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Abstract

In August 1814 a number of British soldiers were arrested as stragglers or deserters in the town of Upper Marlboro, Maryland. Upon learning of the soldiers' absences the British military took local physician, Dr. William Beanes, and two other residents into custody and threatened to burn Upper Marlboro if the British soldiers were not returned. John Hodges, a local attorney, arranged the soldiers' return to the British military. For this, Hodges was charged with high treason for "adhering to [the] enemies, giving them aid and comfort." The resulting jury trial was presided over by Justice Gabriel Duvall, a Supreme Court Justice and Prince Georges County native, and highlights how the crime of treason was viewed in early American culture and the role of the jury as deciders of the facts and the law in early American jurisprudence. Contextually, Hodges' trial took place against the backdrop of the War of 1812 and was informed by the 1807 treason trial of Aaron Burr.

Disciplines

Law, constitutional history, legal history

UNITED STATES V. HODGES:¹
TREASON, JURY TRIALS, AND THE WAR OF 1812

Jennifer Elisa Smith

INTRODUCTION

In August 1814 as British forces left a burned and ravaged Washington, D.C. a number of British soldiers were arrested as stragglers or deserters in the town of Upper Marlboro in Prince Georges County Maryland.² Upon learning of the soldiers' absences the British military took local physician, Dr. William Beanes, and two other residents into custody and threatened to burn Upper Marlboro if the British soldiers were not returned.³ John Hodges, a local attorney, arranged the soldiers' return to the British military.⁴ For this, Hodges was charged with high treason for "adhering to [the] enemies, giving them aid and comfort."⁵ The resulting jury trial was presided over by Justice Gabriel Duvall, a Supreme Court Justice and Prince Georges County native, and highlights how the crime of treason was viewed in early American culture and the role of the jury as deciders of the facts and the law in early American jurisprudence.⁶ Contextually, Hodges' trial took place against the backdrop of the War of 1812 and was informed by the 1807 treason trial of Aaron Burr.⁷

¹ 26 F. Cas. 332 (C.C.D. Md. 1815).

² 1 JOHN HODGES, REPORT OF THE TRIAL OF JOHN HODGES ESQ. A CHARGE OF HIGH TREASON, TRIED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE MARYLAND DISTRICT AT THE MAY TERM, 1815, 5 (1815) [hereinafter REPORT].

³ REPORT, *supra* note 2, at 5; JOHN HODGES (OF THOMAS) (B. 1763 – D. 1825), ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES), MARYLAND STATE ARCHIVES, <http://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/002800/002849/html/002849bio.html> (last visited Nov. 11, 2016) [hereinafter JOHN HODGES (OF THOMAS)].

⁴ REPORT, *supra* note 2, at 5; JOHN HODGES (OF THOMAS), *supra* note 3.

⁵ U.S. CONST. art. III, § 3; REPORT, *supra* note 2, at 5; JOHN HODGES (OF THOMAS), *supra* note 3.

⁶ REPORT, *supra* note 2, at 5; Biographical Directory of Federal Judges: Duvall, Gabriel, Federal Judicial Center, <http://www.fjc.gov/servlet/nGetInfo?jid=671&cid=999&ctype=na&instat=na> (last visited Nov. 11, 2016).

⁷ *See, e.g.*, MARK R. KILLENBECK, *M'CUCCLOCH V. MARYLAND: SECURING A NATION* 192 (Peter Charles Hoffer et al. eds., 2006); *The War of 1712*, SMITHSONIAN NATIONAL MUSEUM OF AMERICAN HISTORY, <http://amhistory.si.edu/starspangledbanner/the-war-of-1812.aspx> (last visited Nov. 26, 2016); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY: THE AARON BURR TREASON TRIAL – HISTORICAL BACKGROUND AND DOCUMENTS, http://www.fjc.gov/history/home.nsf/page/tu_burr_narrative.html (last visited Sept. 25, 2016).

This paper examines the historical context of Hodges' treason trial; describes and analyzes the facts of the alleged crime and resulting trial; and analyzes historical developments of the crime of treason in America as well as changing conceptions of the jury's role as deciders of the facts and the law. Specifically, Part I examines the historical context of Hodges' trial by analyzing treason in early America, jury trials in early America, and the impact of the War of 1812.⁸ Part II recounts the facts of the alleged crime, including the persons involved and events leading up to the crime.⁹ Part III describes and analyzes the trial, including the persons involved, witness statements, attorney arguments, and Justice Duvall's statement to the jury.¹⁰ Part IV examines the impacts of the case, specifically what the trial demonstrates about changing conceptions of the crime of treason and the evolving role of the jury in American jurisprudence.¹¹

PART I: CONTEXTUALIZING *UNITED STATES V. HODGES* - TREASON, JURIES, & THE WAR OF 1812

The 1815 treason trial of John Hodges is best examined within the context of the development of the crime of treason, the role of the jury in American jurisprudence, and the effects of the War of 1812. Early American views of treason were informed by a variety of sources including English laws and the tumultuous Revolutionary period.¹² Additionally, at the time of Hodges' trial the treason trial of Aaron Burr was still fresh in American minds.¹³ The jury was viewed as "an essential part of any free government" but the role of the jury was in flux

⁸ See *infra* Part I.

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.

¹¹ See *infra* Part IV.

¹² See generally Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395 (1945); DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 59 (2016).

¹³ See generally PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR* (2008).

in the early 1800s.¹⁴ Further informing the trial of John Hodges was the War of 1812 and the nation's response to a war they were not prepared for.¹⁵

A. *Treason in Early America*¹⁶

A number of sources influenced the development of the treason doctrine in early America. These sources included English laws, the effects of the tumultuous revolutionary period, and the nation's founders balancing a desire to safeguard America while ensuring charges of treason would not be "used as an instrument of political prosecution."¹⁷ Further, early treason trials, notably the 1807 treason trial of Aaron Burr, informed how treason was viewed by the nation when John Hodges was tried in 1815.¹⁸

The Statute of Edward III, also known as the Treason Act of 1351, was an English statute codifying treasonous offences.¹⁹ Treason in England was considered a crime "if a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies . . . giving to them Aid and Comfort, in the Realm, or elsewhere."²⁰ Treason also included planning "the death of the King, Queen, or their eldest son;" "violating the Queen, or the King's eldest daughter, or his eldest son's wife;" and "killing the Chancellor, Treasurer, or Judges in execution of their duty."²¹ The statute gave broad powers to English courts and prosecutors to define treasonous

¹⁴ HALE, *supra* note 12, at 59.

¹⁵ See generally DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 52–71 (1989); J.C.A. STAGG, *MR. MADISON'S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783-1830*, at 258–59 (1983).

¹⁶ See generally Hurst, *supra* note 12.

¹⁷ JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 370 (1998); HOFFER, *supra* note 13, at 58, 63–70.

¹⁸ *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807).

¹⁹ 25 Edw. 3 St. 5 c. 2. <http://www.legislation.gov.uk/aep/Edw3Stat5/25/2> (translated from Norman-French).

²⁰ *Id.* See also *Defining the Crime of Treason against the United States, [20 August] 1787*, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Madison/01-10-02-0102> (Original source: *The Papers of James Madison*, vol. 10, 27 May 1787–3 March 1788, ed. Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, & Frederika J. Teute. Chicago: The University of Chicago Press, 1977, p. 153).

²¹ 25 Edw. 3 St. 5 c.2, <http://www.legislation.gov.uk/aep/Edw3Stat5/25/2> (translated from Norman-French).

actions.²² Additionally, the monarch or legislature could add treasonous offenses to the act through an exceptions clause.²³ The result was a treason act that could be used to suppress political adversaries regardless of whether they made overt actions against the crown or simply held treasonous acts in “the imagination of his heart.”²⁴

The malicious use of the English treason act to suppress political foes was on the minds of the framers as they debated how to define treason in America.²⁵ Additionally, the framers recognized that the Revolutionary War was in itself a treasonous act against England.²⁶ Against this backdrop, the framers formulated the parameters of treason for the new nation. They balanced the desire to safeguard the new nation from insurrection while ensuring charges of treason would not be “used as an instrument of political prosecution.”²⁷ Although there was general consensus that treason should be limited in scope, how limited was a debate among the Constitution’s framers.²⁸ For example, James Madison, approved the Constitutional Convention’s “great judgement” of “inserting a constitutional definition” of treason in the Constitution but felt the Committee of Detail’s definition was “too narrow [and] [i]t did not appear to go as far as the Stat. of Edwd. III.”²⁹ Madison supported giving the Legislature “more latitude.”³⁰

The constitutional debates regarding treason underscores the significance the founders placed on ensuring “citizens of the Union [were] secured effectually from even legislative tyranny” and the perception that an “indeterminate” definition of treason was “sufficient to make

²² HOFFER, *supra* note 13, at 58–59.

²³ *Id.* at 59.

²⁴ *Id.* (citing the 1592 English treason trial of Sir John Perrot).

²⁵ See generally Hurst, *supra* note 12; HOFFER, *supra* note 13, at 58–75.

²⁶ HOFFER, *supra* note 13, at 58.

²⁷ SMITH, *supra* note 17, at 370; HOFFER, *supra* note 13, at 58, 63–70.

²⁸ Hurst, *supra* note 12, at 395, 399–00.

²⁹ THE FEDERALIST NO. 43 (James Madison); *Defining the Crime of Treason*, *supra* note 20. See also Hurst, *supra* note 12, at 400.

³⁰ *Defining the Crime of Treason*, *supra* note 20. See also Hurst, *supra* note 12, at 400.

any government degenerate into arbitrary power.³¹ The resulting restrictive definition of treason included in the United States Constitution reads:

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. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.³²

Further expounding on the restrictive definition of treason, the 1790 Act for the Punishment of Certain Crimes Against the United States, also known as the Crimes Act of 1790, stated:

[I]f any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.³³

Defining treason in the Constitution and limiting the application of treason to “*only . . . levying war against them, or in adhering to their enemies, giving them aid and comfort*” was seen as a way to prevent use of constructive treason in America.³⁴ Constructive treason was used in England to expand the scope of treasonous acts to include verbal and written criticism of the government as well as “actions taken to prevent the execution of a law.”³⁵ Despite the narrowly worded definition of treason in the Constitution the potential for expanding the doctrine of

³¹ 3 WORKS OF HON. JAMES WILSON 104 (Bird Wilson ed., 1804), <https://archive.org/details/workshonourable00wilgoog>.

³² U.S. CONST. art. III, § 3.

³³ An Act for the Punishment of Certain Crimes Against the United States §1, 1 Stat. 112, 112 (1790). Section 2 of the Act added a misprision of treason provision, creating a criminal offense for anyone

[H]aving knowledge of the commission of . . . treasons . . . , shall conceal, and not, as soon as may be, disclose and make known the same to [the appropriate authority] such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

Id. In 1948, the Criminal Code was revised. The offense of treason was amended and codified in 18 U.S.C. § 2381. Act of June 25, 1948, 62 Stat. 683, 807 (1948).

³⁴ U.S. CONST. art. III, § 3; SMITH, *supra* note 17, at 366–67, 366 n.*.

³⁵ SMITH, *supra* note 17, at 366–67; THE AARON BURR TREASON TRIAL, *supra* note 7.

treason through constructive treason was possible since it fell to the Judicial Branch to interpret the Constitutional definition and refine its application in treason trials.³⁶

1. Early Treason Trials & the Trial of Aaron Burr³⁷

Early application of the treason doctrine demonstrates a continued debate over the scope of treason and the judiciary's attempts to refine the treason doctrine. Specifically, the treason trials that came out of the Whiskey Rebellion and Fries Rebellion show a young nation attempting to maintain unity and order.³⁸ Eventually, in the 1807 treason trial of Aaron Burr, Chief Justice John Marshall clarified the scope of treason, using his 25,000 word decision to provide a framework in which the law of treason could not be used for political suppression.³⁹

The Whiskey Rebellion grew out of discontent with a tax “upon spirits distilled within the United States, and for appropriating the same.”⁴⁰ In 1794, grain growers in Western Pennsylvania resisted the tax and threatened tax collectors.⁴¹ John Quincy Adams' July 29, 1794 letter to Abigail Adams captures the early violence of the Whiskey Rebellion:

A very serious opposition to the collection of the Excise has taken place in one of the western Counties of this State [Pennsylvania]. The Collector's House has been burnt down, and an action between the insurgents and a company of soldiers terminated in the loss of several lives.⁴²

³⁶ See *infra* Part I.A.1; SMITH, *supra* note 17, at 366–67; THE AARON BURR TREASON TRIAL, *supra* note 7.

³⁷ See generally R. KENT NEWMYER, THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION (2013); HOFFER, *supra* note 13.

³⁸ See generally Paul Douglas Newman, *Fries' Rebellion and American Political Culture, 1798-1800*, 119 PA. MAG. HIST. & BIO. 37 (1995); Daniel D. Blinka, “*This Germ of Rottedness*”: *Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135 (2003); Peter Kotowski, *Whiskey Rebellion*, GEORGE WASHINGTON'S MOUNT VERNON, <http://www.mountvernon.org/digital-encyclopedia/article/whiskey-rebellion/> (last visited Nov. 12, 2016).

³⁹ SMITH, *supra* note 17, at 370; Blinka, *supra* note 38, at 183.

⁴⁰ 28 JANUARY 1791, JOURNAL OF THE SENATE OF THE UNITED STATES OF AMERICA, 1789-1793. A CENTURY OF LAWMAKING FOR A NEW NATION, U.S. CONGRESSIONAL DOCUMENTS AND DEBATES, 1774-1875 (Jan. 28, 1791), http://www.stat.yale.edu/~jah49/Pictures_in_R/First_Senate_Decisions/data/journal.

⁴¹ Kotowski, *supra* note 38.

⁴² JOHN QUINCY ADAMS TO ABIGAIL ADAMS (JULY 19, 1794) FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified October 5, 2016), <http://founders.archives.gov/documents/Adams/04-10-02-0139> (Original source: The Adams Papers, Adams Family Correspondence, vol. 10, January 1794–June 1795, ed. Margaret A. Hogan, C. James Taylor, Sara Martin, Hobson Woodward, Sara B. Sikes, Gregg L. Lint, and Sara Georgini. Cambridge, MA: Harvard University Press, 2011, pp. 222–224).

President George Washington responded by issuing a *Proclamation on Violent Opposition to the Excise Tax* and sending the militia into Western Pennsylvania, which dispersed the insurgents and quelled the violence.⁴³ The militia arrested a number of men who were tried for treason.⁴⁴ Attorney William Rawle argued that resistance to federal laws was treasonous because it was equal to levying war against the nation.⁴⁵ Lack of evidence and witnesses resulted in only two men, John Mitchell and Paul Weigel, being found guilty of treason.⁴⁶ Both men were eventually pardoned by President Washington.⁴⁷

Fries Rebellion was also a response against federal taxes.⁴⁸ James McHenry, the Secretary of War, wrote to Alexander Hamilton in March 1799 concerning the rebellion, stating:

[A] combination to defeat the execution of the Laws, for the valuation of lands, and Dwelling houses, have existed, in the Counties of Northampton Montgomery, and Bucks in the State of Pennsylvania, and proceeded in a manner subversive of the just authority of the Government, and that certain Persons in the County of Northampton exceeding one hundred in number, have been hardy enough to

⁴³ PROCLAMATION ON VIOLENT OPPOSITION TO THE EXCISE TAX (FEB. 24, 1794, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified October 5, 2016), <http://founders.archives.gov/documents/Washington/05-15-02-0213> (Original source: The Papers of George Washington, Presidential Series, vol. 15, 1 January–30 April 1794, ed. Christine Sternberg Patrick. Charlottesville: University of Virginia Press, 2009, pp. 275–277); Kotowski, *supra* note 38.

⁴⁴ Blinka, *supra* note 38, at 68; Kotowski, *supra* note 38. *See, e.g.*, FROM ALEXANDER HAMILTON TO WILLIAM RAWLE, (NOV. 17-19, 1794), FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified October 5, 2016), <http://founders.archives.gov/documents/Hamilton/01-17-02-0359> (Original source: The Papers of Alexander Hamilton, vol. 17, August 1794–December 1794, ed. Harold C. Syrett. New York: Columbia University Press, 1972, pp. 378–381) (listing names of “[p]ersons to be excepted from the Amnesty.”)

⁴⁵ Patrick Grubbs, *Fries Rebellion*, ENCYCLOPEDIA GREATER PHILA., <http://philadelphiaencyclopedia.org/archive/fries-rebellion/> (last visited Nov. 12, 2016).

⁴⁶ Kotowski, *supra* note 38.

⁴⁷ *Id. See, e.g.*, TO GEORGE WASHINGTON FROM WILLIAM BRADFORD FN. 3 (MAR. 9, 1795) FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Washington/05-17-02-0425> (Original source: The Papers of George Washington, Presidential Series, vol. 17, 1 October 1794–31 March 1795, ed. David R. Hoth and Carol S. Ebel. Charlottesville: University of Virginia Press, 2013, pp. 634–635).

⁴⁸ Blinka, *supra* note 38, at 170–71. The taxes imposed by Congress were through two acts: *An Act to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States* and *An Act to lay and collect a direct tax within the United States*. TO ALEXANDER HAMILTON FROM JAMES MCHENRY (MAR. 13, 1799) FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Hamilton/01-22-02-0323> (Original source: The Papers of Alexander Hamilton, vol. 22, July 1798–March 1799, ed. Harold C. Syrett. New York: Columbia University Press, 1975, pp. 529–32).

perpetrate certain acts, which he is advised amount to Treason, being overt acts of levying war against the United States.⁴⁹

John Fries was arrested and tried for treason for freeing two tax evaders from jail in Bethlehem, Pennsylvania.⁵⁰ Fries was convicted of treason,⁵¹ a conviction viewed as being “of the highest importance” to maintain “the stability of [the country’s] government.”⁵² Further, Fries’ conviction was seen as being an example to others who might consider rebelling against the government, as demonstrated in a letter from Secretary of State, Timothy Pickering, to John Adams in May 1799, in which Pickering states, “I have heard of but one opinion—That an example or examples of conviction and punishment of such high-handed offenders were essential, to ensure future obedience to the laws, or the exertions of our best citizens to suppress future insurrections.”⁵³ Fries was pardoned by President John Adams on May 21, 1800.⁵⁴

One of the most notable treason trials in American history was the trial of Aaron Burr in 1807.⁵⁵ Burr was charged with treason for “levying war” against the United States and tried in the U.S. Circuit Court of Richmond.⁵⁶ Chief Justice John Marshall presided over the trial and used the trial and his opinion to “clarify the law of treason.”⁵⁷ Specifically, Justice Marshall used his 25,000 word opinion in part to limit an expansive use of treason as an “instrument of political

⁴⁹ TO ALEXANDER HAMILTON FROM JAMES MCHENRY (MAR. 15, 1799) FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Hamilton/01-22-02-0331> (Original source: The Papers of Alexander Hamilton, vol. 22, July 1798–March 1799, ed. Harold C. Syrett. New York: Columbia University Press, 1975, pp. 539–542).

⁵⁰ Blinka, *supra* note 38, at 170–71.

⁵¹ Fries was tried twice for treason. He was tried once and convicted by a jury but was granted a new trial when evidence surfaced that a juror was not impartial. Fries was retried and again found guilty of treason. Justice Samuel Chase presided over Fries’ retrial. Justice Chase’s actions during Fries’ trial were cited by the House of Representatives in 1804 during Justice Chase’s impeachment proceedings. Grubbs, *supra* note 45.

⁵² TO JOHN ADAMS FROM TIMOTHY PICKERING (MAY 10, 1799) FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified October 5, 2016), <http://founders.archives.gov/documents/Adams/99-02-02-3499>.

⁵³ *Id.*

⁵⁴ Grubbs, *supra* note 45.

⁵⁵ United States v Burr, 25 F. Cas. 55 (C.C.D. Va. 1807). See generally SMITH, *supra* note 17, at 348–74; NEWMYER, *supra* note 37; HOFFER, *supra* note 13.

⁵⁶ HOFFER, *supra* note 13, at 198; SMITH, *supra* note 17, at 358; THE AARON BURR TREASON TRIAL, *supra* note 7.

⁵⁷ Blinka, *supra* note 38, at 183.

prosecution.”⁵⁸ Marshall’s opinion limited the treason doctrine and required “strict legal evidence, that an overt act of treason has been committed.”⁵⁹ Marshall echoed Burr’s attorney Edmund Randolph’s statement that “if the doctrine of treason be not kept within precise limits, but left vague and undefined, it gives the triumphant party the means of subjecting and destroying the other.”⁶⁰

B. Jury Trials in Early America

Juries were viewed as “an essential part of any free government” in early America.⁶¹ Specifically, the role of the jury was seen as “protecting ordinary individuals against governmental overreach[].”⁶² There was general consensus among “[t]he friends and adversaries of the plan of the [Constitutional] convention, [who] if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury.”⁶³ Despite agreement that the jury was essential, the role of the jury as deciders of the law and the facts was in flux in the late 1700s and early 1800s.⁶⁴ Chief Justice John Jay captured the fluidity of the jury’s role when he stated in the 1794 Supreme Court case, *Georgia v. Brailsford*:

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, *you have nevertheless a right to take upon yourselves to judge of both, and to determine the*

⁵⁸ SMITH, *supra* note 17, at 370. Marshall also used his opinion in Burr’s trial to clarify statements he made in his opinion in *Ex Parte Bollman*, which could be interpreted as promoting constructive treason including:

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

Ex Parte Bollman, 8 U.S. 75, 126 (1807).

⁵⁹ *United States v. Burr*, 25 F. Cas. 55, 60 (C.C.D. Va. 1807).

⁶⁰ SMITH, *supra* note 17, at 369–70.

⁶¹ HALE, *supra* note 12, at 59.

⁶² Blinka, *supra* note 38, at 136 (citing AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83–84 (Yale Univ. Press 1998)).

⁶³ THE FEDERALIST NO. 83 (Alexander Hamilton).

⁶⁴ See generally HALE, *supra* note 12; VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986); Blinka, *supra* note 38.

law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay the respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.⁶⁵

The nature of early American trials shaped the role of the jury.⁶⁶ Early American trials, influenced by British trials, “studiously avoided finely honed distinctions between law and fact.”⁶⁷ Additionally, serving on a jury “best prepared people to be free” by “giv[ing] to the minds of all citizens a part of the habits of mind of the judge.”⁶⁸ In this respect, serving on a jury was akin to educating citizens of the new nation on the judiciary and law while promoting the concept of the judge and jury being in a partnership.⁶⁹ Juries were also expected to draw on their own experiences and knowledge of circumstances and individuals unlike modern juries.⁷⁰

The jury was viewed as “an obstacle to oppressive government” and as such “unquestionably ha[d] jurisdiction of both fact and law.”⁷¹ For example, John Adams recognized the jury was important to safeguarding “fundamental Principles” especially when “judges should give their Opinion to the jury” counter to “fundamental Principles.”⁷² A “verdict according to

⁶⁵ *Georgia v. Brailsford*, 3 U.S. 1, 7–8 (1794) (emphasis added). The Supreme Court sat as a trial court in *Georgia v. Brailsford*.

⁶⁶ See generally HALE, *supra* note 12; HANS & VIDMAR, *supra* note 64; Blinka, *supra* note 38.

⁶⁷ Blinka, *supra* note 38.

⁶⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 261–62 (Harvey C. Mansfield & Delba Winthrop trans., ed., 2000). De. Tocqueville was a French political theorist who visited the United States in 1831. Though his visit was originally focused on examining United States prisons, his seminal work *Democracy in America* focused broadly on aspects of social equality and individualism in America. *Id.* at xvii–xlii; *Alexis De Tocqueville*, HISTORY.COM (2009), <http://www.history.com/topics/alexis-de-tocqueville>.

⁶⁹ See, e.g., TOCQUEVILLE, *supra* note 68, at 258–64; HALE, *supra* note 12, at 89–93.

⁷⁰ Blinka, *supra* note 38, at 138.

⁷¹ THE FEDERALIST NO. 81 (Alexander Hamilton); HALE, *supra* note 12, at 114.

⁷² *John Adams Diary 16, 10 January 1771 - 28 [i.e. 27] November 1772*. ADAMS FAMILY PAPERS: AN ELECTRONIC ARCHIVE. MASSACHUSETTS HISTORICAL SOCIETY, <http://www.masshist.org/digitaladams/> (follow “Search” hyperlink; enter “10 January 1771” in search bar and select “Diaries of John Adams” in dropdown menu) (last visited Nov. 26, 2016).

conscience” was regarded as a right of the jury and expanded on Adams’ understanding of the jury as protectors of “fundamental Principles.”⁷³

In the late 1700s and early 1800s, perceptions on the role of the jury were changing in response to criticisms of jury trials. For example, Thomas Jefferson was critical of “a great inconsistency” in jury trials and advocated for elected jurors.⁷⁴ Jefferson understood the political nature of trials and wished to prevent a “germ of rotteness [sic]” from infecting jury trials.⁷⁵ Specifically, Jefferson worried that jurors were being selected based on their “ignorance” and “pliability to [the] will and designs of power.”⁷⁶ Jefferson felt jurors were “competent judges of human character,” and therefore capable of being deciders of the facts, but did not feel jurors were qualified “for the management of affairs requiring intelligence above the common level.”⁷⁷

Chief Justice John Marshall used the Aaron Burr treason trial to both clarify the crime of treason, as discussed in Part I.A.1, and comment on the relationship between judge and jury.⁷⁸ Specifically, Marshall asserted the judge’s role as architect of the law by stating “irrelevant testimony may and ought be stopped” and recognized this ability of the judge as a “fundamental principle[] in judicial proceedings.”⁷⁹ When Marshall sent the case to the jury he stated “[t]he

⁷³ HALE, *supra* note 12, at 61 (quoting Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964)); John Adams Diary, *supra* note 72.

⁷⁴ Blinka, *supra* note 38, at 138 (citing 2 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826, at 1077 (James Morton Smith ed., 1995)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ THOMAS JEFFERSON TO PIERRE SAMUEL DU PONT DE NEMOURS, 24 APRIL 1816, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Jefferson/03-09-02-0471> (Original source: The Papers of Thomas Jefferson, Retirement Series, vol. 9, September 1815 to April 1816, ed. J. Jefferson Looney. Princeton: Princeton University Press, 2012, pp. 699–702).

⁷⁸ Blinka, *supra* note 38, at 183. *See generally* HOFFER, *supra* note 13, at 58, 63–70.

⁷⁹ *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807).

jury have now heard the opinion of the court on the law of the case [and] [t]hey will apply that law to the facts.”⁸⁰

C. *The War of 1812*

On June 18, 1812 the United States Congress declared war on Great Britain; President James Madison signed the declaration of war the same day.⁸¹ Reasons for the war were multiple, including British interference with American trade, impressment of American seamen by the British Royal Navy, and American expansionism.⁸² President Madison, writing to Congress on June 1, 1812 concerning British hostility towards America stated: “the conduct of her Government presents a series of acts, hostile to the United States, as an Independent and neutral nation” and “[i]t has become indeed sufficiently certain, that the commerce of the United States is to be sacrificed.”⁸³

Support for the war was not politically unanimous and highlighted divisions between the Democratic-Republicans and Federalist political parties.⁸⁴ President Madison was a Democratic-Republican and received support for the war from fellow Democratic-Republicans such as James Monroe.⁸⁵ Monroe supported President Madison’s view that America should not “continue passive under . . . [the] accumulating wrongs” committed by Britain against America and

⁸⁰ THE FEDERAL CASES: COMPRISING CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER, ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES, AND NUMBERED CONSECUTIVELY, BOOK 25, 180 (1896).

⁸¹ KILLENBECK, *supra* note 7, at 192; SMITHSONIAN, *supra* note 7.

⁸² SMITH, *supra* note 17, at 409; SMITHSONIAN, *supra* note 7; *War of 1812*, HISTORY.COM (2009) <http://www.history.com/topics/war-of-1812>.

⁸³ FROM JAMES MADISON TO CONGRESS, JUNE 1, 1812, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Madison/03-04-02-0460> (Original source: The Papers of James Madison, Presidential Series, vol. 4, 5 November 1811–9 July 1812 and supplement 5 March 1809–19 October 1811, ed. J. C. A. Stagg, Jeanne Kerr Cross, Jewel L. Spangler, Ellen J. Barber, Martha J. King, Anne Mandeville Colony, and Susan Holbrook Perdue. Charlottesville: University Press of Virginia, 1999, pp. 432–439).

⁸⁴ *Domestic Supporters and Opponents*, THE WAR OF 1812, <https://sites.google.com/a/uconn.edu/bav11001/supporters-and-opponents> (last visited Nov. 18, 2016).

⁸⁵ SMITH, *supra* note 17, at 370; HOFFER, *supra* note 13, at 409–10. As Secretary of State before the war, James Monroe was concerned with America’s political relations with France and Britain. JAMES MONROE: LIFE BEFORE THE PRESIDENCY, MILLER CENTER, UNIV. OF VA., <http://millercenter.org/president/biography/monroe-life-before-the-presidency> (last visited Nov. 20, 2016).

supported a declaration of war.⁸⁶ Monroe was Secretary of State during the war and served as temporary Secretary of War, from December 1812 to February 1813 and from August 1814 to March 1815.⁸⁷

Response to the declaration of war was not unanimously positive among U.S. citizens. In general, southern and western states supported the war and New England states were critical of the war.⁸⁸ For example, the citizens of Lexington, Kentucky wrote to President Madison in support of the war stating the declaration of war was “necessary” in light “that war has been forced upon the U.S., by Great Britain.”⁸⁹ Whereas citizens from Berkeley, Massachusetts wrote the President criticizing the declaration of war as “fatal to our Commercial Interest, destructive to our happiness as a people, and threatening to our Liberty and Independence.”⁹⁰

The lack of unanimous support for the war in conjunction with an inefficient, inexperienced, and understaffed War Department effected the United States ability to coordinate an effective military force.⁹¹ Senior officers were “generally, sunk into either sloth, ignorance, or habits of intemperate drinking” and were ineffective leaders.⁹² Enlisted men were undisciplined

⁸⁶ FROM JAMES MADISON TO CONGRESS, JUNE 1, 1812, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Madison/03-04-02-0460> (Original source: The Papers of James Madison, Presidential Series, vol. 4, 5 November 1811–9 July 1812 and supplement 5 March 1809–19 October 1811, ed. J. C. A. Stagg, Jeanne Kerr Cross, Jewel L. Spangler, Ellen J. Barber, Martha J. King, Anne Mandeville Colony, and Susan Holbrook Perdue. Charlottesville: University Press of Virginia, 1999, pp. 432–439).

⁸⁷ MILLER CENTER, *supra* note 85.

⁸⁸ See, e.g., HICKEY, *supra* note 15, at 52–71; STAGG, *supra* note 15, at 258–59.

⁸⁹ TO JAMES MADISON FROM THE CITIZENS OF LEXINGTON, KENTUCKY (JUNE 26, 1812) FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Madison/03-04-02-0542> (Original source: The Papers of James Madison, Presidential Series, vol. 4, 5 November 1811–9 July 1812 and supplement 5 March 1809–19 October 1811, ed. J. C. A. Stagg, Jeanne Kerr Cross, Jewel L. Spangler, Ellen J. Barber, Martha J. King, Anne Mandeville Colony, and Susan Holbrook Perdue. Charlottesville: University Press of Virginia, 1999, pp. 511–512).

⁹⁰ TO JAMES MADISON FROM THE INHABITANTS OF BERKLEY, MASSACHUSETTS, (CA. JULY 1, 1812) FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Madison/03-04-02-0569> (Original source: The Papers of James Madison, Presidential Series, vol. 4, 5 November 1811–9 July 1812 and supplement 5 March 1809–19 October 1811, ed. J. C. A. Stagg, Jeanne Kerr Cross, Jewel L. Spangler, Ellen J. Barber, Martha J. King, Anne Mandeville Colony, and Susan Holbrook Perdue. Charlottesville: University Press of Virginia, 1999, pp. 528–529).

⁹¹ HICKEY, *supra* note 15, at 75–76.

⁹² *Id.* at 76 (quoting the Memoirs of Winfield Scott).

and lacked experience.⁹³ Joseph Wheaton wrote to President Madison in 1813 highlighting issues the military faced:

The Militia Called out in the State of Ohio do almost or for the greater part refuse to turn out, Many very Many have deserted which have been drafted—have refused to March, & from what I can learn very little is to be expected from them⁹⁴

Desertion was common during the War of 1812 for both American and British forces and was punishable by death.⁹⁵ Desertion by American troops was particularly prevalent towards the end of the war.⁹⁶ For example, of the approximately 200 men executed for desertion during the War of 1812, 132 were executed in 1814.⁹⁷ Despite the number of executions, President Madison demonstrated leniency to deserters during the war, specifically pardoning deserters in 1812 and 1814 that became “sensible of their offences, and [were] desirous of returning to their duty.”⁹⁸

⁹³ *Id.*

⁹⁴ TO JAMES MADISON FROM JOSEPH WHEATON, MAR. 8, 1813, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Madison/03-06-02-0097> (Original source: The Papers of James Madison, Presidential Series, vol. 6, 8 February–24 October 1813, ed. Angela Kreider, J. C. A. Stagg, Jeanne Kerr Cross, Anne Mandeville Colony, Mary Parke Johnson, and Wendy Ellen Perry. Charlottesville: University of Virginia Press, 2008, pp. 97–99).

⁹⁵ First time deserters in the U.S military were usually sentenced to death and pardoned. Repeat deserters were more commonly executed. HICKEY, *supra* note 15, at 76, 222; THE MEN ARE SICK OF THE PLACE, NIAGARA 1812 LEGACY COUNCIL (Jan. 23, 2013, 11:34 AM), <http://discover1812.blogspot.com/2013/01/the-men-are-sick-of-place.html>. *See* EXTRACT FROM AN ORIGINAL LETTER FROM THOMAS G. RIDOUT (NEAR NIAGARA) TO HIS BROTHER GEORGE RIDOUT, SEPT. 16, 1813, *Thomas Ridout Family Fonds*, ARCHIVES OF ONTARIO, <http://www.archives.gov.on.ca/en/explore/online/1812/militia.aspx> (last visited Nov. 25, 2016) (quoting a British soldier: “Desertion has come to such height that 8 or 10 men go off daily.”).

⁹⁶ HICKEY, *supra* note 15, at 222. Desertion numbers likely rose in 1814 due to an increase in enlistment bonuses, which spurred soldiers to desert one unit to join another unit to receive two enlistment bonuses. J.C.A. Stagg, *Enlisted Men in the United States Army, 1812–1815: A Preliminary Survey*, 43 WILLIAM & MARY Q. 624–25 (1986).

⁹⁷ HICKEY, *supra* note 15, at 222; John S. Hare, *Military Punishments in the War of 1812*, 4 J. AM. MILITARY INST. 238 (1940). Execution for desertion did not happen as often in the British military during the War of 1812. John Grodzinski, “*Bloody Provost*”: *Discipline During the War of 1812*, 16 CANADIAN MILITARY HIST. 25, 30–31 (2012).

⁹⁸ HICKEY, *supra* note 15, at 76, 222; PRESIDENTIAL PROCLAMATION, 17 JUNE 1814, FOUNDERS ONLINE, NATIONAL ARCHIVES, last modified Oct. 5, 2016, <http://founders.archives.gov/documents/Madison/03-07-02-0511> (Original source: The Papers of James Madison, Presidential Series, vol. 7, 25 October 1813–30 June 1814, ed. Angela Kreider, J. C. A. Stagg, Mary Parke Johnson, Anne Mandeville Colony, and Katherine E. Harbury. Charlottesville: University of Virginia Press, 2012, pp. 568–569).

The Chesapeake Bay Region, a significant area of commerce, trade, and shipbuilding in America, was targeted by British forces during the War of 1812.⁹⁹ The relocation of the nation's capital to Washington, D.C. in 1800 also made the region a political and symbolic target and Baltimore's commercial significance made the area a strategic target.¹⁰⁰ The Maryland House of Delegates recognized the region was a target and wrote to President Madison in January 1814 "to implore the constituted authorities of this nation, that the negotiations [sic] about to be instituted, may be carried on with a just and earnest intention of bringing them to an amicable result; that the evils of this unprofitable and pernicious War may not be protracted" highlighting the "exposed and defenceless [sic] situation in which the State of Maryland has been hitherto left by the General Government, under the impending calamities of War."¹⁰¹

Divides among political parties and citizens stoked concerns that treasonous acts were occurring and were not being suppressed during the war. For example, John Adams voiced his concerns to Thomas Jefferson, referencing early treason trials, in a June 1813 letter, in which he stated:

[E]arly treasonous acts, such occurring during the War of 1812 needed to be suppressed . . . you never felt the Terrorism of Chaises Rebellion in Massachusetts. I believe you never felt the Terrorism of Gallatins Insurrection in Pensilvania [sic]: you certainly never realized [sic] the Terrorism of Fries's, most outrageous [sic] Riot and Rescue, as I call it, Treason.¹⁰²

⁹⁹ MARYLAND WAR OF 1812 BICENTENNIAL COMMISSION, STAR-SPANGLED 200: A NATIONAL BICENTENNIAL IN MARYLAND 9 (2009), <http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/012000/012397/unrestricted/20100274e.pdf#search=war%20of%201812>.

¹⁰⁰ *Id.*

¹⁰¹ TO JAMES MADISON FROM THE MARYLAND HOUSE OF DELEGATES, CA. 25 JAN. 1814 (ABSTRACT), FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Madison/03-07-02-0207> (Original source: The Papers of James Madison, Presidential Series, vol. 7, 25 October 1813–30 June 1814, ed. Angela Kreider, J. C. A. Stagg, Mary Parke Johnson, Anne Mandeville Colony, and Katherine E. Harbury. Charlottesville: University of Virginia Press, 2012, pp. 233–238). The negotiations mentioned by the Maryland House of Delegates was the Treaty of Ghent, which ultimately ended the War of 1812. HICKEY, *supra* note 15, at 298.

¹⁰² FROM JOHN ADAMS TO THOMAS JEFFERSON, JUNE 30, 1813, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Adams/99-02-02-6084>. "Chaises Rebellion in Massachusetts" refers to Shays Rebellion, an uprising by farmers against taxes. Shay's rebellion was used as

The fear that the government was not doing enough to ensure treasonous “opposition . . . [was] hushed” reached across the Atlantic Ocean to Louisa Catherine Johnson Adams in St. Petersburg Russia, who wrote to John Quincy Adams in November 1814:

The defects of our Constitution are certainly now completely brought to light and a Government which is too feeble to check the treason which is formed in the very heart of the people it affects to rule must sink the very conviction that the Laws cannot reach them gives a boldness, energy and strength to factions which must render them successful . . .¹⁰³

Against the backdrop of war and feelings that “opposition [to the war] must be hushed” John Hodges was tried for high treason for acts occurring in August 1814.¹⁰⁴

PART II: THE CRIME

A. Before the Crime

rationale for replacing the Articles of Confederation. “Gallatin’s Insurrection” refers to the Whiskey Rebellion. *Shay’s Rebellion*, HISTORY.COM (2009) <http://www.history.com/topics/shays-rebellion> (last visited Dec. 13, 2016); *supra* Part I.A.1.

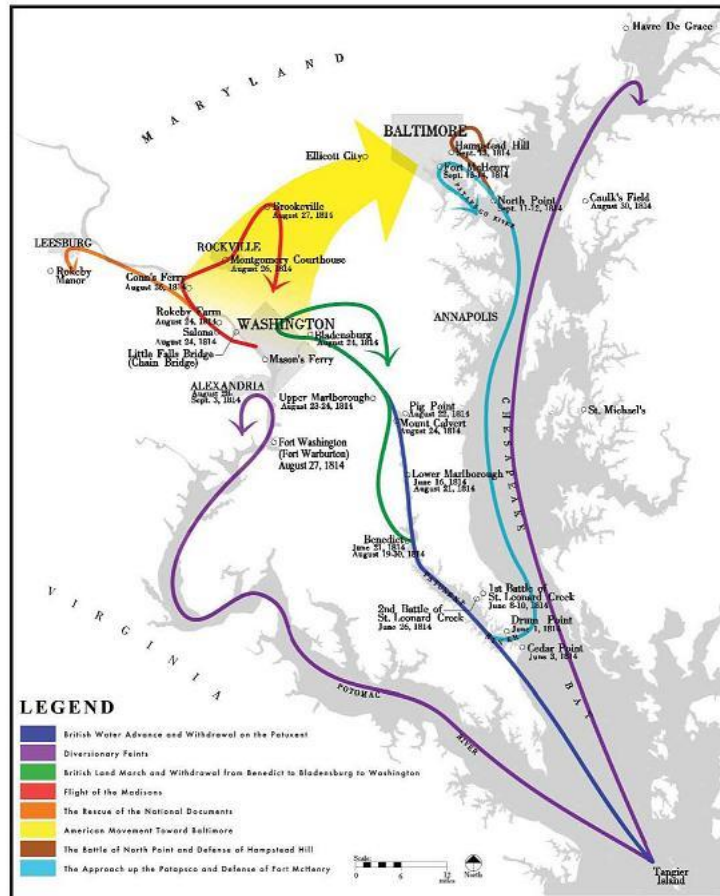
¹⁰³ REPORT, *supra* note 2, at 6; FROM LOUISA CATHERINE JOHNSON ADAMS TO JOHN QUINCY ADAMS, NOV. 6, 1814, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Adams/99-03-02-2657>.

¹⁰⁴ REPORT, *supra* note 2, at 6.

On August 16, 1814, as British warships commanded by Vice Admiral Alexander Cochrane joined British forces already in the Chesapeake Bay region, a plan to attack Washington, D.C. was coordinated.¹⁰⁵ Three days later 5,000 British troops landed at Saint Benedict, Maryland.¹⁰⁶ American forces initially thought the British were planning to attack Baltimore.¹⁰⁷ Secretary of State

James Monroe led a scouting party to report on the number of British troops and sent word back to Washington that British forces were heading towards the city led by General Robert Ross and Rear Admiral George Cockburn.¹⁰⁸

Entering Upper Marlboro, Maryland¹⁰⁹ on August 22, 1814, British forces faced “little or no skirmishing, and . . . were allowed to remain in the village all night without molestation.”¹¹⁰



British Campaign in the Chesapeake Bay. Image courtesy of The Battle of Baltimore: America's Last Chance for Freedom, <http://battleforbaltimore.weebly.com/events-leading-up.html>.

¹⁰⁵ Wesley Gant, *The Fall of Fort Washington and the Battle of White House Landing*, NATIONAL PARK SERVICE, FORT WASHINGTON, <https://www.nps.gov/fowa/learn/historyculture/the-fall-of-fort-washington-and-the-battle-of-white-house-landing.htm> (last visited Oct. 31, 2016).

¹⁰⁶ *Id.*

¹⁰⁷ MARYLAND WAR OF 1812, *supra* note 99.

¹⁰⁸ Gant, *supra* note 105; MILLER CENTER, *supra* note 85.

¹⁰⁹ Upper Marlboro is the current spelling of the town's name. When established in 1706 the spelling was Upper Marlborough. The name was shortened in the nineteenth or early twentieth century. HISTORIC PRESERVATION, UPPER MARLBORO TOWN ACTION PLAN, <http://www.mncppcapps.org/planning/publications/pdfs/220/H-Historic%20Preservation.pdf> (last visited Nov. 15, 2016).

In return, residents “were treated right civilly” and subjected to only minor disturbances, such as thefts of chickens and pigs, from British forces.¹¹¹ Civil treatment by British forces was not to be expected. The August 6, 1814 letter from Walter Hellen to John Quincy Adams captures the uncertainty and fears of citizens in the Chesapeake Bay region:

The force of the Enemy is now accumulating in every direction; The Chesapeake has since the commencement of the War been constantly blockaded—the present Summer they have been up most of the Rivers and Creeks, & have done an immensity [sic] of mischief, in burning, plundering & destroying private property. they have from Maryland taken & destroyed from four to five thousand Hhd. Tobacco, a Number of Negroes, & burnt a vast number of Houses, amongst which I am sorry to add one of my own—They are now up the Potomack [sic] burning & destroying every thing before them—nor is there any force, or any hopes of a force to arrest their depredations; this place will assuredly fall.¹¹²

While in Upper Marlboro, General Ross used the home of a local physician, Dr. William Beanes, as a headquarters.¹¹³ Specifically, General Ross used Dr. Beanes’ home to have a “council of war with Admiral Cockburn.”¹¹⁴ There is no indication that Dr. Beanes resisted General Ross’ use of his home, potentially out of fear that the destruction faced by Walter Hellen would also befall him.¹¹⁵

¹¹⁰ GEORGE GLEIG, A NARRATIVE OF THE CAMPAIGNS OF THE BRITISH ARMY AT WASHINGTON AND NEW ORLEANS, UNDER GENERALS ROSS, PAKENHAM, AND LAMBERT, IN THE YEARS 1814 AND 1815: WITH SOME ACCOUNT OF THE COUNTRIES VISITED BY AN OFFICER 106–07 (1821), <http://webapp1.dlib.indiana.edu/metsnav3/general/index.html#mets=http%3A%2F%2Fpurl.dlib.indiana.edu%2Fiu1%2Fgeneral%2Fmets%2FVAC1887&page=1>.

¹¹¹ Caleb Clarke Magruder Jr., *Dr. William Beanes, the Incidental Cause of the Authorship of the Star-Spangled Banner*, 22 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY, WASHINGTON, D.C. 212 (1919). The “greatest act of wanton vandalism” occurred at Trinity Church where “[s]everal leaves and some in other parts of [the Parrish Register] were torn out by some of Ross’ soldiers.” *Id.* (citing an account of John Read Magruder, the clerk of the vestry).

¹¹² Letter from Walter Hellen to John Quincy Adams (Aug. 6, 1814), <http://founders.archives.gov/documents/Adams/99-03-02-2568>.

¹¹³ Magruder Jr., *supra* note 111, at 212.

¹¹⁴ *Id.*

¹¹⁵ *See, e.g.*, Letter from Walter Hellen, *supra* note 112.

Leaving Upper Marlboro, British forces continued their advance towards Washington.¹¹⁶ At Bladensburg, Maryland, American forces failed to stop the advance of British troops in what antiwar newspapers called the “Bladensburg Races” because American troops were reportedly dropping their weapons and running away from the battle.¹¹⁷ Partial blame for the defeat at Bladensburg went to James Monroe, who instructed a group of American troops to realign and potentially brought them too far away from the combat to be useful.¹¹⁸

On August 24, 1814, British forces marched into Washington, D.C.¹¹⁹ President Madison, his cabinet, government officials, and residents fled and public buildings, including the Capitol and the President’s House, were burned.¹²⁰ The burning of Washington was dramatic and symbolic. General Ross, writing to his wife, stated: “[t]hey feel strongly the disgrace of having had their capital taken by a handful of men and blame very generally a government which went to war without the means or abilities to carry it on.”¹²¹

B. The Crime

The British left Washington, D.C. ravaged and marched towards Baltimore.¹²² British troops once again went through Upper Marlboro.¹²³ Some British troops were arrested for being stragglers or deserters by citizens of Upper Marlboro, including Dr. William Beanes, Dr.

¹¹⁶ Liane Hansen, *Retracing the “Bladensburg Races,”* NPR (Aug. 22, 2004, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=3862200>.

¹¹⁷ *Id.* William Pinkney in *United States v. Hodges* appears to reference this when he stated the British “were unawed by the *thing* which we called an army, for it had fled in every direction.” REPORT, *supra* note 2, at 3 (emphasis in original).

¹¹⁸ Hansen, *supra* note 116; Joel Achenbach, *D.C.’s Darkest Day, a War That No One Remembers*, WASH. POST (Aug. 23, 2014) https://www.washingtonpost.com/national/health-science/2014/08/23/abf407ae-24bd-11e4-86ca-6f03cbd15c1a_story.html.

¹¹⁹ SMITH, *supra* note 17, at 420; Achenbach, *supra* note 117.

¹²⁰ SMITH, *supra* note 17, at 420; Achenbach, *supra* note 117; MARYLAND WAR OF 1812, *supra* note 99.

¹²¹ Steve Vogel, *Five Myths About the Burning of Washington*, WASH. POST (June 28, 2013), https://www.washingtonpost.com/opinions/five-myths-about-the-burning-of-washington/2013/06/28/ac917cf0-ddb0-11e2-b797-cbd4cb13f9c6_story.html?utm_term=.8214ddc5d210.

¹²² SMITH, *supra* note 17, at 420; Achenbach, *supra* note 117; MARYLAND WAR OF 1812, *supra* note 99.

¹²³ REPORT, *supra* note 2, at 9.

William Hill, and Philip Weems.¹²⁴ Dr. Beanes or General Robert Bowie asked local attorney, John Hodges, to take the prisoners to the jail in Queen Anne, Maryland, in northern Prince Georges County.¹²⁵ British forces learned of the arrests and “gave notice to some of the principal inhabitants [of Upper Marlboro], that if the persons were not returned to the British lines by 12 o’clock the ensuing day, the whole town should be destroyed.”¹²⁶ Dr. Beanes, Dr. Hill, and Weems were also taken by the British as barter for the British prisoners.¹²⁷ John Hodges was asked to arrange the return of the prisoners to the British military.¹²⁸ Likely inspired by the threat of destruction to his town and the taking of three prominent residents, Hodges arranged the return of the prisoners.¹²⁹ For his actions, Hodges was charged with treason.¹³⁰

PART III: THE TRIAL

John Hodges’ was indicted by a grand jury for high treason.¹³¹ Specifically, Hodges was charged with “adhering to the enemy, giving him aid and comfort.”¹³² Though the grand jury indicted Hodges, they “expressed their respects for the motives of the traverser, and prayed for *noli prosequi*.”¹³³ Hodges was tried for treason in the Circuit Court of the United States for the

¹²⁴ REPORT, *supra* note 2, at 9; Magruder Jr., *supra* note 111, at 217. Queen Anne, now Hardesty, is a town in Prince George’s County north of Upper Marlboro.

¹²⁵ REPORT, *supra* note 2, at 11–12 (quoting General Bowie’s testimony at trial as instructing John Hodges and his brother to take the deserters “further into the interior”); JOHN HODGES (OF THOMAS), *supra* note 3 (stating Dr. Beanes instructed Hodges to take the deserters to Queen Anne).

¹²⁶ REPORT, *supra* note 2, at 5.

¹²⁷ REPORT, *supra* note 2, at 5; Magruder Jr., *supra* note 111, at 217.

REPORT, *supra* note 2, at 5 (1815). The record indicates that John Hodges’ brother assisted him in returning the British prisoners. John Hodges’ brother was not convicted of treason nor was he part of the trial. *See id.*

¹²⁹ *Id.* at 5.

¹³⁰ *Id.* at 5–6; Magruder Jr., *supra* note 111, at 217.

¹³¹ REPORT, *supra* note 2, at 9.

¹³² *Id.*

¹³³ *Id.* at 18. *Noli prosequi* (also spelled *Nolle Prosequi*) is Latin for “will not prosecute.” *Noli prosequi* is “an entry made on the court record when the . . . prosecutor in a criminal prosecution undertakes not to continue the action or prosecution.” *Noli Prosequi*, COLLINS DICTIONARY OF LAW (2006). Current rules on the “[d]isposition of Nolle Prosequi” and “[e]ffect of Nolle Prosequi” in Maryland can be found in Maryland Rules, Rule 4-247. MD. R. 4-247. A search of Maryland cases on Lexis Advance in the date range 1789 through 1850 referencing the term *Nolle Prosequi* resulted in fifteen cases. A search of Maryland cases on Lexis Advance in the date range 1789 through 1850 referencing the term *Noli Prosequi* resulted in one additional case.

Maryland District during the May 1815 term.¹³⁴ The case was heard before a jury; Supreme Court Justice Gabriel Duval, sitting as Circuit Justice; and District Judge James Houston.¹³⁵

A. *The Trial Report of John Hodges*

Before reviewing and analyzing the trial of John Hodges it is important to understand where much of the information on the crime and the trial originate and potential biases present in the record. The report of John Hodges' treason trial was published in *The American Law Journal*, edited by John Elihu Hall.¹³⁶ Hall is listed in the trial report as one of Hodges' attorneys.¹³⁷ The introduction to the trial report, most likely written by Hall, expresses bias against the United States government and the judiciary.¹³⁸ For example, the introduction states: “[t]here is every reason to believe Mr. Hodges was persecuted for high treason at the instigation of the government.”¹³⁹ The introduction specifically criticizes “[President James] Madison and [Albert] Gallatin [sic] and [James] Monroe” as an “ignorant, [] low minded, and cowardly crew, without ability to discern, or energy to execute.”¹⁴⁰ Additionally, the introduction laments that the judiciary is no longer “enlightened” and implies that Justice Gabriel Duvall, “the honourable chief justice who tried the cause,” was influenced by the government to apply the “abominable

¹³⁴ REPORT, *supra* note 2, at 1. The Judiciary Act of 1789 established the organization of the federal judiciary. Under the Act, circuit courts were set up as the primary federal trial courts. A Supreme Court justice and a local district judge presided over each circuit. For example, Justice Duvall presided over the United States District Court for the District of Maryland with Judge James Houston at the time of Hodges' trial. *Landmark Judicial Legislation, HISTORY OF THE FEDERAL JUDICIARY, FEDERAL JUDICIAL CENTER*, http://www.fjc.gov/history/home.nsf/page/landmark_02.html (last visited Dec. 13, 2016).

¹³⁵ *Id.* at 27–28, 35. Houston Judges for the U.S. District Court for the District of Maryland from 1806 to 1819. *U.S. District Court for the District of Maryland: Houston, James, HISTORY OF THE FEDERAL JUDICIARY, FEDERAL JUDICIAL CENTER* <http://www.fjc.gov/servlet/nGetInfo?jid=1100&cid=87&ctype=dc&instat=md> (last visited Nov. 25, 2016).

¹³⁶ REPORT, *supra* note 2; ALBERT HENRY SMYTH, *THE PHILADELPHIA MAGAZINES AND THEIR CONTRIBUTORS, 1741-1850*, at 139 (1892).

¹³⁷ REPORT, *supra* note 2, at 35.

¹³⁸ *See generally id.* at 1–8.

¹³⁹ *Id.* at 4.

¹⁴⁰ *Id.* at 7. Albert Gallatin was Secretary of the Treasury during the War of 1812. Gallatin helped negotiate the Treaty of Ghent which ended the War of 1812 in 1814. ABOUT: ALBERT GALLATIN, U.S. DEPARTMENT OF THE TREASURY (updated Nov. 11, 2010), <https://www.treasury.gov/about/history/Pages/agallatin.aspx>.

doctrine of constructive treason” in order to hush opposition to the war.¹⁴¹ The biases present in the introduction are not as conspicuous in the trial report text but it is likely the same critical biases permeate the trial report.

In addition to potential biases in the trial report, the report is not a verbatim description of the trial’s proceedings. For example, prior to William Pinkney’s final address to the jury the editor states that Pinkney “proceeded in a strain of eloquence, which the reporter dares not pretend to have followed, *Verba volant*.”¹⁴² Additionally, the introduction explains that the report was delayed in being published.¹⁴³ The delay in publication may have impacted the accuracy of the report.

B. The Trial – Actors, Actions, and an Instantaneous Verdict

The trial of John Hodges for the crime of treason took place in the Circuit Court of the United States for the Maryland District during the May 1815 term.¹⁴⁴ The trial was presided over by Justice Gabriel Duvall¹⁴⁵ and District Judge James Houston.¹⁴⁶ United States District Attorney Elias Glenn presented the case for the United States.¹⁴⁷ Hodges was represented by Upton Scott Heath,¹⁴⁸ Thomas Jenyns,¹⁴⁹ John Elihu Hall,¹⁵⁰ and William Pinkney.¹⁵¹

1. Witnesses & Witness Testimony

¹⁴¹ REPORT, *supra* note 2, at 4, 6, 7–8.

¹⁴² *Id.* at 23. *Verba Volant* is Latin for “spoken words fly away” (translation through Google Translate).

¹⁴³ *Id.* at 1.

¹⁴⁴ *Id.*

¹⁴⁵ See Appendix III.

¹⁴⁶ REPORT, *supra* note 2, at 27, 28.

¹⁴⁷ REPORT, *supra* note 2, at 35.

¹⁴⁸ See *U.S. District Court for the District of Maryland: Heath, Upton Scott*, HISTORY OF THE FEDERAL JUDICIARY, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1017&cid=87&ctype=dc&instate=md> (last visited Nov. 25, 2016).

¹⁴⁹ Probably Thomas Jennings of Baltimore. AMERICAN STATE TRIALS: A COLLECTION OF THE IMPORTANT AND INTERESTING CRIMINAL TRIALS WHICH HAVE TAKEN PLACE IN THE UNITED STATES, FROM THE BEGINNING OF OUR GOVERNMENT TO THE PRESENT DAY, Vol. 10, 163 (John d. Lawson ed., 1918).

¹⁵⁰ REPORT, *supra* note 2, at 27, 28; AMERICAN STATE TRIALS, *supra* note 149.

¹⁵¹ REPORT, *supra* note 2, at 27, 28; AMERICAN STATE TRIALS, *supra* note 149. See Appendix IV.

Witnesses for the prosecution were: William Caton, John Randall, Jr., General Robert Bowie, Gustavus Hay, William Lansdale, Thomas Holden, Solomon Sparrow, Robert Bowie, Benjamin Oden, Jr., Samuel Tyler, and Thomas Sparrow.¹⁵² William Caton testified that he was at the jail in Queen Anne when Hodges arrived to take the prisoners.¹⁵³ Caton testified that he told Hodges “if he surrendered the deserter he was no American – he would stain his hands with human blood” and Hodges told him “he wanted none of his advice.”¹⁵⁴ Witness John Randall, Jr. guarded the prisoners in Queen Anne and testified that when Hodges demanded the prisoners he asked General Robert Bowie if the prisoners should be released.¹⁵⁵ General Bowie upon learning of the threat to Upper Marlboro responded that “it was hard, but he supposed they must be returned.”¹⁵⁶ Witness Thomas Sparrow also testified to General Bowie’s response.¹⁵⁷

General Robert Bowie¹⁵⁸ was also a witness and testified that he wrote to the governor to inform him that British prisoners were at Queen Anne and commended Hodges for his “promptness and patriotism” in removing the prisoners from Upper Marlboro.¹⁵⁹ General Bowie

¹⁵² REPORT, *supra* note 2, at 10–17; COURT REGISTER ENTRY (1815) (listing witnesses, number of days witnesses were present in court, and mileage traveled.)

¹⁵³ REPORT, *supra* note 2, at 10.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 11.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 16.

¹⁵⁸ Bowie was governor of Maryland 1803 to 1805 and again in 1811. Bowie supported the War of 1812 and was criticized for his support of the war in the Baltimore press. Bowie recognized the need to fortify defenses in Maryland, as demonstrated in a letter from Bowie to President Madison in May 1812, where Bowie states:

We are decidedly of Opinion that the fortifications at present erected here are inadequate to its Security and defence [sic], and that to accomplish so desirable an object, it will be necessary for your Excellency to appropriate a portion of the public Money allotted to the defence [sic] of the Sea ports.

TO JAMES MADISON FROM ROBERT BOWIE, MAY 13, 1812, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Madison/03-04-02-0403> (Original source: The Papers of James Madison, Presidential Series, vol. 4, 5 November 1811–9 July 1812 and supplement 5 March 1809–19 October 1811, ed. J. C. A. Stagg, Jeanne Kerr Cross, Jewel L. Spangler, Ellen J. Barber, Martha J. King, Anne Mandeville Colony, and Susan Holbrook Perdue. Charlottesville: University Press of Virginia, 1999, pp. 381–382); GOVERNOR ROBERT BOWIE, NAT’L GOVERNORS ASSN. (2015) https://www.nga.org/cms/home/governors/past-governors-bios/page_maryland/col2-content/main-content-list/title_bowie_robert.default.html (last visited Nov. 20, 2016).

¹⁵⁹ REPORT, *supra* note 2, at 12.

stated that when he saw the deserter at the jail he said “*he* must not be delivered up” but could not recall if Hodges heard this statement.¹⁶⁰ General Bowie was called as a witness for a second time and testified that “Hodges never pressed the delivery of the deserter.”¹⁶¹

Gustavus Hay testified that Hodges asked him “to assist in conducting the prisoners to the British lines” and when they met with the British forces the British asked why they only had four prisoners to return and not six.¹⁶² Further, Hay testified that Hodges or William Lansdale told the British troops the location of the other two prisoners (possibly deserters).¹⁶³ William Lansdale testified that Hodges told him about the British threat and accompanied him to the prison to free the British prisoners.¹⁶⁴ Lansdale stated that the threat was made by British Major Evans as instructed by “the general,” likely General Ross.¹⁶⁵ Further, Lansdale testified that “Hodges said they could not give up the deserter” and mentioned that “[g]reat apprehension was entertained for [Dr. Beanes].”¹⁶⁶

Witness Thomas Holden is referred to in the trial report as the deserter and admits to being a deserter from the British military.¹⁶⁷ Holden testified that Hodges told him, “I am not determined to carry you in” and left him at a house when he brought the prisoners to the British.¹⁶⁸ Solomon Sparrow testified that he was asked by General Bowie to get men to guard the British prisoners and that he heard the exchange between Caton and Hodges.¹⁶⁹

¹⁶⁰ *Id.* (emphasis in original).

¹⁶¹ *Id.* at 16.

¹⁶² *Id.* at 12–13.

¹⁶³ *Id.* at 13.

¹⁶⁴ *Id.*

¹⁶⁵ REPORT, *supra* note 2, at 13.

¹⁶⁶ *Id.* at 14.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 15.

Robert Bowie, son of General Robert Bowie, testified that he took one of the British prisoners to his house with Benjamin Oden.¹⁷⁰ Benjamin Oden testified that “two deserters were left in [his] custody” when Hodges returned the other British prisoners.¹⁷¹ Additionally, Oden stated that the deserters ran away and when British Major Evans demanded to know where the deserters were “[a] woman pointed out the direction which the men had taken.”¹⁷² According to the trial report, witness Samuel Tyler¹⁷³ only testified “to the bringing of the prisoners to Queen Anne, the threat, and the alarm, &c.”¹⁷⁴

Only two witnesses testified for the defense: Dr. Bradley Beanes and J. Donaldson.¹⁷⁵ Dr. Bradley Beanes, Dr. William Beanes’ brother, testified that he and his brother captured the deserter Thomas Holden and had him sent to Queen Anne.¹⁷⁶ When British forces took Dr. William Beanes and threatened Upper Marlboro, Dr. Bradley Beanes asked John Hodges to arrange return of the prisoners being kept in Queen Anne.¹⁷⁷ He also asked Hodges to get a deserter being kept by Robert Bowie, which Bowie “strenuously contended that they had no right to demand” stating the deserter would be executed if returned.¹⁷⁸ Dr. Bradley Beanes “told him [Robert Bowie] he need not be uneasy about the deserters – that that thing could be managed” implying the deserters may be permitted to escape.¹⁷⁹ The second witness for the defense, J.

¹⁷⁰ *Id.*

¹⁷¹ REPORT, *supra* note 2, at 16.

¹⁷² *Id.*

¹⁷³ Samuel Tyler is possibly the husband of Justice Gabriel Duvall’s aunt, Susannah Duvall. See FAMILY: SUSANNAH DUVALL / SAMUEL TYLER, EARLY COLONIAL SETTLERS OF SOUTHERN MARYLAND & VIRGINIA’S NORTHERN NECK COUNTIES, <http://www.colonial-settlers-md-va.us/familychart.php?personID=I022982&tree=Tree1> (last visited Nov. 20, 2016).

¹⁷⁴ REPORT, *supra* note 2, at 16.

¹⁷⁵ *Id.* at 17–18.

¹⁷⁶ *Id.* at 17.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 17–18.

Donaldson, Esq., testified he “never considered him [Holden] a deserter” and he did not think Hodges knew Holden was a deserter.¹⁸⁰

2. Deserters, Stragglers, and/or Prisoners

The British soldiers at the heart of Hodges’ allegedly treasonous actions played a significant role in the trial despite not being present at the trial, except for one who was a witness, Thomas Holden.¹⁸¹ Witness testimony highlights a distinction between stragglers or prisoners¹⁸² and deserters.¹⁸³ Further, witness testimony seems to point to John Hodges intending to return prisoners to the British but not deserters.¹⁸⁴ For example, John Randall testified “Holden, the deserter, should not be taken further than *Hall’s Mill*” and William Lansdale testified “Hodges said that he did not mean to deliver *him* [the deserter] up.”¹⁸⁵

Witness testimony also recognized deserters may be executed if returned to the British military.¹⁸⁶ For example, William Caton, testified he told Hodges that “if he surrendered the deserter he was no American – he would stain his hands with human blood,” and Dr. Bradley Beanes testified that Robert Bowie was concerned that “his prisoner . . . if he was a deserter” would be killed if returned to the British.¹⁸⁷ The Introduction to the trial report only refers to “three or four stragglers” without mention of any deserters.¹⁸⁸ It is unclear if this is a mistaken

¹⁸⁰ REPORT, *supra* note 2, at 18.

¹⁸¹ *Id.* at 14.

¹⁸² The term straggler and prisoner are used interchangeably in the trial report. For purposes of clarity this paper will use the term prisoner or prisoners to delineate British soldiers arrested in Upper Marlboro that were not deserters.

¹⁸³ *Supra* Part III.B.1.

¹⁸⁴ *See generally* REPORT, *supra* note 2.

¹⁸⁵ REPORT, *supra* note 2, at 11, 13 (emphasis in original).

¹⁸⁶ *See supra* Part I.C.

¹⁸⁷ REPORT, *supra* note 2, at 10, 17. Prisoners returned to the British would likely not face death. Under conventions between the U.S. and Britain prisoners from one side could be exchanged for prisoners from the other side. *See generally* HICKEY, *supra* note 15, at 177–80; CHARLES R. MURPHY, CONGRESSIONAL RESEARCH SERVICE, PRISONERS OF WAR: REPATRIATION OR INTERNMENT IN WARTIME 2 (Jul. 20, 1971), https://www.loc.gov/rr/frd/Military_Law/pdf/CRS_Prisoners-of-War_report.pdf.

¹⁸⁸ REPORT, *supra* note 2, at 5.

omission by the author or if the author did not want to highlight Hodges' possible intent concerning deserters.

3. The Prosecution and the Defense – What is Treason?

The distinction between returning prisoners or deserters calls into question which of Hodges' actions constituted treason: was it treasonous to return prisoners and deserters; was it treasonous to just return the prisoners and allow deserters to go free; or was it treasonous to return deserters to the British? The prosecutor, Elias Glenn, points to the latter when he states:

In a moral point of view, some excuse might be found for his [Hodges'] conduct; but with regard to the deserter, there was no excuse, moral, legal, or political. Deserters, it is well known, are always put to death; and, in order to save my property, I have no right to immolate the lives of my fellow creatures.¹⁸⁹

Further, the prosecution attempted to build a case against Hodges based on witness testimony that Hodges knew he was returning at least one deserter.¹⁹⁰ The prosecution's witness testimony was not strong and created doubt as to whether Hodges knew there were possibly British deserters or if he intended to return deserters to the British.¹⁹¹ For example, General Robert Bowie testified that he stated the deserter "must not be delivered up" but was not sure if "Hodges was present when this one was stated to be a deserter."¹⁹² Thomas Holden, a British deserter, testified that Hodges told him he "was not determined to carry [him] in."¹⁹³ Additionally, General Robert Bowie testified a second time specifically to state "Hodges never pressed the delivery of the deserter."¹⁹⁴

¹⁸⁹ *Id.* at 10.

¹⁹⁰ *See supra* Part III.B.1.

¹⁹¹ *See supra* Part III.B.1; REPORT, *supra* note 2, at 10–17.

¹⁹² REPORT, *supra* note 2, at 12.

¹⁹³ *Id.* at 14.

¹⁹⁴ *Id.* at 16.

The two witnesses for the defense further strengthened the case that Hodges either did not know there were deserters or that he intended to allow deserters to go free.¹⁹⁵ For example, Dr. Bradley Beanes informed Robert Bowie that “he need not be uneasy about the [fate of the] deserters” implying that “an opportunity would be given to the deserters to make their escape.”¹⁹⁶ Additionally, J. Donaldson stated “it was impossible that” Hodges would know Thomas Holden was a deserter.¹⁹⁷

Following witness testimony, Elias Glenn “prayed the court to direct the jury that the mere act of delivering up prisoners *or* deserters is an overt act of high treason.”¹⁹⁸ Glenn’s use of “or” between the words prisoners and deserters may be a means of compensating for weak witness testimony and attempting to expand the doctrine of treason to include the return of prisoners, even if “[i]n a moral point of view, some excuse might be found for his [Hodges] conduct.”¹⁹⁹

Glenn emphasized that proving treason required consideration of “the facts and the intention.”²⁰⁰ In Hodges’ case Glenn saw only “two inquiries to be made . . . [d]id [Hodges] deliver the prisoners [and] [d]id [Hodges] intend to do so?”²⁰¹ Answering yes to both proved treason and in Glenn’s opinion Hodges did deliver the prisoners and intended to do so and therefore committed treason.²⁰² Glenn did not mention delivering deserters, only prisoners. It is unclear if Glenn intended to group deserters with prisoners, if Glenn meant to make a distinction, or if this is a mistaken omission from the record.

¹⁹⁵ *Id.* at 17–18.

¹⁹⁶ *Id.* at 17–18.

¹⁹⁷ *Id.* at 18.

¹⁹⁸ REPORT, *supra* note 2, at 18 (emphasis added).

¹⁹⁹ *Id.* at 10.

²⁰⁰ *Id.* at 21.

²⁰¹ *Id.*

²⁰² *Id.*

William Pinkney argued on behalf of Hodges that he “[was] entitled to be sheltered by his motives from the imputation of treason.”²⁰³ Pinkney argued that Hodges’ actions were justified because he was motivated to save his town from “[a] hostile force” and secure release of Dr. Beanes, Dr. Hill, and Weems.²⁰⁴ According to Glenn, motive was not an excuse.²⁰⁵ Specifically, Glenn stated that “apprehension of any loss of property, by waste or fire, or even an apprehension of a slight or remote injury to the person, furnish no excuse.”²⁰⁶

Pinkney’s arguments defending Hodges have been described as “a masterpiece of courage and manly determination in the maintenance of the just rights of the accused.”²⁰⁷ Specifically, Pinkney argued against “reviving the ferocious and appalling doctrine of constructive treason” and stated forcefully “Gracious God! In the nineteenth century, to talk of constructive treason!”²⁰⁸ Pinkney argued that the United States must “prove what they allege” in the indictment, that Hodges acted “*wickedly, maliciously, and traitorously.*”²⁰⁹ As the introduction to the trial report stated that “[t]here is every reason to believe that Mr. Hodges was persecuted for high treason at the instigation of the government,” Pinkney also alleged that Hodges was tried either to be made an example of or to “bring down VENGEANCE upon him.”²¹⁰

4. Justice Duvall’s Opinion & the Jury

²⁰³ *Id.* at 25.

²⁰⁴ REPORT, *supra* note 2, at 27.

²⁰⁵ *Id.* at 21.

²⁰⁶ *Id.*

²⁰⁷ REPORT OF THE EIGHT ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION HELD AT OCEAN CITY, MARYLAND 81 (1903-1904).

²⁰⁸ REPORT, *supra* note 2, at 25, 29.

²⁰⁹ *Id.* at 30 (emphasis in original). Pinkney’s demand that the United States must prove what is in the indictment harkens back to Chief Justice Marshall’s opinion in *United States v. Burr*. See generally *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807).

²¹⁰ REPORT, *supra* note 2, at 4, 29.

Glenn's request for the court to instruct the jury on the law, following the conclusion of witness testimony, was met with criticism from Pinkney.²¹¹ Pinkney criticized Glenn for the timing of his request, stating the court, "after the case is closed . . . may indeed *advise*" if requested by the jury or if the court thought "it proper to do so without being asked."²¹² Pinkney stated that "the established order to [the] trial [was] deserted" and in doing so "the court [was] called upon to mix itself in [jury] deliberations."²¹³ Further, Pinkney requested the court "go on in the customary and legal manner" and stated that if the court "g[a]ve the direction [he] would not submit to it" and "tell the jury that it is not law."²¹⁴

Justice Duvall recognized that the case had not "gone through in the usual way" but offered his opinion on the law.²¹⁵ Justice Duvall stated:

Hodges is accused of adhering to the enemy, and the overt act laid consists in the delivery of certain prisoners, and I am of opinion that he is guilty. When the act itself amounts to treason it involves the intention, and such was the character of this act. No threat of destruction of property will excuse or justify such an act; nothing but a threat of life, and that likely to be put into execution, will justify. The jury are not bound to conform to this opinion, because they have a right in all criminal cases to decide on the law and the facts.²¹⁶

Judge Houston followed that "he did not entirely agree with the chief justice in any, except the last remark."²¹⁷

Pinkney responded to Justice Duvall's delivery of his opinion of the law as he said he would and told the jury "[t]he opinion which the chief justice has just delivered is not . . . the law of this land."²¹⁸ Pinkney asserted that Justice Duvall's interpretation of the law, that Hodges' conduct in returning the prisoners "import[ed] the wicked intention charged by the indictment,"

²¹¹ *Id.* at 18–19.

²¹² *Id.* at 19 (emphasis in original).

²¹³ *Id.* at 29.

²¹⁴ *Id.* at 19.

²¹⁵ *Id.* at 27.

²¹⁶ REPORT, *supra* note 2, at 28.

²¹⁷ *Id.*

²¹⁸ *Id.* at 19, 28.

was constructive treason.²¹⁹ He argued that such a broad interpretation of the doctrine of treason would be dangerous.²²⁰ For example, Pinkney questioned “[i]f the mere naked fact of delivery constitute the crime of treason, why not hang the man who goes under a flag of truce to return or exchange prisoners?”²²¹ Pinkney also conjectured that Justice Duvall’s construction of the treason doctrine would result in General Robert Bowie being charged with treason and further “half of Prince George’s county would come within its baleful influence.”²²²

Pinkney concluded his address to the jury by calling “upon [the] jury, as you are honorouable [sic] men, as you are just, as you value your liberties, as you prize your constitution, to say – and to say it promptly – that my client is NOT GUILTY.”²²³ According to the trial report “[t]he Jury, without hesitating a moment, rendered a verdict of – NOT GUILTY.”²²⁴

C. Analysis

1. Why Did the Jury Find John Hodges Not Guilty?

In light of Justice Duvall’s “opinion on the law” that Hodges was guilty, why did the jury find Hodges not guilty?²²⁵ A number of reasons are possible, including the jury understood their role as deciders of the facts and the law and determined the law as they felt it should be applied to Hodges; the jury was faced with differing opinions of the law from Justice Duvall and Judge Houston and chose to apply Judge Houston’s interpretation of the law; Justice Duvall manipulated the order of the proceedings to encourage the jury to find Hodges not guilty; or the jury’s verdict is an example of early jury nullification.

²¹⁹ *Id.* at 32.

²²⁰ *See id.* at 23, 24, 31, 33, 34.

²²¹ *Id.* at 33.

²²² REPORT, *supra* note 2, at 34.

²²³ *Id.* at 35 (emphasis in original).

²²⁴ *Id.* (emphasis in original).

²²⁵ *Id.* at 27–28.

As discussed in Part I.B the jury in early America was viewed as “protecting ordinary individuals against government overreach[.]”²²⁶ In this context, the jury in Hodges’ trial may have taken on the role John Adams advocated for when he stated the jury must safeguard “fundamental Principles” especially when “judges should give their Opinion to the jury” counter to “fundamental Principles.”²²⁷ In this light, the jury in Hodges’ trial may have found Justice Duvall’s opinion counter to “fundamental Principles” in particular, whether the United States had “prove[n] what they allege” in the indictment, that Hodges acted “*wickedly, maliciously, and traitorously.*”²²⁸ Further, the jury may have found Hodges not guilty based on a “verdict according to conscience.”²²⁹ Even Justice Duvall recognized the jury was “not bound to conform to [his] opinion, because they have a right . . . to decide on the law and the facts.”²³⁰

According to the trial report, the court’s opinion on the law was not given after the case had closed, but was given before Pinkney’s final address to the jury.²³¹ The trial report stated the “[c]ourt proceeded to pronounce an opinion” which is followed by Justice Duvall’s opinion that Hodges was guilty as well as Judge Houston’s opinion that he “did not entirely agree with the chief justice in any, except the last remark”²³² This potentially indicates that the opinion of the court was divided and the jury’s role was to decide between the differing opinions of Justice Duvall and Judge Houston and applied Judge Houston’s opinion.²³³

²²⁶ *Supra* Part I.B; Blinka, *supra* note 38, at 136 (citing AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 83–84 (Yale Univ. Press 1998)).

²²⁷ John Adams Diary, *supra* note 72.

²²⁸ REPORT, *supra* note 2, at 30 (emphasis in original). Pinkney’s demand that the United States must prove what is in the indictment harkens back to Chief Justice Marshall’s opinion in *United States v. Burr*. See generally *United States v Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807).

²²⁹ See *supra* Part I.B; HALE, *supra* note 12, at 61 (quoting Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964)).

²³⁰ REPORT, *supra* note 2, at 27–28.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 35.

Justice Duvall may have manipulated the order of the proceedings to encourage the jury to find Hodges not guilty. Justice Duvall knew Pinkney would “not submit to [the court’s opinion]” if the court did not proceed “in the customary and legal manner” and stated that if the court “g[a]ve the direction [he] would not submit to it” and “tell the jury that it is not law.”²³⁴ Justice Duvall may have purposefully stated his opinion outside of “the customary and legal manner” knowing Pinkney would disagree with his opinion and possibly provide a means for Justice Duvall to save face with the government while securing Hodges’ freedom.²³⁵

The jury’s verdict in Hodges’ trial may be an example of early jury nullification. Jury nullification occurs when a jury “disregard[s] either the evidence presented or the instructions of the judge in order to reach a verdict based on their own consciences.”²³⁶ Though the term, jury nullification, was likely not in common usage until the twentieth century the concept was present in early American jurisprudence.²³⁷ For example, juries in northern states before the Civil War often acquitted abolitionists charged with helping slaves under the Fugitive Slave Laws despite overwhelming evidence of guilt.²³⁸ The jury’s decision to not follow Justice Duvall’s opinion and find Hodges not guilty of treason may be an example of early jury nullification.

2. Why was John Hodges Tried for Treason?

According to the trial report’s introduction “[t]here is every reason to believe Mr. Hodges was persecuted for high treason at the instigation of the government.”²³⁹ If this is correct, why did the government target Hodges, especially after the war had ended?²⁴⁰ Further, why was

²³⁴ *Id.* at 19.

²³⁵ *Id.* at 19, 27–28.

²³⁶ *Jury Nullification*, WEST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008).

²³⁷ HANS & VIDMAR, *supra* note 64, at 149. One scholar searched digital archives and determined the term “jury nullification” did not appear “in the context of jury trials until 1911. HALE, *supra* note 12, at 61 n.4.

²³⁸ HANS & VIDMAR, *supra* note 64, at 149.

²³⁹ REPORT, *supra* note 2, at 4.

²⁴⁰ John Hodges’ treason trial ended in May 1815. The War of 1812 had officially ended three months prior on February 17, 1815. The war sparked a sense of nationalism in the United States. Many citizens began to view

Hodges tried for treason while others who acted in similar treasonous ways were not?

Specifically, why were Alexandrians not charged with treason for surrendering naval supplies and other items to the British in August 1814?²⁴¹ Additionally, why was Dr. William Beanes not charged with treason for “adhering to the enemy, giving him aid and comfort” for allowing British General Ross to stay in his home before the British burned Washington?²⁴²

themselves as residents of the United States, not simply as residents of their individual states. This was particularly felt in the Chesapeake Region, where Hodges’ alleged treasonous acts and trial took place. For example, many monuments were erected including the Battle Monument in Baltimore which was the first monument commemorating the War of 1812 in the United States. It is possible the United States government felt it was necessary to try Hodges for treason in order to maintain national pride. Additionally, the government may have felt they had a better opportunity to convict Hodges on treason and make an example of Hodges if they could seat a jury infected with national pride. *Defining a Nation - Nationalism*, STAR-SPANGLED BANNER NATIONAL HISTORIC TRAIL, <http://starspangledtrail.net/defining-a-nation/nationalism-civic-pride/> (last visited Dec. 13, 2014).

²⁴¹ Alexandria did not unanimously support the war. For example, Samuel Snowden, editor of the *Alexandria Daily Gazette*, in response to the declaration of war in 1812 questioned if Congress was “really so mad as to wish to involve us in a partial and disastrous war.” Ted Pulliam, *Alexandria and the War of 1812: A Series of Articles Telling How Alexandrians Were Affected 200 Years Ago by the War of 1812*, Alexandria Archaeology Publications, No. 127 (2014), <https://www.alexandriava.gov/uploadedFiles/historic/info/archaeology/War1812Pulliam.pdf>; *The Occupation of Alexandria and the War of 1812*, CITY OF ALEXANDRIA, VIRGINIA (Jan. 14, 2016, 10:42 AM), <https://www.alexandriava.gov/1812>.

²⁴² See, e.g., Magruder Jr., *supra* note 111; Meg Fairfax Fielding, *Dr. Beanes: The Forgotten Man in the Star-Spangled Banner Story*, CHESAPEAKE PHYSICIAN (June 30, 2014), <http://chesphysician.com/2014/06/30/dr-beans-the-forgotten-man-in-the-star-spangled-banner-story/>.

In August 1814, the city of Alexandria, Virginia confronted a similar dilemma as John Hodges and the residents of Upper Marlboro confronted that same month.²⁴³ British gun boats threatened to destroy the city if terms of capitulation were not met.²⁴⁴ The terms of



William Charles (1776-1820), *Johnny Bull and the Alexandrians*, 1814, etching and aquatint. Image courtesy of the Library of Congress Prints and Photographs Division Washington, D.C., <http://www.loc.gov/pictures/item/2002708985/>.

capitulation requested American ships and “all naval and ordinance stores” including “16,000 barrels of flour, 1,000 hogsheads of tobacco, 150 bales of cotton and some \$5,000 worth of wine, sugar and other items.”²⁴⁵ The Common Council of Alexandria agreed to the terms in order to save Alexandria from destruction.²⁴⁶ Though Alexandrians were criticized for being part “of the disgraceful disasters that . . . overwhelmed” America, no one in Alexandria was charged with treason for “adhering to [the] enemies, giving them aid and comfort.”²⁴⁷

As discussed in Part II.A, British General Robert Ross used Upper Marlboro physician, Dr. William Beanes’, home as a headquarters and to have a “council of war with Admiral

²⁴³ HISTORY OF ALEXANDRIA AND THE WAR OF 1812: A BRIEF HISTORY, CITY OF ALEXANDRIA VIRGINIA (Dec. 16, 2014, 5:44 PM), <https://www.alexandriava.gov/historic/info/default.aspx?id=78273>; OCCUPATION OF ALEXANDRIA, *supra* note 240.

²⁴⁴ HISTORY OF ALEXANDRIA, *supra* note 243; OCCUPATION OF ALEXANDRIA, *supra* note 241.

²⁴⁵ HISTORY OF ALEXANDRIA, *supra* note 243; OCCUPATION OF ALEXANDRIA, *supra* note 241.

²⁴⁶ HISTORY OF ALEXANDRIA, *supra* note 243; OCCUPATION OF ALEXANDRIA, *supra* note 241.

²⁴⁷ JOHN MINOR TO THOMAS JEFFERSON, SEPT. 8, 1814, FOUNDERS ONLINE, NATIONAL ARCHIVES (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Jefferson/03-07-02-0465> (Original source: The Papers of Thomas Jefferson, Retirement Series, vol. 7, 28 November 1813 to 30 September 1814, ed. J. Jefferson Looney. Princeton: Princeton University Press, 2010, pp. 643–644); U.S. CONST. art. III, § 3. *See, e.g.*, William Charles (1776-1820), *Johnny Bull and the Alexandrians*, 1814, etching and aquatint. Image courtesy of the Library of Congress Prints and Photographs Division Washington, D.C., <http://www.loc.gov/pictures/item/2002708985/> (last visited Nov. 25, 2016).

Cockburn.”²⁴⁸ There is no indication that Dr. Beanes tried to prevent General Ross’ use of his home.²⁴⁹ There is indication that Dr. Beanes was “disposed to treat [the British] as friends.”²⁵⁰ Further, the record indicates General Ross felt Dr. Beanes “deceived and broke[] his faith” with him by taking part in the arrest of British soldiers.²⁵¹ Given Dr. Beanes’ conspicuous acceptance of General Ross’ use of his home prior to the burning of Washington, why was Dr. Beanes not charged with treason for “adhering to [the] enemies, giving them aid and comfort”?²⁵²

John Hodges may have been charged with treason, while others were not, because he was an easier target to make an example of. The same motivation that resulted in Fries’ conviction for treason in 1799, discussed in Part I.A.1, may have motivated the government to charge Hodges with treason.²⁵³ Specifically, convicting Hodges may have been desired to maintain “the stability of [the country’s] government” especially during the War of 1812; which Pinkney alluded to when he stated: “[a]s if the salvation of the state depended upon the conviction of this unfortunate man [Hodges].”²⁵⁴

Charging the Common Council of Alexandria with treason was potentially politically and logistically difficult. Charging Dr. Beanes with treason was also potentially politically difficult and may have caused backlash against the government for charging “poor Dr. Beanes” who was

²⁴⁸ Magruder Jr., *supra* note 111, at 212.

²⁴⁹ *See, e.g., id.* at 220.

²⁵⁰ *Id.* at 212 (quoting GEORGE GLEIG, A NARRATIVE OF THE CAMPAIGNS OF THE BRITISH ARMY AT WASHINGTON AND NEW ORLEANS, UNDER GENERALS ROSS, PAKENHAM, AND LAMBERT, IN THE YEARS 1814 AND 1815: WITH SOME ACCOUNT OF THE COUNTRIES VISITED BY AN OFFICER 106–07 (1821), <http://webapp1.dlib.indiana.edu/metsnav3/general/index.html#mets=http%3A%2F%2Fpurl.dlib.indiana.edu%2Fiudl%2Fgeneral%2Fmets%2FVAC1887&page=1>).

²⁵¹ Magruder Jr., *supra* note 111, at 220 (quoting Chief Justice Taney’s account of Dr. Beanes’ arrest).

²⁵² U.S. CONST. art. III, § 3.

²⁵³ *Supra* Part I.A.1.

²⁵⁴ TO JOHN ADAMS FROM TIMOTHY PICKERING, *supra* note 52; REPORT, *supra* note 2, at 29. Pinkney further stated that “the district attorney has gone out of his way to bring down VENGEANCE upon him [Hodges].” It may be that Hodges was specifically targeted. Pinkney’s references to constructive treason may allude to the use of the treason doctrine to target Hodges as a political adversary of the government. More research is needed to expose any connections between Hodges and the government that could prove Hodges was specifically targeted. REPORT, *supra* note 2, at 29.

taken and “treated with indignity” by the British.²⁵⁵ Hodges may have been viewed as an easy target for the government to demonstrate it was not “too feeble to check the treason which is formed in the very heart of the people it affects to rule.”²⁵⁶

PART IV: IMPACTS OF THE CASE

John Hodges’ treason trial ended in May 1815.²⁵⁷ The War of 1812 had officially ended three months prior on February 17, 1815 with ratification of the Treaty of Ghent.²⁵⁸ The individuals related to the crime and the case resumed their lives²⁵⁹ and America continued to grow and develop as a nation.²⁶⁰ Significant today is what the Hodges’ treason trial demonstrates about how the doctrine of treason has been used since the early 1800s as well as the changing role of the jury as deciders of the facts and the law.

A. Changing Concepts of Treason in America

Treason is the only crime defined in the U.S. Constitution.²⁶¹ The narrow definition of treason has resulted in few treason cases.²⁶² Specifically, since the founding of the nation treason charges have been brought less than forty times, most commonly during times of conflict such as the Civil War, World War II, and the War on Terrorism.²⁶³ The government has relied on other

²⁵⁵ LETTER FROM FRANCIS SCOTT KEY TO JOHN RANDOLPH OF ROANOKE (Oct. 5, 1814), <http://collections.digitalmaryland.org/cdm/compoundobject/collection/mhwe/id/42/rec/27>; Magruder Jr., *supra* note 111, at 219.

²⁵⁶ FROM LOUISA CATHERINE JOHNSON ADAMS TO JOHN QUINCY ADAMS, *supra* note 103.

²⁵⁷ REPORT, *supra* note 2, at 18; JOHN HODGES (OF THOMAS), *supra* note 3.

²⁵⁸ HICKEY, *supra* note 15, at 298.

²⁵⁹ *See Appendix.*

²⁶⁰ *See generally* Appendix I, II, III, IV.

²⁶¹ U.S. CONST. art. III, § 3. The crime of treason is currently codified in 18 U.S.C. § 2381.

²⁶² Theodore M. Vestal, *Treason*, SALEM PRESS ENCYCLOPEDIA (Jan. 2015).

²⁶³ Vestal, *supra* note 262; Pamela J. Podger, *Few Ever Charged or Convicted of Treason in U.S. History/Many Americans Fought for Other Religious, Political, Cultural Beliefs*, SFGATE (Dec. 9, 2001, 4:00 AM), <http://www.sfgate.com/crime/article/Few-ever-charged-or-convicted-of-treason-in-U-S-2843242.php>; National Constitution Center, *Aaron Burr’s Trial and the Constitution’s Treason Clause*, CONSTITUTION DAILY: BLOG OF THE NATIONAL CONSTITUTION CENTER (Sept. 1, 2016) <http://blog.constitutioncenter.org/2016/09/the-great-trial-that-tested-the-constitutions-treason-clause/>.

federal laws, such as the Espionage Act of 1917,²⁶⁴ the Uniform Code of Military Justice,²⁶⁵ and the 2001 Patriot Act,²⁶⁶ to prosecute acts that might be considered treasonous.²⁶⁷

Few treason cases have made it to the Supreme Court with the first treason case appealed to the Court in 1945.²⁶⁸ In 1945, the Supreme Court heard an appeal in the World War II treason case *Cramer v. United States*.²⁶⁹ Anthony Cramer was convicted of treason by the lower court due to his close relationship with Nazi saboteurs.²⁷⁰ The Supreme Court found no overt act of treason and reversed Cramer's conviction.²⁷¹ The last treason case heard by the Supreme Court was the 1952 World War II case *Kawakita v. United States*.²⁷² The Court affirmed the defendant's conviction on treason charges in *Kawakita*.²⁷³

The rise of terrorism in the twenty-first century has renewed debate on how and if the treason doctrine may be applied to U.S. citizens assisting terrorist organizations such as al-Qaeda and the Islamic State of Iraq and the Levant (ISIL).²⁷⁴ For example, the government analyzed treason as a potential criminal charge against John Walker Lindh in 2001.²⁷⁵ Lindh, also known as the American Taliban, was ultimately charged with "engaging in a conspiracy . . . to kill nationals of the United States;" "providing, attempting to provide, and conspiring to provide

²⁶⁴ 18 U.S.C. § 792 *et seq.*

²⁶⁵ U.C.M.J., 10 U.S.C. §§ 801-946.

²⁶⁶ 115 Stat. 272 (2001).

²⁶⁷ Vestal, *supra* note 262.

²⁶⁸ Podger, *supra* note 263.

²⁶⁹ *Cramer v. United States*, 325 U.S. 1 (1945); Podger, *supra* note 262; Vestal, *supra* note 261. *See also* Scott Bomboy, *Treason Charges for Snowden Would Be Rare, Challenging*, CONSTITUTION DAILY: BLOG OF THE NATIONAL CONSTITUTION CENTER (June 11, 2013) <http://blog.constitutioncenter.org/2013/06/treason-charges-for-snowdon-would-be-rare-challenging/>.

²⁷⁰ Podger, *supra* note 263; Vestal, *supra* note 262. *See also* Bomboy, *supra* note 269.

²⁷¹ Podger, *supra* note 263.; Vestal, *supra* note 262. *See also* Bomboy, *supra* note 269.

²⁷² *Kawakita v. United States*, 343 U.S. 717 (1952); Vestal, *supra* note 262.

²⁷³ *Kawakita v. United States*, 343 U.S. 717, 720 (1952).

²⁷⁴ *See, e.g.*, POSSIBLE CRIMINAL CHARGES AGAINST AMERICAN CITIZEN WHO WAS A MEMBER OF THE AL QAEDA TERRORIST ORGANIZATION OR THE TALIBAN MILITIA, U.S. DEPT. OF JUSTICE MEMORANDUM FOR WILLIAM J. HAYNES, II FROM JOHN YU (Dec. 21, 2001); Suzanne Kelly Babb, Note, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1721, 1734 (2003); WHITE HOUSE STATEMENT BY THE PRESS SECRETARY (Apr. 23, 2015), <https://www.whitehouse.gov/the-press-office/2015/04/23/statement-press-secretary>; Vestal, *supra* note 262.

²⁷⁵ POSSIBLE CRIMINAL CHARGES, *supra* note 274.

material support and resources to . . . al-Qaeda and Harakat ul-Mujahideen;” and “engaging in prohibited transactions with the Taliban.”²⁷⁶ Lindh was not charged with treason most likely due to the difficulty of meeting the two witness rule required by the Constitution.²⁷⁷

Treason has been applied most recently in the terrorism case against Adam Yahiya Gadahn.²⁷⁸ The United States charged Gadahn with treason in 2006.²⁷⁹ Gadahn was the first American in over fifty years to be indicted for treason for providing aid and comfort to al-Qaeda.²⁸⁰ He was placed on the FBI’s most wanted list but was likely killed in January 2015 as part of a United States counterterrorism operation before he could be brought to trial.²⁸¹

B. Changing Concepts of the Role of the Jury in American Jurisprudence

The jury’s role in American jurisprudence has continued to evolve since the time of Hodges’ trial.²⁸² Changes have been spurred by shifting societal and political climates as well as changes in the legal system.²⁸³ Specifically, the jury as deciders of the facts and the law has changed dramatically.²⁸⁴ The Supreme Court’s decision in *Sparf and Hansen v. United States* in 1895 and recent Maryland specific decisions highlight the evolution of American juries.²⁸⁵

*1. Sparf and Hansen v. United States*²⁸⁶

²⁷⁶ Affidavit in Support of a Criminal Complaint and an Arrest Warrant, *United States v. John Philip Walker Lindh*, (E.D. Va. Jan. 15, 2002), <https://www.justice.gov/ag-2>.

²⁷⁷ POSSIBLE CRIMINAL CHARGES, *supra* note 274.

²⁷⁸ Raffi Khatchadourian, *Azzam the American: The Making of an Al Qaeda Homegrown*, THE NEW YORKER (Jan. 22, 2007), <http://www.newyorker.com/magazine/2007/01/22/azzam-the-american>. See also MOST WANTED TERRORISTS: ADAM YAHIIYA GADAHN, https://www2.fbi.gov/wanted/terrorists/gadahn_a.htm (last visited Nov. 5, 2016).

²⁷⁹ Khatchadourian, *supra* note 278. See also MOST WANTED TERRORISTS: ADAM YAHIIYA GADAHN, *supra* note 278.

²⁸⁰ Khatchadourian, *supra* note 278. See also MOST WANTED TERRORISTS: ADAM YAHIIYA GADAHN, *supra* note 278.

²⁸¹ WHITE HOUSE STATEMENT BY THE PRESS SECRETARY (Apr. 23, 2015), <https://www.whitehouse.gov/the-press-office/2015/04/23/statement-press-secretary>.

²⁸² See generally HALE, *supra* note 12; HANS & VIDMAR, *supra* note 64; Blinka, *supra* note 38.

²⁸³ HANS & VIDMAR, *supra* note 64, at 43–44.

²⁸⁴ See generally HALE, *supra* note 12; HANS & VIDMAR, *supra* note 64, at; Blinka, *supra* note 38.

²⁸⁵ See generally *Sparf & Hansen v. United States*, 156 U.S. 51 (1895); *Stevenson v. State*, 423 A.2d 558 (Md. 1979); *Unger v. State*, 48 A.3d 242 (Md. 2012); *State v. Waine*, 122 A.3d 294 (Md. 2015).

²⁸⁶ 156 U.S. 51 (1895).

The Supreme Court examined the jury's role as deciders of the law in the case *Sparf and Hansen v. United States*.²⁸⁷ Justice John Marshall Harlan, writing for the majority, examined English and American legal history and doctrines and found nothing sanctioning the right of juries to judge the law or decide a case contrary to the court's instructions.²⁸⁸ Justice Harlan feared giving juries too much latitude to decide the law lead to inconsistency and diminished individual liberties by creating a "government of men" not a "government of laws."²⁸⁹ Specifically, Justice Harlan stated "[w]e must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law for the court and apply that law to the facts as they find them to be from evidence."²⁹⁰

In an over one-hundred page dissent, Justice Horace Gray criticized the majority's opinion and stated that "[t]he judge, by instructing the jury that they were bound to accept the law as given to them by the court, denied their right to decide the law."²⁹¹ Further, Justice Gray harkened back to the concept of a "verdict according to conscience" when he stated "that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue."²⁹² Despite the varying opinions of Justice Harlan and Justice Gray, the Court in *Sparf* ultimately "recognized that judges had no recourse if jurors acquitted in the face of overwhelming inculpatory evidence and law" recognizing the potential for jury nullification.²⁹³

2. Maryland: The Unger Cases

²⁸⁷ *Id.*

²⁸⁸ HALE, *supra* note 12, at 134. *See generally* *Sparf v. United States*, 156 U.S. 51 (1895).

²⁸⁹ *Sparf v. United States*, 156 U.S. 51, 102–03 (1895).

²⁹⁰ *Id.* at 102.

²⁹¹ *Id.* at 113.

²⁹² *Id.* at 114 (1895). *See supra* Part I.B.

²⁹³ Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to do Justice*, 30 AM. CRIM. L. REV. 239, 241–42 (1993).

In Maryland, until 1979 the judge could advise the jury that “[i]n the trial of all criminal cases the jury shall be the judge of the law as well as the facts.”²⁹⁴ The Court of Appeals in the 1979 case, *Stevenson v. State*, held that a judge in a criminal trial may direct the jury that instructions on the law are advisory only to the “law of the crime” and “the legal effect of the evidence” but relating to all other points of law, such as the State’s burden of proof and a statute’s validity, the judge must instruct the jury that the judge’s instructions are binding.²⁹⁵

Specifically, the court stated:

Because of this division of the law-judging function between judge and jury, it is incumbent upon a trial judge to carefully delineate for the jury the following dichotomy: (i) that the jury, under Article 23, is the final arbiter of disputes as to the substantive “law of the crime,” as well as the “legal effect of the evidence,” and that any comments by the judge concerning these matters are advisory only; and (ii) that, by virtue of this same constitutional provision, all other aspects of law (e.g., the burden of proof, the requirement of unanimity, the validity of a statute) are beyond the jury’s pale, and that the judge’s comments on these matters are binding upon that body . . . the jury should be informed that the judge’s charge with regard to any other legal matter is binding and may not be disregarded by it²⁹⁶

The court in *Stevenson* therefore clarified the limitation on the “jury’s Article 23 law-judging function” and narrowed the scope of the jury’s role as deciders of the law.²⁹⁷

The court in *Stevenson* did not determine whether the decision would have retroactive effect on cases tried before *Stevenson* was decided.²⁹⁸ In 2012, the Court of Appeals decided

²⁹⁴ MD. CONST., Art. 23. An example of a jury instruction given before *Stevenson* was decided is:

You, ladies and gentlemen, are the judges of not only the facts, as you are on every case, but on the law as well. It is your responsibility to determine for yourselves what the law is. Everything I say to you is advisory only. You are free to find the law to be other than what the court says it is. We have given you our best opinion about the matter but the final determination — that is solely in your hands.

Robert Siegal, *From a Life Term to Life on the Outside: When Aging Felons Are Freed*, NPR (Feb. 18, 2016, 3:32 PM) <http://www.npr.org/2016/02/18/467057603/from-a-life-term-to-life-on-the-outside-when-aging-felons-are-freed>.

²⁹⁵ *Stevenson v. State*, 423 A.2d 558, 565 (Md. 1979).

²⁹⁶ *Id.* at 565.

²⁹⁷ *Id.* at 570.

²⁹⁸ *Id.*; Siegal, *supra* note 294.

Unger v. State and determined the court in *Stevenson* set forth a new state constitutional standard and that the standard is retroactive.²⁹⁹ Specifically, the court stated:

[T]he *Stevenson* and *Montgomery*³⁰⁰ opinions were intended by the Court in those cases to be fully retroactive. *Stevenson* and *Montgomery* were clearly intended to be retroactive because neither opinion purported to change the prior interpretation of Article 23. Apart from the Court's intention in *Stevenson* and *Montgomery*, the new interpretation of Article 23 set forth in those opinions was retroactive under our cases. It is a well-established principle of Maryland law that a new interpretation of a constitutional provision or a statute is fully retroactive if that interpretation affects the integrity of the fact-finding process . . . A new interpretation of the jury's role in a criminal case certainly could have an impact on the fact-finding function . . . Accordingly, *Stevenson's* and *Montgomery's* interpretation of Article 23 applies retroactively.³⁰¹

Based on the decision in *Unger* approximately 250 incarcerated men and one woman were entitled to new trials.³⁰² Some will be retried, others are offered resentencing.³⁰³ To date, over one-hundred incarcerated individuals effected by the *Unger* decisions have negotiated resentencing deals.³⁰⁴ Under negotiated resentencing prisoners accept guilt, waive future appeals, and are resentenced to time served.³⁰⁵

Stevenson and *Unger* reflect a changing concept of the role of the jury as deciders of the law in the twentieth and twenty-first centuries. Specifically, these cases highlight issues with giving jurors too much autonomy to determine a “verdict according to conscience” especially in light of societal changes in America since the eighteenth and nineteenth centuries.³⁰⁶ For example, many of the prisoners entitled to new trials under

²⁹⁹ *Unger v. State*, 48 A.3d 242 (Md. 2012).

³⁰⁰ *Montgomery v. State* affirmed the decision in *Stevenson*. *Montgomery v. State*, 437 A.2d 654 (Md. 1981).

³⁰¹ *Unger*, 48 A.3d at 261.

³⁰² *Unger* was affirmed in the 2015 case *State v. Waine*. 122 A.3d 294 (Md. 2015). Siegal, *supra* note 294; Jason Fagone, *Meet the Ungers*, HUFFINGTON POST (May 17, 2016) <http://highline.huffingtonpost.com/articles/en/meet-the-ungers/>.

³⁰³ Siegal, *supra* note 294; Fagone, *supra* note 302.

³⁰⁴ Siegal, *supra* note 294; Fagone, *supra* note 302.

³⁰⁵ Siegal, *supra* note 294; Fagone, *supra* note 302.

³⁰⁶ HALE, *supra* note 12, at 61 (quoting Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964)); John Adams Diary, *supra* note 72.

the *Unger* decision are African American men.³⁰⁷ For many, they were unable to afford good representation and were convicted by juries of white men and women.³⁰⁸ Racial biases that may have informed jury decisions in the 1960s and 1970s were not the same civil rights issues when Adams' wrote about the jury as protectors of "fundamental Principles."³⁰⁹ These Maryland specific cases reflect the need to adapt the jury's role to changing societal concerns.

CONCLUSION

The 1815 treason trial of John Hodges highlights early views of the treason doctrine and the role of the jury as deciders of the facts and the law. Examining Hodges' trial in the context of the War of 1812 and the 1807 treason trial of Aaron Burr further highlights the part the treason doctrine and the jury played in maintaining "the stability of [the new country's] government" and "protecting ordinary individuals against government overreach[]." ³¹⁰ Further, Hodges' trial demonstrates the difficulty in reaching a conviction under the treason doctrine, a difficulty which has led to few cases of treason throughout U.S. history.³¹¹ Additionally, Hodges' trial provides a counterpoint to current views of the jury's role as deciders of facts and narrow role as deciders of the law, demonstrating the continued evolution of the jury in American jurisprudence.³¹²

³⁰⁷ Siegal, *supra* note 294; Fagone, *supra* note 302.

³⁰⁸ Siegal, *supra* note 294; Fagone, *supra* note 302.

³⁰⁹ HALE, *supra* note 12, at 61 (quoting Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L.J.* 170 (1964)); John Adams Diary, *supra* note 72.

³¹⁰ TO JOHN ADAMS FROM TIMOTHY PICKERING, *supra* note 52; Blinka, *supra* note 38, at 136 (citing AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83–84 (Yale Univ. Press 1998)).

³¹¹ See *supra* Part IV.

³¹² See *supra* Part IV.

APPENDIX

I. John Hodges

(December 6, 1763 – May 11, 1825)

John Hodges was born in Maryland on December 6, 1763 to Thomas Ramsey and Jemima Plummer Hodges.³¹³ In 1799, Hodges married Rebecca Berry and they resided in Upper Marlboro, Maryland



in a home named *Darnall's Chance*.³¹⁴ The couple had six children: Mary Ellen, Caroline, Cornelia, John, Mary, and Benjamin and were members of the Trinity Episcopal Church.³¹⁵ Hodges was a lawyer and landowner in Prince George's County, Maryland.³¹⁶ Hodges owned a number of tracts of land throughout Prince George's County, including Pentland Hills, purchased in 1820.³¹⁷ As a landowner in Maryland in the early 1800s, Hodges was a slaveholder.³¹⁸ Throughout his life he purchased, sold, and manumitted slaves.³¹⁹ Hodges died on May 11,

³¹³ JOHN HODGES (OF THOMAS), *supra* note 3. See also *Thomas Ramsey Hodges*, ANCESTRY.COM, http://www.ancestry.com/genealogy/records/thomas-ramsey-hodges_23635786 (last visited Nov. 11, 2016).

³¹³ JOHN HODGES (OF THOMAS), *supra* note 3. Rebecca Berry is likely of the Berry family of District Heights, Maryland, specifically the Berry family that lived in the home known as *Concord* in Prince George's County. *Berry Family Cemetery*, INTERMENT.COM, <http://www.interment.net/data/us/md/princegeorge/berry/> (last visited Nov. 11, 2016). *Darnall's Chance* is now a museum "dedicated to the interpretation and study of the history and culture of 18th century Prince George's County, Maryland." *Darnall's Chance House Museum*, HISTORY IN PRINCE GEORGE'S COUNTY MARYLAND, PRINCE GEORGE'S COUNTY DEPARTMENT OF PARKS AND RECREATION, http://history.pgparcs.com/sites_and_museums/Darnall_s_Chance_House_Museum.htm (last visited Sept. 28, 2016).

³¹⁵ JOHN HODGES (OF THOMAS), *supra* note 3.

³¹⁶ PRINCE GEORGE'S COUNTY HISTORIC SITE SUMMARY SHEET, MARYLAND STATE ARCHIVES, http://msa.maryland.gov/megafile/msa/stagsere/se1/se5/019000/019100/019147/pdf/msa_se5_19147.pdf (last visited Nov. 11, 2016) (Hodges' son Benjamin built a home and lived on the property beginning in the 1830s); JOHN HODGES (OF THOMAS), *supra* note 3.

³¹⁷ JOHN HODGES (OF THOMAS), *supra* note 3.

³¹⁸ *Id.*

³¹⁹ *Id.*

1825.³²⁰ He is interred at *Omaha Hill*, the Hodges family cemetery in Prince George's County, Maryland.³²¹

Image: Photograph of Darnall's Chance, home of John Hodges. Image courtesy of Prince George's County Department of Parks and Recreation, Darnall's Chance House Museum, http://history.pgparcs.com/sites_and_museums/Darnall_s_Chance_House_Museum.htm.

II. Dr. William Beanes (January 24, 1749 – October 12, 1828)

Dr. William Beanes was born at Brooke Ridge, in Prince George's County, Maryland on January 24, 1749.³²² Dr. Beanes likely apprenticed with a local physician since there was no medical school in America at this time.³²³ Dr. Beanes was a founding members of the Medical and Chirurgical Faculty of Maryland, a precursor to the Maryland State Medical Board.³²⁴

In November 1773 Dr. Beanes married Sarah Hawkins Hanson.³²⁵ Sarah Hawkins Hanson was the niece of John Hanson, president of the First Continental Congress.³²⁶ This connection to John Hanson resulted in Dr. Beanes being asked to store Maryland State Records on his property twice.³²⁷

During the Revolutionary War, Dr. Beanes worked as a surgeon at the General Hospital in Philadelphia.³²⁸ In 1779, he purchased land in Upper Marlboro, Maryland from William Sprigg Bowie and built a home.³²⁹ Beanes, like John Hodges, was a member of the Trinity

³²⁰ *Id.*

³²¹ *Id.*; HODGES FAMILY CEMETERY, FINDAGRAVE.COM, <http://www.findagrave.com/cgi-bin/fg.cgi?page=cr&CRid=2434599> (last visited Nov. 11, 2016).

³²² Magruder Jr., *supra* note 111, at 209; Fielding, *supra* note 242.

³²³ Magruder Jr., *supra* note 111, at 209–10.

³²⁴ *Id.* at 210.

³²⁵ *Id.* at 209.

³²⁶ *Id.*; Dr. Robert Arnold, *Dr. William Beanes and the Privateers*, INNOMINATESOCIETY.COM, <http://www.innomimatesociety.com/Articles/Dr.%20William%20Beanes%20and%20the%20Privateers.htm> (last visited Nov. 11, 2016).

³²⁷ Arnold, *supra* note 326.

³²⁸ Magruder Jr., *supra* note 111, at 209–10.

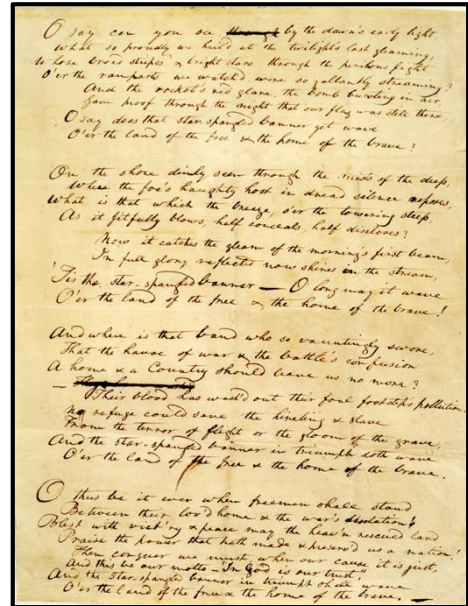
³²⁹ *Id.* at 210.



Episcopal Church in Upper Marlboro.³³⁰ After Dr. Beanes was released by the British in 1814 he returned to Upper Marlboro and lived the remainder of his life at his home on Academy Hill.³³¹ Dr. Beanes passed away on October 12, 1828.³³²

Dr. William Beanes and the “Star Spangled Banner”

Despite the return of British soldiers to the British military, Dr. Beanes, was not freed with Dr. Hill and Mr. Weems.³³³ The British kept Dr. Beanes as the main “culprit” who instigated the arrest of the British soldiers.³³⁴ Francis Scott Key was asked to help negotiate Dr. Beanes’ release.³³⁵ This placed Key in the Baltimore area when Ft.



McHenry was bombarded in September 1814 and ultimately inspired Key’s writing *The Star Spangled Banner*.³³⁶

Image: Francis Scott Key, *Star Spangled Banner Manuscript*. Image courtesy of the Smithsonian National Museum of American History, <http://amhistory.si.edu/starspangledbanner/the-lyrics.aspx>

III. Justice Gabriel Duvall

³³⁰ *Id.* at 220.

³³¹ *Id.* at 222.

³³² *Id.*

³³³ *Id.* at 217.

³³⁴ Magruder Jr., *supra* note 111, at 219.

³³⁵ LETTER FROM FRANCIS SCOTT KEY TO JOHN RANDOLPH OF ROANOKE, *supra* note 255; Magruder Jr., *supra* note 111, at 218–19.

³³⁶ LETTER FROM FRANCIS SCOTT KEY TO JOHN RANDOLPH OF ROANOKE, *supra* note 255; Magruder Jr., *supra* note 111, at 218–19.

(December 6, 1752 – March 6, 1844)

Justice Gabriel Duvall was a native of Prince George’s County, Maryland.³³⁷ Duvall studied law and was admitted to the bar in 1778.³³⁸ He served on the Maryland State Council and the Maryland House of Delegates before being elected to the United States House of Representatives.³³⁹ While in the House of Representatives, Duvall associated with James Madison and Albert Gallatin.³⁴⁰ Duvall’s connection to Gallatin helped him secure the position of comptroller of the Treasury and in 1811 Madison appointed Duvall to the Supreme Court.³⁴¹ Duvall served on the Court until 1835 when he resigned due to deafness.³⁴²

Duvall has been called ”The Most Insignificant Justice.”³⁴³ This view is based largely on Duvall having only given one opinion in constitutional cases during his time on the Court and that this one opinion was "DuvALL, Justice, dissented."³⁴⁴ David Currie, in his analysis of Duvall as the “Most Insignificant Justice” states that Duvall’s “Pages Per Year” output for his time on the Court was “*eight ten-thousandths* of a page per year.”³⁴⁵ Duvall was also criticized for allowing himself to be dominated by lawyers, such as William Pinkney.³⁴⁶

³³⁷ GABRIEL DUVALL (1752-1844), ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES), MARYLAND STATE ARCHIVES, <http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/000300/000379/html/379bio.html> (last visited Nov. 26, 2016).

³³⁸ GABRIEL DUVALL (1752-1844), *supra* note 337; *Gabriel Duvall*, OYEZ, https://www.oyez.org/justices/gabriel_duvall (last visited Nov 28, 2016).

³³⁹ GABRIEL DUVALL (1752-1844), *supra* note 337; OYEZ, *supra* note 338.

³⁴⁰ GABRIEL DUVALL (1752-1844), *supra* note 336; *Gabriel Duvall*, OYEZ, https://www.oyez.org/justices/gabriel_duvall (last visited Nov 28, 2016).

³⁴¹ GABRIEL DUVALL (1752-1844), *supra* note 337; OYEZ, *supra* note 338.

³⁴² GABRIEL DUVALL (1752-1844), *supra* note 337.

³⁴³ See David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466 (1983).

³⁴⁴ See Currie, *supra* note 342, at 468 (citing Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 713 (1819) (Duvall, J., dissenting)).

³⁴⁵ Currie, *supra* note 343, at 468 (emphasis in original). This figure does not include Duvall’s opinions sitting as a Circuit Justice and does not take in to account Duvall served with Chief Justice John Marshall, who authored the majority of opinions during this period. Sean Braswell, *The Worst Supreme Court Justice in History?*, THE DAILY DOSE (Nov. 2, 2015) <http://www.ozy.com/flashback/the-worst-supreme-court-justice-in-history/61632>.

³⁴⁶ NEWMYER, *supra* note 37, at 321.



Duvall lived at his home *Marietta* in Prince George's County until his death on March 6, 1844.³⁴⁷

Duvall was buried next to his wife, Jane, and his horse.³⁴⁸



Images:

Charles Balthazar Saint-Memin (1770-1852), *Portrait of Gabriel Duvall*, engraving. Image courtesy of Maryland State Archives, <http://msa.maryland.gov/msa/speccol/sc3500/sc3520/000300/000379/html/379collect.html>.

Photograph of Grave Marker for Justice Gabriel Duvall's Horse. Image courtesy of Allen Browne, Landmarks, <http://allenbrowne.blogspot.com/2014/03/the-most-insignificant-justice.html>.

IV. William Pinkney

(March 17, 1764 – February 25, 1822)

William Pinkney was born in Annapolis, Maryland in 1764.³⁴⁹ Pinkney was a Democratic-Republican elected in October 1788 to the Maryland House of Delegates³⁵⁰ He was

³⁴⁷ GABRIEL DUVALL (1752-1844), *supra* note 337; OYEZ, *supra* note 338.

³⁴⁸ Allen Browne, *The Most Insignificant Justice*, LANDMARKS (Mar. 4, 2014) <http://allenbrowne.blogspot.com/2014/03/the-most-insignificant-justice.html>.

elected to Congress in 1790.³⁵¹ Pinkney “had a well-earned reputation as a self-centered individual” and was well known as a strong orator.³⁵² William Wirt stated “he wielded the club of Hercules adorned with flowers”³⁵³

Thomas Jefferson selected Pinkney to assist James Monroe in negotiating with Britain in 1806 which resulted in the Monroe-Pinkney Treaty.³⁵⁴ The Treaty resulted in Britain agreeing to respect the United States neutral trading rights impacted by the Napoleonic War.³⁵⁵ The Treaty did not however impact Britain’s impressment of American sailors.³⁵⁶

Pinkney felt the War of 1812 was “irreproachably just” and “he entered the military service with great ardor.”³⁵⁷ Pinkney was a Major in a battalion of riflemen during the War of 1812 and “while in the discharge of his duty, he was severely wounded in Bladensburg.”³⁵⁸

Pinkney’s argument in *United States v. Hodges* have been described as “a masterpiece of courage and manly determination in the maintenance of the rights of the accused.”³⁵⁹ The argument is further described as:

The dual argument of Mr. Pinkney to the Court and jury forms a part of an episode in judicial history, which has no parallel since Thomas Erskine, at the trial of the Dean of St. Aspah withstood with respect and firmness what he regarded on the part of the court as an encroachment upon the province of the jury and the constitutional and legal rights of the client³⁶⁰

³⁴⁹ *Pinkney, William*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=p000362> (last visited Nov. 26, 2016).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² KILLENBECK, *supra* note 7, at 105; 2 GILBERT JOHN CLARK, LIFE SKETCHES OF EMINENT LAWYERS, AMERICAN, ENGLISH AND CANADIAN: TO WHICH IS ADDED THOUGHTS, FACTS, AND FACETIAE 205 (1895).

³⁵³ CLARK, *supra* note 352 (quoting William Wirt).

³⁵⁴ HICKEY, *supra* note 15, at 13.

³⁵⁵ *Id.* at 14.

³⁵⁶ *Id.*

³⁵⁷ *Id.*; CLARK, *supra* note 352.

³⁵⁸ HICKEY, *supra* note 15, at 11.

³⁵⁹ WILLIAM PINKNEY WHYTE, A PAPER ON WILLIAM PINKNEY 12 (1904).

³⁶⁰ *Id.*

Pinkney passed away in Washington, D.C. on February 25, 1822.³⁶¹ He is buried in the Congressional Cemetery.³⁶²

Image: Unknown Artist, *Portrait of William Pinkney*, published by Johnson, Fry & Co. (New York), c.1863, engraving. Image courtesy of Library of Congress Prints and Photographs Division Washington, D.C., <http://hdl.loc.gov/loc.pnp/cph.3b40286>.

³⁶¹ BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, *supra* note 349.

³⁶² *Id.*