UNITED STATES V. HODGES: DEVELOPMENTS OF TREASON AND THE ROLE OF THE JURY

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ABSTRACT

Legal history is an important element in understanding current legal and political debates. What can a long-forgotten treason trial from the War of 1812 teach us about present-day discussions of treason and the development of the jury trial in America? In August 1814, the town of Upper Marlboro, in Prince Georges County, Maryland, arrested a number of British soldiers as stragglers or deserters. Upon learning of the soldiers' absence, the British military took into custody the local physician, Dr. William Beanes, and two other Upper Marlboro residents, and threatened to burn Upper Marlboro if the town did not return the soldiers to the British military. John Hodges, a local attorney, arranged for the soldiers' return to the British military and was charged with high treason for "adhering to [the] enemies, giving them aid and comfort." The resulting jury trial—presided over by Justice Gabriel Duvall, a U.S. Supreme Court Justice and Prince Georges County native—highlights: (1) how the crime of treason was viewed in early American culture, and (2) the role of the jury as deciders of the facts and law in early American jurisprudence. Hodges's trial proceeded against the backdrop of the War of 1812 and was informed by the 1807 treason trial of Aaron Burr.

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INTRODUCTION

Legal history is important to understanding present-day legal and political issues. What, then, can a long-forgotten treason trial from the War of 1812 teach us about present-day debates around the doctrine of treason and the development of the jury trial in America? This Article starts by examining the context of John Hodges's treason trial and begins the complex examination of how history impacts current views of treason and jury trials in America.

In August 1814, as British forces left a burned and ravaged Washington, D.C., the Maryland town of Upper Marlboro, in Prince Georges County, arrested a number of British soldiers as stragglers or deserters.[1] Upon learning of the soldiers' absence, the British military took into custody Dr. William Beanes, and two additional Upper Marlboro residents, and threatened to burn Upper Marlboro if the town did not return the British soldiers.[2] John Hodges, a local attorney, arranged for the soldiers' return to the British military[3] and was later charged with high treason for "adhering to [the] [e]nemies, giving them [a]id and [c]omfort."[4] The resulting jury trial—presided over by Justice Gabriel Duvall, a U.S. Supreme Court Justice and Prince Georges County native—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.[5]

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1. 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 HODGES). Upper Marlboro is located in Prince Georges County, Maryland, approximately twenty miles from Washington, D.C.

2. HODGES, *supra* note 1; *John Hodges (of Thomas) (b. 1763 – d. 1825)*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES), http://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/002800/002849/html/002849bio.html (last visited Oct. 8, 2019) [hereinafter *John Hodges (of Thomas)*].

3. HODGES, *supra* note 1, at 9–10; *John Hodges (of Thomas)*, *supra* note 2.

4. U.S. CONST. art. III, § 3; HODGES, *supra* note 1; *John Hodges (of Thomas)*, *supra* note 2.

5. HODGES, *supra* note 1, at 27; *Duvall, Gabriel*, FED. JUD. CTR., https://www.fjc.gov/history/judges/duvall-gabriel (last visited Oct. 8, 2019).

Hodges's trial took place during a tumultuous time, against the backdrop of the War of 1812, while the 1807 treason trial of Aaron Burr was still fresh in American minds.[6]

This Article: (1) examines the historical context of Hodges's treason trial; (2) describes and analyzes the facts of the alleged crime and resulting jury trial; (3) analyzes the historical developments in America of treason as a crime; and (4) assesses the changing conceptions of the jury's role as deciders of the facts and the law. Specifically, Part I examines the historical context of Hodges's trial by analyzing treason and jury trials in early America and the impact of the War of 1812.[7] Part II recounts the facts of the alleged crime including: the persons involved and events leading up to the crime.[8] Part III describes and analyzes the trial including: the persons involved; witness statements; attorney arguments; and Justice Duvall's statement to the jury.[9] Part IV examines: the impacts of the case; the changing conceptions of the crime of treason during times of strife in American history; and the evolving role of the jury in American jurisprudence.[10]

I. CONTEXTUALIZING *UNITED STATES V. HODGES*—TREASON, JURIES, AND THE WAR OF 1812

This Article examines the 1815 treason trial of John Hodges 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.

A. Treason in Early America

A number of sources[11] influenced the development of the American treason doctrine.[12] 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."[13] Early treason trials—specifically, the 1807 treason trial of Aaron Burr—informed how the nation perceived treason at the time of John Hodges's trial in 1815.[14]

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6. *See, e.g*, MARK R. KILLENBECK, M'CULLOCH V. MARYLAND: SECURING A NATION 192 (2006); *The War of 1812*, SMITHSONIAN NAT'L MUSEUM OF AM. HIST., http://amhistory.si.edu/starspangledbanner/the-war-of-1812.aspx (last visited Oct. 8, 2019).
7. *See infra* Part I.
8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See* Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 395–417 (1945).
12. *See generally* Treason Act of 1351, 25 Edw. 3 St. 5 c. 2 (1350) (defining treason in English law); Charles Warren, *What is Giving Aid and Comfort to the Enemy?*, 27 YALE L.J. 331 (1918) (focusing on the development of the elements of treason).
13. *See* PETER CHARLES HOFFER, THE TREASON TRIALS OF AARON BURR 58, 63–70 (Peter Charles Hoffer & N.E.H. Hull eds., 2008); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 370 (Henry Holt & Co. ed., 1998).
14. *See* United States v. Burr, 25 F. Cas. 55, 186 (C.C.D. Va. 1807).

English treason law influenced America's founding fathers as they crafted the U.S. Constitution. Specifically, America's founders wished to develop a treason doctrine that—unlike English treason doctrine—could not be used to suppress political adversaries. The Statute of Edward III codified treasonous offences in England.[15] England considered an act a treasonous 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."[16] Treason also included: planning "the [d]eath of the King, Queen, or their eldest [s]on"; "violating the Queen, or the King's eldest [d]aughter unmarried, or his eldest [s]on's [w]ife"; and "killing the Chancellor, Treasurer, or Judges in [e]xecution of their [d]uty."[17] The statute gave broad powers to English courts and prosecutors to define treasonous actions.[18] Additionally, the monarch or legislature could add treasonous offenses to the act through an exceptions clause.[19] The result was the establishment of a treason act used to suppress political adversaries whom made overt actions against the crown or simply held treasonous acts in "the imagination of his heart."[20]

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.[21] The framers also recognized that the Revolutionary War was, in itself, a treasonous act against England.[22] The framers defined treason for the new nation within this context, balancing their desire to safeguard the new nation from insurrection with their desire to confirm charges of treason would not be "used as an instrument of political prosecution."[23] Although there was general consensus among the framers of the U.S. Constitution that treason should be limited in scope, there was significant debate on how to precisely define and limit the scope of treason in the U.S. Constitution.[24] James Madison approved the Constitutional Convention's "great judgement" of "inserting a constitutional definition" of treason in the U.S. 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."[25] Madison supported giving the legislature "more latitude."[26]

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15. 25 Edw. 3 St. 5 c. 2 (the Statute of Edward III is also known as the Treason Act of 1351).

16. *Id.*; *see also Defining the Crime of Treason Against the United States, [20 August] 1787*, NATIONAL ARCHIVES, http://founders.archives.gov/documents/Madison/01-10-02-0102 (last visited Oct. 8, 2019) [hereinafter *Defining the Crime of Treason*] (quoting THE PAPERS OF JAMES MADISON, VOL. 10, 27 MAY 1787–3 MARCH 1788, at 153 (Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, & Frederika J. Teute, eds., Univ. of Chi. Press, 1977)).

17. 25 Edw. 3 St. 5 c. 2.

18. HOFFER, *supra* note 13, at 58–59.

19. *Id.* at 59.

20. *Id.* (quoting the prosecution's argument in the 1592 English treason trial of Sir John Perrot).

21. *See* HOFFER, *supra* note 13, at 58–70; Hurst, *supra* note 11, at 405–17.

22. HOFFER, *supra* note 13, at 58.

23. *See* HOFFER, *supra* note 13, at 58, 63–69; SMITH, *supra* note 13.

24. *See* Hurst, *supra* note 11, at 395, 399–400.

25. THE FEDERALIST NO. 43 (James Madison); *Defining the Crime of Treason*, *supra* note 16; *see also* Hurst, *supra* note 11, at 400.

26. *Defining the Crime of Treason*, *supra* note 16; *see also* Hurst, *supra* note 11, at 400.

The constitutional debate over treason underscores the significance to the founders of ensuring that "citizens of the Union [were] secured effectually from even legislative tyranny" and the perception that an "indeterminate" definition of treason was "sufficient to make any government degenerate into arbitrary power."[27] The resulting restrictive definition of treason included in the Constitution of the United States reads:

> Treason against the United States, shall consist only in levying [w]ar against them, or in adhering to their [e]nemies, giving them [a]id and [c]omfort. No [p]erson shall be convicted of [t]reason unless on the [t]estimony of two [w]itnesses to the same overt [a]ct, or on [c]onfession in open [c]ourt. The Congress shall have [p]ower to declare the [p]unishment of [t]reason, but no [a]ttainder of [t]reason shall work [c]orruption of [b]lood, or [f]orfeiture, except during the [l]ife of the [p]erson attainted.[28]

Further expounding on the restrictive definition of treason, the 1790 Act for the Punishment of Certain Crimes Against the United States (Crimes Act of 1790) states:

> [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.[29]

Defining treason in the U.S. 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 the use of constructive treason in America.[30] 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."[31] Despite the narrow definition of treason in the U.S.

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27. 3 WORKS OF HON. JAMES WILSON 96, 99 (Bird, Wilson ed., 1804).

28. U.S. CONST. art. III, § 3.

29. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 2, 2 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. at 112–13. In 1948, the Criminal Code was revised. The offense of treason was amended and codified in 18 U.S.C. § 2381 (2018); Act of June 25, 1948, ch. 645, 62 Stat. 807 (1948).

30. U.S. CONST. art. III, § 3 (emphasis added); SMITH, *supra* note 13, at 366–67.

31. SMITH, *supra* note 13, at 366–67.

Constitution, the treason doctrine could potentially be broadened and refined through judicial interpretation.[32]

1. Early Treason Trials and the Trial of Aaron Burr

Early application of the treason doctrine demonstrates a continued debate over the scope of treason and judicial attempts to refine the treason doctrine.[33] Specifically, the treason trials that came out of the Whiskey Rebellion and Fries Rebellion show a young nation attempting to maintain unity and order.[34] Eventually, in the 1807 treason trial of Aaron Burr, Chief Justice John Marshall clarified the scope of treason; in a 25,000-word decision, Chief Justice Marshall provided a framework to limit treason so it could not be used for political suppression.[35]

The Whiskey Rebellion grew out of discontent with a tax "upon spirits distilled within the United States, and for appropriating the same."[36] In 1794, grain growers in western Pennsylvania resisted the tax and threatened tax collectors.[37] John Quincy Adams's 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.[38]

President George Washington responded to the violence. He issued the Proclamation on Violent Opposition to the Excise Tax and sent the militia into western Pennsylvania, which successfully dispersed the insurgents and quelled the violence.[39] The militia arrested a number of men whom were tried for treason.[40] Attorney William Rawle argued that resistance to federal laws was treasonous because it was equal to levying

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32. *See infra* Part I.A.1; SMITH, *supra* note 13, at 366–67, 71.

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

34. *See* Daniel D. Blinka, *"This Germ of Rottedness": Federal Trials in the New Republic, 1789–1807*, 36 CREIGHTON L. REV. 135, 167 (2003); Paul Douglas Newman, *Fries's Rebellion and American Political Culture, 1798–1800*, 119 PA. MAG. HIST. & BIOGRAPHY 37, 43 (1995); Peter Kotowski, *Whiskey Rebellion*, GEORGE WASHINGTON'S MOUNT VERNON, http://www.mountvernon.org/digital-encyclopedia/article/whiskey-rebellion/ (last visited Oct. 8, 2019).

35. SMITH, *supra* note 13, at 370; Blinka, *supra* note 34, at 183.

36. SENATE J., 1st Cong., 3d Sess., at 237 (1791).

37. Kotowski, *supra* note 34.

38. John Quincy Adams to Abigail Adams (July 19, 1794), http://founders.archives.gov/documents/Adams/04-10-02-0139.

39. *Proclamation on Violent Opposition to the Excise Tax, 24 February 1794*, NAT'L ARCHIVES, http://founders.archives.gov/documents/Washington/05-15-02-0213 (last visited Oct. 8, 2019); Kotowski, *supra* note 34.

40. Blinka, *supra* note 34, at 68; Kotowski, *supra* note 34; *see, e.g.*, From Alexander Hamilton to William Rawle (Nov. 17–19, 1794), http://founders.archives.gov/documents/Hamilton/01-17-02-0359 (listing names of "[p]ersons to be excepted from the Amnesty").

war against the nation.[41] Only two men, John Mitchell and Paul Weigel, were found guilty of treason due to a lack of evidence and witnesses.[42] Both Mitchell and Weigel were eventually pardoned by President Washington.[43]

Fries Rebellion was also a response against federal taxes.[44] 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 perpetrate certain acts, which he is advised amount to Treason, being overt acts of levying war against the United States.[45]

John Fries was arrested and tried for treason for freeing two tax evaders from jail in Bethlehem, Pennsylvania.[46] Fries was convicted of treason,[47] a conviction viewed as being "of the highest importance" to maintain "the stability of [the country's] government."[48] Further, Fries's conviction served as a warning to others considering rebellion against the government; as demonstrated by a May 1799 letter from Timothy Pickering, Secretary of State, to John Adams. 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*."[49] Fries was pardoned by President John Adams on May 21, 1800.[50]

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41. Patrick Grubbs, *Fries Rebellion*, ENCYCLOPEDIA GREATER PHILA. (2015), http://philadelphiaencyclopedia.org/archive/fries-rebellion/.

42. Kotowski, *supra* note 34.

43. *Id.*; *see, e.g.*, *To George Washington from William Bradford, 9 March 1795*, NAT'L ARCHIVES, http://founders.archives.gov/documents/Washington/05-17-02-0425 (last visited Oct. 8, 2019) (citing n.3).

44. Blinka, *supra* note 34, 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, 13 March 1799*, NAT'L ARCHIVES, http://founders.archives.gov/documents/Hamilton/01-22-02-0323 (last visited Oct. 8, 2019) (citing n.12).

45. *To Alexander Hamilton from James McHenry, 13 March 1799*, *supra* note 44.

46. Blinka, *supra* note 34, at 171.

47. 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's retrial. Justice Chase's actions during Fries's trial were cited by the House of Representatives in 1804 during Justice Chase's impeachment proceedings. Grubbs, *supra* note 41.

48. To John Adams from Timothy Pickering (May 10, 1799), http://founders.archives.gov/documents/Adams/99-02-02-3499.

49. *Id.*

50. Grubbs, *supra* note 41.

One of the most notable treason trials in American history was the trial of Aaron Burr in 1807.[51] Burr was charged with treason for "levying war" against the United States and tried in the U.S. Circuit Court of Richmond; he was represented by attorney Edmund Randolph.[52] Chief Justice John Marshall presided over the trial and used the trial and his opinion to "clarify the law of treason."[53] Specifically, Chief Justice Marshall used his 25,000-word opinion, in part, to limit the expansive use of treason as an "instrument of political prosecution."[54] Marshall's opinion limited the treason doctrine and required "strict legal evidence, that an overt act of treason has been committed."[55] Marshall echoed 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."[56]

B. Jury Trials in Early America

Juries were viewed as "an essential part of any free government" in early America.[57] Specifically, the role of the jury was to "protect[] ordinary individuals against governmental overreach[ ]."[58] 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."[59] 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.[60] Chief Justice John Jay captured the fluidity of the jury's role when he stated in the 1794 U.S. Supreme Court case, *Georgia v. Brailsford*:[61]

> 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*

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51. United States v. Burr, 25 F. Cas. 55, 55 (C.C.D. Va. 1807); *see* HOFFER, *supra* note 13, at 58; NEWMYER, *supra* note 33; SMITH, *supra* note 13, at 348–74.

52. HOFFER, *supra* note 13, at 198; SMITH, *supra* note 13, at 357–58.

53. Blinka, *supra* note 34, at 183.

54. SMITH, *supra* note 13. Chief Justice 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:

> [I]f 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.

8 U.S. 75, 126 (1807).

55. *Burr*, 25 F. Cas. at 60.

56. SMITH, *supra* note 13, at 369–70.

57. DENNIS HALE, THE JURY IN AMERICA: TRIUMPH AND DECLINE 59 (2016).

58. Blinka, *supra* note 34, at 136 (citing AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 83–84 (Yale Univ. Press 1998)).

59. THE FEDERALIST NO. 83 (Alexander Hamilton).

60. *See generally* HALE, *supra* note 57, at 1–4; VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 36–38 (1986); Blinka, *supra* note 34, at 136–78.

61. 3 U.S. 1, 4 (1794).

> *yourselves to judge of both, and to determine the law as well as the fact in controversy*. On this, and on every other occasion, however, we have no doubt, you will pay that 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.[62]

The nature of early American trials shaped the role of the jury.[63] Influenced by British trials, early American trials "studiously avoided finely honed distinctions between law and fact."[64] Additionally, serving on a jury "best prepare[d] the people to be free" by "giv[ing] to the minds of all citizens a part of the habits of mind of the judge."[65] 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 a judge-and-jury partnership.[66] Early American juries drew on their own experiences and knowledge of circumstances in a way unfamiliar to modern-day juries, which are expected to maintain impartiality and neutrality.[67]

To the U.S. founders, juries were "an obstacle to oppressive government" and, as such, "unquestionably ha[d] jurisdiction of both fact and law."[68] For example, John Adams recognized the jury was important to safeguarding "fundamental Principles," especially when "judges should give their Opinions to the jury" counter to those "fundamental Principles."[69] Further, the founders regarded a "verdict according to . . . conscience" as a right of the jury that expanded on Adams's understanding of the jury as protectors of "fundamental Principles."[70]

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 inconsistence" in jury trials and advocated for elected jurors.[71] Jefferson understood the political nature of trials and wished to prevent a "germ of rottedness" from infecting jury

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62. *Id.* (emphasis added). The Supreme Court sat as a trial court in *Georgia v. Brailsford*. *Id.*

63. *See generally* HALE, *supra* note 57; HANS & VIDMAR, *supra* note 60, at 36–39; Blinka, *supra* note 34, at 136–89.

64. Blinka, *supra* note 34, at 138.

65. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 262 (Harvey C. Mansfield & Delba Winthrop eds., trans., 2000). De Tocqueville was a French political theorist who visited the United States in 1831. Though his visit was originally focused on examining U.S. prisons, his seminal work *Democracy in America* focused broadly on aspects of social equality and individualism in America.

66. *See, e.g.*, *id.* at 258–64; HALE, *supra* note 57, at 89–93.

67. Blinka, *supra* note 34, at 138.

68. THE FEDERALIST NO. 81 (Alexander Hamilton); HALE, *supra* note 57, at 114.

69. John Adams Diary 16 (Jan. 10, 1771–Nov. 28, 1772) (on file with the Massachusetts Historical Society). According to Adams, "fundamental Principles" included, "[t]he general Rules of Law and common Regulations of Society." These "fundamental Principles," according to Adams, were known and understood by "ordinary Jurors." *Id.*

70. HALE, *supra* note 57, at 61 (quoting *Comment: The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 173 (1964)); John Adams Diary 16, *supra* note 69.

71. Blinka, *supra* note 34, at 179 (citing THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 1077 (James Morton Smith ed., 1995).

trials.[72] Specifically, he worried that juror selection was based on "ignorance" and "pliab[ility] to the will and designs of power."[73] Jefferson felt jurors were "competent judges of human character," and, therefore, capable decision-makers of fact; however, he viewed jurors as "unqualified for the management of affairs requiring intelligence above the common level."[74]

Chief Justice John Marshall not only used the Aaron Burr treason trial to clarify the crime of treason, as discussed in Part I.A.1, but also to comment on the relationship between the judge and jury.[75] Specifically, Marshall asserted the judge's role—as architect of the law—by stating, "[I]rrelevant testimony may and ought be stopped" and recognizing the ability of the judge to cease trivial testimony as a "fundamental principle[] in judicial proceedings."[76] When sending the case to the jury, Chief Justice Marshall stated, "The 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."[77]

C. The War of 1812

On June 18, 1812, the U.S. Congress declared war on Great Britain and President James Madison signed the declaration of war.[78] Reasons for the war were multiple: British interference with American trade; impressment of American seamen by the British Royal Navy; and American expansionism.[79] A strong rationalization for the war can be found in James Madison's June 1, 1812 letter to Congress. Concerning British hostility towards America, President Madison wrote: "[T]he 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."[80]

Support for the war was not politically unanimous and highlighted divisions between the Democratic-Republicans and Federalist political parties.[81] Inspired by the war, the Federalist Party grew in New England

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72. *Id.*

73. *Id.*

74. Thomas Jefferson to Pierre Samuel Du Pont de Nermours (Apr. 24, 1816), https://founders.archives.gov/documents/Jefferson/03-09-02-0471.

75. Blinka, *supra* note 34, at 183; *see* HOFFER, *supra* note 13, at 58, 63–70.

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

77. THE FEDERAL CASES. BOOK 25. 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 180 (1896).

78. KILLENBECK, *supra* note 6; *The War of 1812*, *supra* note 6.

79. SMITH, *supra* note 13, at 409; Daniel Preston, *James Monroe: Life Before the Presidency*, UNIV. OF VA. MILLER CTR., http://millercenter.org/president/biography/monroe-life-before-the-presidency (last visited Oct. 8, 2019); *The War of 1812*, *supra* note 6; *War of 1812*, HISTORY (2009), http://www.history.com/topics/war-of-1812 (last visited Oct. 8, 2019).

80. James Madison to Congress (June 1, 1812), http://founders.archives.gov/documents/Madison/03-04-02-0460.

81. *Domestic Supporters and Opponents*, THE WAR OF 1812, https://sites.google.com/a/uconn.edu/bav11001/supporters-and-opponents (last visited Oct. 8, 2019).

and highlighted north-south divisions in the young nation, leading to fear of a New England secession. President Madison was a Democratic-Republican from the southern state of Virginia and received support for the war from fellow Democratic-Republicans, including James Monroe.[82] Monroe supported the President's declaration of war and view that America should not "continue passive under . . . [the] accumulating wrongs" committed by Britain against America.[83]

There was mixed response among U.S. citizens. In general, southern and western states supported the war and New England states were critical of the war.[84] Examples of the divide are found in letters to President Madison from American citizens. The citizens of Lexington, Kentucky, wrote to the President in support of the war stating the declaration of war was "necessary" because Great Britain forced the war upon the United States.[85] Whereas citizens from Berkeley, Massachusetts, wrote letters 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."[86]

The lack of unanimous support for the war, in conjunction with an inefficient, inexperienced, and insufficiently resourced War Department, undermined the United States' ability to coordinate an effective military force.[87] Senior officers were ineffective leaders and "generally, sunk into either sloth, ignorance, or habits of intemperate drinking."[88] Enlisted men were undisciplined and lacked experience.[89] In 1813, Joseph Wheaton wrote President Madison highlighting issues the military faced: "[T]he 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 them."[90]

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82. Preston, *supra* note 79. James 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. As Secretary of State before the war, Monroe was concerned with America's political relations with France and Britain.

83. James Madison to Congress, *supra* note 80.

84. *See, e.g.*, 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).

85. To James Madison from the Citizens of Lexington, Kentucky (June 26, 1812), http://founders.archives.gov/documents/Madison/03-04-02-0542.

86. To James Madison from the Inhabitants of Berkley, Massachusetts (July 1, 1812), http://founders.archives.gov/documents/Madison/03-04-02-0569.

87. HICKEY, *supra* note 84, at 75–76.

88. *Id.* at 76 (quoting Winfield Scott).

89. *Id.*

90. To James Madison from Joseph Wheaton (Mar. 8, 1813), http://founders.archives.gov/documents/Madison/03-06-02-0097.

For both American and British forces, desertion was common and punishable by death.[91] Desertion by American troops was particularly prevalent towards the end of the war;[92] of approximately 200 men executed for desertion during the War of 1812, 132 were executed in 1814.[93] Despite the number of executions, President Madison demonstrated leniency to deserters, specifically pardoning deserters in the years 1812 and 1814 that became "sensible of their offences, and [were] desirous of returning to their duty."[94]

The Chesapeake Bay region—a significant area of commerce, trade, and shipbuilding—was targeted by British forces during the war.[95] 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 region a strategic target.[96] The Maryland House of Delegates recognized the region's vulnerability and, in January 1814, wrote President Madison "to implore the constituted authorities of this nation, that the negociations [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." The January 1814 letter effectively highlighted 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."[97]

Deep divides among political parties and citizens stoked concerns that treasonous acts were occurring. For example, in a June 1813 letter, John Adams referenced early treason trials to impress upon Thomas Jefferson the need to suppress treasonous acts happening during the war:

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91. HICKEY, *supra* note 84, at 76, 222 (discussing how first-time deserters in the U.S. military were usually sentenced to death and pardoned, while repeat deserters were more commonly executed); *see* Justin Letourneau, *The Men are Sick of the Place*, BLOGGER: NIAGARA 1812 LEGACY COUNCIL (Jan. 23, 2013, 11:34 AM), http://discover1812.blogspot.com/2013/01/the-men-are-sick-of-place.html; *The War of 1812: Militia and Civilian Life*, ONTARIO MINISTRY OF GOV. & CONSUMER SERVS., http://www.archives.gov.on.ca/en/explore/online/1812/militia.aspx (last visited Oct. 8, 2019) (according to a British soldier, "Desertion has come to such height that 8 or 10 men go off daily.").

92. 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. HICKEY, *supra* note 84, at 222; *see* J.C.A. Stagg, *Enlisted Men in the United States Army*, *1812–1815: A Preliminary Survey*, 43 WM. & MARY Q. 615, 624–25 (1986).

93. HICKEY, *supra* note 84, at 222; John S. Hare, *Military Punishments in the War of 1812*, 4 J. AMER. MIL. INST. 225, 238 (1940). Execution for desertion did not happen as often in the British military during the War of 1812. John R. Grodzinski, *"Bloody Provost": Discipline During the War of 1812*, 16 CANADIAN MIL. HIST. 25, 30–31 (2012).

94. HICKEY, *supra* note 84, at 76, 222; Presidential Proclamation (June, 17 1814), http://founders.archives.gov/documents/Madison/03-07-02-0511.

95. MARYLAND WAR OF 1812 BICENTENNIAL COMM'N, STAR-SPANGLED 200: A NATIONAL BICENTENNIAL IN MARYLAND 9 (2009).

96. *Id.* at 9–10.

97. To James Madison from the Maryland House of Delegates, ca. (Jan. 25, 1814), http://founders.archives.gov/documents/Madison/03-07-02-0207. The negotiation mentioned by the Maryland House of Delegates was the Treaty of Ghent, which ultimately ended the War of 1812. HICKEY, *supra* note 84, at 296, 298.

> [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 reallized [sic] the Terrorism of Fries's, most outrageous [sic] Riot and Rescue, as I call it, Treason.[98]

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. In a November 1814 letter, Louisa Catherine Johnson Adams wrote John Quincy Adams:

> 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 . . .[99]

Against the backdrop of war and the commonly-held view that "opposition [to the war] must be hushed," John Hodges was tried for high treason for acts occurring in August 1814.[100]

II. THE CRIME

A. Before the Crime

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.[101] Three days later, 5,000 British troops landed in Saint Benedict, Maryland.[102] American forces initially thought the British were planning to attack Baltimore.[103] Secretary of State James Monroe led a scouting party to report on the number of British troops; Monroe sent word back to Washington that British forces—led by General Robert Ross and Rear Admiral George Cockburn—were heading towards Washington, D.C.[104]

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98. From John Adams to Thomas Jefferson (June 30, 1813), http://founders.archives.gov/documents/Adams/99-02-02-6084. "Chaises Rebellion in Massachusetts" refers to Shay's Rebellion, an uprising by farmers against taxes. Shay's rebellion was used as rationale for replacing the Articles of Confederation. *Shay's Rebellion*, HISTORY (Nov. 12, 2009), http://www.history.com/topics/shays-rebellion."Gallatins Insurrection" refers to the Whiskey Rebellion. *See supra* Part I.A.1.

99. From Louisa Catherine Johnson Adams to John Quincy Adams (Nov. 6, 1814), http://founders.archives.gov/documents/Adams/99-03-02-2657; see Hodges, supra note 1, at 6.

100. HODGES, *supra* note 1, at 6.

101. *The Fall of Fort Washington and the Battle of White House Landing*, NAT'L PARK SERV., https://www.nps.gov/fowa/learn/historyculture/the-fall-of-fort-washington-and-the-battle-of-white-house-landing.htm (last updated May 21, 2018).

102. *Id.*

103. MARYLAND WAR OF 1812 BICENTENNIAL COMM'N, *supra* note 95, at 10.

104. *The Fall of Fort Washington and the Battle of White House Landing*, *supra* note 101; Preston, *supra* note 79.

Entering Upper Marlboro, Maryland[105] on August 22, 1814, British forces faced "little or no skirmishing, and . . . were allowed to remain in the village all night without molestation."[106] In return, residents "were treated right civilly" and subjected to only minor disturbances including theft of chickens and pigs by British forces.[107] Civil treatment by British forces was not expected. Walter Hellen's August 6, 1814 letter 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 immencity [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.[108]

General Ross used the home of local physician, Dr. William Beanes, as a headquarters to have a "council of war with Admiral Cockburn."[109] There is no indication that Dr. Beanes resisted General Ross's use of his home; his lack of resistance was seemingly out of fear that the destruction faced by Walter Hellen would also befall him.[110]

Leaving Upper Marlboro, British forces continued their advance on Washington.[111] At Bladensburg, Maryland, American forces failed to stop the British troops. Antiwar newspapers referred to this battle as the "Bladensburg Races" because American troops reportedly dropped their

105. 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 (1992).

106. 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).

107. Caleb Clarke Magruder Jr., *Dr. William Beanes, the Incidental Cause of the Authorship of the Star-Spangled Banner*, 22 RECS. OF THE COLUM. HIST. SOC'Y, WASHINGTON, D.C. 207, 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's soldiers." *Id.* (citing an account of John Read Magruder, the clerk of the vestry).

108. From Walter Hellen to John Quincy Adams (Aug 6, 1814), http://founders.archives.gov/documents/Adams/99-03-02-2568.

109. Magruder Jr., *supra* note 107.

110. *See, e.g.*, From Walter Hellen to John Quincy Adams, *supra* note 108.

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

weapons and quickly ran away from the battle rather than face British forces.[112]

On August 24, 1814, British forces marched into Washington, D.C.[113] President Madison, his cabinet, government officials, and residents fled the city. Public buildings—including the Capitol and the President's House—were burned.[114] The burning of Washington, D.C. was dramatic and symbolic. Writing to his wife, General Ross stated: "They 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."[115]

B. The Crime

The British left Washington, D.C. ravaged and marched towards Baltimore.[116] British troops once again went through Upper Marlboro.[117] Citizens of Upper Marlboro—including Dr. William Beanes, Dr. William Hill, and Philip Weems—arrested a group of British soldiers as stragglers or deserters.[118] Dr. Beanes or General Robert Bowie asked local attorney, John Hodges, to take the British prisoners to the jail in Queen Anne, Maryland, in northern Prince Georges County.[119] 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."[120] The British forces took Dr. Beanes, Dr. Hill, and Weems under British control as barter for the British prisoners.[121] Residents of Upper Marlboro asked John

112. 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. *See* Hansen, *supra* note 111; *see also* Joel Achenbach, *D.C.'s Darkest Day, a War That No One Remembers*, WASH. POST (Aug. 23, 2014, 7:00 AM), https://www.washingtonpost.com/national/health-science/2014/08/23/abf407ae-24bd-11e4-86ca-6f03cbd15c1a_story.html. William Pinkney in *U.S. 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." 26 F. Cas. 332, 335 (C.C.D. Md. 1815).

113. SMITH, *supra* note 13, at 420; *see* Achenbach, *supra* note 112.

114. MARYLAND WAR OF 1812 BICENTENNIAL COMM'N, *supra* note 95; SMITH, *supra* note 13, at 420; Achenbach, *supra* note 112. President's House was the common name used in 1812 to refer to what we now call the White House. President Theodore Roosevelt officially gave the President's House the name White House in 1901. *How Did the White House Get its Name?*, WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/questions/how-did-the-white-house-get-its-name (last visited Nov. 12, 2019).

115. 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.

116. MARYLAND WAR OF 1812 BICENTENNIAL COMM'N, *supra* note 95; SMITH, *supra* note 13, at 420; Achenbach, *supra* note 112.

117. HODGES, *supra* note 1.

119. *Id.*; Magruder Jr., *supra* note 107, at 217. Queen Anne, now Hardesty, is a town in Prince George's County, north of Upper Marlboro.

119. There is uncertainty in the record. HODGES, *supra* note 1, 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 2 (stating Dr. Beanes instructed Hodges to take the deserters to Queen Anne).

120. HODGES, *supra* note 1, at 5.

121. *Id.*; Magruder Jr., *supra* note 107, at 217.

Hodges to arrange the return of the prisoners to the British military.[122] Likely inspired by the threat of destruction to Upper Marlboro and the taking of three prominent residents, Hodges arranged the return of the British prisoners;[123] for his actions, John Hodges was charged with treason.[124]

III. THE TRIAL

A grand jury indicted John Hodges for high treason.[125] Specifically, Hodges was charged with "adhering to the enemy, giving him aid and comfort."[126] Though the grand jury ultimately indicted Hodges, the jury "expressed their respect for the motives of the traverser, and prayed for *noli prosequi*."[127] Hodges was tried for treason in the Circuit Court of the United States for the Maryland District during the May 1815 term.[128] The case was heard before a jury; Supreme Court Justice Gabriel Duval; and District Judge James Houston.[129]

A. The Trial Report of John Hodges

Before reviewing and analyzing the trial of John Hodges, it is important to consider the origin of the information available concerning the crime and the trial. Specifically, it is important to recognize that the historical record is incomplete, inconsistent, and the information we do have likely reflects biases. For example, the report of Hodges's treason trial that provides the most information on the crime and trial was published in *The American Law Journal*, which was edited by John Elihu Hall.[130] Hall is listed in the trial report as one of Hodges's attorneys.[131] The introduction to the trial report, most likely written by Hall, expresses bias against the

123. HODGES, *supra* note 1, at 5. The record indicates that John Hodges's brother assisted him in returning the British prisoners. John Hodges's brother was not convicted of treason nor was he part of the trial. *See id.* at 3–5, 10.

123. *Id.* at 5.

124. *Id.* at 5–6; Magruder Jr., *supra* note 107, at 217.

125. HODGES, *supra* note 1.

126. *Id.*

127. *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 the Maryland Rules, Rule 4-247. MD. CODE ANN., CRIM. LAW § 4-247 (2019). 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.

128. HODGES, *supra* note 1, 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 U.S. District Court for the District of Maryland with Judge James Houston at the time of Hodges' trial. *Landmark Legislation: Judiciary Act of 1789*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-judicial-legislation-back-historical-note-0 (last visited Oct. 8, 2019).

129. Justice Duval sat as a Circuit Justice. HODGES, *supra* note 1, at 27–28, 35. Houston judged for the U.S. District Court for the District of Maryland from 1806 to 1819. *Houston, James*, FED. JUD. CTR., https://www.fjc.gov/history/judges/houston-james (last visited Oct. 8, 2019).

130. HODGES, *supra* note 1; ALBERT H. SMYTH, THE PHILADELPHIA MAGAZINES AND THEIR CONTRIBUTORS, 1741–1850, at 139 (1892).

131. HODGES, *supra* note 1, at 35.

U.S. government and, prominently, the Judicial Branch.[132] For example, the introduction of the report provides: "There is every reason to believe Mr. Hodges was persecuted for high treason at the instigation of the government."[133] The introduction specifically criticizes "[President James] Madison and [Albert] Galatin [sic] and [James] Monroe" as an "ignorant, … low minded, and … cowardly crew, without ability to discern, or energy to execute."[134] 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 doctrine of constructive treason" to hush opposition to the war.[135] The discernable biases present in the introduction are not as conspicuous in the trial report text; but, because the report was likely also written and/or edited by Hall, it is reasonable to presume that the trial report reflects similar biases against the government.

In addition to potential biases in the trial report, it is not a verbatim description of the trial's proceedings. For example, prior to William Pinkney's final address to the jury, Hall states that Pinkney "proceeded in a strain of eloquence, which the reporter dares not pretend to have followed, *Verba volant*."[136] Additionally, the introduction explains that the publication of the report was delayed.[137] The delay in publication may have impacted the accuracy of the report.

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

The treason trial of John Hodges took place in May 1815.[138] The trial was presided over by Justice Gabriel Duvall[139] and District Judge James Houston.[140] U.S. District Attorney Elias Glenn presented the case for the United States.[141] Hodges was represented by Upton Scott Heath,[142] Thomas Jenyngs,[143] John Elihu Hall,[144] and William Pinkney.[145]

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132. *See id.* at 4–8.
133. *Id.* at 4.
134. *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 in 1814. *About: Albert Gallatin (1801–1814)*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/about/history/Pages/agallatin.aspx (last updated Nov. 11, 2010).
135. HODGES *supra* note 1, at 4, 6–8.
136. *Id.* at 23, 28. *Verba Volant* is Latin for "spoken words fly away."
137. *Id.* at 3.
138. *Id.* at 1.
139. *Id.* at 27.
140. *Id.* at 28.
141. *Id.* at 35.
142. *Id.*; *see Heath, Upton Scott*, FED. JUD. CTR., https://www.fjc.gov/history/judges/heath-upton-scott (last visited Oct. 8, 2019).
143. 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 164 (John D. Lawson ed., 1918) [hereinafter AMERICAN STATE TRIALS].
144. AMERICAN STATE TRIALS, *supra* note 143, at 164–65; HODGES, *supra* note 1, at 35.
145. AMERICAN STATE TRIALS, *supra* note 143; HODGES, *supra* note 1, at 35.

1. Witnesses and Witness Testimony

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.[146] William Caton testified that he was at the jail in Queen Anne when Hodges arrived to take the British prisoners.[147] Caton testified that he told Hodges "if [Hodges] surrendered the deserter he was no American – he would stain his hands with human blood"; Caton testified that Hodges replied: "[H]e wanted none of [Caton's] advice."[148] Witness John Randall, Jr. guarded the British prisoners in Queen Anne; Randall testified that when Hodges demanded the release of the British prisoners Randall asked General Robert Bowie if the prisoners should be released.[149] Upon learning of the British threat to Upper Marlboro, General Bowie responded that "it was hard, but he supposed they must be returned."[150] Witness Thomas Sparrow confirmed General Bowie's response to Hodges's request for release of the British prisoners.[151]

General Robert Bowie[152] was also a witness and testified that he wrote to the governor to inform him that British prisoners were at Queen Anne; General Bowie commended Hodges for his "promptness and patriotism" in removing the prisoners from Upper Marlboro.[153] General Bowie stated that when he saw the British deserter at the jail, Bowie said, "[*H*]*e* must not be delivered up" but could not recall if Hodges heard this statement.[154] When called as a witness for a second time, General Bowie testified that "Hodges never pressed the delivery of the deserter."[155]

Gustavus Hay testified that Hodges asked him "to assist in conducting the prisoners to the British lines"; when Hay and Hodges met with the British forces, the British asked why they only had four prisoners to return and not six.[156] Further, Hay testified that Hodges or William Lansdale told

146. HODGES, *supra* note 1, at 10–17; COURT REGISTER ENTRY (1815) (listing witnesses, number of days witnesses were present in court, and mileage traveled).

147. HODGES, *supra* note 1, at 10.

148. *Id.*

149. *Id.* at 10–11.

150. *Id.* at 11.

151. *Id*. at 16.

152. Bowie was Governor of Maryland 1803 to 1805 and again in 1811. He supported the War of 1812 and was criticized for his support in the Baltimore press. Bowie recognized the need to fortify defenses in Maryland, as demonstrated in a letter he wrote 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), http://founders.archives.gov/documents/Madison/03-04-02-0403.

153. HODGES, *supra* note 1, at 11–12.

154. *Id.*

155. *Id.* at 16.

156. *Id.* at 12–13.

the British troops the location of the other two prisoners whom were possibly deserters.[157] William Lansdale testified that Hodges told Lansdale about the British threat to Upper Marlboro, and Lansdale accompanied Hodges to the prison to free the British prisoners.[158] Lansdale stated that the threat was made by British Major Evans as instructed by "the general,"—likely General Ross.[159] Further, Lansdale testified that "Hodges said they could not give up the deserter" and mentioned that "[g]reat apprehension was entertained for [Dr. Beanes]."[160]

The trial report refers to witness Thomas Holden as the deserter and provides that Holden admitted to deserting the British military.[161] Holden testified that Hodges told him, "I am not determined to carry you in" and left Holden at a house while Hodges returned the prisoners to the British military.[162] Solomon Sparrow testified that he was asked by General Bowie to find men to guard the British prisoners and that he heard the exchange between Caton and Hodges.[163]

Robert Bowie—son of General Robert Bowie—testified that he took one of the British prisoners, along with Benjamin Oden, to Bowie's house.[164] Oden testified that "two deserters were left in [Oden's] custody" when Hodges returned the other British prisoners.[165] Additionally, Oden stated that the deserters ran away; when British Major Evans demanded to know where the deserters were "[a] woman pointed out the direction which the men had taken."[166] According to the trial report, witness Samuel Tyler[167] only testified "to the bringing of the prisoners to Queen Anne, the threat, and the alarm, &c."[168]

Only two witnesses testified for the defense: Dr. Bradley Beanes and J. Donaldson.[169] Dr. Bradley Beanes—Dr. William Beanes's brother—testified that Bradley and his brother William captured the deserter, Thomas Holden, and sent Holden to Queen Anne.[170] When British forces took Dr. William Beanes and threatened Upper Marlboro, Dr. Bradley Beanes asked John Hodges to arrange the return of the prisoners from Queen Anne to the British military.[171] Dr. Bradley Beanes also asked Hodges to secure

157. *Id.*
158. *Id.* at 13.
159. *Id.*
160. *Id.* at 13–14.
161. *Id.* at 14.
162. *Id.*
163. *Id.* at 15.
164. *Id.*
165. *Id.* at 15–16.
166. *Id.*
167. Samuel Tyler is possibly the husband of Justice Gabriel Duvall's aunt, Susannah Duvall. *See Family: Samuel Tyler / Susannah Duvall*, EARLY COLONIAL SETTLERS OF SOUTHERN MARYLAND AND VIRGINIA'S NORTHERN NECK COUNTIES, http://www.colonial-settlers-md-va.us/familychart.php?personID=I022982&tree=Tree1 (last visited Oct. 8, 2019).
168. HODGES, *supra* note 1, at 16.
169. *Id.* at 17–18.
170. *Id.* at 17.
171. *Id.*

a deserter kept by Robert Bowie whom Bowie "strenuously contended that they had no right to demand"; Dr. Bradley Beanes stated the deserter would be executed if returned.[172] Dr. Bradley Beanes "told [Robert Bowie] he need not be uneasy about the deserters – that that thing could be managed"—implying the deserters may be permitted to escape.[173] The second witness for the defense, J. Donaldson, Esq., testified he "never considered him [Holden] a deserter" and Donaldson did not think Hodges knew Holden was a deserter.[174]

2. Deserters, Stragglers, and/or Prisoners

Despite not being present at John Hodges's treason trial—except for Thomas Holden, who was a witness—the British soldiers at the heart of Hodges's allegedly treasonous actions played a significant role in the trial.[175] Witness testimony highlights the distinction between stragglers or prisoners[176] and deserters.[177] Further, witness testimony points to John Hodges's intending to return prisoners to the British but not deserters.[178] 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 Holden] up."[179]

Witness testimony also recognized deserters may be executed if returned to the British military.[180] For example, William Caton testified that Caton told Hodges that "if [Hodges] surrendered the deserter he was no American – [Hodges] would stain his hands with human blood," and Dr. Bradley Beanes testified that Robert Bowie was concerned that "[Bowie's] prisoner . . . if he was a deserter" would be killed if returned to the British.[181] The trial report's introduction only refers to "three or four stragglers" without mention of any deserters.[182] It is unclear if the omission of "deserter" from the introduction is a mistake by the author or an effort to deemphasize the possibility that Hodges did not intend to return deserters to the British.

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172. *Id.*
173. *Id.* at 17–18.
174. *Id.* at 18.
175. *Id.* at 14.
176. The term straggler and prisoner are used interchangeably in the trial report. For purposes of clarity, this Article will use the term prisoner or prisoners to delineate British soldiers arrested in Upper Marlboro that were not deserters.
177. *See supra* Part III.B.1.
178. *See* HODGES, *supra* note 1, at 10–18.
179. *Id.* at 10–11, 13.
180. *See* HODGES, *supra* note 1, at 10–18.
181. *Id.* Prisoners returned to the British would likely not face death. Under conventions between the United States and Britain, prisoners from one side could be exchanged for prisoners from the other side. *See generally* HICKEY, *supra* note 84, at 177–80 (discussing the history of prisoner exchange between American and British militaries); CHARLES H. MURPHY, CONG. RES. SERV., PRISONERS OF WAR: REPATRIATION OR INTERNMENT IN WARTIME 2 (1971).
182. HODGES, *supra* note 1, at 5.

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

The report's distinction between returning *prisoners* and returning *deserters* begs the question: Which of Hodges's actions constituted treason? Did Hodges commit treason by returning prisoners and deserters? Did Hodges commit treason by returning the prisoners and allowing deserters to go free? Or, was the act of returning deserters to the British treasonous? The prosecutor, Elias Glenn, points to the latter:

> In a moral point of view, some excuse might be found for his [Hodges's] 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.[183]

Further, the prosecution attempted to build a case against Hodges—on witness testimony—that Hodges knew he was returning at least one deserter.[184] The prosecution's witness testimony was insufficient and created doubt as to whether Hodges actually knew of the possible British deserters or intended to return the British deserters to the British.[185] For example, General Robert Bowie testified that he said the deserter "must not be delivered up" but was unsure if "Hodges was present when this one was stated to be a deserter."[186] Holden, a British deserter, testified that Hodges told Holden that he was "not determined to carry [Holden] in."[187] Additionally, General Robert Bowie testified a second time, specifically, to state, "Hodges never pressed the delivery of the deserter."[188]

The two defense witnesses further strengthened the assertion that Hodges either did not know there were deserters or that Hodges intended to allow deserters to go free.[189] For example, Dr. Bradley Beanes informed Robert Bowie that "[Bowie] need not be uneasy about the [fate of the] deserters," implying "that an opportunity would be given to the deserters to make their escape."[190] Additionally, J. Donaldson stated "it was impossible" that Hodges knew Thomas Holden was a deserter.[191]

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."[192] Glenn's use of "or" between the words prisoners

183. *Id.* at 9–10.
184. *See supra* Part III.B.1.
185. HODGES, *supra* note 1, at 10–17; *see supra* Part III.B.1.
186. HODGES, *supra* note 1, at 12.
187. *Id.* at 14.
188. *Id.* at 16.
189. *Id.* at 17–18.
190. *Id.*
191. *Id.* at 18.
192. *Id.* (emphasis added).

and deserters may be a means of compensating for weak witness testimony. Further, using "or" may be an attempt to expand the doctrine of treason to include the return of prisoners, as well as deserters.[193]

Glenn emphasized that proving treason required consideration of "the facts and the intention."[194] In Hodges's case, Glenn saw only "two inquiries to be made . . . [d]id [Hodges] deliver the prisoners . . . [and] [d]id [Hodges] intend to do so?"[195] Answering yes to both inquiries established treason. In Glenn's opinion, Hodges delivered the prisoners and intended to deliver the prisoners and, therefore, committed treason.[196] Glenn did not mention returning deserters; he only mentioned returning prisoners. It is unclear whether Glenn intended for the word prisoners to also include deserters; whether Glenn meant to make a distinction between prisoners and deserters; or if the omission of deserters is a mistake in the record.

William Pinkney argued on behalf of Hodges, stating that Hodges "[was] entitled to be sheltered by his motives from the imputation of treason."[197] Pinkney argued that Hodges's actions were justified because Hodges was motivated to save his town from "[a] hostile force" and secure release of Dr. Beanes, Dr. Hill, and Weems.[198] To rebut, Glenn argued that motive was not an excuse.[199] Specifically, Glenn argued 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."[200]

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."[201] 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!"[202] Pinkney argued that the United States must "prove what they allege" in the indictment and that Hodges acted "*wickedly, maliciously*, and *traitorously*."[203] Pinkney alleged that Hodges was tried either to be made an example of or "to bring down VENGEANCE upon him"—accentuating the assertion made in the report's introduction that "[t]here is every reason

193. *Id.*
194. *Id.* at 21.
195. *Id.*
196. *Id.* at 20–21.
197. *Id.* at 25.
198. *Id.* at 15, 27.
199. *Id.* at 21.
200. *Id.*
201. MARYLAND STATE BAR ASS'N, REPORT OF THE NINTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION HELD AT ANNAPOLIS, MARYLAND 81 (James U. Dennis, ed., 1904).
202. HODGES, *supra* note 1, at 25, 32.
203. *Id.* at 30 (explaining Pinkney's demand that the United States prove what is in the indictment harkens back to Chief Justice Marshall's opinion in *United States v. Burr*, 25 F. Cas. 55, 76 (C.C.D. Va. 1807)).

to believe that Mr. Hodges was persecuted for high treason at the instigation of the government."[204]

4. Justice Duvall's Opinion and the Jury

Following witness testimony, Glenn requested the court instruct the jury on the law.[205] Pinkney criticized Glenn for the timing of this request—stating that, after the case is closed, the court "may indeed *advise*" if requested by the jury or if the court thought it "proper to do so without being asked."[206] Pinkney stated that "the established order of [the] trial [was] deserted" and, in doing so, "the court [was] called upon to mix itself in [jury] deliberations."[207] Further, Pinkney requested the court "go on in the customary and legal manner" and, if the court "g[a]ve the direction, [Pickney] shall not submit to it" and "tell the jury that it is not law."[208]

Justice Duvall recognized that the case had not "gone through in the usual way" but, regardless, offered his opinion on the law:[209]

> 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.[210]

Judge Houston followed that "he did not entirely agree with the chief justice in any, except the last remark."[211]

Pinkney responded to Justice Duvall's delivery of his opinion of the law—as Pickney said he would—and told the jury "[t]he opinion which the chief justice has just delivered is not . . . the law of this land."[212] Pinkney asserted that Justice Duvall's interpretation of the law—that Hodges's conduct in returning the prisoners "import[ed] the wicked intention charged by the indictment"—was constructive treason.[213] Pickney argued that such a broad interpretation of the doctrine of treason would be

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204. HODGES, *supra* note 1, at 4, 29.
205. *Id.* at 18–19.
206. *Id.* at 19.
207. *Id.* at 29.
208. *Id.* at 19.
209. *Id.* at 27.
210. *Id.* at 28.
211. *Id.*
212. *Id.* at 19, 28.
213. *Id.* at 32.

dangerous and 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?"[214] Pinkney also conjectured that Justice Duvall's construction of the treason doctrine would result in General Robert Bowie being charged with treason, and that "half [of] Prince George's county would come within its baleful influence."[215]

Pinkney concluded his address to the jury by calling "upon [the jury], as you are honourable [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."[216] According to the trial report, "The Jury, without hesitating a moment, rendered a verdict of – NOT GUILTY."[217]

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?[218] A number of reasons are possible: the jury understood its role as deciders of the facts and the law and determined the law as the jury 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; 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.

As discussed in Part I.B, the jury in early America was viewed as "protecting ordinary individuals against governmental overreach[]."[219] In this context, the jury in Hodges's trial may have taken on the role John Adams advocated—the jury must safeguard "fundamental Principles," especially when "judges should give their Opinions to the jury" counter to "fundamental Principles."[220] The jury in Hodges's trial may have found Justice Duvall's opinion counter to Adams's conception of "fundamental Principles", in particular whether the United States had "prove[n] what they allege[d]" in the indictment—that Hodges acted "*wickedly, maliciously*, and *traitorously*."[221] Alternatively, the jury may have found Hodges not guilty based on a "verdict according to . . . conscience."[222] Even Justice Duvall recognized the jury was "not bound to conform to

214. *Id.* at 33.
215. *Id.* at 34.
216. *Id.* at 35.
217. *Id.*
218. *Id.* at 27–28.
219. Blinka, *supra* note 34, at 136 (quoting AMAR, *supra* note 58, at 84); *see supra* Part I.B.
220. John Adams Diary, *supra* note 69, at 8.
221. HODGES, *supra* note 1, at 30.
222. HALE, *supra* note 57, at 27 (quoting *Comment: The Changing Role of the Jury in the Nineteenth Century*, *supra* note 70); *see supra* Part I.B.

[his] opinion, because they have a right . . . to decide on the law and the facts."[223]

According to the trial report, the court's opinion on the law was not given after the case had closed but, instead, before Pinkney's final address to the jury.[224] The trial report states: the "court 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 Houston "did not entirely agree with the chief justice in any, except the last remark."[225] The opinions of Justices Duvall and Houston indicate a divided court. The jury needed to decide between the differing opinions of Justice Duvall and Judge Houston; the jury ultimately accepted Judge Houston's opinion.[226]

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"; Pinkney 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."[227] Justice Duvall may have purposefully stated his opinion outside of "the customary and legal manner" knowing Pinkney would disagree and tell the jury Duvall's opinion was not law, and the jury could find differently than Justice Duvall. Duvall knew Pinkney's oratorical abilities. Duvall may have anticipated Pinkney's closing statements inspiring the jury to find Hodges not guilty. In this scenario, Justice Duvall saves face with the government—he told the jury Hodges was guilty—while also securing Hodges's freedom.[228]

The jury's verdict in Hodges's 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 upon their own consciences."[229] Though the term—jury nullification—was likely an uncommonly used phrase until the twentieth century, the concept of jury nullification was present in early American jurisprudence.[230] For example, before the Civil War, juries in northern states often acquitted—despite overwhelming evidence of guilt—abolitionists charged with helping slaves under the Fugitive Slave Laws.[231] Finding Hodges not guilty—despite Justice Duvall's opinion on the law—may be an early example of jury nullification.

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223. HODGES, *supra* note 1, at 28.
224. *Id.* at 27–28.
225. *Id.*
226. *Id.* at 35.
227. *Id.* at 19.
228. *Id.* at 19, 27–28.
229. *Jury Nullification*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008).
230. HANS & VIDMAR, *supra* note 60, 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 57, at 61 n.4.
231. HANS & VIDMAR, *supra* note 60, at 149.

2. Why was John Hodges Tried for Treason?

According to the trial report's introduction, "There is every reason to believe Mr. Hodges was persecuted for high treason at the instigation of the government."[232] If this is correct, why did the government target Hodges after the war ended?[233] Further, why was Hodges tried for treason while others whom acted similarly were not? For example, why were residents of Alexandria, Virginia not charged with treason for surrendering naval supplies and other items to the British in August 1814?[234] Additionally, why was Dr. William Beanes not charged with treason for allowing British General Robert Ross to stay in his home before the British burned Washington, D.C.—an act that seems consistent with "adhering to the enemy, giving him aid and comfort"?[235]

In August 1814, the residents of Alexandria, Virginia confronted a similar dilemma as the residents of Upper Marlboro.[236] British gun boats threatened to destroy Alexandria if terms of capitulation were not met.[237] The terms of 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."[238] To save Alexandria, the Common Council of Alexandria agreed to the capitulation terms.[239] Though Alexandrians were criticized for being part "of the disgraceful disasters that . . . overwhelmed" America, no one

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232. HODGES, *supra* note 1, at 4.

233. 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 themselves as residents of the United States, not simply as residents of their individual states. This was particularly felt in the Chesapeake Region. 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 U.S. government felt it was necessary to try Hodges for treason 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. *The Unfinished Revolution*, NAT'L PARK SERV.: THE AM. REVOLUTION, https://www.nps.gov/revwar/unfinished_revolution/war_of_1812.html (last updated Dec. 10, 2003).

234. Alexandria did not unanimously support the war. For example, Samuel Snowden, editor of the *Alexandria Daily Gazette*, in response to the declaration of war, 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 PUBL'N, no. 127, 2014, at ii, 1–2; *The Occupation of Alexandria and the War of 1812*, CITY OF ALEXANDRIA, VIRGINIA, https://www.alexandriava.gov/1812 (last updated Mar. 4, 2019).

235. *See, e.g.*, Magruder Jr., *supra* note 107; Meg Fielding, *Dr. Beanes: The Forgotten Man in the Star-Spangled Banner Story*, BALTIMORE FISHBOWL (Sept. 12, 2014), https://baltimorefishbowl.com/stories/forgotten-man-behind-national-anthem/.

236. *History of Alexandria and the War of 1812: A Brief History*, CITY OF ALEXANDRIA, VIRGINIA, https://www.alexandriava.gov/historic/info/default.aspx?id=78273 (last updated July 2, 2019) [hereinafter *History of Alexandria*]; *The Occupation of Alexandria and the War of 1812*, *supra* note 234.

237. *History of Alexandria*, *supra* note 236; *The Occupation of Alexandria and the War of 1812*, *supra* note 234.

238. *History of Alexandria*, *supra* note 236; *The Occupation of Alexandria and the War of 1812*, *supra* note 234.

239. *History of Alexandria*, *supra* note 236; *The Occupation of Alexandria and the War of 1812*, *supra* note 234.

in Alexandria was charged with treason for "adhering to [the] enemies, giving them aid and comfort."[240]

As discussed in Part II.A, British General Ross used Dr. William Beanes's home as a headquarters for a "council of war with Admiral Cockburn."[241] There is no indication that Dr. Beanes tried to prevent General Ross's use of his home.[242] There is indication that Dr. Beanes was "disposed to treat [the British] as friends."[243] The record further indicates General Ross felt Dr. Beanes "deceived and broke[] [General Ross's] faith" by taking part in the arrest of British soldiers.[244] Given Dr. Beanes's conspicuous acceptance of General Ross's use of his home, why was Dr. Beanes not charged with treason for "adhering to [the] enemies, giving them aid and comfort"?[245]

John Hodges may have been charged with treason while others were not because Hodges was an easier target that the government could use to dissuade others who were contemplating similar acts. The same motivation that resulted in Fries's conviction for treason in 1799—to make an example of someone as a warning to others—likely motivated the government to charge Hodges with treason.[246] The government may have sought conviction of Hodges to maintain "the stability of [the country's] government" during the War of 1812; Pinkney alluded to the desire for stability when he stated: "As if the salvation of the state depended upon the conviction of this unfortunate man."[247]

Charging the Common Council of Alexandria with treason was 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 old Dr. Beanes" who was taken and "treated with indignity" by the British.[248] Hodges was likely viewed as an

240. U.S. CONST. art. III, § 3; John Minor to Thomas Jefferson (Sep. 8, 1814), http://founders.archives.gov/documents/Jefferson/03-07-02-0465; *see, e.g.*, William Charles, *Johnny Bull and the Alexandrians*, LIBRARY OF CONG., http://www.loc.gov/pictures/item/2002708985/ (last visited Oct. 9, 2019).

241. Magruder Jr., *supra* note 107.

242. *See, e.g.*, *id.* at 220.

243. *Id.* at 221 (quoting GEORGE GLEIG, A SUBALTERN IN AMERICA 46 (Carey, Hart & Co. 1883)).

244. Magruder Jr., *supra* note 107, at 220 (quoting Chief Justice Taney's account of Dr. Beanes's arrest).

245. U.S. CONST. art. III, § 3.

246. *See supra* Part I.A.1.

247. HODGES, *supra* note 1, at 29; To John Adams from Timothy Pickering, *supra* note 48. 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. HODGES, *supra* note 1, at 29.

248. Magruder Jr., *supra* note 107, at 219; 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.

easy target for the government to demonstrate to citizens that the government was not "too feeble to check the treason which is formed in the very heart of the people it affects to rule."[249]

IV. IMPACTS OF THE CASE

John Hodges's treason trial ended in May 1815.[250] The War of 1812 was officially over three months prior, on February 17, 1815, with ratification of the Treaty of Ghent.[251] The individuals related to the crime and the case resumed their lives, and America continued to grow and develop as a nation. Significant today is what the Hodges's treason trial demonstrates about the use of the treason doctrine since the early 1800s, and 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.[252] The Constitution defines the crime of treason narrowly, which has resulted in very few court cases interpreting the treason doctrine.[253] Since the founding of the United States, treason charges have been brought less than forty times—most commonly during times of conflict including the Civil War, World War II, and the War on Terrorism.[254] The government has relied on other federal laws—including the Espionage Act of 1917,[255] the Uniform Code of Military Justice,[256] and the 2001 Patriot Act[257]—to prosecute potentially treasonous acts.[258]

Few treason cases have progressed to the U.S. Supreme Court.[259] It was not until 1945 that the Supreme Court heard its first treason case—the World War II case, *Cramer v. United States*.[260] Anthony Cramer was convicted of treason by the lower court due to his close relationship with Nazi

249. From Louisa Catherine Johnson Adams to John Quincy Adams, *supra* note 99.
250. HODGES, *supra* note 1, at 18; *John Hodges (of Thomas)*, *supra* note 2.
251. HICKEY, *supra* note 84, at 298.
252. U.S. CONST. art. III, § 3. The crime of treason is currently codified in 18 U.S.C. § 2381 (2019).
253. *Treason*, SALEM PRESS ENCYCLOPEDIA (2015).
254. Id.; Scott Bomboy, *Aaron Burr's Trial and the Constitution's Treason Clause*, NAT'L CONST. CTR.: CONST. DAILY (Sept. 1, 2016), https://constitutioncenter.org/blog/the-great-trial-that-tested-the-constitutions-treason-clause; 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.
255. 18 U.S.C. § 792 et seq. (2018).
256. 10 U.S.C. § 802 et seq.
257. 115 Stat. 272 (2001).
258. *Treason*, *supra* note 253.
259. Podger, *supra* note 254.
260. Cramer v. United States, 325 U.S. 1, 3 (1945); *Treason*, *supra* note 253; Podger, *supra* note 254; *see* Scott Bomboy, *Treason Charges for Snowden Would Be Rare, Challenging*, NAT'L CONST. CTR.: CONST. DAILY (June 11, 2013), https://constitutioncenter.org/blog/treason-charges-for-snowdon-would-be-rare-challenging/.

saboteurs.[261] The Supreme Court found no overt act of treason and reversed Cramer's conviction.[262] The last treason case heard by the Supreme Court was in 1952—the case of *Kawakita v. United States*.[263] The outcome turned on whether Kawakita was an American citizen when he performed the treasonous acts during World War II. The Court affirmed Kawakita's conviction on treason charges for his actions in a Japanese prisoner-of-war camp, finding that he retained his U.S. citizenship.[264]

The rise of terrorism in the twenty-first century 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.[265] In 2001, the government analyzed treason as a potential criminal charge against John Walker Lindh.[266] Lindh—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 material support and resources to . . . al-Qaeda and Harakat ul-Mujahideen"; and "engaging in prohibited transactions with the Taliban."[267] Lindh was not charged with treason, likely due to the difficulty of meeting the two witnesses required by the U.S. Constitution.[268]

The treason doctrine was most recently applied in the case against Adam Yahiya Gadahn.[269] In 2006, Gadahn became the first American in over fifty years to be indicted for treason for the act of providing aid and comfort to al-Qaeda.[270] The U.S. Federal Bureau of Investigation (FBI) added Gadahn to the *Most Wanted Terrorist* list; the U.S. State Department offered a reward for his arrest.[271] Gadahn was likely killed in January 2015

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261. *Treason*, *supra* note 253; Podger, *supra* note 254; *see* Bomboy, *supra* note 260.

262. *Treason*, *supra* note 253; Podger, *supra* note 254; *see* Bomboy, *supra* note 260.

263. Kawakita v. United States, 343 U.S. 717, 719–20 (1952); *Treason*, *supra* note 253.

264. *Kawakita*, 343 U.S. at 720–21, 727.

265. *See, e.g.*, *Treason*, *supra* note 253; 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); JOHN YOO, U.S. DEPT. OF JUSTICE, POSSIBLE CRIMINAL CHARGES AGAINST AMERICAN CITIZEN WHO WAS A MEMBER OF THE AL QAEDA TERRORIST ORGANIZATION OR THE TALIBAN MILITIA (2001); *Statement by the Press Secretary*, WHITE HOUSE (Apr. 23, 2015), https://www.whitehouse.gov/the-press-office/2015/04/23/statement-press-secretary.

266. YOO, *supra* note 265.

267. Affidavit in Support of a Criminal Complaint and an Arrest Warrant, see United States v. Lindh, 212 F. Supp. 2d 541, 541 (E.D. Va. 2002). Lindh plead guilty and was sentenced to twenty years in prison. He was released in May 2019, after serving seventeen years of his twenty-year sentence. Greg Myre, *John Walker Lindh, the 'American Taliban,' is Released from Prison*, NPR (May 23, 2019, 10:10 AM), https://www.npr.org/2019/05/23/725865999/john-walker-lindh-the-american-taliban-set-to-be-released.

268. YOO, *supra* note 265.

269. *See* Raffi Khatchadourian, *Azzam the American: The Making of an Al Qaeda Homegrown*, NEW YORKER (Jan. 22, 2007), http://www.newyorker.com/magazine/2007/01/22/azzam-the-american.; *see also Most Wanted Terrorists: Adam Yahiya Gadahn*, FBI, https://www2.fbi.gov/wanted/terrorists/gadahn_a.htm (last visited Oct. 9, 2019).

270. Khatchadourian, *supra* note 269; *see Most Wanted Terrorists: Adam Yahiya Gadahn*, *supra* note 269.

271. *Most Wanted Terrorists: American Charged with Treason*, FBI (Oct. 11, 2006), https://archives.fbi.gov/archives/news/stories/2006/october/gadahn_101106.

as part of a U.S. counterterrorism operation before he could be brought to trial.[272]

Possible Russian involvement in the 2016 presidential election, the current impeachment process, and widening political divides under the Trump Administration have renewed discussions over treason. Unfortunately, much of the discussion highlights the lack of clarity and understanding of what constitutes the crime of treason—resulting in more rhetoric than substance.[273] In 2018, U.S. District Court Judge Emmet G. Sullivan used the word treason during a hearing for former National Security Advisor Michael Flynn.[274] Judge Sullivan later clarified his statement, stating he "fe[lt] terrible about [implying Flynn committed treason]."[275] Recently, treason has been referenced in relation to the impeachment inquiry of President Donald Trump. The inquiry is examining if the President committed an impeachable offense—including treason.[276] In response, the President has accused multiple members of Congress and the whistleblower—whose complaint concerning a call between the President and the Ukrainian President led to the inquiry—of committing treason.[277] As treason again enters the common vernacular as a form of political weaponry, it is important not to fall into a rhetoric of constructive treason. Rather, we must look at the historical framework of how the treason doctrine developed to truly understand how it can and should be applied—as a safeguard against wartime support of enemies, not as a political weapon.

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

The jury's role in American jurisprudence continues to evolve.[278] Shifting societal and political climates, and changes to the legal system,

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272. *Statement by the Press Secretary*, *supra* note 265.

273. *See, e.g.*, Steve Vladeck, *Americans Have Forgotten What 'Treason' Actually Means—and How it Can be Abused*, NBC: THINK (Feb. 16, 2018, 10:10 AM), https://www.nbcnews.com/think/opinion/americans-have-forgotten-what-treason-actually-means-how-it-can-ncna848651 (describing "the need for a long overdue moratorium on the blithe characterization of things as 'treason'); A.G. Sulzberger, *Accusing the* New York Times *of 'Treason,' Trump Crosses a Line*, WALL ST. J. (June 19, 2019, 6:59 PM), https://www.wsj.com/articles/accusing-the-new-york-times-of-treason-trump-crosses-a-line-11560985187 (discussing President Trump's June 2019 treason accusations against the *New York Times*).

274. *See, e.g.*, Deanna Paul, *A Judge Implied that Flynn was a 'Traitor' Who Committed 'Treason.' What Does That Actually Mean?*, WASH. POST (Dec. 20, 2018, 2:38 PM), https://www.washingtonpost.com/politics/2018/12/20/judge-implied-flynn-was-traitor-who-committed-treason-what-does-that-actually-mean/?utm_term=.48419173f954.

275. Andrew M. Harris & Tom Schoenberg, *Flynn Sentencing Postponed as Judge Raises Doubts: Court Update*, BLOOMBERG (Dec. 18, 2018, 9:16 AM), https://www.bloomberg.com/news/articles/2018-12-18/ex-trump-aide-flynn-to-be-sentenced-in-washington-court-update.

276. U.S. CONST. art. II, § 4.

277. Kyle Balluck & Aris Folley, *Trump Suggests Pelosi Committed Treason, Should be 'Immediately Impeached'*, HILL (Oct. 7, 2019, 7:04 AM), https://thehill.com/homenews/administration/464603-trump-suggests-pelosi-committed-treason-should-be-immediately; Sonam Sheth & Grace Panetta, *Trump Suggested the Whistleblower who Filed a Complaint Against Him is Guilty of Treason, which is Punishable by Death*, BUS. INSIDER (Sept. 26, 2019, 11:40 AM), https://www.businessinsider.com/trump-suggests-whistleblower-guilty-of-treason-2019-9.

278. *See generally* HANS & VIDMAR, *supra* note 60, at 43–44; HALE, *supra* note 57; Blinka, *supra* note 34, at 189.

have spurred evolution of the jury's role.[279] Specifically, the jury as deciders of the facts and the law has changed dramatically.[280] The U.S. Supreme Court's decision in *Sparf and Hansen v. United States*[281] and recent Maryland-specific decisions highlight the significant evolution of American juries.[282]

1. *Sparf and Hansen v. United States*

In 1895, the U.S. Supreme Court examined the jury's role as deciders of the law in the case *Sparf and Hansen v. United States*.[283] Writing for the majority, Justice John Marshall Harlan examined English and American legal history; Justice Harlan found nothing in the legal history sanctioning the right of juries to judge the law or decide a case contrary to the court's instructions.[284] He feared that giving juries too much latitude to decide the law would create a "government of men"—not a "government of laws"—resulting in inconsistency and diminished individual liberties.[285] Specifically, he stated, "We 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 from the court and apply that law to the facts as they find them to be from the evidence."[286]

In a one-hundred-plus-page dissent, Justice Horace Gray criticized the majority's opinion and stated, "The 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."[287] Further, Justice Gray harkened back to the concept of a "verdict according to conscience," stating, "[T]hat 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."[288] Despite the differing opinions of Justices Harlan and Gray in *Sparf*, the Court ultimately "recognized that judges had no recourse if jurors acquitted in the face of overwhelming inculpatory evidence and law" acknowledging the potential for jury nullification.[289]

279. HANS & VIDMAR, *supra* note 60, at 43–44.
280. *See generally* HANS & VIDMAR, *supra* note 60, at 36–40; HALE, *supra* note 57; Blinka, *supra* note 34, at 136–40.
281. 156 U.S. 51, 182–83 (1895).
282. *See generally id.*; State v. Waine, 122 A.3d 294, 295 (Md. 2015); Unger v. State, 48 A.3d 242, 244 (Md. 2012); Stevenson v. State, 423 A.2d 558, 559 (Md. 1979), *overruled by Unger*, 48 A.3d at 242.
283. 156 U.S. at 59–183.
284. HALE, *supra* note 57, at 134; *see generally Sparf*, 156 U.S. at 106–07.
285. *Sparf*, 156 U.S. at 102–03.
286. *Id.* at 102.
287. *Id.* at 113.
288. *Id.* at 114; *see supra* Part I.B.
289. 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).

2. Maryland: The *Unger* Cases

Until 1979, a judge in Maryland could advise the jury that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact."[290] In the 1979 case of *Stevenson v. State*,[291] the Maryland Court of Appeals 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."[292] 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.[293] 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 it.[294]

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.[295]

The court in *Stevenson* did not determine whether the decision would have retroactive effect on cases tried before the *Stevenson* decision.[296] In 2012, the Maryland Court of Appeals decided *Unger v. State*[297] and determined the *Stevenson* court set forth a new state constitutional standard and that the standard is retroactive.[298] Specifically, the court stated:

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290. 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 Siegel, *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.

291. 423 A.2d 558 (Md. 1980), *overruled by* Unger v. State, 48 A.3d 242 (Md. 2012).

292. *Stevenson*, 423 A.2d at 564 (Md. 1980) (quoting Wheeler v. State, 42 Md. 563, 570 (1875), then quoting Beard v. State, 71 Md. 275, 280 (1889)).

293. *Stevenson*, 423 A.2d at 565.

294. *Id.*

295. *Id.* at 570.

296. *Id.* at 569–70; Siegel, *supra* note 290.

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

298. *Id.* at 261.

> [T]he *Stevenson* and *Montgomery*[299] 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.[300]

Based on the *Unger* decision, approximately 250 incarcerated men and one woman were entitled to new trials.[301] Some will be retried, others will be offered resentencing.[302] To date, close to 200 incarcerated individuals effected by the *Unger* decision have negotiated resentencing deals.[303] Under negotiated resentencing deals, prisoners accept guilt, waive future appeals, or are resentenced to time served.[304]

Stevenson and *Unger* reflect a changing concept of the role of the jury 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.[305] For example, many of the prisoners entitled to new trials pursuant to the *Unger* decision are African-American men.[306] For many, they were unable to afford adequate representation and were convicted by juries of white men and women—at a time when racial tensions were heightened.[307] Racial biases that may have informed jury decisions in the 1960s and 1970s are not the same civil rights issues that Adams addresses when referring to the jury as protectors of "fundamental Principles."[308] These Maryland cases reflect the need to evolve the jury's role to changing societal concerns.

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299. In *Montgomery v. State*, 437 A.2d 654, 656–57 (Md. 1981), the court reaffirmed the decision in *Stevenson*.

300. *Unger*, 48 A.3d at 261 (footnote omitted).

301. Jason Fagone, *Meet the Ungers*, HUFF. POST (May 17, 2016), http://highline.huffingtonpost.com/articles/en/meet-the-ungers/; Siegel, *supra* note 290. For an extensive description and analysis of the *Unger* cases and the University of Maryland Francis King Carey School of Law's *Unger* Clinic, see Michael Millemann et al., *Digging Them Out Alive*, 25 CLINICAL L. REV. 365, 365–66 (2019). *Unger* was affirmed in *State v. Waine*, 122 A.3d 294, 295 (Md. 2015).

302. Fagone, *supra* note 301; Siegel, *supra* note 290.

303. Fagone, *supra* note 301; Siegel, *supra* note 290.

304. Siegel, *supra* note 290; *see* Fagone, *supra* note 301.

305. HALE, *supra* note 57, at 61 (quoting *Comment: The Changing Role of the Jury in the Nineteenth Century*, *supra* note 70, at 170); John Adams Diary, *supra* note 69.

306. Fagone, *supra* note 301; Siegel, *supra* note 290.

307. Fagone, *supra* note 301.

308. HALE, *supra* note 57, at 61 (quoting *Comment: The Changing Role of the Jury in the Nineteenth Century*, *supra* note 70, at 170); John Adams Diary, *supra* note 69.

CONCLUSION

The 1815 treason trial of John Hodges highlights early interpretations of the treason doctrine and the role of the jury as deciders of the facts and the law. Examining Hodges's trial—within the context of the War of 1812 and the 1807 treason trial of Aaron Burr—further highlights the role that the treason doctrine and the jury played in maintaining "the stability of [the new country's] government" and "protecting ordinary individuals against government overreach[]."[309] Hodges's trial demonstrates the difficulty in reaching a conviction under the treason doctrine—a difficulty that has resulted in few cases of treason throughout American history and the safeguarding of citizens agains the pernicious use of constructive treason.[310] Additionally, Hodges's trial provides a differentiation to current views of the jury's role as deciders of facts and narrow role as deciders of the law, demonstrating the necessary evolution of the jury in American jurisprudence.[311] The long-forgotten treason trial of John Hodges provides important lessons about the history of the treason doctrine and the role of the jury in the United States. It is essential to continued democratic progress that we understand the historical development and evolution of the treason doctrine and the role of the jury in the United States—knowing where we come from can thoughtfully guide us to a stronger, more just, democracy.

309. To John Adams from Timothy Pickering, *supra* note 48; Blinka, *supra* note 34, at 136 (citing AMAR, *supra* note 58).

310. *See supra* Part IV.

311. *See supra* Part IV.