a judge whose views were the same as Joseph's accusers and who disregarded the law then in force, both the substantive law of treason and the constitutional guarantees of due process and fair trial.

Why did Judge King insist on binding Joseph and his four associates over to be investigated by the grand jury for treason, in the absence of any evidence that went beyond inflammatory words, when he could more appropriately have charged them with the lesser offense of insurrection, or of arson, larceny, and receiving stolen goods, as he did the many other defendants? The same question could be modified to apply to Parley P. Pratt and his four co-defendants.¹⁰⁶ That is, why were they bound over for murder, the factual basis for which was a pitched battle between two duly constituted but opposing companies of Missouri Militia, without any evidence connecting the fatal shot that killed Moses Rowland, a Missouri militiaman, to any of those five, when there may have been evidence to connect them with lesser crimes?

The answer lies in the fact that both treason and murder are *nonbailable* offenses. All the other chargeable offenses were bailable. Most, if not all, of the other defendants, shortly after being bound over, posted bail via the recognizance process noted earlier. They left the state and forfeited their bail. Not so for Joseph and the other nine co-defendants held for treason or murder. Sidney Rigdon succeeded after some months in being admitted to bail on a writ of habeas corpus.¹⁰⁷ Efforts by the others to obtain such writs and get a bail hearing fell on deaf ears,¹⁰⁸ but that, too, is a subject for another paper, along with the proceedings of the Daviess County Grand Jury and the change of venue which led to the escape of the prisoners. It is worthy of note here, however, that Joseph later recalled that his legal bills in Missouri in cash, land, and goods came to about \$50,000.¹⁰⁹

From the record of the Court of Inquiry, it thus appears that Austin A. King was determined to put Joseph Smith and those he perceived to be principal Mormon leaders in prison on some nonbailable charge and hold them there as hostages until the Mormons had all left the state. Hyrum Smith said as much:

The next morning [after the hearing] a large wagon drove up to the door, and a blacksmith came into the house with some chains and handcuffs. He said his orders were from the Judge to handcuff us and chain us together. He informed us that the Judge had made out a mittimus and sentenced us to jail for treason. He also said the Judge had done this *that*

*we might not get bail. He also said that the Judge declared his intention to keep us in jail until all the "Mormons" were driven out of the state (italics added).*¹¹⁰

Austin King was on a quest for hostages. Due process and constitutional standards for probable cause were inconsequential in that quest. One need not be reminded that the same nonbailable treason gambit would be used again at Carthage, Illinois.¹¹¹

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The author wishes to express particular gratitude to Max K. Parkin, Richard L. Anderson, and Alexander L. Baugh, all of the Joseph Smith Papers project, and Kenneth H. Winn, Missouri State Archivist, for their generous sharing of sources and insights, which, of course, does not absolve the author from full responsibility for the content of this article, which is duly assumed.

This article is an expansion of a paper given at the annual conference of the Mormon History Association in 1999 in Ogden, Utah.

1. See Joseph Smith Jr., *History of The Church of Jesus Christ of Latter-day Saints*, ed. B. H. Roberts, 2d ed., rev., 7 vols. (Salt Lake City: Deseret Book, 1971), 3:187–206 (hereafter cited as *History of the Church*). See also Parley P. Pratt, *History of the Late Persecution* (Detroit: Dawson & Bates, 1839), reprinted in *Mormon Redress Petitions: Documents of the 1832–1838 Missouri Conflict*, ed. Clark V. Johnson (Provo, Utah: Religious Studies Center, Brigham Young University, 1992), 80–88. Stated in the Pratt account is "A Lyman and several others were added to our number," 83; besides Amasa Lyman, however, the others were not named. For a concise overview of the conflict between Mormons and Missourians, see Max H. Parkin, "Missouri Conflict," in *Encyclopedia of Mormonism*, ed. Daniel H. Ludlow, 4 vols. (New York: Macmillan, 1992), 2:927–32. Alexander Doniphan, prior to this incident and thereafter, served as attorney for Joseph Smith and other Mormons.

2. *Correspondence, Orders, &c. in Relation to the Disturbances with the Mormons; and the Evidence* (Fayette, Missouri: Missouri General Assembly, 1841), 90–91 (hereafter cited as *Missouri General Assembly Document*). See also *History of the Church*, 3:201–6. For notes on this and other Mormon documents from the Missouri period, see Stanley B. Kimball, "Missouri Mormon Manuscripts: Sources in Selected Societies," *BYU Studies* 14, no. 4 (1974): 458–87.

3. *History of the Church*, 3:319–30.

4. He noted that he heard "the Judge say, whilst he was sitting in his pretended court, that there was no law for us, nor for the 'Mormons' in the state of Missouri; that he had sworn to see them exterminated and to see the Governor's order executed to the very letter; and that he would do so." *History of the Church*, 3:420.

5. Gordon D. Pollock, "The Prophet before the Bar: The Richmond Court Transcript" (paper presented to the Mormon History Association, Annual Meeting, Logan, Utah, May 17, 1988, copy in writer's possession), 18. See also Stephen C. LeSueur, *The 1838 Mormon War in Missouri* (Columbia, Mo.: University of Missouri Press, 1987) where on page 214 he writes: "Finally, an examination of the court record reveals that Judge King, regardless of any prejudice he may have had, charged and committed the defendants on the evidence." But two pages later, he continues: "This reexamination of Mormon claims regarding the Richmond hearing may lead the reader to conclude that justice was served by this judicial inquiry. Just the opposite is true. Although Mormon leaders presented inaccurate and misleading descriptions of the court's proceedings, their basic contention was correct: the Richmond inquiry did not represent a thorough—or, therefore, unbiased—investigation of the disturbances." LeSueur, *Mormon War*, 216. These two statements seem contradictory, and, like Pollock, LeSueur offers no legal basis on which to conclude that King properly "charged and committed the defendants on the evidence."

A more recent article is H. Michael Marquardt, "Judge Austin A. King's Preliminary Hearing: Joseph Smith and the Mormons on Trial," *John Whitmer Historical Association Journal* 24 (2004): 41–55. Marquardt similarly fails to consider the many problems in the procedure and substance of the trial.

6. *Missouri General Assembly Document*, 2.

7. *Senate Document* 189, 26th Cong., 2d sess., 1841 (hereafter cited as *U.S. Senate Document*).

8. *Missouri General Assembly Document*, title page. The minor discrepancies between the two published transcripts of the testimony have little significance as to substance and are not discussed here. The letters, some with attached affidavits, which passed between Governor Boggs, Judge King, and the militia commanders, composing the first half of *Missouri General Assembly Document*, were apparently included in the report by the Legislative Committee to show the inflamed state of some minds prior to Governor Boggs's Order and the convening of the court. Much in the affidavits turned out to be overblown, and nothing in the record indicates that any of the affidavits were offered or received into evidence. Accordingly they are also not discussed in this article.

9. For a summary of the causes and major details of those years of conflict, together with the efforts of David R. Atchison as both an attorney and militia general in trying to preserve peace, see Richard Lloyd Anderson, "Atchison's Letters and the Causes of Mormon Expulsion from Missouri," *BYU Studies* 26, no. 3 (1986): 3–46. A more extensive treatment is Alexander L. Baugh, *A Call to Arms: The 1838 Mormon Defense of Northern Missouri* (PhD diss., Brigham Young University, 1996; reprint, Provo, Utah: BYU Studies and Joseph Fielding Smith Institute for Latter-day Saint History, 2000), particularly chaps. 7–11. Another evenhanded treatment is Kenneth H. Winn, *Exiles in a Land of Liberty: Mormonism in America, 1830–1846* (Chapel Hill, N.C.: University of North Carolina Press, 1989), chaps. 3–7. The Mormon population numbers were shared with the author by Alexander Baugh.

10. "If it appear that an offence has been committed, and that there is probable cause to believe the prisoner guilty thereof, the magistrate shall bind, by recognizance, the prosecutor, and all material witnesses against such prisoner, to

appear and testify before the court having cognizance of the offence, on the first day of the next term thereof, and not to depart such court without leave." Practice and Proceedings in Criminal Cases, *The Revised Statutes of the State of Missouri, 1835* (Argus Office 1835), Article II, sec. 22, pp. 476–77.

11. "The magistrate, before whom any such person shall be brought, shall proceed, as soon as may be, to examine the complainant, and the witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offence charged, and other matters connected with such charge, which such magistrate may deem pertinent." Criminal Cases, *Statutes of Missouri, 1835*, Article II, sec. 13, p. 476.

12. "If desired by the prisoner, his counsel may be present during the examination, and may cross-examine the complainant, and the witnesses on the part of the prosecution." Criminal Cases, *Statutes of Missouri, 1835*, Article II, sec. 14, p. 476.

13. "If the offence with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance, to answer the charge before the court in which the same is cognizable, on the first day of the next term thereof, and not to depart such court without leave, and thereupon he shall be discharged." Criminal Cases, *Statutes of Missouri, 1835*, Article II, sec. 26, p. 477.

14. "If the offence be not bailable, or sufficient bail be not offered, the prisoner shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law." Criminal Cases, *Statutes of Missouri, 1835*, Article II, sec. 27, p. 477.

15. "The evidence given by the several witnesses examined, shall be reduced to writing by the magistrate, or under his direction, and shall be signed by witnesses respectively." Criminal Cases, *Statutes of Missouri, 1835*, Article II, sec. 20, p. 476. "All examinations and recognizances, taken in pursuance of the provisions of this article shall be certified by the magistrate taking the same, and delivered to the clerk of the court in which the offence is cognizable, on or before the first day of the next term thereof, except, that where the prisoner is committed to jail, the examination of himself, and of the witnesses for or against him, duly certified, shall accompany the warrant of commitment, and be delivered therewith to the jailor." Criminal Cases, *Statutes of Missouri, 1835*, Article II, sec. 29, p. 477. In the 1838 Court of Inquiry, as the legislature's committee observed in the quote noted earlier in this paper, the testimony of all the witnesses, while signed, was not certified (that is, sworn to before the magistrate, as required) thus leaving it of questionable authenticity.

16. *Encyclopedia Britannica*, 24 vols. (London: Encyclopedia Britannica, 1945), 20:576, s.v. "Shorthand."

17. Criminal Cases, *Statutes of Missouri, 1835*, Article II, sec. 20, p. 476, and sec. 29, p. 477.

18. U.S. Senate Document, 26, 28, 36, 38; *Missouri General Assembly Document*, 130, 131, 133, 134, 142, 144, 145.

19. *History of the Church*, 3:430. I have not raised the question of prejudicial or biased comments which were attributed to Judge King during the hearing, or of his letters to General Atchison and Governor Boggs which preceded the hearing

which demonstrate a prejudice or predisposition against the Mormons (*Missouri General Assembly Document*, 28–29, 53–54) because there is no motion by defense counsel to disqualify the judge for prejudice in the record; nor does it appear that the legislature's Joint Committee took any specific exception to the sentiments demonstrating bias in his writings that were included in the documents the Committee ordered printed, beyond the following: "These documents, although they are serviceable in giving direction to the course of inquiry, are none of them, except the official orders and correspondence, such as ought to be received as conclusive evidence of the facts stated; nor are their contents such as would, without the aid of further evidence, enable the committee to form a satisfactory opinion in relation to the material points of the inquiry." *Missouri General Assembly Document*, 3.

20. They were King Follett, Samuel Bent, Ebenezer ["Ebberry"] Brown, William Whitman, and Jonathan Dunham. *U.S. Senate Document*, 19–20; *Missouri General Assembly Document*, 119.

21. They were James Newberry and Sylvester Hewlett. *U.S. Senate Document*, 27; *Missouri General Assembly Document*, 132.

22. They were Clark Hallett and Joel S. Miles. *U.S. Senate Document*, 34; *Missouri General Assembly Document*, 140.

23. Rollins's name was spelled "Rawlins" and Morris's name was spelled "Maurice" in the order. *Missouri General Assembly Document*, 150.

24. The three whose testimony does not appear in either printed transcript were Robert Snodgrass, George Walton, and Abner Scovell ("Scovil" in *History of the Church*). *Missouri General Assembly Document*, 151, names them. *History of the Church*, 3:210, lists all three as having testified. There are three copies of the transcript submitted to the legislative committee and/or the U.S. Senate. One is located at the Missouri State Archives, Jefferson City, Mo.; one at the Missouri State Historical Society, University of Missouri, Columbia, Mo.; and one at the State Historical Society, St. Louis, Mo. Only the transcript at the Archives in Jefferson City contains the testimony of the three above-named witnesses. Reference will be made below to that testimony.

25. *Missouri General Assembly Document*, 150. "Lyman Gibbs" in the order was actually Luman Gibbs. *History of the Church* lists the names of all the prisoners with their correct spellings, 3:209. This paper focuses on Joseph Smith and the treason charges. The charges against Parley P. Pratt and his co-defendants for murder are only summarized as follows: Those charges arose from the "Battle of Crooked River." Upon receiving a report that Captain Samuel Bogart of the Missouri militia (mostly from Ray County and non-Mormon) had taken three Mormon prisoners and were camped on Crooked River in Ray County, just south of its border with Caldwell County, Judge Elias Higbee, a Mormon and the first District Judge of newly settled and predominantly Mormon Caldwell County, ordered Lieutenant Colonel George M. Hinkle, the commander of the state militia in that county, to call out a company to proceed to Crooked River to rescue the prisoners. Colonel Hinkle dispatched Captain David W. Patten and his men on that assignment. The Caldwell militia arrived at Crooked River just before dawn, and a short skirmish ensued. Moses Rowland of the Bogart company was killed, and Patten, Gideon Carter, and Patrick O'Banion of the Caldwell troops died. Several

others on both sides were wounded. Pratt and his four co-defendants were in the Caldwell company. No evidence appears in the record that connects any of the five with Rowland's death. Indeed, without ballistic or forensic sciences as developed today, determining who fired a fatal shot in a pitched military battle would be nigh impossible to ascertain. The evidence does identify several other defendants who were also at Crooked River on that occasion who were not charged with murder. See *History of the Church*, 3:169–71; Baugh, *A Call to Arms*, 99–113; and LeSueur, *Mormon War*, 137–42.

26. *Missouri General Assembly Document*, 150. Those bound over were: George W. Robinson, Alanson Ripley, Washington Voorhees, Sidney Turner ("Tanner" in the order), Jacob Gates, Jesse D. Hunter ("Jos." in the order), George Grant, Thomas Beck ("Rich" in the order and "Buck" in *U.S. Senate Document*, 1), John S. Higbee (*History of the Church*, 3:209; "Higbey" in both *U.S. Senate Document*, 1, and *Missouri General Assembly Document*, 97, 150), Ebenezer Page, Ebenezer Robinson, James M. Henderson, David Pettigrew (*History of the Church*, 3:209; "Pettigrew" in both *U.S. Senate Document*, 1, and *Missouri General Assembly Document*, 97, 150), Edward Partridge, Francis Higbee (*History of the Church*, 3:209; "Higby" in *U.S. Senate Document*, 1, and "Higbey" in *Missouri General Assembly Document*, 97, 150), George Kimball (*History of the Church*, 3:209; "Kimble" as charged in both *U.S. Senate Document*, 1, and *Missouri General Assembly Document*, 97, but "Kemble" in the order, *Missouri General Assembly Document*, 150), Joseph W. Younger, Daniel Garn (*History of the Church*, 3:209; "Carn" in both *U.S. Senate Document*, 1, and *Missouri General Assembly Document*, 97, 150), James H. Rollins (not originally charged, nor named as an added defendant in the record, but bound over as "James H. Rawlings" in the order, *Missouri General Assembly Document*, 150), Samuel Bent ("Lemuel" Bent in the order, *Missouri General Assembly Document*, 150), Jonathan Dunham, Joel S. Miles, and Clark Hallett.

27. The six were: King Follett (who was later indicted for robbery by the grand jury of Caldwell County, imprisoned in Boone County Jail in Columbia, Mo., with Parley P. Pratt and the others named above, attempted to escape with them, was recaptured, tried on the robbery charge and acquitted), Benjamin Jones, George W. Harris ("Harris," as originally charged, *U.S. Senate Document*, 1, and *Missouri General Assembly Document*, 97, but listed as "Morris," in the order, *Missouri General Assembly Document*, 149), Elijah Newman, Moses Clawson, and Daniel Shearer (*Missouri General Assembly Document*, 149). The dismissal of these six does not appear in *U.S. Senate Document*.

For the twenty-three dismissed, see *U.S. Senate Document*, 37, and *Missouri General Assembly Document*, 143. They were: Amasa Lyman ("Amazy" in *U.S. Senate Document*, 1), John Buchanan (*History of the Church*, 3:209; "Buckhannon" in *U.S. Senate Document*, 1, 37, and "Buchanan" as originally charged and "Buchannan" in the order in *Missouri General Assembly Document*, 97, 143), Andrew Whitlock, Alvin G. Tippetts (*History of the Church*, 3:209; "Abraham L." in *U.S. Senate Document*, 37), Jedediah Owens (listed as "Zedekiah Owens" in *U.S. Senate Document*, 1, and *Missouri General Assembly Document*, 97), Isaac Morley, John J. Tanner ("Turner" as originally charged in *Missouri General Assembly Document*, 97), Daniel S. Thomas, Elisha Edwards, Benjamin Covey, David Frampton,

Henry Zobriskie (*History of the Church*, 3:209; "Zabriskey" as originally charged in *U.S. Senate Document*, 1, and "Zabriski" in *U.S. Senate Document*, 37, *Missouri General Assembly Document*, 97, and the order, *Missouri General Assembly Document*, 143), Allen J. Stout, Sheffield Daniels, Silas Maynard (*History of the Church*, 3:209; "Manard" in *U.S. Senate Document*, 1, 37, and *Missouri General Assembly Document*, 97, 143), Anthony Head, John T. Earl, Ebenezer Brown (originally added as a defendant as "Ebbery Brown," *U.S. Senate Document*, 19–20, and *Missouri General Assembly Document*, 119), James Newberry, Sylvester Hewlett, Chandler Holbrook (*History of the Church*, 3:209; "Haldbrook," as originally charged, *U.S. Senate Document*, 1, and *Missouri General Assembly Document*, 97, and "Halbrook" in the order in both *U.S. Senate Document*, 37, and *Missouri General Assembly Document*, 143), Martin C. Allred, and William Allred (*History of the Church*, 3:209; both Allreds spelled "Alred" in *U.S. Senate Document*, 1, 37, and *Missouri General Assembly Document*, 97, 143).

28. *Missouri General Assembly Document*, 150.

29. "Whenever complaint shall be made to any magistrate, that a criminal offence has been committed, it shall be his duty to examine the complainant, and any witnesses who may be produced by him, on oath." Criminal Cases, *Statutes of Missouri*, 1835, Article II, sec. 2, p. 474.

30. "If it appear on such examination, that any criminal offence has been committed, the magistrate shall issue a proper warrant, reciting the accusation, and commanding the officer to whom it shall be directed, forthwith to take the accused, and bring him before such magistrate, to be dealt with according to law." Criminal Cases, *Statutes of Missouri*, 1835, Article II, sec. 3, p. 475.

31. "Persons arrested under any warrant for any offence, shall, when no provision is otherwise made, be brought before the magistrate who issued the warrant . . . and the warrant, by virtue of which the arrest was made, with a proper return endorsed thereon, and signed by the officer or person making the arrest, shall be delivered to such magistrate." Criminal Cases, *Statutes of Missouri*, 1835, Article II, sec. 12, p. 476.

32. *History of the Church*, 3:463. General Clark, who served as liaison between Governor Boggs and Judge King during the hearing, wrote the governor on November 10, 1838, two days before the hearing began: "I this day made out charges against the prisoners, and called on Judge King to try them as a committing court, and I am now busily engaged in procuring witnesses, and submitting facts." *Missouri General Assembly Document*, 67. He does not say that the "charges" were reduced to writing and accompanied by a warrant. Nor are there any such documents attached to the record in either *U.S. Senate Document* or *Missouri General Assembly Document*.

33. *History of the Church*, 3:448.

34. *History of the Church*, 3:463.

35. *History of the Church*, 3:212–13.

36. *History of the Church*, 3:419. Allen is not listed as a witness in either *Missouri General Assembly Document* or *U.S. Senate Document*, so no effort was made to reduce to writing what testimony he did give.

37. Peter H. Burnett, a non-Mormon journalist and attorney, who later represented Joseph Smith and the others before the grand jury, was, as a journalist,

covering the hearing and observed that Sampson Avard, the prosecution's first and principal witness, was "cross-examined very rigidly." Peter H. Burnett, *An Old California Pioneer* (Oakland, Calif.: Biobooks, 1946), 38. The record of Avard's testimony (*U.S. Senate Document*, 1-9, 21, *Missouri General Assembly Document*, 97-108) discloses no cross-examination.

38. *Autobiography of Parley P. Pratt* (Salt Lake City: Deseret Book, 1972), 211-12; italics in original.

39. Spelled "Morris" in *U.S. Senate Document*, 11-12, and "Maurice" in *Missouri General Assembly Document*, 109-10, 150.

40. *U.S. Senate Document*, 11-12; *Missouri General Assembly Document*, 109-10, 150. A later reminiscence written by Morris Phelps expands what appears in the record and recounts that during the course of his testimony, he attempted to testify favorably about Joseph Smith and the others and was prevented from doing so by Judge King and the prosecuting attorney, who thereafter filed charges against him for murder in connection with the Battle of Crooked River. Morris Phelps, "Memoirs of Columbia Jail," manuscript, Church Archives, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, 1. Similarly, Chandler Holbrook, one of the original 53 charged and also one of the 23 released (listed above) wrote that he, too, was told when imprisoned "that he would remain there until he would testify against [Joseph]." He replied, "I will stay in this dungeon until the worms carry me out the keyhole, and then I won't." Bryant S. Hinckley, *That Ye Might Have Joy* (Salt Lake City: Bookcraft, 1958), 24.

41. *Missouri General Assembly Document*, 150.

42. *Missouri General Assembly Document*, 150.

43. A "Thomas Buck" is named as a defendant in *U.S. Senate Document*, 1. A "Thomas Beck" is named in *Missouri General Assembly Document*, 97.

44. *U.S. Senate Document*, 2; *Missouri General Assembly Document*, 98.

45. *Missouri General Assembly Document*, 150.

46. *Missouri General Assembly Document*, 2.

47. The long-continuing debate about how much Joseph Smith was involved with or knew about Avard and the Danites is not in the purview of this article. For discussions of this issue, see *History of the Church*, 3:179-82; LeSueur, *Mormon War*, 43-47; David J. Whittaker, "Danites," in *Encyclopedia of Mormonism*, 1:356-57; and for a more extended treatment, David J. Whittaker, "The Book of Daniel in Early Mormon Thought," in *By Study and Also by Faith: Essays in Honor of Hugh W. Nibley*, ed. John M. Lundquist and Stephen D. Ricks (Salt Lake City: Deseret Book, 1990), 1:155-201, particularly 166-74.

48. Avard is quoted as having told Oliver Olney prior to the Court of Inquiry that if Olney "wished to save himself, he must swear hard against the heads of the Church, as they were the ones the court wanted to criminate; . . . 'I intend to do it,' said he, 'in order to escape, for if I do not they will take my life.'" *History of the Church*, 3:209-10.

49. The phrase "in which Gallatin was burnt" implies that the whole village was burned down. Actually a store owned by Jacob Stollings in Gallatin was the only structure destroyed by fire. It contained the store, the post office and the office of the county treasurer. See testimony of Patrick Lynch, Stollings's store clerk, who locked the store as the Mormons approached, ran away, and returned later to see

the store on fire. *U.S. Senate Document*, 38–39; *Missouri General Assembly Document*, 145. Later, George W. Worthington, who lived about a quarter of a mile outside Gallatin, was accosted by the Mormons, who advised him that if he “belonged to neither party, I had better put off, and take the best of my property with me. . . . I fixed, and did start, that evening. . . . After I left, my house was burnt.” He does not indicate how long after his departure his home was burned, nor does he say who burned it. *U.S. Senate Document*, 34; *Missouri General Assembly Document*, 140–41.

50. *U.S. Senate Document*, 16; *Missouri General Assembly Document*, 115.

51. This testimony also brings to the fore the rule against hearsay. An out of court statement by someone other than a defendant or the testifying witness is by this rule inadmissible because the party who purportedly made the statement is not available to be cross-examined as to the truth of his supposed statement. Blackstone puts it succinctly: “So, no evidence of a discourse with another will be admitted, but the man himself must be produced.” *Blackstone’s Commentaries on the Laws of England*, 4 vols., reprint (Buffalo, N.Y.: William S. Hein, 1992), 3:368 (hereafter cited as *Blackstone*). There are exceptions to the rule, which Blackstone immediately lists following the language just quoted. One exception or circumvention of the rule in today’s litigation practice is the requirement that unless hearsay is objected to at the time it is given and a motion is made to strike the hearsay testimony, it is allowed to remain in the record. Whether that requirement was the practice in 1838 Missouri is nigh impossible to discover. Since, as noted previously, the record discloses no objections or comments of either counsel or the judge, I have for the purposes of this paper treated all the hearsay as though properly admitted. Nevertheless, “it was said by some . . . and by others” is not only hearsay compounded, it is no more than rumor.

52. Testimony was given by three witnesses about another fire in Millport, a town between Adam-ondi-Ahman and Gallatin. Two of the witnesses, Charles Bleckley and James Cobb, say only that Joseph Smith, Lyman Wight, and others were sitting on horseback observing the burning of the building which Cobb says was a “stable.” *U.S. Senate Document*, 30–31; *Missouri General Assembly Document*, 136. The third, James B. Turner, states that while he and another were watching the structure burning, he saw Joseph and the others “ride up.” Turner continues:

Mr. Cobb, the mail-rider, and several of the Bleckleys, came up also. Cobb observed, “See what the damned Mormons have done!” speaking of the burning. Hiram Smith asked how he knew it was the Mormons? He said they had burnt Gallatin. Some of the Mormons replied, that Gallatin was burnt by the mob from Platte. Cobb then remarked, that all Clay and Ray [counties] were turning out to come against them. Wight or Smith, observed he did not believe that was true. Lyman Wight said their cause was just; he considered they were acting on the defensive, and he would as soon 50,000 should come as 500. (*U.S. Senate Document*, 33–34; *Missouri General Assembly Document*, 139–40)

So there is no testimony as to who set the fire at Millport or who owned the structure; and, according to this testimony, the structure was already burning *before* Joseph Smith, Lyman Wight, and the others arrived at the scene. For more about Millport, see footnote 93 below.

53. Crimes and Punishments, *The Revised Statutes of the State of Missouri*, 1835 (Argus Office 1835) Article I, sec. 1., p. 166.

54. *Blackstone*, 4:81–83, emphasis added. Since the above quote begins with the “Third species of treason,” one might ask what the first and second species were. The first was the plotting or attempting the death of the king. *Blackstone*, 4:76. The second was to “violate the king’s companion, or the king’s eldest daughter unmarried, or the wife of the king’s eldest son and heir.” *Blackstone*, 4:81. Both species have no relevance in the United States.

55. *Blackstone*, 4:80, emphasis added.

56. In the *Bollman* case cited at footnote 59 below and which is treated in detail later in this article, Chief Justice John Marshall of the U.S. Supreme Court, speaking of the pre-eminence of the Constitution, wrote, “That great fundamental law which defines and limits the various departments of our government has given a rule on the subject [treason] both to the legislature and the courts of America, which neither can be permitted to transcend.” *Ex parte Bollman and Ex parte Swartwout*, 4 Cranch 126; 8 U.S. 46; 2 L. Ed. 554 (1807), cited hereafter as *Bollman*.

57. *Constitution of the United States of America*, Article III, sec. 3, emphasis added. Treason is the only crime that is defined in the Constitution, all other federal crimes being defined by Congressional statute. This gives some credence to the notion that the Founding Fathers considered treason to be a crime directed against the union (as opposed to one against a single state) deserving constitutional definition. Moreover, the phrase in the Constitutional definition is “levying War against them” rather than “levying War against any one of them,” suggesting the same interpretation. The *Lynch* case, discussed below, dealt directly with this distinction.

58. “Missouri Constitution, 1820,” in William F. Swindler, *Sources and Documents of United States Constitutions*, 10 vols. (Dobbs Ferry, N.Y.: Oceana, 1975), 5, Article XIII, sec. 15, emphasis added.

59. *United States v. Burr*, 4 Cranch 470; 8 U.S. 281; 2 L. Ed. 684 (1807) and *Bollman*, 4 Cranch 75.

60. I am relying primarily on three works for the information on the Burr conspiracy: Milton Lomask, *Aaron Burr: The Conspiracy and Years of Exile, 1805–1836* (New York: Farrar, Straus, Giroux, 1982); Albert J. Beveridge, *The Life of John Marshall*, 4 vols. (Boston: Houghton Mifflin, 1916, 1919); and David Robertson, *Trial of Aaron Burr for Treason*, 2 vols. (Jersey City, N.J.: Frederick D. Linn, 1879). Lomask authored an earlier companion work (*Aaron Burr: The Years from Princeton to Vice President, 1756–1805* [New York: Farrar, Straus, Giroux, 1979]) to which I referred but have not cited herein.

61. Lomask, *Aaron Burr*, 33–35, 38–40.

62. Lomask, *Aaron Burr*, 50–51.

63. Lomask, *Aaron Burr*, 193–94.

64. Lomask, *Aaron Burr*, 44.

65. Lomask, *Aaron Burr*, 4–6, 17.

66. Lomask, *Aaron Burr*, 164–68, 179.

67. Lomask, *Aaron Burr*, 174.

68. Lomask, *Aaron Burr*, 180–81. Lomask cites Richardson, *Messages of the Presidents*, 1:404, as his source.

69. Lomask, *Aaron Burr*, 194.

70. *Bollman*, 4 Cranch 135; 8 U.S. 82; 2 L. Ed. 574.

71. *Bollman*, 4 Cranch 125; 8 U.S. 76; 2 L. Ed. 571.

72. *Bollman*, 4 Cranch 126; 8 U.S. 76–77; 2 L. Ed. 571, emphasis added.

73. *Bollman*, 4 Cranch 126; 8 U.S. 77; 2 L. Ed. 571, emphasis added.

74. *Bollman*, 4 Cranch 127; 8 U.S. 77; 2 L. Ed. 571, emphasis added.

75. Each of the Justices of the Supreme Court of that time also served as Circuit Court judge with fellow District Judges in one of the several circuits of states into which the country was divided. Marshall's circuit included Virginia.

76. Robertson, *Trial of Aaron Burr*, 1:509–14; Beveridge, *John Marshall*, 3:427. In a later deposition, Tupper denied the incident stating he “neither had nor pretended to have any authority . . . to arrest anyone.” That is so, since Tupper was an Ohioan, and the island was Virginia territory. See Lomask, *Aaron Burr*, 266–67.

77. The issue of jurisdiction should be explained here. Federal courts cover the same territory as the states. At Marshall's time, the district of Virginia included the whole state of Virginia, including the island owned by Blennerhassett in the Ohio River near the Virginia shore. Jurisdiction in the state courts of Missouri at the time of Judge King's hearing was divided into circuits and districts. The circuits, presided over by circuit judges were groupings of several counties. Districts consisting of single counties were presided over by district judges. Crimes charged had to be proved to have occurred in the county of the circuit or district where they were charged in the state courts, and within the district charged in the federal court. So, the crimes charged against Burr and his associates had to be proved to have occurred in the state of Virginia, and the crime of treason charged against Joseph Smith and his associates had to be proved to have occurred in Daviess County, Missouri.

78. Beveridge, *John Marshall*, 3:513; Lomask, *Aaron Burr*, 282. For the whole trial, in addition to Robertson, *Trial of Aaron Burr*, volumes 1 and 2, I have relied on Beveridge, *John Marshall*, 3:398–513, and Lomask, *Aaron Burr*, 233–98.

79. Appendix. Note (B) Opinion on the Motion to Introduce Certain Evidence in the Trial of Aaron Burr, for Treason, pronounced Monday, August 31 (1807) (more commonly cited as *United States v. Burr*), 4 Cranch, 473; 8 U.S., 284; 2 L. Ed., 685, emphasis added. Cited herein as *United States v. Burr*.

80. *United States v. Burr*, 4 Cranch, 499–500; 8 U.S., 304; 2 L. Ed., 699.

81. *United States v. Burr*, 4 Cranch, 501; 8 U.S., 305; 2 L. Ed., 700.

82. *United States v. Burr*, 4 Cranch, 505–6; 8 U.S., 308; 2 L. Ed., 702–3, emphasis added.

83. *People v. Mark Lynch, Aspinwall Cornell, and John Hagerman*, Johnson Reports 11:549, Sup. Ct. New York (1814), hereafter cited as *Lynch*.

84. *Lynch*, 549–50, emphasis in original.

85. *Lynch*, 552–54, italics in original, emphasis added by underlining. A footnote at the end of the opinion indicates that the prisoners were not immediately discharged, but rather retained in custody while the federal authorities were notified to determine whether or not they wished to prosecute them for treason against the United States.

86. The dispute between Congress and the president about that prerogative did not surface until more than a century and a half later.

87. In the same Article of the statute which contains the treason language cited at footnote 53 above are found the following provisions:

Section 4. If two or more persons shall combine, by force, to usurp the government of this state, or overturn the same, or interfere forcibly in the administration of the government, or any department thereof, evidenced by forcible attempt made within the state, to accomplish such purpose, the person so offending shall be punished by imprisonment in the penitentiary for a period not exceeding five years, or by fine not exceeding five thousand dollars, and imprisonment in the county jail for a period not exceeding six months.

Section 5. If twelve or more persons shall combine to levy war against any part of the people of this state, or to remove forcibly out of the state, or from their habitations, evidenced by taking arms and assembling to accomplish purpose, every person so offending shall be punished as declared in the preceding section. Crimes and Punishments, *Statutes of Missouri*, 1835, Article 1, sec. 4-5, p. 166.

None of the defendants were bound over or later indicted under either of these sections. See the last section below for the possible explanation.

88. A comment in the current Missouri State statutes under the present Treason section says: "This section is based on Missouri Constitution, Art. I Section 30. . . . No provisions concerning treason are contained in the Model Penal Code, nor in the Alaska, Colorado, Michigan, New Jersey, New York or Texas codes. There are no reported cases in Missouri indicating any prosecutions under the present laws." "Comment to 1973 Proposed Code," *Vernon's Annotated Missouri Statutes*, 42 vols. (St. Paul, Minn.: Thomson West, 2003), vol. 41A, p. 320.

89. *U.S. Senate Document*, 31, 32; *Missouri General Assembly Document*, 137.

90. The nine were: Sampson Avarad (*U.S. Senate Document*, 3, 4, 21; *Missouri General Assembly Document*, 99, 100, 107), John Cleminson (*U.S. Senate Document*, 16; *Missouri General Assembly Document*, 115), Reed Peck (*U.S. Senate Document*, 18; *Missouri General Assembly Document*, 117), George M. Hinkle (*U.S. Senate Document*, 22; *Missouri General Assembly Document*, 126), Jeremiah Myers (*U.S. Senate Document*, 27; *Missouri General Assembly Document*, 132), Burr Riggs (*U.S. Senate Document*, 29; *Missouri General Assembly Document*, 134), Porter Yates (*U.S. Senate Document*, 36; "Porter Yale" in *Missouri General Assembly Document*, 143), Ezra Williams (*U.S. Senate Document*, 37; *Missouri General Assembly Document*, 144), William W. Phelps (*U.S. Senate Document*, 47; *Missouri General Assembly Document*, 125). Avarad, Peck, and Yates are the ones who specifically place Joseph Smith and Lyman Wight at Adam-ondi-Ahman.

91. *U.S. Senate Document*, 19; *Missouri General Assembly Document*, 118.

92. "Mob" is the common pejorative used by Mormons in Missouri in referring to the native Missourians in or out of the militia. For example, John Cleminson, quoted earlier, described the preparations of the Mormon militia in Far West to withstand attack: "The town of Far West was kept under military rule; troops paraded and disciplined every day. It was a generally prevailing understanding among the troops—and seemed to be so much so towards the last, that no other impressions prevailed—that they would oppose either militia or mob, should they come out against them; for they considered them all mob at heart" (italics added). *U.S. Senate Document*, 17; *Missouri General Assembly Document*, 116.

93. David W. Patten, as noted above, was commissioned a Captain in the Caldwell contingent of the Missouri militia. He served under Lt. Col. George M.

Hinkle, the Caldwell militia commander. At the time Avaré was referring to, Hinkle had been ordered by General Doniphan (referred to earlier) to proceed to Daviess County to protect Adam-ondi-Ahman and investigate some reported burnings of *Mormon* homes at Millport. Millport was the first settled town in Daviess County and had perhaps a dozen early Missouri residents. It was nearer to Adam-ondi-Ahman than Gallatin, and a number of Mormons settled on its outskirts, including Joseph Smith's brother Don Carlos, whose house was one of those reportedly burned. There were about 100 members of the Caldwell militia in the expedition. See *History of the Church*, 3:162–63. In his testimony at the Court of Inquiry, Hinkle acknowledged that he went with the expedition, but insisted he went "without being attached to any company, or without having any command." *U.S. Senate Document*, 21; *Missouri General Assembly Document*, 125. At about the same time, General Parks, another of the commanders of Missouri militia, receiving reports of the same disturbances, ordered Lyman Wight, Colonel of the Daviess County militia to march to Millport and "put the mob down." Wight's detachment proceeded to Millport, which they found deserted. Patten's troops went to Gallatin, which became quickly vacated upon their arrival. No battle took place at either location. See *History of the Church*, 3:162–63, and B. H. Roberts, *The Missouri Persecutions* (Salt Lake City: George Q. Cannon and Sons, 1900), 213–15. See also *U.S. Senate Document*, 21. It should also be observed that contrary to Avaré's assertion that Joseph Smith appointed Patten and Brunson commanders, Joseph held no commission or command in the militia at any time and had no authority to call out troops. *History of the Church*, 3:404. Hinkle corroborated that fact.

94. *U.S. Senate Document*, 3–4; *Missouri General Assembly Document*, 99–100. Porter Yates, the third witness who places Joseph Smith and Lyman Wight at Adam-ondi-Ahman, does no more than place them there.

95. *U.S. Senate Document*, 21; *Missouri General Assembly Document*, 107.

96. *U.S. Senate Document*, 22; *Missouri General Assembly Document*, 126; italics added.

97. "Circuit Court, Daviess County, Mo. in the Matter of State of Mo. vs. Joseph Smith Jr. via Evidence," Missouri State Archives, Jefferson City, Mo. Copies of the transcripts in author's possession. Emphasis added.

98. "The Congress shall have Power:

"To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years

"To provide and maintain a Navy.

"To make Rules for the Government and Regulation of the land and naval Forces. . . .

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." (*United States Constitution*, Article I, section 8, clauses 11–15). These clauses are known as "The War Powers."

99. See footnotes 94 and 95.

100. The requirement of two corroborating witnesses for treason is unlike the probable cause needed for arson, larceny, burglary or receiving stolen property. That is, as shown in the *Bollman* and *Burr* opinions cited above, the two witness testimony of an overt act has to be provided at the preliminary hearing stage. Not so for other crimes. Testimony of just one witness may be relied on by the committing magistrate to find probable cause, and additional evidence may be supplied at the grand jury or trial stage. Even so, a persuasive argument could be made from what was received in Judge King's hearing that given the lack of any witness giving direct evidence tying Joseph Smith, Hyrum Smith, or Sidney Rigdon to any specific act of arson, larceny, burglary or receiving stolen property, such action would be equally untenable, had Judge King bound them over on such charges. That argument, however, needs to be tempered by the later experience that they and the other defendants underwent before the Grand Jury in Daviess County. At that hearing, they *all*, in various groupings, were indicted for arson, larceny, burglary, receiving stolen property, and so on, presumably on the basis of additional evidence adduced or supplied at that hearing.

101. *Missouri General Assembly Document*, 67.

102. *Missouri General Assembly Document*, 81–82. The governor apparently assumed that the *Burr* case was a state rather than a federal one and that, since Richmond and Blennerhassett Island were in different counties of Virginia, jurisdiction was not a concern in treason matters. As footnote 77 above notes, *Burr* was tried in federal court, and the whole state of Virginia comprised the federal district of Virginia.

103. In this petition, which asked for a writ of habeas corpus, Joseph Smith was joined by Alanson Ripley, Heber C. Kimball, William Huntington, and Joseph B. Noble.

104. This is the "council" in Caldwell County which Avarad testified about and which is quoted at length in the reproduction of his testimony above.

105. "Petition," March 10, 1839, Church Archives, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, question mark in transcript.

106. Pratt's codefendants were Norman Shearer, Darwin Chase, Luman Gibbs, and Morris Phelps. *Missouri General Assembly Document*, 150.

107. *History of the Church*, 3:264.

108. *History of the Church*, 3:421.

109. "Before leaving Missouri I had paid the lawyers at Richmond thirty-four thousand dollars in cash, lands, &c.; one lot which I let them have, in Jackson County, for seven thousand dollars, they were soon offered ten thousand for it, but would not accept it. For other vexatious suits which I had to contend against, the few months I was in the State, I paid lawyers' fees to the amount of about sixteen thousand dollars, making in all about fifty thousand dollars, for which I received very little in return; for sometimes they were afraid to act on account of the mob, and sometimes they were so drunk as to incapacitate them for business. But there were a few honorable exceptions." B. H. Roberts, *Persecutions*, 272.

110. *History of the Church*, 3:420; also printed in *Times and Seasons*, vol. 4, no. 16 (July 1, 1843), 4:255.

111. On June 25, 1844, Joseph Smith arrived at Carthage pursuant to the request of Governor Thomas Ford to be tried again on the charge of riot for

the destruction of the Nauvoo Expositor, a newspaper declared by the Nauvoo city council to be a public nuisance. Joseph and the other city council members had previously been twice acquitted of that charge by the Nauvoo city court and Justice of the Peace Daniel H. Wells (who was not then a Mormon) respectively. Upon arrival and posting bond to return for a later trial date on the riot charge, Joseph and Hyrum were newly charged with treason and were immediately incarcerated in the Carthage Jail. Efforts for a hearing to contest the legality of the new arrest or to obtain writs of habeas corpus were unavailing, and two days later they were killed in the jail by a mob. See Joseph I. Bentley, "Joseph Smith: Legal Trials of," in *Encyclopedia of Mormonism*, 3:1347.