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The habeas corpus protection of Joseph Smith from Missouri arrest requisitions

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The Habeas Corpus Protection of Joseph Smith from Missouri Arrest Requisitions

A. Keith Thompson

Abstract: *This is the first of two articles discussing Missouri's requisitions to extradite Joseph Smith to face criminal charges and the Prophet's recourse to English habeas corpus practice to defend himself. In this article, the author presents research rejecting the suggestion that the habeas corpus powers of the Nauvoo City Council were irregular and explains why the idea that the Nauvoo Municipal Court lacked jurisdiction to consider interstate habeas corpus matters is anachronistic. In the second article, the author analyzes the conduct of Missouri Governor Thomas Reynolds in relation to the requisitions for Joseph Smith's extradition. Even by the standards of the day, given what he knew, his conduct was unethical.*

Former Illinois Governor Thomas Ford and the *Warsaw Signal* editor Thomas Sharp, together with Sharp's correspondents, popularized the view that the use Joseph Smith and the Latter-day Saints made of the English writ of habeas corpus during the Nauvoo period was suspect.[1] In fact, it was Missouri's willingness to pursue Joseph Smith's extradition, even though it had dismissed the underlying indictments, that forced

1. Thomas Ford, *History of Illinois, From Its Commencement as a State in 1818 to 1847* (Chicago: S.C. Griggs and Co, 1854), 265. Note that Governor Ford had criticized the Mormon use of powers under the Nauvoo Charter in his letter to the Saints dated 22 June 1844 which was published by Thomas Sharp in the *Warsaw Signal* on 29 June 1844.

Smith's recourse to the now-misunderstood English habeas corpus process and seeded the resentment of later enemies.[2]

In his *History of Illinois* in 1854, Ford wrote that the Nauvoo Charter's provisions were "unheard of, and anti-republican in many particulars; and capable of infinite abuse by a people disposed to abuse them."[3] Though he had formerly held office as an Illinois Supreme Court Justice,[4] objectivity was not to be expected from Governor Ford. He had promised Joseph Smith safe conduct if he went to Carthage[5] and was thus considered responsible for the martyrdom by the Latter-day Saints.

Thomas Sharp quoted Charles Foster in his newspaper, suggesting that "Joseph's escape from arrest through habeas corpus writs in the Nauvoo municipal court,"[6] was just one example of "galling oppression"[7] by the Mormon majority in Nauvoo. Sharp began his relationship with the Mormons as a "neutral observer"[8] who "reported the issuance of the Nauvoo Charter without editorial comment" in January 1841,[9] but he became a Mormon-hater within a few months, largely because of the Mormon reaction to his criticism of John C. Bennett's appointment

2. See, for example, Jeffrey N. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism, Joseph Smith's Legal Bulwark for Personal Freedom," *BYU Studies Quarterly* 52, no. 1 (2013), 4–97. I discuss Judge Thomas Reynolds' dismissal of the underlying indictments in my following article, "Missourian Efforts to Extradite Joseph Smith and the Ethics of Governor Thomas Reynolds of Missouri," *Interpreter: A Journal of Mormon Scripture* (forthcoming).

3. Ford, *History of Illinois*, 265.

4. "Thomas Ford," *Governors of Illinois*, Online Biographies (website), accessed February 8, 2018, http://www.onlinebiographies.info/gov/il/ford-t.htm.

5. Letter from Governor Ford to Joseph Smith, June 22, 1844, History of the Church 6:533–537, accessed April 23, 2016, http://law2.umkc.edu/faculty/projects/ftrials/carthage/fordletter.html. Note that Governor Ford sets out some of his objections to the Nauvoo Charter and the Nauvoo Municipal Court's exercise of its habeas corpus powers in this letter. However, note also that Governor Ford had earlier received Joseph Smith favorably and cooperated with him and his counsel, Justin Butterfield, in connection with the dismissal of his predecessor's warrants to arrest Joseph in connection with the attempted murder of former Governor Boggs in Missouri.

6. Richard Bushman, *Rough Stone Rolling, A Cultural History of Mormonism's Founder* (New York: Alfred A. Knopf, 2005), 533; quoting from January 10, 17, and February 7 editions of the *Warsaw Message* in 1844, and from Charles A. Foster's letter to the Editor of the same newspaper renamed the *Warsaw Signal* on April 12, 1844.

7. Ibid.

8. Ibid., 427.

9. Ibid.

as Mayor of Nauvoo and his concern about "the political power of the growing number of Mormons in Hancock County."[10] That political power was demonstrated in Sharp's loss in the 1842 Hancock County election for the Illinois legislature to William Smith, the Mormon Apostle and brother of the Prophet.[11]

Joseph Smith became something of an expert in the law[12] as a result of the many legal cases in which he was involved.[13] The purpose of this article is to show that neither he nor the other Latter-day Saints misused the English writ of habeas corpus in connection with Missouri's efforts to extradite him to face criminal charges in that state. Indeed, the habeas corpus power in the Nauvoo Charter and the use that was made of it was reasonable, predictable, and legal according to the standards of the times.

I have approached this task in four parts. First, I summarize the nature of the habeas corpus powers provided to Nauvoo by its charter, and I concur with the assessment of James L. Kimball and Jeffrey N. Walker that despite what Governor Ford wrote in 1854, there was nothing particularly unusual about those powers when they were granted in 1840.

Second, to correct misunderstanding as to how habeas corpus worked in Illinois in the 1840s, I trace the history of the habeas corpus writ from England into the Western United States during the period before the Civil War, and I reject the notion that this writ predated Magna Carta and was always an instrument designed to protect the rights of prisoners. I provide this review so that readers will understand what happened in Joseph Smith's habeas corpus cases in light of the law and practices that

10. Marshall Hamilton, "Thomas Sharp's Turning Point: Birth of an Anti-Mormon," *Sunstone Magazine*, October 1989, 21, https://www.sunstonemagazine.com/pdf/073-16-23.pdf.

11. James B. Allen and Glen E. Leonard, *The Story of the Latter-day Saints*. (Salt Lake City, UT: Deseret Book, 1976), 177.

12. Perhaps referring to his ironic legal experience, Joseph Smith once observed:

> I am a lawyer; I am a big lawyer and comprehend heaven, earth and hell, to bring forth knowledge that shall cover up all lawyers, doctors and other big bodies. This is the doctrine of the Constitution, so help me God. The Constitution is not law to us, but it makes provision for us whereby we can make laws. Where it provides that no one shall be hindered from worshiping God according to his own conscience, is a law. No legislature can enact a law to prohibit it. The Constitution provides to regulate bodies of men and not individuals. (*History of the Church*, 5:289–290).

13. Joseph I. Bentley says that the Joseph Smith Papers Project team has counted "about 220 cases involving Joseph Smith as plaintiff, defendant, witness or judge" from 1819 when he was thirteen until his death in 1844" ("Road to Martyrdom, Joseph Smith's Last Legal Cases," *BYU Studies Quarterly*, 55, No. 2 (2016): 8–9).

then applied, rather than in terms of practices after the Civil War, which have received more attention in American historical and legal literature. I believe this excursion is necessary to correct the misunderstanding that happens when historical practices are interpreted through the lens of modern understanding. During Joseph Smith's time, habeas corpus processes were almost completely English, and United States courts at all levels had not yet resolved the question of whether municipal or state courts, granted habeas corpus powers by their charters and constitutions, could exercise those powers in federal cases.

In Part III, I further reject the idea — prominent in 19th-century American legal scholarship and which has found its way into the historiography of the Missouri extradition episodes — that it was American judges who pioneered review of the facts behind habeas corpus returns (written explanations of why jailers were holding their prisoners). I will explain that the Mormons did not abuse the habeas corpus process that had been developed by English judges and which was applied in a very English fashion in the United States before the Civil War.

In Part IV, I discuss the two causes of action cited for the Missouri requisitions for Joseph Smith's arrest and extradition from Illinois to Missouri between 1840 and 1843. The first requisition, issued in 1840, was based upon Joseph Smith's escape from Missouri while in transit to Boone County, where he was to be tried for arson, riot, burglary, treason, and receiving stolen goods during the Mormon War and extermination order period (what I will call the "first Mormon War requisition").[14] The affidavit supporting the second requisition for Joseph's arrest by Missouri in August 1842 alleged that he was an accessory before the fact in the attempted murder of Governor Lilburn W. Boggs on May 6, 1842, (the "accessory before the fact" requisition). The third requisition was a revival of the first cause of action and was peremptorily dismissed by the Nauvoo Municipal Court on double-jeopardy grounds (the "second Mormon War requisition").

I argue that the first Mormon War requisition was a sham from start to finish since the indictments in the underlying cause of action had been dismissed before the extradition request was made, even though Joseph Smith and his team did not know that until late 1843. I also observe that if the first Mormon War requisition was invalid because the underlying cause of action had been dismissed, then as a necessary consequence, any warrant based upon those same charges was also invalid, even if a new indictment had been issued by a different court.

14. Bushman, *Rough Stone Rolling*, 382.

Since Judge Nathaniel Pope of the United States Circuit Court for the District of Illinois had found the accessory before the fact requisition invalid on January 5, 1843,[15] I argue that the Nauvoo Municipal Court's previous conduct in that matter was not unreasonable or oppressive. I also suggest reasons why Judge Pope's ruling in *Ex parte Smith*[16] was cited with approval as a precedent in the United States for more than 100 years afterwards.[17]

Even though Mormon critics argue that the Nauvoo Municipal Court exceeded its authority when dismissing the second Mormon War requisition, I argue that the process involved in the issue of that requisition was illegal and unethical in accordance with the principle of double jeopardy.

I conclude that criticism of the use of the writ of habeas corpus in Nauvoo between 1840 and 1843 on the basis that it was preferential, capricious, or overreaching is not substantiated by the law, the facts, or the practice of the period. Not all may agree that the actions taken by Nauvoo's leaders during the *Nauvoo Expositor* episode were wise, but this analysis suggests that we in the 21st century should pause before passing judgment on 19th-century English legal practices in the US without proper understanding. (This analysis is also relevant to the use of the writ of habeas corpus during the *Nauvoo Expositor* episode, although that is not the focus of this article.)

Part I — City Habeas Corpus Powers in Illinois between 1837 and 1840

In 1971, James L. Kimball, Jr. was the first to publish a research article confirming that Nauvoo was not the only chartered Illinois city with a municipal court that had been granted habeas corpus powers by 1840.[18] Chicago was chartered first in March of 1837, Alton four months later in July 1837, Galena in 1839, and Springfield, the state capital along with Quincy, in 1840. Nauvoo was the sixth Illinois city to receive a charter and received it from the 12th Illinois legislature on December 16, 1840,[19]

15. Ibid., 479.

16. Ex parte Smith, 22 F. Cas. 373 (C.C.D., Ill., 1843) (No. 12, 968); 3, McLean, 121.

17. Jeffrey N. Walker, "Invoking Habeas Corpus in Missouri and Illinois" quoted in Gordon A. Madsen, Jeffrey N. Walker and John W. Welch, eds., *Sustaining the Law, Joseph Smith's Legal Encounters* (Provo UT: BYU Studies, 2014), 393.

18. James L. Kimball, Jr., "The Nauvoo Charter: A Reinterpretation," *Journal of the Illinois State Historical Society*, University of Illinois Press 64, no. 1 (Spring 1971): 67–68. This article developed ideas that Kimball had researched in his Masters thesis at the University of Iowa in 1966.

19. Ibid., 70. The Nauvoo Charter was effective from February 1, 1841.

effective February 1, 1841. Though each city charter was different, Nauvoo's 28-section charter closely followed the others.[20] Kimball has noted differences,[21] the largest in his view being Nauvoo's omission of a residence or American citizenship requirement for public office. Kimball speculated that was because of Nauvoo's wish to press recent Canadian and English converts into municipal service as soon as possible.[22]

While the original charters of Chicago and Alton did not specifically endow their municipal courts with habeas corpus powers,[23] habeas corpus writs were popular, and Alton's charter was amended in 1839 to include a habeas corpus power[24] before Nauvoo's charter was even drafted. Effective June 3, 1839, the habeas corpus power amendment to Alton's charter read as follows:

> *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That the judge of the municipal court of the city of Alton shall have power, and is hereby authorized, to issue writs of habeas corpus, writs *ne exeat*, writs of injunction, and writs *certiorari*, within the jurisdiction of said court; and the same proceedings shall be had thereon before said judge

20. Ibid., 68–70.

21. Ibid., 70–74. Kimball's list of differences includes:

> i.) the absence of a residency requirement for city leaders,
>
> ii.) the city council's right to remove city offices "at will,"
>
> iii.) the large number of alderman and councilors who, with the Mayor, formed the Council,
>
> iv.) the fact that the principal judge of Nauvoo was also ex officio the Mayor, who thus conducted city business as Chief Judge with the aldermen functioning as Associate Justices.

However, the requirement that appeals from the Nauvoo Court would be heard in the Hancock County Circuit Court was more restrictive than equivalent provisions in the Chicago and Alton charters that granted their local courts "concurrent jurisdiction with the circuit courts of their respective counties" and thus allowed them to bypass the local circuit courts which could hear Nauvoo in jury trial cases.

22. Ibid., 70.

23. *Encyclopedia of Chicago*, s.v. "Act of Incorporation for the City of Chicago, 1837," http://www.encyclopedia.chicagohistory.org/pages/11480.html. The original powers of its municipal court are set out in clauses 69–78.

24. https://papersofabrahamlincoln.org/documents/D271113b.

> and court as may be had in like cases before the circuit judges and circuit courts of this State, respectively.[25]

The right of Chicago's municipal court to issue writs of habeas corpus is not so obvious. It was there from the beginning in 1837 in consequence of the language of section 69 which read:

> That there shall be established in the said city of Chicago, a municipal court which shall have jurisdiction concurrent with the circuit courts of this State in all matters civil and criminal, arising within the limits of said city, and in all cases where either plaintiff and defendant or defendants, shall reside at the time of commencing suit, within said city, which court shall be held within the limits of said city in a building provided by the corporation.[26]

Jeffrey Walker calls this an express grant of habeas corpus power since Illinois' circuit courts had the power to issue writs of habeas corpus.[27]

The habeas corpus power in Nauvoo's charter documents, written 18 months later, was expressed slightly differently but without tangible difference in legal consequence:

> The Municipal Court shall have power to grant writs of habeas corpus in all cases arising under the ordinances of the City Council.[28]

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25. Ibid., Section 1 from "An Act to amend an act, entitled 'An act to incorporate the city of Alton.'"

26. *Encyclopedia of Chicago*, s.v. "Act of Incorporation for the City of Chicago, 1837," http://www.encyclopedia.chicagohistory.org/pages/11480.html, 19.

27. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 33.

28. This was a portion of section 17 of the Nauvoo charter. The whole read:

> The Mayor shall have exclusive jurisdiction in all cases arising under the ordinances of the corporation, and shall issue such process as may be necessary to carry such ordinances into execution and effect; appeals may be had from any decision or judgment of said Mayor or Aldermen, arising under the city ordinances, to the Municipal Court under such regulations as may be presented by ordinance; which court shall be composed of the Mayor as Chief Justice, and the Aldermen as Associate Justices, and from the final judgment of the Municipal Court to the Circuit Court of Hancock county, in the same manner of appeals are taken from judgments of the Justices of the Peace; provided that the parties litigant shall have a right to a trial by a jury of twelve men in all cases before the Municipal Court. The Municipal Court shall have power to grant writs of habeas corpus in all cases arising under the ordinances of the City Council.

Kimball observed that the charters of Chicago, Alton, Quincy, Galena, Springfield, and Nauvoo all "illustrate early nineteenth century tendencies towards democratization in government."[29] In other commentaries, that localization trend is attributed to Jefferson's government[30] and has much in common with the 21st century European concept of subsidiarity.[31] While Kimball does not elaborate on the trend to encourage local government and judiciary, he concludes his discussion of the habeas corpus power possessed by the Nauvoo Municipal Court with the view that those provisions followed state precedent and "the powers of the court were well hedged and easily within the era's allowable range of acceptance."[32] Walker's summary is similar:

> The drafting of the Nauvoo Charter was undoubtedly influenced by the Mormons' experiences in Missouri and the perceived threat of additional efforts by the Missourians to apprehend Mormon leaders, especially Joseph Smith. Yet its grant of rights to issue writs of habeas corpus cannot be seen as entirely unique.[33]

The original habeas corpus powers in the Nauvoo charter documents were not tailored to respond to Missouri efforts to extradite Joseph Smith, since those efforts did not begin until September 1841. However, the Nauvoo City Council did later amend its ordinances to respond to the

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See https://en.wikisource.org/wiki/Nauvoo_Charter.

29. Kimball, "The Nauvoo Charter: A Reinterpretation," 70.

30. For example, L.K. Caldwell, "Thomas Jefferson and Public Administration," *Public Administration Review* 3, no. 3 (Summer, 1943): 240–53, where the author explains that Jefferson's idea that administration should be delegated to the local level unless locals could not perform the relevant tasks was the tonic that undid the centralization that Alexander Hamilton drove through during Washington's administration. Bushman has also observed that "[t]he charter implemented the Jeffersonian principle of distributing power to the level of society closest to the people" (Bushman, *Rough Stone Rolling*, 412).

31. The ideas of subsidiarity and sphere-sovereignty from Catholic and Calvinist social teaching from the late nineteenth century have roots in Aristotle and Aquinas and were also prominent in De Toqueville's *Democracy in America* published in 1835. For more detail on contemporary applications of these ideas, see Michelle Evans and Augusto Zimmerman, eds., *Perspectives on Subsidiarity*, (Dordrecht, 2014). In its essence, the idea behind subsidiarity is that best government occurs when decision making authority is delegated to the level where the governmental decisions take effect.

32. Kimball, "The Nauvoo Charter: A Reinterpretation," 75.

33. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 33.

Missouri requisitions.[34] Richard Bushman has suggested that the original Missouri requisition for Joseph Smith's arrest on Mormon War charges was a response to Mormon redress petitions in the nation's capital. Those petitions had embarrassed Missouri because they argued that the absence of any extradition proceedings to that point was a tacit admission of Missouri's culpability in the Mormon War and extermination order.[35]

Missouri's embarrassment and desire to arrest and incarcerate the citizen of another state did not invalidate the habeas corpus right. Citizen protection in the face of official displeasure was the very essence of that right — protection from what Joseph Smith had described as unrighteous dominion after his earlier and more famous incarceration without trial for nearly six months in jails at Richmond and Liberty, Missouri. Habeas corpus had been developed by English judges and parliamentarians to protect its citizens from the capricious and arbitrary conduct of an angry monarch, and its adoption into United States state charters was intended to do the same.

Part II — The History of the Writ of Habeas Corpus

The Latin phrase *habeas corpus* literally means that a court required the body of the person charged in court so that it could make a decision in light of the facts. From as early as the end of the 13th century, English courts would issue orders using this phrase to make sure parties were in court so civil cases could proceed. But the "modern" use of the writ by courts to review arrests by members of the executive English government can only be traced to the 16th and 17th centuries.[36]

Walker observes that a complete history of the idea of habeas corpus would review "a series of writs from the Middle Ages" before Magna Carta in 1215, which provided protection from imprisonment.[37] While Magna Carta does foreshadow the writ of habeas corpus, since clauses 38 to 40 of

34. *Nauvoo Neighbor* 1, No. 33 (13 December 1843): 1, which was described as "an extra Ordinance for the extra case of Joseph Smith and Others." This amendment was passed five days earlier on 8 December 1843. This amendment, and the Missouri action that prompted it, is discussed in the author's sequel article, "Missourian Efforts to Extradite Joseph Smith and the Ethics of Governor Thomas Reynolds of Missouri," *Interpreter: A Journal of Mormon Scripture* 28 (forthcoming).

35. Bushman, Rough Stone Rolling, 397, 405, 505.

36. R.J. Sharp, The Law of Habeas Corpus, 2nd ed. (Oxford, UK: Clarendon Press, 1989), 1–3.

37. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 8.

the original version denied arbitrary imprisonment without prompt trial,[38] the writ of habeas corpus extolled as the engine of practical liberty was a much later judicial innovation.[39] The English legal historian Edward Jenks observed that when it first appeared, the king's high writ of habeas corpus was about getting people into prison rather than getting them out.[40] The counter-intuitive origin of the writ of habeas corpus in English history will not surprise readers familiar with English legal history; they know the impartial English jury was actually a tool of the king, who summoned people who were likely well-informed about their neighborhoods. There was originally no trace of an impartiality requirement in their selection. The first jurors were chosen because they likely knew, or would be able to discover, the detail and value of property in their towns and the identity of people likely to have committed notorious crimes.

The Canadian scholar Robert Sharp has confirmed that by the 16th century the writ of habeas corpus was being used to combat executive committals. The writ was not originally connected with liberty but involved an element of due process because the courts were unwilling to decide anything in connection with a case without the physical presence of the defendant in court.[41] However, the medieval rule held that the king's writs were not available when imprisonment was by the king's order.[42] The original writs were part of the marketing of the king's justice

38. William S. Holdsworth, *A History of English Law*, 3rd ed., (London: Methuen & Co, 1945), 2: 215. Note that the original 1215 version of Magna Carta was revoked by the Pope within three months of its finalization in June 1215. The numbering of these clauses is changed in the later 1217, 1225 and 1297 issues of the Great Charter where slightly abbreviated versions of the clauses that conceptually prefigure the writ of habeas corpus are numbered 28 and 29.

39. For example, in his judgment in favor of Joseph Smith in *Ex parte Smith* 22 F. Cas. 373 (C.C.D. Ill 1843) (No, 12,968), Judge Nathaniel Pope wrote:

> All who are familiar with English history, must know that it was extorted from an arbitrary monarch, that it was hailed as a second magna carta, and that it was to protect the subject from arbitrary imprisonment by the king and his minions, which brought into existence that great palladium of liberty in the latter part of the reign of Charles II. It was indeed a magnificent achievement over arbitrary power. Magna Carta established the principles of liberty; the habeas corpus protected them. (377)

40. Edward Jenks, "The Story of Habeas Corpus," *Law Quarterly Review XVIII*, (1902) reprinted in *Select Essays in Anglo-American Legal History*, (New York: The Lawbook Exchange, 1992): 532.

41. Sharp, *The Law of Habeas Corpus*, 1–3.

42. Ibid., 4.

as a desirable alternative to local and franchise courts.[43] The adaptation of the writs to achieve other purposes, including prompt peer trials, was a trial and error effort that took centuries to unfold. It was not really secure until the 17th century when Parliament had acquired the power to force the king to accept the *Petition of Right* in 1628 and the first *Habeas Corpus Act* following the Restoration of the monarchy in 1679.

Jenks has explained that the innovation which developed the habeas corpus writ as an instrument of liberty came when the writ was paired with the idea of privilege.[44] That is, if a writ of habeas corpus could remove a trial from a local court into the king's court, then a person of high breeding could similarly insist that his case should always be heard in a higher court. This idea also resonated with the Magna Carta's idea that barons were entitled to a trial by their peers.[45] Its potential was amplified in the early 17th century when Sir Edward Coke asserted that his common-law courts had authority to hear cases traditionally heard in other courts, including the king's ecclesiastical courts.[46] These ideas appealed in colonial America, and they appealed to Joseph Smith from the pages of William Blackstone's famous 18th-century English law commentaries because a corrupt court could be called to account by another court with completely different jurisdiction.[47]

The judicial innovation that saw the writ of habeas corpus used to test arrests by lesser members of the King's Executive took much longer to settle. The efforts of the king's common-law judges to use the writ of habeas corpus to protect high-born folk against orders made by the king's equity (Chancery and Exchequer Chamber) and prerogative (Star Chamber and High Commission) courts, resulted in furious

43. Holdsworth, *A History of English Law*, 5:300. See also Sharp, *The Law of Habeas Corpus*, 4. As a matter of practice, no one ever queried the king's orders one on one. They were only successfully (and safely) challenged by collectives as when the barons challenged King John in connection with Magna Carta in 1215 and when Parliament secured the Petition of Right from King Charles I in 1627.

44. Jenks, "The Story of Habeas Corpus," 538–40.

45. Note that the trial by peers envisaged in Magna Carta did not extend to all classes and was not a jury trial. The trial of peers in the House of Lords was not abolished until 1948 (The *Criminal Justice Act* (UK)). During the 12th century, juries discovered facts for the king on the basis of personal knowledge. Jury impartiality was not well established until the 15th century (Theodore Plucknett, *A Concise History of the Common Law* (Boston: Little Brown and Company, 1956), 129–30).

46. Plucknett, *A Concise History of the Common Law*, 243–44.

47. Bentley, "Road to Martyrdom, Joseph Smith's Last Legal Cases," 36, 54–55. Bentley notes that Joseph Smith and the Nauvoo Municipal Council often referred to Blackstone as their bible of the law absent modern in-house counsel.

jurisdictional battles.[48] But in an age when judges were still appointed and dismissed at the pleasure of the king, a return that cited the king's personal authority behind an imprisonment engaged a wholly different level of political consideration. Would a judge risk his career and possibly his life by ordering the release of a man if he were convinced the king had indeed ordered the imprisonment challenged by a particular writ of habeas corpus?[49] If a lesser departmental official of the king was behind the arrest, the personal safety of the judge was not so large an issue.

Darnell's case in England in 1627[50] focused on the practical question of whether a judge would countermand the king's personal order of imprisonment; the resulting judicial back-down was redressed by the House of Commons the following year when Sir Edward Coke authored the *Petition of Right*. Because King Charles I needed funding for his military campaign in France,[51] the House of Commons required him to concede that his judges could issue the writ of habeas corpus in cases where the imprisonment had been the result of Executive direction, including his own personal direction.

The story of habeas corpus in England after *Darnell's case* in 1627 and the *Petition of Right,* which immediately followed, tells of English judges looking behind the returns provided by jailers when responding to habeas

48. Sharp, *The Law of Habeas Corpus*, 6–8. Note that while English habeas corpus history did not feature jurisdictional battles between state and federal jurisdictions, the battles between the common-law courts, the ecclesiastical courts, and the king's prerogative courts were much more furious, largely because twentieth-century ideas of jurisdiction did not yet exist.

49. Ibid., 10. Sharp suggests that the practical questions revolved around when the court had to accept on good faith a statement in the jailer's return that the king had ordered the imprisonment and whether the king's executive power so exercised superseded the common-law adjudicatory process.

50. In this case, which is also known as the Five Knights' case (3 How. St. Tr. 1 (K.B. 1627)), the warrant that resulted in the imprisonment had been personally signed by two members of the king's privy council. Though the court of King's Bench had issued the writ of habeas corpus, when the return was duly provided confirming direct Privy Council engagement on the king's behalf, the judges backed down, retreating to the old rule which had held since medieval times that the king's executive orders were an exception to the general habeas corpus rules that applied in other cases.

51. For example, Gregorio F. Zaide, World History (Quezon City, Philippines: Rex Printing Company Inc., 2000 reprint), 221–22. Zaide reports that Parliament's price in supporting the king's request for additional fundraising was the Petition of Right, which was prepared by the Commons and supported by the Lords.

corpus writs.[52] When jailers sought to deny judicial review by claiming the prisoner was held by personal order of the king, judges refused to accept those simple assertions, and if proper reasons were not given on the face of the record or by testimony, the prisoners were released.

Robert Sharp says that although the king flouted his promise to give reasons for all imprisonments after the *Petition of Right* (1628) as soon as his urgent need for finance had passed, the practice of providing reasons gradually took hold.[53] And in a short time, that practice was reinforced by the first English *Habeas Corpus Act* in 1640, and others soon followed. The 1679 *Habeas Corpus Act* (UK) was passed to curtail a variety of Executive abuses that developed to get around the writ. These included the arrest of prisoners when the courts were not in session and the removal of prisoners to places like Scotland and the Channel Islands, where the writ did not reach.[54] Certainly, errors on the face of the record enabled court interference in cases of Executive arrest,[55] but section 3 of the 1816 *Habeas Corpus Act* (UK) confirmed again that the courts were authorized to examine the truth of the reasons given in cases where liberty was infringed by an act of the Executive.[56] If not so, state officials and inferior tribunals would have been free to determine the

52. When a writ of habeas corpus was issued by a competent court, it was issued to the person "holding the body" of the person in custody, who was simply the jailer. It directed the jailer to bring the person concerned to the court making the order and go explain why the person was being so held. Since jailers were often not familiar with the procedural niceties of the laws under which an arrest had been made, when questioned as to the reason they were holding someone, they would answer simply, saying "by order of the king" or similar. In time, as writs of habeas corpus became more common, they would read a script. But these simple recitations would not always satisfy the ordering judge, who would order the release of prisoners if adequate and just cause could not be shown.

53. Sharp, *The Law of Habeas Corpus*, 15.

54. See Amanda L. Tyler's extensive discussion of the influence of the 1679 *Habeas Corpus Act* (UK) on the embodiment of the privilege and the suspension practice that was both endorsed and limited in the US Constitution. ("A 'Second *Magna* Carta': The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege," *Notre Dame Law Review* 19 (2016): 1949.) See also Geoffrey Robertson, *The Tyrannicide Brief* (New York: Anchor Books, 2007), 349. Robertson observed that the US Supreme Court relied on the 1679 *Habeas Corpus Act* (UK) to invalidate similar executive overreach by the US government when it established the Guantanamo Bay detention facility, partly for the reason that prisoners held there would be beyond the reach of US habeas corpus.

55. Sharp, *The Law of Habeas Corpus*, 25.

56. Ibid., 71.

limits of their own powers when it came to imprisonment,[57] and the laws requiring all matters affecting the liberty of the subject to be construed strictly would be without effect.[58]

For English judges, the core of the writ of habeas corpus was to review the sufficiency of the evidence, especially if that was not clear from the face of the return.[59] English habeas corpus principle and practice was well known, respected, and followed by US judges at the time of Joseph Smith's habeas corpus experiences. Subsequent American commentators have stated that American innovation first saw the courts examine the sufficiency of evidence rather than take arrest warrants at face value[60] but that American reinterpretation completely ignores how the English developed the writ as a check on Executive power. It also ignores how the English Parliament bargained with the king — before American independence — to make sure English judges were authorized by habeas corpus Acts to look beyond simple summaries of the reasons for imprisonment that jailers gave in response to habeas corpus writs.

During Joseph Smith's lifetime, habeas corpus practice in America remained decidedly English. The supremacy of federal courts lay in the future, but some of the seeds of that future were planted by Justin Butterfield, who served as the United States District Attorney for Illinois and represented Joseph Smith before federal circuit judge Nathaniel Pope. Joseph Smith's first Illinois habeas corpus hearing before Judge Stephen A. Douglas in the Illinois Supreme Court (state) in response to the first Missouri Mormon War requisition[61] did not result in any jurisdictional argument. Butterfield advised that the charge that Joseph Smith had been an accessory before-the-fact in the attempted murder of the former governor of a state should be brought in the Illinois

57. Ibid., 73.

58. Ibid., 55.

59. Ibid., 79.

60. For example, Jeffrey Walker says that habeas corpus was primarily used as "a vehicle to protect from misuse of the judicial processes or procedures," and that it was the American courts that "began 'looking behind the writ' to review the underlying charges" (Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 15).

61. See, for example, Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 53–56. The hearing of the second warrant case in Judge Nathaniel Pope's federal circuit court also avoided the possibility that the relevant Illinois Supreme Court judge might be sympathetic to an extradition request from Governor Thomas Reynolds of Missouri, who had previously served as Chief Justice of the State of Illinois.

Circuit Court (federal). Bringing that second Illinois habeas corpus case in federal court was innovative and was strenuously opposed by Josiah Lamborn, arguing for the State of Illinois.[62] But Lamborn's challenge did not sway the presiding federal judge, Nathaniel Pope, and his decision in favor of Joseph Smith was cited as a precedent for more than 100 years afterwards.[63]

Part III — How US Habeas Corpus Practice Was Innovative

However, to give a fair overview of this practice in United States history and so readers interested in LDS history may properly understand Joseph Smith's legitimate and "English" use of the writ of habeas corpus, I will briefly explain what was and remains innovative in US habeas corpus practice.

The English Courts never developed a post-conviction habeas corpus practice because they did not have to deal with imaginative efforts to confirm the liberty of former slaves.[64] That was partly because of the success of the anti-slavery politics of William Wilberforce, partly because England did not have a federal constitution entrenching a federal version of habeas corpus, and partly because English jurisprudence has always had an aversion to any interference with the finality of the trial process.[65] Robert Sharp says the essential reason the United States developed the writ of habeas corpus as a post-trial remedy was because of the belief that any claim that a criminal trial breached constitutional law was best

62. On the first day of the hearing (Wednesday, January 4, 1843), Josiah Lamborn as Attorney-General for the State of Illinois, argued that the federal court had no jurisdiction to hear the matter, but Judge Pope accepted the contrary argument for Joseph Smith that the federal court had exclusive jurisdiction "because Joseph Smith was in custody 'under color of US Law.'" (Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 60–61).

63. Walker says that "the first official 'legal' version of the report was published in 1847 in *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Seventh Circuit* (Cincinnati, OH: Derby, Bradley and Co., 1847) as 3 McLean 121 and includes a synopsis of the case, selected pleadings (Bogg's affidavit, Reynold's request for extradition, and Ford's arrest warrant), and the opinion from the court." He continues that "the preferred official version was published in 1896 as 22 F. Cas. 373 in *The Federal Cases Comprising Cases Argued and Determined in the Circuit and District Courts of the United States*" ("Habeas Corpus in Early Nineteenth-Century Mormonism," 68n210).

64. During the same period that the United States was being reconstructed physically and legally after the Civil War, the English Parliament simplified its own formal appeals process to deal with unsafe convictions in the *Judicature Acts* of 1873 and 1875 (respectively 36 & 37 Vic. c 66 and 38 & 39 Vic. c 77).

65. Sharp, *The Law of Habeas Corpus*, 146.

heard by a forum divorced from the guilt-finding process.[66] But that is also a simplification of a process developed over an extended period.

In a 1965 article in *The University of Chicago Law Review*, Dallin H. Oaks wrote that most of the states followed the English *Habeas Corpus* Act of 1679 when they sought to provide the habeas corpus guarantee in their state constitutions. However, that state legislation was passed only after the signing of the Declaration of Independence, in consequence of the English Crown's previous position that the writ of habeas corpus was not available in the colonies.[67] While most of the state statutes that implemented habeas corpus were "patterned after the English act,"[68] there were variations. Generally, the benefits of the writ did not "extend to persons properly charged with felony or treason or to 'persons convict' or in execution under civil or criminal process."[69] But there was variation as to whether the writ was available only in criminal matters or whether it extended to the restraint of liberty for any cause, including civil matters.[70] There was also variation as to whether writs of habeas corpus could be issued when the courts were not in session, and some jurisdictions extended the English template to authorize judges not just to allow bail when they perceived a defect in process or evidence but to release such prisoners completely.[71]

In effect, when passing their state constitutions, the American states added to the remedial work done by the English *Habeas Corpus Act* of 1679 and codified the English common-law practice that developed during the century after that Act was passed. Before 1865, there is no evidence that the US courts were using the writ of habeas corpus to review convictions unless it could be shown that the impugned proceedings were somehow void *ab initio*.[72]

> Habeas corpus petitions brought after conviction fell under the shadow of state legislation patterned after [the English Act

66. Ibid.

67. Dallin H. Oaks, "Habeas Corpus in the States 1776–1865," *The University of Chicago Law Review* 32, no. 2 (Winter 1965): 251. See also Tyler, "A 'Second *Magna* Carta': The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege," 1985–87.

68. Oaks, "Habeas Corpus in the States 1776–1865," 254.

69. Ibid.

70. Ibid.

71. Ibid.

72. Ibid., 262–63. That is, void from the beginning of the relevant process.

> of 1679 and still] … withheld the benefits … from 'persons convict or in execution by legal process'.[73]

Thus, Oaks confirmed that once states had claimed the writ of habeas corpus for themselves, the only pre-Civil War innovations to the law related to adjusting the categories where the English writ was applicable. The emergence of the writ of habeas corpus as a post-conviction remedy lay in the future. But slavery cases before the Civil War hinted at the development of the writ of habeas corpus that was to come, and Justin Butterfield made reference to the use of habeas corpus writs in northern slave cases before the Civil War when he defended Joseph Smith against the accessory before the fact requisition in federal court. Josiah Lamborn for Illinois, on behalf of Missouri, had argued that the case should have been brought in the Illinois Supreme Court because the matter was between two states and did not involve the federal government. Butterfield replied that the federal court had exclusive jurisdiction to hear Smith's case. It had been held, in a case seeking the return of a Louisiana slave in the New York Court of Errors, that "the state process could not circumvent federal process" or the US Constitution. After that, he asked rhetorically, "Has not my client, Joseph Smith, the rights of a [slave]?"[74]

Slavery Cases before the Civil War

Before the Civil War, Oaks reports, the way habeas corpus issues were decided in slavery cases had more to do with geography than doctrine.[75] In the North, when a writ of habeas corpus for a slave was returned to the court, a hearing was held to determine whether or not he was a slave, and if proven to be so, the court would remand him to his master's custody. If he was proven to be a free man, he was released. In the South, however, the writ of habeas corpus was not available for a colored person because the master was entitled to a jury trial before being deprived of his property. Some southern courts held that there was no point to the use of the writ in slavery cases since a master could claim the slave again. But Oaks claims that reasoning is suspect since English law ruled against

73. Ibid., 261. Oaks reports that there were few such applications before 1850 but many afterwards but he could not find any "explanation" for that increase.

74. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 62–64.

75. Oaks, "Habeas Corpus in the States 1776–1865," 267.

those recapturing a person who had been discharged following a hearing on a writ of habeas corpus.[76]

Before the Civil War, two writs were available to determine slave cases. Bail-like arrangements were normally made until trial when the issues would be heard by a jury rather than by a judge, as was the invariable practice in habeas corpus cases. Juries allowed community sentiment a place in the process, but the process also allowed slaves to escape on terms of bond forfeiture — a price that some abolitionist plaintiffs were prepared to pay.[77] But the choice as to which writ was most likely to secure a party's objectives in slavery cases before the Civil War differed from state to state and from North to South.

Slavery Cases after the Civil War

After the Civil War, US *Habeas Corpus Act* 1867 tipped the federal-state balance in favor of the federal government.[78] Congress passed the *Habeas Corpus Act* of 1867 at the same time that it implemented the Emancipation Proclamation and the Thirteenth Amendment. Before the Civil War, state courts in abolitionist states had resisted slavery by requiring detailed evidence of title to slaves before they would release runaway slaves to slaveholders and federal marshals in accordance with the federal *Fugitive Slave Act* of 1850. After the Civil War, it was the federal courts that were skeptical about black arrests because they appeared to be enforcing slavery.[79]

Though congressional understanding of the legal history and development behind the Habeas Corpus Bill in 1866 was limited, the new Bill was drafted to enlarge and strengthen federal court power. [80] The final language of the *Habeas Corpus Act* confirmed that federal courts could hear writs of habeas corpus filed by prisoners held under state law. It also permitted the federal courts to do their own fact-finding about those cases and allowed appeals to the Supreme Court.[81]

The spirit of federal court cooperation with federal government policy is manifest in the decision in *In re Turner* (1867), given shortly after

76. Ibid., 268, 277.

77. Ibid., 281–82.

78. William M. Wiecek, "The Great Writ and Reconstruction: The Habeas Corpus Act of 1867," *The Journal of Southern History* 36, no. 4 (Nov. 1970): 548.

79. Mark M. Arkin, "The Ghost at the Banquet: Slavery, Federalism and Habeas Corpus for State Prisoners," *Tulane Law Review* 70, no. 1 (Nov 1995): 4–5.

80. Wiecek, "The Great Writ and Reconstruction," 538–39.

81. Ibid., 539.

the Bill was passed into law.[82] The case was decided by Salmon P. Chase, the sixth Chief Justice of the US Supreme Court acting in his capacity as a Circuit Court Judge. He had previously served as Abraham Lincoln's Treasury Secretary. Justice Chase ordered the release of an ex-slave who was bound to her former master under the Maryland *Apprenticeship Act*.[83] He struck down the Maryland law because it attempted to impose involuntary servitude contrary to the Thirteenth Amendment.[84] Other federal courts took similar action to disallow southern judicial enforcement of the Black Codes.[85]

The *1867 Habeas Corpus Act* empowered US federal courts to issue writs of habeas corpus "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States."[86] But its innovation was the authorization of federal court review of cases already decided in state courts. The political justification for this intrusion into state rights and sovereignty was the supremacy of federal law as confirmed by the outcome of the Civil War, but the underlying argument about the bounds of state rights has never been authoritatively resolved.[87] However this history is interpreted, the federal judiciary's insistence that state courts could not decide federal constitutional issues was well entrenched by 1880.[88]

Habeas Corpus in Joseph Smith's Federal Case before the Civil War

On the first day of Joseph Smith's habeas corpus hearing in federal court before Judge Nathaniel Pope, Josiah Lamborn (for Illinois and Missouri) and Justin Butterfield (for Joseph Smith) argued about jurisdiction.

82. Ibid., 541.

83. Ibid.

84. Ibid. See also Charles Olmsted, "In re Turner (1867)" (paper, Legan History Publications, 2005), 1. http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1002&context=mlh_pubs.

85. Ibid. The Black Codes were laws passed by the Southern States after the Civil War to restrict the freedom of former slaves by requiring them to work for low wages and sometimes, to clear artificially created debt.

86. *An Act to amend "An Act to establish the judicial Courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine,"* Session II, Chapter 28, 14 Statute 385 (1867). See also https://www.loc.gov/law/help/statutes-at-large/40th-congress/session-2/c40s2ch34.pdf.

87. Wiecek, "The Great Writ and Reconstruction: The Habeas Corpus Act of 1867," 544.

88. Ibid.

Their jurisdictional argument would not have been necessary *after* the Civil War since the federal jurisdiction would have prevailed. But an assumption by many modern lawyers and historians of federal jurisdictional prevalence is not appropriate in Joseph Smith's habeas corpus cases *before* the Civil War; it did not yet exist. Lamborn (for Illinois and Missouri) was justified in arguing at this time that the federal court had no jurisdiction in Smith's case because it was a matter between two states. But Butterfield asserted that the federal courts had a legitimate claim to jurisdiction. Butterfield's argument was easily upheld since the judge in this case was a federal judge. While the legal argument was unsettled in 1843, the recommendations of Butterfield, Judge Douglas, and Governor Ford that this case should be brought in the federal court show the new federal jurisdiction beginning to unfold.[89]

For the purposes of this article, the important point is that US habeas corpus practice largely followed English practice until the *Habeas Corpus Act of 1867* was passed following the Civil War. That legislation was a part of the Reconstruction package, which included the Thirteenth and Fourteenth Amendments to the Constitution. It authorized federal courts to review state judicial practices that enabled slavery under another name. Though habeas corpus writs were used in slavery cases before the Civil War, practices varied from North to South depending on whether the relevant court was part of a state inclined to free slaves or to preserve them as a form of property.

This brief summary of that history shows how the writ of habeas corpus was changed in the United States after the Civil War. Those changes did not affect the habeas corpus doctrine or practice in Nauvoo, Illinois, during the early 1840s. But the early use of the writ of habeas corpus in some pre-Civil War slavery cases enabled Justin Butterfield, Joseph Smith's lead advocate before the US Circuit Court in 1843, to rhetorically ask whether his client, Joseph Smith had at least the rights of a slave.[90]

Part IV — The Missouri Warrants for Joseph Smith's Arrest between 1840 and 1843

In the unabridged version of his article entitled "Habeas Corpus in Early Nineteenth Century Mormonism,"[91] Jeffrey Walker has confirmed that

89. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 62–64.

90. Ibid., 64.

91. Ibid. Note that an abridged version of the unabridged article was reprinted in Walker, "Invoking Habeas Corpus in Missouri and Illinois."

the State of Missouri sought the extradition of Joseph Smith to stand trial in Missouri on multiple occasions but on only two grounds.

The first of those grounds was that Joseph Smith was a fugitive from Missouri justice and had never been tried on charges "ranging from arson, burglary and robbery to treason and even murder."[92] These were the charges that famously resulted in Joseph Smith's imprisonment, first at Richmond, Missouri, and then, following transfer, at Liberty, near modern-day Kansas City.

The second Missouri warrant for Joseph Smith's arrest asserted that he was an accessory before the fact in the attempted murder of former Governor Lilburn W. Boggs on May 6, 1842. This idea seems to have been spawned by anti-Mormons including John C. Bennett in Illinois.[93]

The Mormon War Charges

Walker is gentle when he discusses the Mormon War charges, especially in light of the information he has uncovered in connection with them. He has written:

> In early April 1839, Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin were taken from Liberty Jail … to Gallatin, Daviess County, where a grand jury was empanelled … to consider the charges … against them, including the … treason. There, after a two-day hearing … Judge Thomas Burch granted a request to change venue to Boone County due to the fact that he had been the prosecuting attorney in the preliminary hearing before Judge Austin King. En route to Boone County, all of the prisoners either escaped or were released and made their way to Illinois to join the body of the Church.
>
> Sixteen months later, on September 1, 1840, Governor Boggs sent a requisition to Illinois Governor Thomas Carlin seeking the extradition of Joseph Smith and five others to Missouri based on these outstanding indictments. The extradition request was supported by the indictments, of which Governor Boggs had secured certified copies in July 1839. *What is not clear is whether Governor Boggs knew that in August 1839 all of these indictments had been dismissed based on a motion by the Boone County prosecuting attorney.* The judge in Boone

92. Ibid., 23.
93. Bushman, *Rough Stone Rolling* , 468.

> County was Governor Boggs's successor, Thomas Reynolds … The hearing started on a procedural matter, since the underlying indictments from the Missouri courts had not been attached to the arrest warrant as required by law. As this procedural irregularity could result in further postponement, both sides stipulated that such indictments existed. Ironically, *had Joseph Smith's counsel further investigated this issue, they would have discovered that in fact no indictments existed, all of them having been dismissed in August 1840 by the now sitting Missouri Governor Reynolds* (emphasis added).[94]

I discuss the legal and ethical issues in the State of Missouri's conduct that Walker has raised in his research in my second, shorter article about the Missouri requisitions for Joseph Smith's arrest. The purpose of this article is to show that there was nothing improper or even unwise in Joseph Smith's response to these requisitions. Given the malevolent attitudes that existed toward him in Missouri, the only other course Joseph Smith could have taken was to run away and hide, and that would have been interpreted by the world as well as Church members as an admission of guilt.

The first Mormon War requisition for Joseph Smith's arrest was never dealt with by the Nauvoo Municipal Court. Rather, that warrant was handled by Illinois Supreme Court Justice Stephen A. Douglas in June 1841 in Monmouth, Illinois. Judge Douglas considered the merits of the requisition following the issue of an arrest warrant by Illinois Governor Thomas Carlin, after Joseph Smith was arrested at the Heberlin Hotel in Bear Creek 28 miles south of Nauvoo. The writ of habeas corpus that had permitted Joseph to return home until Judge Douglas could hear the merits of the case a few days later at Monmouth[95] was issued by Charles Warren, an equity court official in Quincy. Bushman says Judge Douglas decided the case on a technicality that gave the Latter-day Saints the result they wanted but without vindicating them.[96] Bushman has also suggested that the favorable judgment was part of Douglas's "mission to recover [the LDS vote and the balance of power] for the Democrats" in future elections.[97]

Walker's analysis of the legal issues is more nuanced. Judge Douglas heard witnesses from both sides and could have looked behind the writ,

94. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 34–37.
95. Bushman, *Rough Stone Rolling* , 425–26.
96. Ibid., 426.
97. Ibid.

but he did not need to. The original warrant for Joseph's arrest on the Mormon War charges had been issued in September 1840 by Illinois Governor Carlin following Missouri requisition, but the warrant was spent because it had been returned to Governor Carlin.[98] Walker has explained that, despite the suggestion that Douglas made the decision in favor of the Prophet to garner Mormon political support,[99] the ruling was legally correct, and it is misleading to suggest that the case was decided on a technicality. A returned warrant was *functus officio*, meaning it could not be reused or resurrected in any way. It was dead. There was a variety of sound judicial precedent for that decision,[100] but Walker has observed that even if Judge Douglas had not been able to deal with the case on the basis that the warrant was spent, there was ample evidence before him that the warrant had been issued "by fraud, bribery and duress."[101] That evidence meant he would have been able to decide the case in favor of the liberty of Joseph Smith in accordance with established precedent, even if the warrant was not spent. It is also clear that if Judge Douglas had known the underlying indictments had been dismissed by then-Justice Reynolds in August 1840, he would have had a third reason to order Joseph set free.

The Accessory Before the Fact Charges

While he was reading the newspaper in his Missouri home at about 9pm on May 6, 1842, someone tried to kill Lilburn W. Boggs, the former governor of Missouri.[102] Bushman says that early suspicion fell on Boggs' political opponents "in a heated campaign for a state senate seat."[103] However, two weeks later, anti-Mormons in Illinois started reporting rumors of Joseph Smith's involvement — ranging from an alleged prophecy that Boggs would suffer a violent death within a year to John C. Bennett's more direct allegations in letters to the *Sangamo Journal*. Bennett alleged therein that Joseph "had offered a five-hundred dollar reward for Boggs' death" and that "Orrin Porter Rockwell [w]as the likely assassin."[104]

98. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 39.
99. Ibid.
100. Ibid., Walker cites decisions to the same effect by the New York Supreme Court in 1821 (*Filkins v Brockway* 19 Johns 170, 171) and the Maryland Court of Appeal in 1834 (*Hall v Hall* 6 G. & L. 386, 411).
101. Ibid., 38.
102. Bushman, Rough Stone Rolling, 468.
103. Ibid.
104. Ibid. See also Andrew H. Hedges and Alex D. Smith, "Joseph Smith, John C. Bennett, and the Extradition Attempt," quoted in *Joseph Smith, the*

Bushman records that Rockwell was living in Independence, Missouri, near his in-laws at the time because he was awaiting the birth of his fourth child, but he says that Rockwell left Independence immediately after the shooting. Bennett then "traveled to Missouri to publicize his suspicions," which were plausible because of Boggs' history in mistreating the Mormons.[105] Missouri Sheriff, J. H. Reynolds eventually arrested Rockwell for attempted murder and held him for a year, but Rockwell was defended by Alexander Doniphan and acquitted of all charges.[106]

In the meantime, and so as to protect Joseph Smith should an arrest warrant be issued premised on these allegations, the Nauvoo City Council utilized their habeas corpus power and passed an ordinance empowering them to examine all outside arrest warrants and issue writs of habeas corpus.[107] The Council also asked Illinois State Governor Carlin to disregard the false reports of John Cook Bennett, but "[b]y August 8, the extradition papers had passed from Governor Thomas Reynolds of Missouri through Carlin to the deputy sheriff of Adams County," who then arrested both Orrin Porter Rockwell and Joseph Smith in

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Prophet and Seer , Richard Neitzel Holzapfel and Kent P. Jackson, eds. (Provo, UT: Religious Studies Center, Brigham Young University; Salt Lake City: Deseret Book, 2010), 437–66, https://rsc.byu.edu/archived/joseph-smith-prophet-and-seer/joseph-smith-john-c-bennett-and-extradition-attempt-1842. Bennett's letter in the *Sangamo Journal* as follows:

> In 1841, Joe Smith predicted or prophesied in a public congregation in Nauvoo, that Lilburn W Boggs, ex-Governor of Missouri, should die by violent hands within one year. From one or two months prior to the attempted assassination of Gov. Boggs, Mr. O. P. Rockwell left Nauvoo for parts unknown to the citizens at large. I was then on terms of close intimacy with Joe Smith, and asked him where Rockwell had gone? 'Gone,' said he, 'GONE TO FULFILL PROPHECY!

105. Bushman, Rough Stone Rolling, 468.

106. In fact, the Independence grand jury never indicted Rockwell for the attempted murder of Boggs, and the only trial that Rockwell faced was in respect to a failed escape attempt. (Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 47n129). See Robert Nelson, *Enemy of the Saints: The Biography of Lilburn W. Boggs of Missouri,* (Baltimore: Publish America, 2011). Nelson reports that Sheriff Reynold's initial suspicion fell on a local hired man named Tomkins because of evidence provided by the shopkeeper whose stolen pepperbox pistol was found abandoned at the scene of the crime. But Reynolds did not persist with those inquiries when public attention shifted to Joseph Smith's possible involvement. See also Monte B. McLaws, "The Attempted Assassination of Missouri's Ex-Governor, Lilburn W. Boggs," *Missouri Historical Review* 60, no. 1 (1965): 50–62.

107. Bushman, *Rough Stone Rolling*, 468–69.

Nauvoo.[108] The City Council then issued writs of habeas corpus for both men, and "[u]nsure of his legal grounds, [the sheriff] went back to Carlin for instructions." In the meantime, both men disappeared.[109]

Various officials continued to search for Joseph for the next few months, and Governor Carlin "offered a $200 reward for Joseph's capture." But the searching ended in December 1842 when Joseph Smith agreed to submit to a further habeas corpus hearing in Springfield Illinois. The United States District Attorney for Illinois, Justin Butterfield, had been approached to act for Joseph Smith and had opined "that the extradition of the Prophet was unconstitutional."[110] This was an opinion in which Judge Stephen A. Douglas concurred.[111] According to Butterfield, the proposed extradition was unconstitutional because the US Constitution allowed only the extradition of a "fugitive from justice." Joseph Smith could not be a fugitive from justice in Missouri on accessory or attempted murder charges since he was in Illinois rather than Missouri at all material times and had never been charged with those crimes. While Emma had made this same argument to Governor Carlin in two letters in July that year and had been sharply dismissed,[112] the US District Attorney's sophisticated version of the same argument gave the new Governor, Thomas Ford pause.[113] Butterfield had thus advised Joseph to voluntarily take the matter "to the state supreme court, assuring him the justices were unanimously in his favor."[114] But ultimately the matter was taken before Judge Nathaniel Pope of the United States Circuit Court in Springfield, Illinois, on December 31, 1842, with Justin Butterfield now retained as counsel. A decision in Joseph's favor was handed down on January 5, 1843.[115]

108. Ibid., 469.
109. Ibid.
110. Ibid., 479.
111. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 53.
112. Bushman, *Rough Stone Rolling* , 474.
113. Ibid., 479.
114. Ibid. Also, Walker reports that Stephen A. Douglas had advised Joseph to petition Governor Ford to revoke the arrest warrant and reward but went with him to discuss the matter further with Justin Butterfield (Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 53n153)
115. Note that other authors have dealt with the detail of this second warrant case in greater detail than I can within the confines of this article. For example, see Morris A. Thurston, "The Boggs Shooting and Attempted Extradition: Joseph Smith's Most Famous Case." *BYU Studies* 48, no. 1 (2009): 4–56. Readers interested in viewing copies of the original documents may also be interested to view them and read commentary in Andrew H. Hedges, Alex D. Smith, and Richard Lloyd Anderson, eds., *The Joseph Smith Papers, Journal, Volume 2: December*

Before the matter came before the court, Butterfield was careful to satisfy every procedural requirement. Governor Carlin's old warrant for Joseph's arrest was still in the possession of Sheriff King more than 100 miles away in Quincy, and obtaining it in a timely manner would cause significant delay. So cooperative arrangements were made for a new arrest warrant to be issued by Governor Thomas Ford. Justin Butterfield then filed a petition for a writ of habeas corpus with the United States Circuit Court in Springfield, and Joseph was duly arrested by General Wilson Law of the Nauvoo militia.[116] Butterfield asked the court to issue a writ of habeas corpus on the grounds that Joseph could not be a fugitive from Missouri justice since he was not in Missouri at the time of the crime. Judge Pope set the matter down for hearing on Monday, January 2, 1843. On that day, Illinois Attorney-General Josiah Lamborn sought a continuance to allow more preparation time, and the matter was adjourned till Wednesday, January 4th.

Walker has provided detailed commentary on the motions filed and the arguments made by both sides in the contest. The procedural cooperation of the parties, the decision to try the matter in a federal court because of its constitutional significance in the 1840s, and the fact that the resulting decision was cited in other habeas corpus cases for more than 100 years afterward demonstrate that this event had significance well beyond the municipal city limits of Nauvoo. *Ex parte Smith* in 1843[117] was a test case with national significance. That the United States Circuit Court so readily issued a writ of habeas corpus shows that the Nauvoo Municipal Court's issue of a similar writ, four months earlier on August 8, 1842, was soundly based on habeas corpus law and practice in the pre-Civil War United States.

Judge Pope considered himself called upon to decide a matter of wide significance. He explained the US Constitution's requirement that important interstate matters, including extraditions, should be decided in the federal courts. He then explained that the protection afforded by the writ of habeas corpus against arbitrary imprisonment at the behest of the executive, in the spirit of Magna Carta, was of foundational

1841–April 1843 (Salt Lake City: The Church Historian's Press, 2011): 194–236; and "Appendix 1: Missouri Extradition Attempt, 1842–1843, Selected Documents, Introduction," The Joseph Smith Papers, http://www.josephsmithpapers.org/paper-summary/appendix-1-missouri-extradition-attempt-1842-1843-selected-documents-introduction/1.

116. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 55–56.

117. *Ex parte Smith* 22 F. Cas. 373 (C.C.D. Ill 1843) (No, 12, 968).

importance to the framers of the US Constitution. This was something English that must be retained:

> All who are familiar with English history, must know that it was extorted from an arbitrary monarch, and that it was hailed as a second magna charta (sic), and that it was to protect the subject from arbitrary imprisonment by the king and his minions, which brought into existence that great palladium of liberty in the latter part of the reign of Charles II. It was indeed a magnificent achievement over arbitrary power. Magna Charta (sic) established the principles of liberty; the habeas corpus protected them.

He then confirmed why his federal court had jurisdiction to finally settle the matter as Justin Butterfield had advised:

> The matter under consideration presents a case arising under the 2d section, 4th article of the constitution of the United States, and the act of congress of February 12th, 1793 [1 Stat. 302], to carry it into effect … This court has jurisdiction. Whether the state courts have jurisdiction or not, this court is not called upon to decide.

Judge Pope then moved to the substance of the arguments behind the extradition warrant. He examined the warrant for Joseph's arrest and the Boggs' affidavit in support, and he concluded that neither provided any evidence of Joseph's complicity in a crime. The highest argument against Joseph Smith was suspicion in the minds of others. He accepted Justin Butterfield's argument refuting the "fugitive from justice" claim, and then he pontificated upon the State's paramount duty to defend citizen liberty, for as citizens surrender their liberty to the state in the interests of law and order, they do so with an expectation that the state would protect a citizen's liberty in return:

> Man in a state of nature is a sovereign, with all the prerogatives of king, lords and commons … But when he unites himself with a community, he lays down all the prerogatives of sovereign, (except self-defence,) and becomes a subject. He owes obedience to its laws and the judgments of its tribunals, which he is supposed to have participated in establishing, either directly or indirectly. He surrenders, also, the right of self-redress. In consideration of all which, he is entitled to the aegis of that community to defend him from wrongs … It would be a gross violation of the social compact, if the

> state were to deliver up one of its citizens to be tried and punished by a foreign state, to which he owes no allegiance, and whose laws were never binding on him. No state can or will do it. In the absence of the constitutional provision, the state of Missouri would stand on this subject in the same relation to the state of Illinois, that Spain does to England. In this particular, the states are independent of each other. A criminal, fugitive from the one state to the other, could not be claimed as of right to be given up.

Judge Pope then observed that Missouri could have asserted that Smith was an accessory before the fact in the commission of a crime in Missouri but had not done so nor provided any evidence that would have enabled that conclusion. After examining Boggs' affidavit, Judge Pope concluded that Missouri really sought Smith's extradition on unfounded suspicion, and suspicion of a crime was not grounds on which to deprive a man of his liberty. He therefore had no option but to dismiss the warrant and set Joseph Smith at liberty:

> It is not averred that Smith was accessory before the fact, in the state of Missouri, nor that he committed a crime in MO: therefore, he did not commit the crime in Missouri — did not flee from Missouri to avoid punishment … Mr. Boggs' opinion, then, is not authority. He should have given the facts … Is the constitution satisfied with a charge upon suspicion?... "to say that he was complained of, or was examined, is no proof of his guilt; and then to say that he had cause to suspect him, is too cautious; for who can tell what they count a cause of suspicion, and how can that ever be tried? At this rate they would have arbitrary power, upon their own allegation, to commit whom they pleased." From this case, it appears that suspicion does not warrant a commitment, and that all legal intendments are to avail the prisoner. That the return is to be most strictly construed in favor of liberty … No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the constitution of the United States. It is proposed to deprive a freeman of his liberty — to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him — separated from his friends, his family and his witnesses, unknown and unknowing … The mis-recitals and overstatements in

> the requisition and warrant, are not supported by oath, and cannot be received as evidence to deprive a citizen of his liberty, and transport him to a foreign state for trial. For these reasons, Smith must be discharged.

There were two reasons why this should have been an end of the matter for Joseph. The first reason was evidentiary. While the charges against Orrin Porter Rockwell were not dealt with in Missouri until a year later,[118] there was no evidence that Joseph had hired Rockwell to assassinate Boggs. If there had been such evidence, as might have been the case if a Rockwell trial had adduced such evidence, then Joseph Smith could have been re-arrested on accessory charges.[119] But more compellingly, the accessory before the fact requisition had now been tested in federal court before an independent federal judge. Joseph had been represented by the US District Attorney for Illinois (though acting in a private capacity for a private client), and the Illinois State Attorney-General had presented Missouri's case after being allowed time for preparation. If Missouri had taken the matter further, their mistreatment of Joseph Smith and the extermination order against the latter-day Saints may have been brought into stark focus. The absence of an evidentiary connection between Joseph Smith and the Missouri facts could easily have been interpreted as evidence of Missouri's vindictiveness against the Latter-day Saints in the court of public opinion.

The Revived Mormon War Charges

The third Missouri requisition for Joseph Smith's arrest was based on a new indictment for treason issued by the Daviess County Circuit

118. Bushman, *Rough Stone Rolling* , 468. Note again that Rockwell was never tried for this crime. He was arrested for the crime on March 6, 1843, and then indicted and convicted of jailbreak, but the Missouri grand jury found there was insufficient evidence "to justify an indictment for shooting ex-Governor Boggs [and so] … did not indict him for that offence." He was released from prison on December 13, 1843 (William Ogden Niles, *Niles' National Register* , September 30, 1843, Washington, http://www.sidneyrigdon.com/dbroadhu/MA/nilesre2.htm).

119. The relevant double-jeopardy provisions appear as Article VIII clause 11 of Illinois' 1818 Constitution and Article XIII clause 10 of Missouri's 1820 Constitution. Neither an earlier arrest on those charges nor a habeas corpus trial to determine whether there was cause to deprive Joseph Smith of his liberty pending trial would have counted as a trial as an accessory before the fact, engaging the double-jeopardy rules that applied under the constitutions of both Illinois and Missouri.

Court in Missouri in June 1843.[120] Hedges confirms that this new indictment was a renewal of the old Mormon War charges dismissed in August 1839.[121] Governor Reynolds, who issued the third requisition, knew the old charges had been dismissed because he was a Missouri Supreme Court Justice at the time and had dismissed them shortly before he became Governor. This requisition should never have been issued on double-jeopardy grounds, since jeopardy had attached and the case had been dismissed in a competent Missouri court. Perhaps Reynolds interpreted the double-jeopardy provision in the State's 1820 Constitution as allowing this action because the underlying matters had never come before a jury for trial despite the attachment of jeopardy.[122] But for a man who had served as a Supreme Court Justice in both Illinois and Missouri, that is unlikely.[123]

What seems inescapable is that Governor Reynolds knew neither Joseph nor his lawyers knew at the time that the underlying indictments had been dismissed, and so they did not know (and were unlikely to find out) that constitutional double jeopardy was in play.[124] Even though legal ethics were not well defined in the U.S. in the 1840s, and Governor Reynolds may not have considered himself bound to observe applicable legal ethics since he was no longer practicing as a lawyer or a judge,

120. Andrew H. Hedges, "Thomas Ford and Joseph Smith, 1842–1844," *The Journal of Mormon History* 42, no. 4 (October 2016): 106.

121. Ibid, see also Andrew H. Hedges, "Extradition, the Mormons, and the Election of 1843," *Journal of the Illinois State Historical Society* 109, no. 2, (2016): 127–47, and Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 34–7.

122. Clause 10 of Article XIII of the 1820 Missouri Constitution states:

> That no person, after having been once acquitted by one jury, can, for the same offence, be again put in jeopardy of life or limb, but if, in any criminal prosecution, the jury be divided in opinion at the end of the term, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial at the next term of such court.

123. There is also a thin argument that the matter should have been decided against Missouri on grounds of judicial precedent, since Illinois Supreme Court Judge, Stephen A. Douglas had already decided the same matter previously in Joseph Smith's favor.

124. Note, however, that they appear to have discovered the dismissal of the underlying charges later that year since the Municipal Council passed its *nolle prosequi* Ordinance amendment on December 8, 1843. This ordinance is quoted and discussed in the author's sequel article, "Missourian Efforts to Extradite Joseph Smith and the Ethics of Governor Thomas Reynolds of Missouri," *Interpreter: A Journal of Mormon Scripture* 29 (forthcoming).

there was nothing honorable about the abuse of process which he twice condoned against Joseph Smith. Whether he was complicit in the issue of the new Daviess County indictments in June 1843 to try and cover this abuse of process is not something that is likely to be uncovered, unless he referred to such a plan in correspondence that has been preserved.

Mormon Reliance on Habeas Corpus Review in the Nauvoo Municipal Court Did Not Overreach the Court's Chartered Jurisdictional Powers

Governor Ford and Thomas Sharp of the *Warsaw Signal* had stated that the Mormons abused their city's habeas corpus powers to protect Joseph Smith from legitimate warrants for his arrest. The argument that the habeas corpus powers of the city of Nauvoo were an overreach appeals to modern readers who do not expect a city to have the power to invalidate arrest warrants issued by a state or federal authority. But that is an anachronistic assumption. If Nauvoo and the other cities of Illinois that were given habeas corpus powers in the late 1830s and early 1840s were able to exercise those powers only in respect to arrests made under city authority, then those powers would have been redundant from the date of their issue. Habeas corpus powers were always controversial because judges with modest authority were authorized by those powers to hold the exercise of high executive power to independent account. Joseph Smith and his colleagues merely applied English precedents of this law to similarly evade the abuse of executive power.

The power to grant writs of habeas corpus afforded to the City of Nauvoo under its December 1840 Charter was unremarkable. Suggestions that this power was anti-republican or oppressive are best explained by the agendas of those who suggested irregularity. In accordance with Jeffersonian principle in the 1840s, the State of Illinois was in the business of distributing power, including judicial power, to local people and institutions unless they were incapable of exercising that power.[125] The Mormons in Nauvoo were no exception to that trend.

125. Bushman, *Rough Stone Rolling* , 412. See also Thomas Jefferson, *Summary View of the Rights of British Americans* (Williamsburg, VA: Clementina Rind, 1774). Jefferson's own expression of the modern principle of subsidiarity is perhaps best seen when he protested to King George III and the English Parliament that only a body elected by the people could exercise its power, which power would revert to the people if their elected body was dissolved. Though Bushman says there was little debate when the Nauvoo Charter was originally passed in 1840, Firmage and Mangrum have observed that one Illinois assemblyman thought it should have been renamed "A

Rather, in 1840 the Mormons were seen by the Illinois legislature as the very epitome of a people prepared to rule themselves.

Anthony Gregory has identified a decentralized approach to the habeas corpus power in America generally when he wrote that even "the language of the [federal] Constitution" intended "a lower court power over the central state's detention authority."[126] Indeed, while it is shocking to modern Americans to understand that the Suspension Clause provisions in the federal Constitution were included to protect state power, including state "power to review federal detentions," this was "a radical states' rights power and was intended as an institutionally diffuse check on federal authority."[127] Gregory is certain of this, despite the "common assumption that the Framers intended the Suspension Clause to protect the power of federal courts to test the validity of federal detentions."[128]

James L. Kimball has made a similar decentralization point in relation to the habeas powers that were conferred upon the city of Alton by amendment of that city's Charter in 1839. He wrote:

> [T]he Alton Charter provided that "the judge of the Municipal Court of the city of Alton shall have power … to issue writs of *Habeas Corpus* … with the jurisdiction of said court; and the same proceedings shall be had thereon before said judge and course as may be had … before the circuit courts of this state." Alton's court thereby limited the power of the Madison County Circuit Court. In Alton and Nauvoo, then, the lesser government unit had influence over the greater one, at least for a time.[129]

The revocation of the Nauvoo Charter on January 27, 1845, was the result of majoritarian politics in the greater State of Illinois and confirms

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Bill for the Encouragement of the Importation of Mormons"! (Edwin Brown Firmage and R. Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900* (Urbana and Chicago: University of Illinois Press, 1988) 85.) B.H. Roberts also considered it passed easily because all the political parties in the legislature at the time were courting the Mormon vote (Joseph Smith, *History of The Church of Jesus Christ of Latter-day Saints* , 7 volumes, ed. Brigham H. Roberts, (Salt Lake City: Deseret Book, 1957), 4: xxi).

126. Gregory, "The Writ Reconstructed," 64.

127. Ibid., 63.

128. Ibid. Gregory goes further and says that the federal "Constitution does not actually grant any federal entity with the power to issue the writ. Habeas is not mentioned in Section 8 of Article 1, which spells out the powers of Congress, but rather in Section 9, which enumerates restrictions." Federal habeas power only came as Congress created federal courts other than the Supreme Court and gave them habeas power.

129. Kimball, "The Nauvoo Charter: A Reinterpretation," 75.

only that outside forces had broken down the rule of law in Nauvoo by then.[130] The fact that the habeas corpus power had been conferred by the Illinois State Legislature when Nauvoo was chartered indicates that the Nauvoo Municipal Court did indeed have the power to hear and decide cases arising within its jurisdiction. To suggest that the Nauvoo City Council's power usurped the powers of the Supreme Court of Illinois or of the United States Circuit Court in that state is to misunderstand the legal context of the time.

Conclusion

The nature of the habeas corpus power exercised in pre-Civil War America had a very English character. As yet, there was only limited recourse to the writ of habeas corpus in slavery matters, and its development as a post-conviction remedy lay in the future. In Nauvoo, as elsewhere in America in the 1840s, the courts followed established English practice and used the writ of habeas corpus to review the form and the substance of arrests and incarcerations by executive authority, including high executive authority where no trial had yet taken place. Suggestions in late 19th-century American scholarship that US courts were the first to look behind the official reasons given for incarceration when prisoners were presented at court following the issue of writs of habeas corpus misunderstands or misrepresents the nature of the English habeas corpus practice that America inherited. Certainly, the availability of this great writ was denied in the colonies for 100 years after the remedial *Habeas Corpus Act* (UK) of 1679 was passed, but as soon as independence was declared, the right to seek habeas corpus writs was proclaimed by a series of state enactments in completely English terms. The right for state courts to seek the writ in federal cases was also confirmed when the Constitution was drafted.

Suggestions that the Nauvoo Municipal Court's habeas corpus practice unfairly protected Joseph Smith from Missouri's extradition warrants are also unfounded. I have not discussed the Nauvoo Municipal Court's use of the writ to test the Hancock County arrest warrants issued in the wake of the destruction of the Expositor Press. However, the suggestion that standard habeas corpus practice was abused or departed from in Nauvoo in the earlier 1841–1843 period has no substance. The Nauvoo Municipal Court dealt with habeas corpus writs in connection with Governor Carlin's 1842 warrant for Joseph Smith's arrest on the

130. See, for example, Robert Bruce Flanders, *Nauvoo: Kingdom on the Mississippi* (Urbana and Chicago: University of Illinois Press, 1975): 228–38.

charge that he was an accessory before the fact in the attempted murder of former Governor Boggs of Missouri, and in connection with Governor Ford's June 1843 warrant issued in respect of treason Joseph Smith was alleged to have committed during the Mormon War in 1838. In the Boggs' attempted murder case, the Nauvoo Municipal Court's decision to grant the writ was effectively affirmed by the United States Circuit Court in early January 1843 when the court freed Joseph Smith after looking behind the warrant and finding the charge was unfounded.

Both Missouri requisitions for Joseph Smith's arrest on grounds that he was a fugitive from Missouri justice in matters connected with the Mormon War and extermination order were an unethical business from start to finish. While Missouri Governor Boggs may not have known that the indictments against Joseph Smith had been dismissed before he issued Missouri's first requisition for Joseph Smith's arrest, the new Missouri Governor Reynolds was well aware, as he himself dismissed those indictments at the insistence of the Boone County Prosecutor. Reynolds did not withdraw Missouri's request for Joseph Smith's extradition from Illinois, and he issued a further requisition founded on the same facts, even though the 1820 Missouri State Constitution included a double-jeopardy clause intended to make such an act an unconstitutional abuse of process. While legal ethics on the frontier were still developing, it is indisputable that Reynolds acted dishonorably. Both Missouri governors who sought Joseph Smith's extradition from Missouri had dirty hands.

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