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Author(s): Gordon A. Madsen
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Chapter Twelve

Imprisonment by Austin King's Court of Inquiry in 1838

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, 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]

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.

On November 4, General John B. Clark, who was the overall commander of the Missouri militia, arrived at Far West. 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 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 in Richmond, Missouri, beginning November 12 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, on charges of treason.

At one end of the spectrum concerning the legitimacy of this November 1838 hearing, Hyrum Smith referred to it as a "pretended court."[3] At the other end, some writers have called it a reasonable hearing fairly reported that fully justified Judge King's order to hold the prisoners on charges of treason.[4] The Joint Committee of the Missouri Legislature later found that the evidence adduced

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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,* 3:420. Hyrum 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."

4. Gordon B. 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).

at trial was "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."[5]

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.[6] 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.[7] 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.

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.[8] The parties charged must be present during all stages of the proceeding[9] and are entitled to legal counsel, who may cross-examine the witnesses.[10] The prosecutor is obliged to present at least enough evidence to establish probable cause. He does not need to provide sufficient evidence to convince beyond a reasonable doubt. If the judge determines that probable cause has been 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 bail, the defendants and their bondsmen are "recognized," which means to be 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

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5. Missouri General Assembly Document, 2.

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

7. *Missouri General Assembly Document,* title page.

8. Practice and Proceedings in Criminal Cases, *The Revised Statutes of the State of Missouri, 1835* (Argus Office, 1835), art. 2, sec. 22, pp. 476–77.

9. Practice and Proceedings in Criminal Cases, art. 2, sec. 13, p. 476.

10. Practice and Proceedings in Criminal Cases, art. 2, sec. 14, p. 476.

that time by each defendant and his two bondsmen and filed with the court.[11] If the offense charged is not bailable, the defendants are committed to jail to await grand jury proceedings and/or trial.[12] 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 both innocence and guilt.[13]

The process used at the time 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, then the witness would read it or have it read to him, swear to its truthfulness, and sign it.[14]

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 P. 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."[15]

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.[16] Morris Phelps

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11. Practice and Proceedings in Criminal Cases, art. 2, sec. 26, p. 477.
12. Practice and Proceedings in Criminal Cases, art. 2, sec. 27, p. 477.
13. Practice and Proceedings in Criminal Cases, art. 2, sec. 20 & 29, p. 476–77.
14. Practice and Proceedings in Criminal Cases, art. 2, sec. 20, p. 476, and sec. 29, p. 477.
15. *History of the Church,* 3:430
16. *U.S. Senate Document*, 19–20, 27, 34; *Missouri General Assembly Document,* 119, 132, 140.

and James H. Rollins never were named as defendants but were nonetheless bound over by Judge King's order.[17]

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.[18] 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.[19]

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

18. *Missouri General Assembly Document,* 151, names them.

19. 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, *History of the Church,* 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

Judge King found probable cause to bind over twenty-three of the remaining defendants on charges of "Arson, Burglary, Robbery and Larceny" in Daviess County.[20] He then found no probable cause against six defendants, having earlier dismissed twenty-three of their fellow accuseds.

Trampling the Defendants' Right of Due Process

The procedural due process rights of Joseph and his associates were not protected in their hearing before Judge King. Under the Missouri law then in force, criminal actions were to be commenced by a party (the complainant) going before a magistrate (a judge or justice of the peace) and giving sworn testimony about a crime.[21] The magistrate then prepared a warrant "reciting the accusation" and issued it to an officer, directing him to arrest the defendant.[22] The arrested accused was then brought before the magistrate by the officer, and the warrant was endorsed and returned to the magistrate.[23]

In the case of Joseph Smith and his associates, none of this 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; and no written warrant reciting the accusation was furnished to any of them. Sidney

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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.

20. 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 Pettegrew (*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.

21. Practice and Proceedings in Criminal Cases, art. 2, sec. 2, p. 474.

22. Practice and Proceedings in Criminal Cases, art. 2, sec. 3, p. 475.

23. Practice and Proceedings in Criminal Cases, art. 2, sec. 12, p. 476.

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."[24] Lyman Wight corroborated Sidney and said that it was General Clark and not a magistrate who "made out charges,"[25] not in writing, without sworn testimony, and without any warrant.[26]

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. 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 our trial together."[27]

Witnesses for the defendants were intimidated and driven off.[28] Hyrum Smith recounts the driving off of a defense witness named Allen from the courtroom in the midst of his testimony.[29] Cross-examination of witnesses[30] 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*

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24. *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*.

25. *History of the Church,* 3:206

26. *History of the Church,* 3:206–7, 348.

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

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

29. *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.

30. Peter H. Burnett, a non-Mormon journalist and attorney, 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.

> *treason*." Our Lawyer observed as follows: "Judge, you had better make the Bible treason." The Court made no reply.[31]

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.

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 Statues of the State of Missouri, 1835,* 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. For example, Morris Phelps,[32] 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, and never given opportunity to cross-examine a single witness. It would appear that his testimony was simply not satisfactory to the prosecutors.[33]

The report of the legislative committee, claiming that the hearing was "not of the character which should be desired for the basis of a fair and candid investigation"[34] has considerable basis in fact as disclosed by the record. It appears that fundamental due process was not afforded to those defendants.

Presentation of the Evidence

Sampson Avard 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 purge Caldwell County of Mormon dissidents. Danites did carry out some marauding raids in Daviess County. Avard was first arrested with the others in Far West but claimed to have become

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

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

33. *U.S. Senate Document,* 11–12; *Missouri General Assembly Document,* 109–10, 150.

34. *Missouri General Assembly Document,* 2.

disenchanted with Mormonism and "turned state's" evidence and was granted immunity.[35] 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.

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."[36] He then names who was "there" but continues:

> 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. . . . 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.[37]

Cleminson's 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.[38] Thus, much of Cleminson's testimony should have been exluded under the hearsay rule for lack of personal knowledge.

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35. 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.

36. Missouri General Assembly Document, 115. 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.

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

38. 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

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

Analysis of the Charge of Treason against Joseph Smith and Others

We now come to the substantive law. To understand the charge of treason that was lodged in the Court of Inquiry, it is necessary to survey the governing laws, statutes, and cases that defined 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, and 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. Could such testimony support a charge of treason?

Both the constitutions of the United States and of the state of Missouri define the crime of treason and the evidence required to prove a charge of treason. 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.[39]

Likewise, 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.[40]

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inadmissible because the party who purportedly made the statement is not available to be cross-examined as to the truth of his supposed statement.

39. *Constitution of the United States of America,* Article III, sec. 3.

40. "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.

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.[41]

In addition, Missouri law required that "in trials for treason, no evidence shall be given of any overt act that is not expressly laid in the indictment, and no conviction shall be had upon any indictment for such offence, unless one or more overt acts be expressly alleged therein."[42]

The words "levying war" were defined by *Blackstone's Commentaries,* a four-volume summary treatise of the British and, in the American Editions, the U.S. case law. *Blackstone,* the proverbial Bible of frontier lawyers and judges, 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* inclosure, 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.[43]

This treatise also 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* spoken amount to only a high misdemeanor, *and no treason*.… As therefore there can be

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41. Crimes and Punishments, *Revised Statutes of the State of Missouri, 1835,* article 1, sec. 1, p. 166.

42. Practice and Proceedings in Criminal Cases, art. 6, sec. 17, p. 491.

43. *Blackstone's Commentaries on the Laws of England,* 4 vols., reprint (Buffalo, N.Y., William S. Hein, 1992), 4:81–83, emphasis added.

> nothing more equivocal and ambiguous than *words,* it would indeed be unreasonable to make them amount to high treason.[44]

Bollman and *Burr* and the Strict Definition of Treason

Although no Missouri courts had defined the meaning of treason under Missouri law in Joseph Smith's day, two pivotal U.S. Supreme Court cases involving Aaron Burr and his associates had addressed the law of treason in 1807.[45] These two cases, representing the law of the land under the supremacy clause in both the U.S. and Missouri constitutions, bear a number of contrasts and parallels to the Austin King hearing being here discussed.[46] In *Bollman*, the Court held that "to conspire to levy war and actually to levy war, are distinct offences," thereby foreclosing the argument that Joseph Smith was guilty of treason by having somehow conspired with others. In the *Burr* case, the Court held that "the presence of the party" is necessary as "a part of the overt act" that must be proved by the testimony of two witnesses, unaided by presumptive or circumstantial evidence, inferences or conjectures, thereby again making even a prima facie case of treason improper against Joseph Smith, who was not present at any scene of any relevant overt action. An underlying theme in these two opinions by Chief Justice Marshall is the need to define treason as narrowly as possible in order to protect the founding American principles of liberty and civic dissent.

Following the conclusion of his term as vice president of the United States in March 1805, Aaron Burr began an odyssey that became known as the "Burr conspiracy." In this plot, as inflated by the press, Burr allegedly intended to liberate or "revolutionize" Spanish-owned Mexico, 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 campaigns

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44. *Blackstone's Commentaries,* 4:80, emphasis added.

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

46. 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.

for invading first Texas and then Mexico, and bought arms and supplies.[47] He was betrayed by General James Wilkinson, his chief co-conspirator. Wilkinson sent a letter to President Thomas Jefferson exposing the plot (omitting, of course, his own involvement).[48]

Upon receiving Wilkinson's letter, Jefferson issued a proclamation that 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."[49]

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. The men immediately thereafter obtained a writ of habeas corpus from the U.S. Supreme Court. The matter was reheard in that court. The lower court's bind-over order was reversed, and Bollman and Swartwout were discharged.

What Chief Justice John Marshall wrote in *Bollman* 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." He then 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*

47. Lomask, *Aaron Burr,* 33–35, 38–40, 50–51, 193–94.

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

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

> *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.

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 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.*[50]

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*

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

> *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 . . . , 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 contruction* to doubtful cases; and that *crimes not clearly within the constitutional definition,* should receive such punishment as the legislature in its wisdom may provide.[51]

In a separate trial, Aaron Burr and six others were also arrested and ultimately taken to Richmond, Virginia, before Justice Marshall sitting as a circuit judge, joined by District Judge Cyrus Griffin.[52] These seven prisoners were also charged with treason and high misdemeanor and tried and acquitted of both charges. Repeatedly through the Burr trial, the 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 regarding Harmann Blennerhassett resisting arrest. That, however, was the only testimony of any overt act occurring in Virginia on which to hang a treason prosecution.[53] 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 others were attributable to Burr.

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

52. 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.

53. The issue of jurisdiction should be explained here. "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.

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 one 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.'"[54]

Marshall, in seeming contrast with his decision in *Bollman,* determined that "*whatever would make a man an accessary 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."[55]

Marshall then confronted the language he had written in the *Bollman* opinion, namely "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 this language ambiguous and after expanding and explaining that phrase for many pages he 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.
>
> . . . To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself.
>
> 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

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54. 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.

55. 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.

> 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.
>
> . . . That overt act must be proved, according to the mandates of the constitution and of the act of congress, by two witnesses.[56]

Thus, the controlling law relevant to Joseph Smith's case was fairly clear: treason consisted "only in levying war" (not just riot or contempt), which needed to be proved by "two witnesses to the same overt act" (and overt acts did not include spoken words that even incited treason), and which overt act or acts had been "expressly alleged" in the indictment. Beyond that, Missouri statutes made it a crime, even if falling short of treason, to "interfere forcibly in the administration of government" (acting in general defiance of public government), or to "combine to levy war against any part of the people [of Missouri]."

Moreover, with all their recital of facts and law, the *Bollman* and *Burr* opinions clarify and refine what the law of treason was in America up to and including 1838. The making of war must involve some minimal overt act with "force and arms." 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 U.S. law. To advise or procure treason is in its nature conspiracy, and conspiracy alone is *not* treason. 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.

In addition, the 1835 criminal code of Missouri made it a crime against the government of Missouri for any one person to conceal knowledge that "any other person has committed, or is about to commit, treason against this state," or for any two or more persons to make any "forcible attempt" within the state to "interfere forcibly in the administration of the government, or any department thereof," or for any twelve or more persons to "combine to levy war against any part of the people of this state."[57] Not only are these crimes not within the definition of treason, but as the following analysis will show, none of these charges against Joseph were well founded, for he did not

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56. United States v. Burr, 4 Cranch, 499–501, 505–6; 8 U.S., 304–305, 308; 2 L. Ed., 699–700, 702–3, emphasis added.

57. Crimes and Punishments, *Revised Statutes of the State of Missouri, 1835,* article 1, secs. 2, 4, 5, p. 166.

participate personally in any forcibly interference with government and no overt acts of levying war were expressly alleged or proved against him by the required two eye-witnesses.

The Case of Mark Lynch: Treason against a State

One final legal issue must be considered: Under the law in 1838, could treason be committed against a state, separate from the national government? The New York case of *People v. Lynch,*[58] while not standing expressly for the proposition that treason could never be committed against a state,[59] shows that the domains of state and federal treason laws, which had been vigorously debated in the early years of the American republic,[60] were still open to various interpretations and arguments.[61] In southern states such as Missouri, where states rights advocates were predominant, popular support probably favored the idea that states should be able to construe and enforce their own treason laws as broadly as federal law would allow. In northern states, such as New York, where federalist inclinations were stronger, deferring to United States interests would seem to have been more natural. Thus, in Joseph Smith's case, an argument by the defendants to the effect that treason could not be committed against an individual state might have gotten traction before a judge in a northern jurisdiction, but in the end probably would have been taken lightly by Judge Austin King.

Lynch arose 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, . . . and his subjects, then, and yet being at war with, and enemies of the said state of *New-York.*"[62]

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

59. J. Taylor McConkie, "State Treason: The History and Validity of Treason against Individual States," *Kentucky Law Journal* 101, no. 2 (2012–13): 309, rightly shows that *Lynch* should not be interpreted overbroadly.

60. McConkie, "State Treason," 287–96.

61. The argument that treason could not be committed against a state was argued by Thomas Wilson Dorr in 1842 in Rhode Island, but ultimately to no avail. Although convicted of treason, Dorr was finally released from prison by a law passed by the state General Assembly. McConkie, "State Treason," 301–5.

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

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 be committed only 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.

Given the facts of this case, the New York court ruled:

> 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.
>
> ... [A]*dmitting 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.[63]

Thus, the court held that an allegation of treason against the United States does not automatically amount to an allegation of treason against one of its states.[64] In addition, the New York court followed the proposition that the U.S. Constitution, federal statutes, and U.S. court rulings controlled the sense and meaning of all treason laws within the United States.

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63. *Lynch,* 549–50.

64. The concepts and holding of the *Lynch* case were mentioned in the petition of Joseph Smith, March 10, 1839, Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City. See Gordon A. Madsen, "Joseph Smith and the Missouri Court of Inquiry: Austin A. King's Quest for Hostages," *BYU Studies* 43, no. 4 (2004): 121.

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 outside 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.[65] Other witnesses saw David W. Patten (who all witnesses agreed 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."[66] 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 said 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 added:

> I heard Perry Keyes, one who was engaged in the depredations in Daviess say that Joseph Smith, jr., remarked, in his presence,

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

66. The nine were: Sampson Avard (*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). Avard, Peck, and Yates are the ones who specifically place Joseph Smith and Lyman Wight at Adam-ondi-Ahman.

> 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.[67]

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.*

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. This question was put by the prophet, Joseph Smith, jr., and passed unanimously, with a few exceptions. Captains Patten 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; … [Joseph Smith] 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.… On the next day Captain Patten (who was called by the prophet Captain Fearnaught) took command of about one hundred armed men.… 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.… and these affairs were under the superintendence of the first presidency. [68]

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-ondi-Ahman. The supposed inflammatory words he attributes to Smith were by his account all spoken in Caldwell County, not Daviess. Avard

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

68. *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.

acknowledged that Hyrum not only committed no overt act, he never even "made any inflammatory remarks."[69]

Lieutenant Colonel George M. Hinkle, the commander of the state militia at Caldwell County, both disputes and corroborates Avard'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."[70] Such words are hardly direct evidence of giving an order, commanding troops, or any other overt act.

Under the standard of the *Bollman* and *Burr* decisions, what does that testimony, giving it full face value, establish? There may have been acts of arson, larceny, and destruction of property, possibly connected to Joseph Smith and the others, but not treason. There was no "making war"; indeed, no gunfire was reported by any witness at Gallatin; no "burning of all inclosures, all brothels"; 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.

Legal Conclusions

The order binding over Joseph Smith and the others 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 gave "directions about things in general" to troops.[71] 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.

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

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

71. See footnote 62.

Third, there was no armed assemblage making or levying war against the government at Gallatin: not a single gun was fired, there was no confrontation between armed camps.

Fourth, there was no overt act of making war.

Fifth, inflammatory language that Sampson Avard attributes to Joseph Smith was spoken in a county other than the one in which treason was charged, and words alone do not constitute treason.

Sixth, the testimony of two witnesses to the same act, as required by the United States and Missouri constitutions, was not produced. Indeed, as in the *Burr* case, no one testified of an overt act of making war at Gallatin.[72] This condition legally makes all the other testimony at the hearing as it relates to treason irrelevant.

One could argue that we could hardly expect Austin King to be familiar with the paticulars of laws of treason as well as the *Bollman, Burr,* and *Lynch* cases. Although King was living in frontier Missouri, he was one of the finest jurists in the state. At the beginning of the 1835 compilation of Missouri statues, A. A. King certified on October 10, 1835, the correctness of that massive compilation in behalf of the committee on which he served that assembled that volume. Thus it is unlikely that he was ignorant of these laws and cases. Moreover, it is likely he was specifically 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.[73]

72. 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.

73. *Missouri General Assembly Document,* 67.

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 on 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.[74]

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 reasonable to suppose that Governor Boggs's communication was transmitted to Judge King. However, there were, at the time, in print and widely distributed, sets of law reports that contained the *Bollman, Burr,* and *Lynch* opinions. What was available to King is now unknown, but it is significant that Joseph Smith's petition addressed to Justice George Thompkins of the Missouri Supreme Court, dated March 10, 1839, refers to each of the concepts and holdings of the *Bollman, Burr,* and *Lynch* cases. It therefore seems highly likely that the three cases were called to the judge's attention.

Synthesis and Aftermaths

Why did Judge King insist on binding over Joseph and his associates to be investigated by the grand jury for treason 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 answer lies in the fact that both treason and murder are nonbailable offenses.[75] All the other chargeable offenses were bailable. Most, if not all,

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74. *Missouri General Assembly Document,* 81–82.

75. *Blackstone's Commentaries,* 4:294–95; Habeas Corpus, *Revised Statutes of the State of Missouri, 1835,* sec. 12–13, p. 303; Practice and Proceedings in Criminal Cases, *Revised Statutes of the State of Missouri, 1835,* sec. 8–11, p. 475.

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 co-defendants held for treason or murder. Sidney Rigdon succeeded after some months in being admitted to bail on a writ of habeas corpus.[76] Efforts by the others to obtain such writs and get a bail hearing fell on deaf ears.[77]

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.*[78]

Austin King was part of a quest for hostages. Due process and constitutional standards for probable cause were inconsequential in that quest. He allowed the rights of Joseph Smith and his associates to be violated. One need not be reminded that the same nonbailable treason gambit would be used again six years later at Carthage, Illinois, where Joseph and Hyrum Smith were martyred.[79]

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

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

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

79. See Joseph I. Bentley, "Joseph Smith: Legal Trials of," in *Encyclopedia of Mormonism,* 3:1347. See also the discussion of the treason charge in Dallin Oaks's chapter on the suppression of the *Nauvoo Expositor* in this volume.