Connecticut Federalists in President Jefferson's (Republican) Court: *United States v. Hudson and Goodwin*

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One of the most controversial issues in the years following the American Constitution's ratification was the role of common law, particularly the common law of crimes, in the nation's federal courts.[1] Specifically, federal judges, lawyers, and members of the Federalist and Republican parties disagreed intensely about whether federal judges could base their decisions on sources of law other than the federal Constitution and federal statutes and, if so, what sources they could use.

Advocates of a federal common law jurisdiction believed that the nation's courts needed authority to address issues not anticipated by the Constitution's framers or members of the first sessions of Congress, especially crimes against the new federal government. Opponents feared that the federal judiciary would, if allowed such jurisdiction, usurp Congress' law-making power and extend the federal government's authority beyond that granted by the individual states.[2] With some notable exceptions,[3] the debate generally followed party lines; Federalists, who admired British common law traditions, favored a federal common law jurisdiction while the Republicans, who favored the more democratic French political system, opposed it.[4] The existence of a federal common law jurisdiction was, therefore, both an important legal and political issue. After more than twenty years of debate, however, the United States Supreme Court settled the matter in the 1812 case of *United States v. Hudson and Goodwin*.[5]

Thomas Jefferson was one of the Republicans who opposed a federal common law of crimes and his campaign against such jurisdiction was part of his larger battle to limit federal courts' power.[6] Considering scholars' apparent inability to explain why "Jefferson was so bitter toward the Supreme Court[,]" former United States Supreme Court Chief Justice Warren Burger speculated that "it was because, although Jefferson did not love England, he was an admirer of the parliamentary system, and he espoused the idea that the hardy yeomen of America, not six or nine non-elected Justices, should run the country."[7] Alternatively, Burger suggested that it was because, in *Marbury v. Madison*, then-Chief Justice John Marshall "went out of his way to scold—even excoriate—Jefferson's petty handling of Marbury's commission."[8] Thomas Jefferson's public papers and other contemporary materials suggest that his reaction to, and possible instigation of Hudson and Goodwin's indictments contradicted his prior opposition to federal seditious libel prosecutions—prosecutions based on a federal common law of crimes.[9] There is also considerable evidence that Jefferson influenced how United States District Court Judge Pierpont Edwards handled *Hudson and Goodwin* at the trial court level, including possibly encouraging the prosecution. Moreover, *Hudson and Goodwin* is noteworthy because it involved several prominent Connecticut citizens: Barzillai Hudson and George Goodwin, the defendants in the case, were the editors of the paper that is now known as the *Hartford Courant*; Judge Edwards later helped draft Connecticut's 1818 constitution and Samuel Dana, one of Connecticut's United States Senators, served as Hudson and Goodwin's attorney before the Supreme Court.

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I

Disagreement regarding a federal common law of crimes arose partially from conflicting interpretations of the federal Constitution and statutes implementing its provisions. For example, Article III § 2 of the United States Constitution establishes the types of cases that federal courts may hear.[10] Besides its discussion of treason,[11] Article III's only mention of criminal law is a declaration that "[t]he trial of all Crimes, except in Cases of Impeachment, shall be by jury" in the State where the crime occurred, or, in the case of crimes committed outside the States, at a place designated by Congress.[12] Because the Tenth Amendment proclaims that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"[13] opponents of a federal criminal common law argued that such jurisdiction was unconstitutional. Nevertheless, although the Constitution did not expressly empower federal courts to rely on a common law of crimes, "the federal judiciary under the Constitution was infused with the common law. [Indeed,] American lawyers and judges . . . had been schooled in its principles and methods,"[14] and Section 34 of the Judiciary Act of 1789 required federal courts to follow state law (which was largely based on common law) in certain cases.[15] Further, both the 1789 Process Act and a similar 1790 law established federal court procedures using common law terms and rules.[16] Therefore, "the Constitution itself could not be fully understood without reference to the common law."[17]

Employing common law courtroom rules, however, is quite different from adopting common law definitions of crimes. Further, relying on federal judges' jury instructions and several criminal prosecutions during the 1790s, one historian stated that "[i]t seems to have been commonly assumed that federal authority over crimes

trial, United States District Attorney Rawle also invoked the "law of nations"—a non-statutory source of law—to implore the jury to find Henfield guilty. Specifically, Rawle stated that, if unpunished, Henfield's act would not only draw America into the war, but also ignite a civil war between Americans sympathetic to the British and others supporting the French.[50] Therefore, he argued that it "is an offence against our own country, at common law, because the right of war is vested in the government only."[51]

Henfield's Republican attorneys, however, argued that the court lacked jurisdiction because no federal statute either created such a crime or conferred jurisdiction over such an offense.[52] Ultimately, despite Justice Wilson's charge to the jury that Henfield's enlistment on a French privateer violated both the "law of nations" and America's treaty obligations,[53] the jury found Henfield not guilty. Its verdict did not, however address the legitimacy of a federal criminal common law prosecution.[54] Moreover, Professor Palmer has argued that *Henfield's Case* did not reflect Justice Wilson's support for a federal criminal common law. Instead, Palmer claimed that since the charges against Henfield were based on treaties and the law of nations, Justice Wilson undoubtedly interpreted Section 34 of the 1789 Judiciary Act to apply the law of nations as it was incorporated in Pennsylvania state law, and did not rely on federal criminal common law.[55]

In 1798, District Attorney Rawle pursued another indictment based on federal criminal common law. This time, however, Rawle appeared before United States District Judge Peters and Justice Samuel Chase, the latter being the only Federalist Justice who scholars uniformly agree denied the existence of federal criminal common law jurisdiction. In *United States v. Worrall*,[56] Rawle alleged that Robert Worrall offered a federal tax official a bribe in exchange for a government contract to build a lighthouse on Cape Hatteras, North Carolina.[57] After the jury found Worrall guilty, his Republican attorney moved for an arrest of judgment because the court lacked jurisdiction over the bribery charge.[58] Here, the legitimacy of the federal courts' criminal common law jurisdiction was directly challenged for the first time. Specifically, Attorney Alexander Dallas maintained that "the nature of our Federal compact, will not . . . tolerate th[e] doctrine" of "the common law [as] the law of the United States" because "the judicial authority of the Federal Courts, must be derived, either from the Constitution of the United States, or from the Acts of Congress made in pursuance of that Constitution."[59] Therefore, since "the Act constituting the office [of Commissioner of Revenue] does not create or declare the offence" of bribing a tax commissioner, no federal court could consider such a charge.[60] Undercutting the authority of *Henfield's Case*, Dallas claimed that Henfield's indictment "expressly charged [him] with a violation of the [nation's] treaties [which was] a matter cognizable under the Federal authority by the very words of the Constitution."[61]

Rawle, however, argued that *Henfield's Case* supported the court's common law jurisdiction. Specifically, he stated that Henfield's indictment was "not expressly on the treaty, but on the law of nations, which is a part of the common law of the United States."[62] Further, he claimed that since federal law created the office of tax commissioner, federal courts had common law jurisdiction to punish attempts to corrupt that office.[63] Indeed, Rawle warned that "unless this offence is punishable in the Federal Courts, it certainly is not cognizable before any State tribunal" and Worrall would go unpunished.[64]

Nevertheless, Justice Chase dismissed Worrall's indictment. "[T]he United States," he said, "as a Federal government have no common law."[65] Justice Chase cogently argued that because each state adopted and later revised different portions of English common law, it was impossible to know what provisions a federal common law would included.[66] Therefore, while Worrall's "indictment [was] for an offence highly injurious to morals, and deserving the severest punishment,"[67] Justice Chase concluded that "[j]udges cannot remedy political imperfections, nor supply any Legislative omission."[68] Judge Peters, however, believed that "[w]henever a government has been established, [he had] always supposed, that a power to preserve itself, was a necessary, and an inseparable, concomitant."[69]

Unable to agree on the applicable law, Justice Chase and Judge Peters, together with Attorney Rawle, wanted to put the case "into such a form, as would admit of obtaining the ultimate decision of the Supreme Court, upon the important principle of the discussion," meaning the existence of a federal criminal common law.[70] Attorney Dallas, however, maintained that he was not "authorised [sic] to enter into a compromise of that nature."[71] Because early federal court rules do not appear to have allowed a prosecutor to appeal a court's dismissal of an indictment, the case was closed.

Considering the Supreme Court's membership in 1798, Dallas' statement appears to have been both a shrewd political and legal tactic. In 1798, the Supreme Court included Chief Justice Ellsworth and Justices Cushing, Iredell, Paterson, Chase, and Washington.[72] Although scholars disagree,[73] there is evidence that Chief Justice Ellsworth and every other Justice except Justice Chase recognized the existence of a federal criminal common law.[74] Accepting this to be true, if Dallas had agreed to certify the question, the Supreme Court would have rejected Chase's position by a five-to-one vote, thereby affirming federal courts' criminal common law jurisdiction. Consequently, Dallas' position served both his client's interest and avoided a political defeat for his emerging Republican party.

While neither *Henfield's Case* nor *Worrall* involved the crime of seditious libel, other federal courts relied on common law jurisdiction to convict Republican newspaper editors of that crime. For example, in 1795 and 1797, Chief Justice Ellsworth presided over two criminal common law libel indictments against the *New-York Journal's* editor.[75] In 1798, before the enactment of the Sedition Act on July 14, federal District Attorneys in New York and Pennsylvania pursued similar indictments against editors of the *Aurora* (Philadelphia), the *Time Piece* (New York) and another unidentified New York newspaper.[76] Consequently, because Federalist judges and prosecutors were consistently punishing the Republican critics of Federalist officials, the issue of a federal criminal common law became an intensely partisan

federal common law was an "audacious" claim, Professor Stewart Jay claims that Henfield's 1793 "prosecution drew the approval of a wide range of important political figures, from Hamilton and Jay to Jefferson and Randolph."[107] Considering Justice Wilson's statement that American law rested on common law and District Attorney Rawle's assertion that Henfield's manning a French privateer was "an offence against our own country, at common law,"[108] some observers conclude that Jefferson must have realized that he was supporting a federal common law prosecution. However, if Jefferson understood the case to have turned on Pennsylvania state law, as Professor Palmer argued, this conclusion is unwarranted.

More tellingly, during the 1808-1809 embargo on foreign trade, Jefferson approved of federal action to enforce the Embargo Act, including the arrest and prosecution of smugglers. Because the Embargo Act did not create penalties for violating the Act, these punishments were based on federal criminal common law. Nevertheless, writing to Treasury Secretary Albert Gallatin on August 11, 1808, Jefferson stated that "I am clearly of opinion this law ought to be enforced at any expense." He maintained that if the resistance to the embargo continued, "Congress must legalize all *means* which may be necessary to obtain it's [sic] *end*."[109] Indeed, Congress later provided such penalties in the January 9, 1809 Enforcement Act.[110] Therefore, it appears that Jefferson may have dropped his opposition to federal courts' criminal common law jurisdiction when doing so served a cause he supported.

While he usually opposed federal courts' power to punish common law crimes, Jefferson regularly sanctioned state common law criminal prosecutions, especially for seditious libel. Indeed, he "accepted without question the dominant view of his generation that government could be criminally assaulted merely by the expression of critical opinions that allegedly tended to subvert it by lowering it in the public's esteem."[111] As early as 1776, Jefferson's drafts of a Virginia law protecting religious freedom upheld "the power of the state to curb dangerous political expressions."[112]

Despite writing to his Attorney General, Levi Lincoln, in 1802 that "I would wish to see the experiment tried of getting along without public prosecutions for libels,"[113] in an 1803 letter marked "entirely confidential" Jefferson encouraged Pennsylvania's Governor to charge a Federalist printer with seditious libel. Denouncing Federalist newspapers, he stated that "I have therefore long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses."[114] Jefferson then explained that "[t]he paper I now inclose [sic] appears to me to offer as good an instance in every respect to make an example of, as can be selected . . . If the same thing be done in some other of the states it will place the whole band more on their guard."[115] Not surprisingly, Pennsylvania later prosecuted the Federalist editor of the Philadelphia *Port-Folio* for seditious libel.[116]

Three years later, in his Second Inaugural Address, Jefferson publicly stated his belief that the "artillery of the [Federalist] press . . . might, indeed, [be] corrected by the wholesome punishments reserved and provided by the laws of the several States against falsehood and defamation."[117] Jefferson's wish that officials outside Pennsylvania pursue seditious libel indictments against Federalist newspapers came true. In 1804 New York indicted the editor of a Federalist paper, *The Wasp*;[118] and two years later federal authorities in Connecticut charged the Federalist editors of the *Connecticut Courant* with seditious libel.[119]

II

In the May 7, 1806 issue of the *Connecticut Courant*, editors Barzillai Hudson and George Goodwin reprinted an April 28, 1806 *Utica* (New York) *Patriot* article discussing President Jefferson's plan to pay France to persuade Spain to sell Florida to the United States. The article claimed that "[t]he administration have recommended, and congress, having sat two months in secret conclave, have voted two millions of dollars, a present to Bonaparte, for liberty to make a treaty with Spain."[120] Asking Revolutionary War veterans to remember their fight against taxes imposed by America's "acknowledged sovereign," the article's author queried its readers "[f]or what did you walk barefoot and bleeding over the frozen hills of New Jersey: For what did your blood flow at Brandywine and Monmouth? That your chosen rulers should become tax-gatherers of an insatiable, savage, blood thirsty tyrant?"[121] Instead, the writer asked his readers "[i]f christians support not the friend of infidelity. If virtuous, reject the vicious. If Americans, discard promoters of foreign influence. If lovers of independence, frown on the supporters of that administration which would link your fate with Holland; Switzerland and Spain, to the chariot wheels of an [sic] usurper."[122]

During Jefferson's presidency, Connecticut was a staunchly Federalist state and one of only two states that did not give him their electoral votes in 1804.[123] Jefferson knew that he could not encourage Connecticut's Federalist state authorities to prosecute the *Connecticut Courant*'s editors for seditious libel. But in March 1806 President Jefferson had appointed Pierpont Edwards, his loyal Connecticut operative and a prominent New Haven lawyer, as Connecticut's federal district court judge.[124] Thereafter, in September 1806,[125] Justice Edwards presided over a federal grand jury, packed with Republicans by the Republican marshal, which issued indictments against Hudson and Goodwin.[126] (Judge Edwards allegedly convened this grand jury in response to a Connecticut state court indictment of the Republican editor of the *Litchfield* (Connecticut) *Witness* for seditious libel earlier that year.)[127] According to the October 1, 1806 *Connecticut Courant*, the court scheduled the editors' trial for its next term in April 1807.[128] While the *Courant* did not reprint Judge Edwards' grand jury charge from this September session, the *Witness* recorded the Judge's April 1806 grand jury charge. The paper's discussion of seditious libel's danger is worth quoting at length, since it likely mirrored his charge to the grand jury that indicted Hudson and Good-win. In April, Judge Edwards had instructed that

> when publications . . . violate the laws of decorum and clearly are not written in order to promote the welfare of the community, but are the offspring of revenge for disappointment, as to party views, unfounded in truth, or principle, are calculated to create distrust and jealousy, to excite hatred against the government, and those who are intrusted with the management of it,

and Goodwin.[156] Ultimately, however, Justice Johnson and a majority of the court adhered to its earlier decision.[157] Nevertheless, Justice Story continued to contend that "a broad criminal jurisdiction was indispensable" to the federal judiciary.[158]

Chief Justice Marshall's position on the doctrine of a federal criminal common law jurisdiction, however, is less clear. Many years before the Supreme Court decided *Hudson and Goodwin*, Marshall "had claimed that the [Sedition Act] was harmless since it only codified the common law criminal rules on seditious libel."[159] Historians could reasonably interpret his approval of the Sedition Act as a reflection of Marshall's support for federal courts' criminal common law jurisdiction.

Marshall's ruling in a subsequent case, however, undermines this inference. In the 1808 case of *U.S. v. Smith*, Marshall rejected the prosecutor's attempt to punish the defendant under both federal statutory and common law.[160] Although he limited the penalty to the statutory punishment, Marshall expressly did not address "the question whether an indictment can be supported in this Court on common law principles."[161] It is unclear whether Marshall believed that the statutory crime and punishment superceded the common law penalties or whether he believed that federal courts did not possess a criminal common law jurisdiction. Some scholars, however, interpret Marshall's decision not to address the issue as a sign that he opposed the doctrine.[162]

Thereafter, when the question was put directly to the Supreme Court in *Hudson and Goodwin*, Marshall did not champion the existence of a federal criminal common law. One possible explanation for this is that Marshall wanted to see the two Federalists escape punishment. Alternatively, one Supreme Court historian speculated that Marshall did not dissent because he opposed the doctrine of federal courts possessing criminal common law jurisdiction. This conclusion, the observer explained, is consistent with Marshall's "opinions concerning the civil jurisdiction of the Supreme Court and the inferior federal courts [which] were clearly aimed at constraining federal judicial activity within the express grants made by the Federal Constitution and congressional action."[163] Considering the lack of a clear statement by Marshall himself, this interpretation appears to be the most reasonable assessment of Marshall's opinion on the subject of a federal criminal common law. Moreover, this conclusion is consistent both with Marshall's political philosophy and his efforts to ensure the Court's legitimacy in the public eye. Marshall shared Justice Johnson's belief that federal courts had limited powers, as expressly provided by the Constitution and federal statutes. Sensitive to the Court's public image, Marshall's decision not to dissent in *Hudson and Goodwin* helped present the Supreme Court as a defender of the federal Constitution.[164]

Jefferson's hypocritical reaction to and possible involvement in the Connecticut seditious libel prosecutions is revealed in his correspondence and other contemporaneous documents. In a June 13, 1809 letter to his political lieutenant, Virginia Congressman Wilson Cary Nicholas, Jefferson discussed the Connecticut seditious libel indictments. "Certain it is," he wrote, "that the prosecution had been instituted, and had made considerable progress, without my knowledge, that they were disapproved by me as soon as known, and directed to be discontinued."[165] He further explained that "I always understood that these prosecutions had been invited, if not instituted, by Judge Edwards, and the marshal being republican, had summoned a grand jury partly or wholly republican."[166] However, despite Jefferson's apology that "I write all this from memory, and after too long an interval of time to be certain of the exactness of all the details,"[167] Jefferson clearly knew of Hudson and Goodwin's indictments soon after the grand jury proceedings concluded.

Three years earlier, in an October 9, 1806 letter, Jefferson's Postmaster General, Gideon Granger, informed him of the case's facts, and expressed concern that the "dreadful doctrines maintained by Federalists . . . are to be sanctioned by precedents given by the republican administration."[168] Even Jefferson's sympathetic biographer Dumas Malone notes that Jefferson likely read an October 17, 1806 *Richmond Enquirer* article discussing the Connecticut grand jury's seditious libel indictments.[169] Thereafter, on December 20, 1806, other Connecticut Republicans, including Thomas Seymour, wrote Jefferson of their "complete approval of [the prosecutions] for libels against the President and Administration of the General Government."[170] Later, on January 2, 1807, Connecticut Congressman Samuel Dana—who would later serve as Hudson and Goodwin's attorney—alerted the House of Representatives to charges brought "in the courts of the United States, not arising under any existing statute or treaty of the United States, but prosecutions sustained at common law."[171] He also identified the defendants as two newspaper "printers. . .[and two] clerical gentlemen."[172] Finally, on February 11, 1807, Jefferson himself discussed the Connecticut prosecutions in a letter to Thomas Seymour. After acknowledging the Federalist state officials' "afflicting oppression" under which the state's Republicans suffered, Jefferson wrote that "[w]ith respect to the countervailing prosecutions now instituted in the Court of the U S in Connecticut, I had heard but little, & certainly, I believe, never expressed a sentiment on them."[173] Further, while he supported restraining the press:

> within the legal & wholesome limits of truth, . . . I leave to others to restore it to it's [sic] strength, by recalling it within the pale of truth. . . . If this can be done in your State, I trust we shall soon see it's [sic] citizens rally to the republican principles of our Constitution, which unite their sister-States into one family.[174]

Considering these several communications, Jefferson was obviously aware of the indictment of Hudson and Goodwin well before their April 1807 trial date. Therefore, Jefferson's statement to Congressman Nicholas that the case had progressed considerably before he learned of it is false. Further, in February 1807 he acknowledged having "never expressed a sentiment on" the trials. Therefore, his claim to have disapproved of these common law seditious libel prosecutions "as soon as known" was also untrue. In reality, Jefferson only intervened to stop the one Connecticut case he feared would be personally embarrassing—that of Azel Backus. And once he decided to stop this prosecution, Jefferson acted quickly.[175]

specifically, Dana stated that he believed that the prosecutor had not "acted altogether on his own opinion; I rather suppose that he was impelled by influence of certain persons who are generally supposed to have the chief weight in appointments under the United States in" Connecticut.[193] These persons likely included Jefferson's Postmaster General, Gideon Granger, who "advised Jefferson on patronage decisions in Connecticut."[194] Therefore, the popular theory implicated one of Jefferson's closest advisors. Indeed, Jefferson's trust in Granger is revealed by the fact that Jefferson recommended that President James Madison appoint Granger to the Supreme Court when Justice Cushing died in 1810.[195] Unfortunately for Granger, Madison found him to be an unacceptable nominee.[196] If Granger was involved, it is unlikely he would have pursued a prosecution so contrary to Republican principles without Jefferson's support. However, Congressman Dana later discounted this theory, stating that in 1807 "he had then mentioned [the Connecticut libel prosecutions] to an officer of the Government, who, when it was mentioned, appeared at that time to have been entirely ignorant of [them]."[197] Nevertheless, it is not an implausible claim that Jefferson directed a trial against one of his enemies. Indeed, Jefferson's role in Vice President Aaron Burr's 1807 treason trial demonstrates how, as President, Jefferson directed another federal prosecution.

In 1806 and 1807, Burr planned to establish an empire in the American Southwest with the help of foreign governments.[198] An army officer foiled his plan by reporting his scheme to Jefferson.[199] Thereafter, Jefferson ordered an investigation of Burr's activities that led to Burr's arrest.[200] During Burr's trial in Richmond, Virginia, Jefferson also interrogated one of the prosecution's key witnesses and offered him a presidential pardon in exchange for his testimony.[201] Jefferson also instructed the prosecutor how to examine the witness at trial.[202] Considering these acts, one writer concluded that "Jefferson was personally directing the prosecution from Washington," and "the conviction of Burr had become an idea so fixed that it clouded his judgment."[203]

Jefferson also meddled in the litigation concerning the New Orleans Batture, an area of sand and silt lying between the river's low water mark and the levee in the city.[204] Although the Batture was traditionally open to the public for various purposes, developers later claimed title to the land and, eventually, sold their purportedly valid title to one of Jefferson's enemies.[205] Jefferson directed the local officials to evict the developer from the Batture after the city transferred its claim of ownership, on behalf of its citizens, to the federal government.[206] When the developer sued him, Jefferson tried to rig the outcome in his favor.[207] First, he tried to use his influence within the Madison Administration to ensure that sympathetic judges—judges that he communicated with directly about his desires—were appointed to the court that would decide the matter.[208] Second, he tried to influence members of Congress to come to his support.[209] Although there is no direct evidence to support the conclusion, considering his active involvement in Burr's treason trial and his attempts to fix the case involving ownership of the New Orleans Batture, it is possible that Jefferson also helped direct Hudson and Goodwin's indictments.

III

Unquestionably, Thomas Jefferson was an active participant in the national political debate over federal courts' criminal common law jurisdiction. However, while he professed opposition to the doctrine, Jefferson flouted other Constitutional and statutory limits to obtain Louisiana and enforce the Embargo Act during his Presidency. Further, while he opposed a federal crime of seditious libel, Jefferson encouraged his Republican allies to use state libel laws to prosecute Federalist newspaper publishers. He also allowed a federal court to prosecute several Connecticut Federalists for seditious libel. Indeed, Jefferson only intervened to stop the prosecutions when one case threatened to reveal his failed attempt to seduce a friend's wife. Even one of his charitable biographers acknowledged that "the charge that [Jefferson] condoned the [Connecticut indictments] for a time is inescapable."[210] However, while his public papers establish that Jefferson was "something of a hypocrite on First Amendment issues,"[211] they do not prove that he personally directed the *Hudson and Goodwin* prosecutions.

Nevertheless, because his letters reveal that Jefferson was not forthright about his knowledge of and reaction to *Hudson and Goodwin*, there is reason to suspect that he encouraged the prosecutions. Further, while no available correspondence contains an order for Judge Edwards to pursue Connecticut's Federalist press, the significant gap in Edwards' papers invites speculation that such a directive, either express or implied, may have existed. Alternatively, Jefferson's other Connecticut political lieutenants, Thomas Seymour or Gideon Granger, may have relayed Jefferson's wishes to either Judge Edwards or the District Attorney. There is also substantial evidence showing a connection between Jefferson's wishes and Judge Edwards' handling of the case.

Undoubtedly, both Jefferson and local Republicans wanted to exact revenge on Connecticut's Federalists for their unending persecution of Republicans within the state. Until 1806, however, the Republicans had no government positions—particularly judgeships—from which to retaliate because Federalists held all of the state offices. In that year, Jefferson's newly-appointed federal district judge quickly began prosecuting Federalists for the federal common law crime of seditious libel, likely with Jefferson's support, and possibly at his suggestion.

Although Jefferson also despised the federal judiciary and wanted to limit its power, it is improbable that he instigated or encouraged these prosecutions as a vehicle to obtain a ruling from the Supreme Court invalidating a federal criminal common law jurisdiction. In early 1806 the Supreme Court had only one Republican Justice—Jefferson's own appointee, William Johnson. If the defendants were convicted and appealed to the high court, and Justice Story and Judge Edwards' reports of the Justices' support for a federal common law of crimes were true,[212] then the Court would likely have reached a decision that Jefferson opposed. Even if Jefferson believed he could delay any such appeal for several years, it is incredible that he could have predicted accurately that the Court would have a Republican majority before it considered the case.

[35] Jay, 1040 n.186 (quoting Wilson's Charge to the Grand Jury for the District of Pennsylvania (Feb. 21, 1791)); see also Preyer, 227; Presser, 326; but see Palmer, 291-92.

[36] Goebel, 610 n.12 (discussing *United States v. Mundell*, 3 Ms. Record Book, Circuit Ct. Virginia Dist., 414 (1795)) (Iredell); Jay, 1084 (internal citation omitted) (Paterson); Preyer, 231 (both); Presser, s 326 (both Justices); but see Palmer, 301 (both Justices merely recognized federal courts' jurisdiction over crimes violating the law of nations).

[37] Haskins and Johnson, 639 (Washington); 1 Charles Warren, *The United States Supreme Court in United States History* (Boston: Little, Brown & Company, 1922), 159 n.1 (Cushing); see also Presser, 326 (both Justices).

[38] Warren, 434-35.

[39] Goebel, 158; see also Warren, 163 (explaining that the doctrine of a federal common law was "regarded by the [Republicans] as merely a portion of the general plan of the Federalist party to control the Judiciary; and its support by the Judiciary was considered merely further evidence of their devotion to Federalism.").

[40] *Henfield's Case*, 11 F. Cas. 1099, 1099 n.1 (C.C.D. Penn. 1793).

[41] Arthur M. Schlesinger, Jr., *Almanac of American History* (New York: Putnam, 1983), 163.

[42] Ibid.

[43] Ibid.

[44] *Henfield's Case*, 11 F. Cas. at 1099. A privateer is a "vessel owned, equipped, and armed by one or more private individuals, and duly commissioned by a belligerent power to go on cruises and make war upon the enemy, usually by preying on his commerce." *Black's Law Dictionary*, 1195.

[45] *Henfield's Case*, 11 F. Cas. at 1099. Prize masters assumed control of ships "apprehen[ded] and det[ained] at sea . . . by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo." *Black's Law Dictionary*, *supra* note 1 at 1200.

[46] *Henfield's Case*, 11 F. Cas. at 1099.

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] Ibid., 1116.

[51] Ibid. at 1117.

[52] Ibid. at 1119.

[53] Ibid. at 1120.

[54] Ibid. at 1122. While *Henfield's Case* angered the Republicans, who supported France, federal courts also enforced Washington's Neutrality Proclamation against the British. See Warren, 160 n.2 (quoting newspaper account of a federal case against the British Counsel for allegedly selling a captured Spanish vessel in an American port).

[55] Palmer, 294-99; see also Preyer, 230.

[56] 28 F. Cas. 774 (C.C.D. Penn. 1798).

[57] Ibid. at 774-75.

[58] Ibid. at 776.

[59] Ibid. at 777.

[60] Ibid.

[61] Ibid. at 778.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Ibid., at 779.

[66] Ibid. While this paper focuses on the disagreement about federal courts' criminal common law jurisdiction, Americans raised similar objections to state courts' common law jurisdiction. For example, in 1795, Connecticut's Zephaniah Swift, who later served as the Chief Justice of the state's Supreme Court, "was troubled by the doctrine 'that every crime committed against the law of nature may be punished at the discretion of the judge, where the legislature has not appointed a particular punishment.'" Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harv. Univ. Press, 1977), 14 (quoting N. Chipman's Rep. 61, 67, 2 Z. Swift, *A System of Laws of the State of Connecticut* (Windham, Conn.: John Byrne, 1796), 365-66).

[67] *Worrall*, 28 F. Cas. at 778.

[68] Ibid. at 779.

[69] Ibid.

[70] Ibid. at 780.

[71] Ibid. Professor Palmer speculated that the compromise may "have required an agreed upon statement of facts, and Worrall preferred a conviction to an admission of guilt." Palmer, 318. Alternatively, Palmer writes, the compromise may have required Dallas to abandon his support for the *Henfield* and *Ravara* prosecutions, a choice he did not want to make. Ibid.

[72] *Black's Law Dictionary*, 1651.

[73] See Preyer, 227-31; Palmer, 299-301; and Presser, 326.

[74] See notes 26-38 above and accompanying text.

[75] Goebel, 629.

[76] Ibid., 629, 632 (identifying Bache and Greenleaf as the publishers of the *Aurora* and the *New-York Journal*, respectively). Jefferson himself confirmed these newspapers' Republican credentials. Specifically, in his "Notes on Professor Ebeling's Letter of July 30, 1795," Jefferson lists "Adam's Boston paper, Greenleaf's of New York, Freneau's of New Jersey, Bache's of Philadelphia[and] Pleasant's of Virginia" as "adapted to the [Republican] palate." Merrill D. Peterson, ed., *Jefferson: Writings* (New York: Library of America, 1984), 700-01.

[77] 1 U.S. Stat. 596 (1798).

[78] See notes 15 and 21 above and accompanying text.

[79] Jay, 1076.

[80] Palmer, 321.

[81] Jay, 1076-77.

[82] Alf J. Mapp, Jr., *Thomas Jefferson: A Strange Case of Mistaken Identity* (Lanham, Md.: Madison Books, 1987), 371.

[83] 25 F. Cas. 239 (C.C.D. Va. 1800). One Court historian identified *Callender* and three other cases as the most important Sedition Act trials. The others included *United States v. Lyon*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (Republican Congressman from Vermont who criticized President Adams); *United States v. Haswell*, 26 F. Cas. 218 (C.C.D. Vt. 1800) (newspaper publisher who printed an advertisement soliciting money to help pay Congressman Lyon's fine and a second article asserting that President

1806 *Litchfield* (Connecticut) *Witness* article recording that session's indictments does not mention charges against either Hudson or Goodwin. Indeed, the April grand jury could not have indicted them because the article prompting the indictment did not appear until the *Connecticut Courant*'s May 7, 1806 issue.

[127] Preyer, 242.

[128] *Connecticut Courant*, October 1, 1806 (reporting trial at next session); Heckman, 703 (placing the date of the court's next session as April 1807).

[129] *Litchfield* (Connecticut) *Witness*, April 30, 1806.

[130] Malone, 376.

[131] Ibid. In April 1806, the six Justices of the Court included Chief Justice Marshall and Justices Cushing, Chase, Washington, Paterson and William Johnson. *Black's Law Dictionary*, 1651. Chase was the only Federalist who opposed federal common law, *see supra* notes 26-38 and accompanying text, and, as a Republican appointee, Johnson opposed the doctrine.

[132] Malone, 375.

[133] Levy, *Jefferson and Civil Liberties*, 63-64.

[134] Malone, 386 (describing letters dated August 24, 1807).

[135] Ibid.

[136] Ibid.

[137] William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953), 777.

[138] Levy, *Emergence of a Free Press*, 345.

[139] Ibid., 346; Preyer, 238.

[140] Crosskey, 781.

[141] Ibid., 782.

[142] *Black's Law Dictionary*, 1651.

[143] Ibid.

[144] *Hudson and Goodwin*, 11 U.S. 32 at 32.

[145] Ibid.

[146] Preyer, 247 n. 84. Alternatively, Pinkney might have declined to appear because he would have had to argue for a proposition that both he and President Madison, as Republicans, certainly opposed. While Jefferson was also a Republican, he was able to conceal his support for the Connecticut indictments from the public eye by voicing his opinion in letters to trusted aides and loyal party members. Madison, however, could not act with similar stealth. Indeed, had he directed Attorney General Pinkney to champion the indictments before the Supreme Court, Madison would have employed the full power of the federal government to advocate for a doctrine that Madison's Republican Party had opposed for decades.

[147] *Hudson and Goodwin*, 11 U.S. 32 at 32.

[148] Ibid. Although his reference to the court of public opinion is vague, it is likely that Justice Johnson was referring to the 1800 and 1804 elections. See Warren, 168 (observing that "the general attitude of the Judges of the United State Court, [who had supported federal courts' criminal common law jurisdiction in their Circuit court opinions] had been one of the [1800] campaign issues."). Jefferson's Second Inaugural Address supports this inference:

> Nor was it uninteresting to the world, that an experiment should be fairly and fully made, whether freedom of discussion, unaided by power, is not sufficient for the propagation and protection of truth—whether a government, conducting itself in the true spirit of its constitution, with zeal and purity, and doing no act which it would be unwilling the whole world should witness, can be written down by falsehood and defamation. The experiment has been tried; you have witnessed the scene; our fellow citizens have looked on, cool and collected; they saw the latent source from which these outrages proceeded; they gathered around their public functionaries, and when the constitution called them to the decision by suffrage, they pronounced their verdict.

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in *Jefferson: Writings*, 521-22.

[149] *Hudson and* Goodwin, 11 U.S. 32 at 32.

[150] Ibid., 33.

[151] Ibid., 34.

[152] Ibid., 33.

[153] Ibid., 34.

[154] Ibid.

[155] Donald G. Morgan, *Justice William Johnson: the First Dissenter: the Career and Constitutional Philosophy of a Jeffersonian Judge* (Columbia, S.C.: University of South Carolina Press, 1954), 79.

[156] Ibid., citing *United States v. Coolidge*, 1 Wheat. 415 (1816).

[157] Ibid.

[158] Ibid., quoting letter from Justice Story to William Pinkney (1816)).

[159] Haskins & Johnson, *supra* note 20 at 641.

[160] Ibid., 641.

[161] Ibid.

[162] Preyer, 146-47.

[163] Haskins and Johnson, 646.

[164] Newmyer, 63, 206, 208, 209.

[165] Thomas Jefferson to Wilson Cary Nicholas, June 13, 1809, www.memory.loc.gov/ammem/mtjquery.html.

[166] Ibid.

[167] Ibid.

[168] Levy, *Emergence of a Free Press*, 344 (quoting Letter from Gideon Granger to Thomas Jefferson (Oct. 9, 1806)) (internal quotation marks omitted).

[169] Malone, 380.

[170] Crosskey, 772 (internal citation omitted).

[171] 16 *Annals of Congress* 247 (1807).

[172] Ibid. In 1809, Congressman Dana reported to the House of Representatives that he had also "mentioned [the case] to one of the heads of departments" during [the 1807] session" of Congress. 20 *Annals of Congress* 83 (1809). Because Gideon Granger, Jefferson's Postmaster General was also from Connecticut, it is likely that Dana approached Granger about the prosecutions.

[173] Thomas Jefferson to Thomas Seymour, February 11, 1807, www.memory.loc.gov/ammem/mtjquery.html.

[174] Ibid.

[175] Malone, 385-87.

[214] See Burger, Address at the Supreme Court Historical Society Annual Lecture. Although *Hudson and Goodwin* prevented America's federal courts from exercising a criminal common law jurisdiction, that decision did not address whether federal courts possessed a civil common law jurisdiction—a jurisdiction concerning business law, tort law, property law, and other non-criminal matters. In 1842, however, the Supreme Court recognized such a jurisdiction in certain cases. Specifically, in *Swift v. Tyson*, 41 U.S. 1 (1842) Justice Story wrote that Section 34 of the 1789 Judiciary Act did not require federal courts to follow state court rulings in federal lawsuits between citizens of different states. Instead, only state statutes bound federal courts. Therefore, federal judges were free to apply their own interpretation of "general principles and doctrines of commercial jurisprudence." Ibid., at 19.

In 1938, however, the Supreme Court rejected this position in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938). The Court concluded that the state law that Section 34 of the 1789 Judiciary Act required federal courts to apply included both state statutes and state courts' opinions. Leaving no doubt about the issue, the Court announced that "[t]here is no federal common law." Ibid. at 78. Therefore, the larger question of the federal courts' common law jurisdiction was not settled conclusively until 126 years after the Court's decision in *Hudson and Goodwin*.

and punishments was to be limited and limited solely to that which was specified by statute."[18] Indeed, Congress had already done so, having created federal crimes including treason, violations of international law and various offenses at sea, crimes committed on federal property, and offenses injurious to federal authority.[19]

Nevertheless, Professor Herbert Johnson identified two bases for the proposition that America's federal courts could also impose punishment for crimes that were not defined by federal statute. First, he explained that some contemporary writers argued that "as a sovereign power the United States had criminal jurisdiction over [any] common law offenses not prohibited by federal statute."[20] Alternatively, others claimed that the Judiciary Act of 1789 gave federal courts a criminal common law jurisdiction. Specifically, the Act's thirty-fourth section states that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[21] Therefore, because most states adopted many elements of the English common law,[22] some people argued that federal courts did not need statutory authority to rely on these sources of criminal common law "in [federal] cases where they apply."[23] Proponents of a federal common law of crimes also pointed to the Act's legislative history as evidence of Congress' intention to create such jurisdiction. They argued that the final version's omission of a clause requiring Congress to define crimes revealed a desire for federal courts to punish crimes under both common law and the law of nations.[24] Professor Robert Palmer, however, argued that the omission is insignificant because it merely repeated Constitutional language requiring Congress to define such crimes.[25] Therefore, there was and is understandable disagreement regarding the Constitutional and statutory basis for a federal criminal common law jurisdiction.

What is remarkable about this controversy, however, is that scholars even disagree strongly about how individual Supreme Court Justices lined up on this issue. According to United States Supreme Court Justice Joseph Story, who joined the Court in 1811, "excepting Ju[stice Samuel] Chase, every Judge that ever sat on the Supreme Court bench from the adoption of the constitution until 1804 (as I have been authoritatively informed) held a like opinion [in favor of] the legitimacy of the federal common law of crimes."[26] Although Professor Stephen Presser claimed that "no one has yet refuted Justice Story's statemént,"[27] other scholars have argued persuasively that the Justices did not approve of such jurisdiction.[28] The source of this scholarly dispute involves two related issues: (1) whether early federal judges recognized a federal common law jurisdiction and (2) if so, whether the common law on which they relied consisted of state common law, the law of nations as incorporated in state common law, or a general federal common law of crimes.[29] Presser further argued that even if there is a difference between these non-statutory sources it was immaterial to early federal judges.[30] Although they disagree about who supported or opposed the doctrine, scholars would likely agree with Professor Kent Newmyer that there were "judges and lawyers of learning on both sides" of the debate regarding a federal common law of crimes.[31]

Notwithstanding this disagreement, there is evidence that twelve of the first thirteen Justices of the Supreme Court, all of whom were Federalists, believed in and relied on federal criminal common law jurisdiction.[32] Chief Justice Jay presided over a piracy case that was based, in part, on common law.[33] Scholars also claim that Chief Justice Jay's two immediate successors, Chief Justices Oliver Ellsworth and John Marshall, also supported federal courts' criminal common law jurisdiction.[34] Others argue that the majority of the Court's Associate Justices also supported a federal criminal common law jurisdiction. In 1791, before Congress enacted America's first treason law, Justice Wilson presided over a treason trial.[35] Justices Iredell and Paterson, respectively, interpreted the Constitution and Section 34 of the Judiciary Act of 1789 to allow federal courts to decide cases based on common law.[36] Both Justices Washington and Cushing reportedly "favored the doctrine" of a federal criminal common law.[37] Finally, because Professor Charles Warren notes that since no other Justice joined Justice Chase's opposition to federal criminal common law jurisdiction,[38] one could conclude that Justices Rutledge, Blair, and Thomas Johnson also supported federal courts' criminal common law jurisdiction.

Regardless of which, if any, of the early Justices supported a federal common law of crimes, prosecutions over which they presided during the 1790s that arguably involved such crimes fostered opposition to both the federal government and the Federalists who administered it. Federal prosecutions for one of the most potent common law crimes—seditious libel—illustrated that "the legal and constitutional issues concerning the common law of crimes were intimately connected to the practical consideration that political leaders could, and did, use the doctrine of common law crime to stifle the opposition press and perpetuate themselves in office."[39] According to the contemporary court reporter, Thomas Isaac Wharton, "[T]he earliest case on the subject of the common law jurisdiction of the federal courts" was *Henfield's Case*.[40]

On February 1, 1793, France declared war on Great Britain.[41] Thereafter, in early April, the French Ambassador enlisted sympathetic Americans to man ships and attack British vessels along the American coast.[42] Later that month, however, President Washington proclaimed that America would not take sides in the war and directed American citizens not to join the fight.[43] Nevertheless, Gideon Henfield, a Massachusetts native, boarded a French privateer on May 1, 1793.[44] During a naval battle, the French captured the British ship *William* and Henfield became its prize master.[45] Federal authorities detained Henfield when he sailed the *William* into Philadelphia's harbor.[46]

In his July 1793 instructions to the federal grand jury considering the charges against Henfield, Justice Wilson explained that "the basis of the American judicial system [was] the common law."[47] Describing citizens' common law duties to each other and to their nation, Justice Wilson stated that a "citizen who in our state of neutrality, and without the authority of the nation, takes an [sic] hostile part with either of the belligerent powers, violates thereby his duty, and the laws of his country."[48] Thereafter, on July 27, 1793, the federal grand jury indicted Henfield.[49] At

political issue. Indeed, in 1798, the crime of seditious libel took center stage in America's national politics.

Judging solely from its title, "An Act in addition to the Act for the Punishment of certain crimes against the United States,"[77] the July 1798 law did not appear controversial. More commonly know as the Sedition Act, this law established seditious libel as a federal crime and allowed defendants to prove the truth of their statements as a defense to the charge. Considering most Federalists' belief in federal criminal common law jurisdiction, a legislative act appeared unnecessary. Indeed, the Act was arguably redundant because Section 34 of the 1789 Judiciary Act appeared to allow federal courts to apply state law, which in several cases included a law punishing libel.[78] Nevertheless, American legal scholars identify at least three reasons for the Act.

First, Federalists "were worried that in Republican dominated areas it would be unlikely for seditious libel actions to be brought under state law."[79] Second, the Federalist Congress may have wanted to provide those federal judges who were uncomfortable presiding over common law seditious libel prosecutions with a statutory basis to do so.[80] Others, however, claim that "[e]vidence regarding the enactment of the Sedition Act would indicate its origin in the fear that the common law crime of seditious libel would not be within the jurisdiction of the federal courts."[81] Regardless of its basis, the Federalist-dominated federal courts enforced the law. Predictably, many of Jefferson's "active supporters were threatened by the Sedition Act [and between 1798 and the expiration of the law in 1801,] twenty-five editors and printers were prosecuted."[82] Among the more significant trials was *United States v. Callender*.[83]

In 1800, James Callender criticized President Adams as, among other things, a "hoary headed incendiary" who favored an aristocracy.[84] Thereafter, the federal District Attorney for the District of Virginia charged Callender with violating the Sedition Act.[85] At the trial before Justice Chase, however, Callender's attorneys did not focus on proving his innocence. Instead, they challenged the Sedition Act's constitutionality and invoked Section 34 of the Judiciary Act of 1789 to argue that the jury could nullify the law if it contradicted the federal Constitution.[86]

In rejecting such claims Justice Chase insisted that "the judicial power of the United States is the only proper and competent authority to decide whether any statute made by Congress. . .is contrary to, or in violation of, the Federal Constitution."[87] Thereafter, the jury found Callender guilty of violating the Sedition Act.[88] Although the case did not involve the issue of federal criminal common law, *Callender* is a useful bridge between a discussion of the doctrine of federal criminal common law and Thomas Jefferson's views on the subject. The arguments raised by Callender's attorneys challenging the court's sole power to determine a law's constitutionality were more radical versions of Jefferson's opinion (Jefferson was Callender's patron)[89] and "the general attitude of the Judges of the United States Court had been one of the campaign issues" in the 1800 election that sent Jefferson to the White House.[90]

As part of his organized opposition to the Alien and Sedition Laws,[91] then-Vice President Jefferson secretly drafted what later became known as the Kentucky Resolutions.[92] Jefferson argued that the federal government, and therefore its judicial branch, "was not made the exclusive or final judge of the extent of the powers delegated to itself," a view that was diametrically different from Justice Chase's pronouncement in *Callender*.[93] Instead, "where powers are assumed which have not been delegated, a nullification of the [federal] act [by the States] is the rightful remedy."[94] Jefferson also claimed that "the power to create, define, and punish. . .crimes [not explicitly listed in the Constitution was]. . .reserved, and, of right, appertains solely and exclusively to the respective States."[95] Therefore, the Sedition Act was unconstitutional because "libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."[96]

While he did not sign his name to his draft of the Kentucky Resolutions, Jefferson voiced his strong opposition to the Sedition Act once he became President in 1801. Indeed, Jefferson wrote that "whenever in the line of my functions I should be met by the Sedition law, I should treat it as a nullity."[97] For example, in the case of William Duane, he "directed that prosecution to be discontinued."[98] Later, in a July 22, 1804 letter to Abigail Adams, Jefferson boasted that he had similarly "discharged every person under punishment or prosecution under the sedition law."[99]

Writing to Edmund Randolph in 1799, Jefferson had stated that "[o]f all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force & cognizable as an existing law in their courts, is to me the most formidable."[100] Compared to the "audacious bare-faced and sweeping pretension to a system of law for the U S, without the adoption of their legislature," Jefferson saw the "bank law, the treaty doctrine, the sedition act, alien act" and similar laws as small matters.[101] Such a claim was "audacious" because, unlike most of the individual states, the federal government had not "adopt[ed] a whole system of laws ready made to [its] hand" at its inception.[102] Instead, the federal government "was only [created] for special purposes, to wit, the management of [the states'] concerns with one another & with foreign nations."[103] Therefore, consistent with its limited, express powers "the common law did not become, ipso facto, law on the new association; it could only become so by a positive adoption," which Congress had not yet done.[104] This requirement that federal courts' power spring from a specific Constitutional or statutory provision reflected Jefferson's, and his party's, belief that the federal government only possessed the powers expressly granted by the Constitution of the United States.[105] On August 13, 1800, Jefferson again discussed federal common law in a letter to his future Postmaster General, Connecticut's Gideon Granger. Jefferson warned "[t]hat if the principle were to prevail, of a common law being in force in the U S, (which principle possesses the general government at once of all the powers of the state governments, and reduces us to a single consolidated government), it would become the most corrupt government on earth."[106]

However, some historians claim that Jefferson did not consistently oppose federal criminal common law. For example, despite his insistence that the existence of a

> and to bring any or all of them into contempt, they not only dare to be innocent, but the authors of them become just objects of detestation and demerit exemplary punishments. . . . Such publications, if the authors of them may not be restrained, but are permitted to continue them with impunity, will more effectively undermine and sap the foundation of our Constitution and Government, than any kind of treason that can be named.[129]

In response to Judge Edwards' charge, the grand jury indicted three people for seditious libel: Judge Tapping Reeve; Thomas Collier, the *Litchfield* (Connecticut) *Monitor's* editor; and a seminarian named Thaddeus Osgood.[130] Significantly, Judge Edwards' first grand jury charge never invoked a statutory basis for punishing seditious libel. Indeed, because the Sedition Act expired in 1801, federal common law was the only basis on which Judge Edwards' could have based his charge. He explained this choice in his closing remarks, stating that in "delivering these sentiments I deliver the sentiments of a great majority of those Judges who preside in that Court, whose duty it is to correct the errors of this and all other inferior courts of the United States."[131] Both these and Hudson and Goodwin's later indictments are ironic because, as Dumas Malone observed, these "sentiments . . . had historically been opposed by the Republican party, which claimed that the authority of the federal courts was limited to what was expressly granted in the Constitution."[132]

Later, in April 1807, when Hudson and Goodwin were to stand trial, the court postponed their case until September 1807.[133] Meanwhile, Jefferson wrote two letters to Postmaster General Granger concerning the Connecticut seditious libel indictments.[134] Unfortunately, these letters are missing from Jefferson's papers Interestingly, upon receiving Jefferson's correspondence, Granger traveled to meet with United States District Attorney Huntington and other Connecticut Republicans.[135] In his representations to his colleagues, Granger reportedly stressed the inconsistency of the prosecutions with Republican principles, indicating that he spoke in the President's name.[136]

Then, in September 1807, the editors' attorney objected to the court's jurisdiction and asked that Judge Edwards not decide the issue until the Circuit Court judge arrived, which Edwards agreed to do.[137] At its April 1808 session, the court again postponed the trial because witnesses were unavailable and the Circuit Court Justice H. Brockholst Livingston had not yet arrived.[138] Finally, because Justice Livingston disagreed with Judge Edwards' assertion of a federal criminal common law jurisdiction when he did arrive, Judge Edwards and Judge Livingston certified Hudson and Goodwin's challenge to the court's common law authority to the Supreme Court in October 1808.[139] However, the district court clerk, who was Judge Edwards' son, did not send the appeal to the Supreme Court until February 1809.[140] In 1810 the Supreme Court continued the case to the next term, but the Court did not meet during 1811.[141] Therefore, the Supreme Court did not consider he case until 1812.

Between April 1806, when Judge Edwards delivered his first grand jury charge, and 1812, the Supreme Court's composition changed significantly. In 1806, the only Republican Justice was William Johnson, whom Jefferson had appointed in 1804.[142] However, by 1812 Presidents Jefferson and Madison had appointed four more

Republicans—Justices Livingston, Todd, Duval and Story—to the high court.[143] Understanding this change, from a four-to-two Federalist majority to a four-to-two Republican majority and the general position of the two political parties, helps explain the Supreme Court's *Hudson and Goodwin* opinion. Further, it also likely explains why Hudson and Goodwin's attorney, United States Senator Samuel Dana, declined to argue the case.[144] Interestingly, United States Attorney General Pinkney also declined to argue the case.[145] (Apparently, he was too busy with his private practice of law to appear.)[146] In 1812, unlike today, lawyers were not required to submit written arguments to the Court. Consequently, the only bases on which the Supreme Court decided early cases were the arguments made by the parties' attorneys. Nevertheless, without hearing oral argument, the Supreme Court considered the case's merits. This was highly unusual because the Supreme Court resolved one of the most contentious legal issues in early American history without either party presenting their positions to the Court.

Although Hudson and Goodwin were accused only of seditious libel, the Supreme Court stated the question that the case presented "broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those Courts by statute."[147] Fittingly, Justice Johnson wrote the opinion. Concerning federal courts' common law jurisdiction, he wrote that "[a]lthough this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion."[148] Without discussing the several 1790s Circuit Court precedents often cited as having invoked federal criminal common law jurisdiction, he instead relied on "the general acquiescence of legal men . . . in favor of the negative of the proposition."[149]

Justice Johnson based his conclusion on three points. First, paraphrasing the Tenth Amendment, he wrote that the "powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve."[150] Second, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[151] Therefore, since criminal common law "jurisdiction has not been conferred by any legislative act," federal courts did not have such authority.[152] Third, Justice Johnson stated that federal courts did not possess such jurisdiction as part of the judiciary's inherent power to punish crimes.[153] In contrast, only the power to "fine for contempt—imprison for contumacy—inforce [sic] the observance of order, &c. are powers which cannot be dispensed with in a Court."[154] Accordingly, the Supreme Court concluded that federal courts did not possess criminal common law jurisdiction.

While he did not publish a dissenting opinion, Justice Story likely disagreed strongly with Justice Johnson's majority opinion. For example, despite *Hudson and Goodwin*'s statement that federal courts did not possess criminal common law jurisdiction, Justice Story relied on that very doctrine in a later Circuit Court case.[155] Thereafter, when the defendant appealed that case to the Supreme Court, Justices Story and Johnson argued about whether the Court was required to follow *Hudson*

One of the "clerical gentlemen" indicted by Judge Edwards' September 1806 grand jury was Azel Backus. When Jefferson later learned that the minister had subpoenaed several prominent Virginians, he "for the first time conjectured the subject of the libel."[176] Specifically, after reviewing the indictment, Jefferson understood that the minister's alleged libel against Jefferson concerned a time "when young and single I offered love to a handsome [married] lady."[177] Apparently, when he wrote to Thomas Seymour, on February 11, 1807, that he was "conscious that there was not a *truth* on earth which I feared should be known"[178] Jefferson did not expect that his attempted seduction would be publicly rehashed.

Despite Jefferson's obvious interest in dismissing this case, withdrawing only one of the Connecticut indictments would have appeared suspicious. Therefore, Leonard Levy has speculated that "[t]he course decided upon was to proceed with a test case that would draw from the Supreme Court a decision on the question whether the federal courts possessed common-law jurisdiction over criminal libels."[179] That test case was *Hudson and Goodwin*. By asking the Supreme Court to decide the very issue on which both *Hudson and Goodwin* and Reverend Backus' case were based, Judge Edwards stopped the embarrassing revelations expected in the *Backus* case from surfacing.

Accordingly, nothing in Jefferson's 1809 account of his reaction to the Connecticut libel trials is credible. Instead, while they do not contain explicit directions, or send examples of offending papers, as did his letter to Pennsylvania Governor McKean, Jefferson's letters convey his wish to his political aides that they prosecute Connecticut's Federalist newspapers. Unfortunately, gaps in both Jefferson's and Judge Edwards' papers hinder our attempts to discern Jefferson's strategic thinking in these matters.[180] Therefore, one must examine the circumstantial evidence of Jefferson's involvement in the *Hudson and Goodwin* indictments.

Connecticut Federalists appear to have particularly irked Jefferson. While he "had been nettled by attacks from the Federalist press," its members "in Connecticut took a back seat to no one in fulminations against the President."[181] Further, within months of becoming President, Jefferson planned revenge on Connecticut's Federalists. While discussing his removal of Federalists from offices newly within his patronage, Jefferson identified Connecticut as a special problem. Writing to Senator Wilson Cary Nicholas in July 1801, Jefferson stated that in "Connecticut alone a general sweep seems to be called for on principles of justice and policy."[182] Because Federalists were evicting "every republican even from the commissions of the peace and the lowest offices[, t]here then we will retaliate. Whilst the Feds. are taking possession of all the state office, exclusively, they ought not to expect we will leave them the exclusive possession of those at our disposal."[183]

Thereafter, Jefferson's first federal judicial appointment in Connecticut was "his trusted lieutenant in building up his Connecticut party organization, Pierpont Edwards."[184] While no existing correspondence shows Jefferson instructing Judge Edwards to pursue Connecticut's Federalist press, Judge Edwards charged the first two grand juries impaneled during his tenure to investigate seditious libels against Jefferson's administration. Further, Alexander Wolcott, the state manager of the Connecticut Republican Party "attended the [court's] sessions faithfully and consulted with the District Attorney frequently."[185] Later, the Republican-packed grand juries returned indictments against several of Jefferson's Federalist critics. In 1807, in language similar to his 1801 declaration of revenge on Connecticut Federalists, Jefferson wrote of these prosecutions "that a spirit of indignation and retaliation should arise when an opportunity should present itself, was too much within the human constitution to excite surprise or censure."[186] Later events during the proceedings in *Hudson and Goodwin* strengthen the connection between Jefferson's antipathy for the Connecticut Federalist press and Judge Edwards' handling of *Hudson and Goodwin*.

In January 1807, Federalist Congressman Dana proposed that, if the federal courts had criminal common law jurisdiction, Congress should allow "the parties prosecuted the liberty of giving the truth in evidence."[187] Two years later, Representative John Randolph, a Virginia Republican, illustrated how, without this allowance, the Connecticut libel prosecutions would cast the Republicans as more repressive than the Federalists:

> For if the sedition law was objectionable because it established a law of libel which permitted the truth to be given in evidence, *a fortiori*, the common law doctrine was more so, which not only established a law of libel the more hideous, because the truth was not permitted to be given in evidence.[188]

Interestingly, between Dana's January 1807 remarks and *Hudson and Goodwin*'s April 1807 trial date, Jefferson wrote a Connecticut Republican that he, too, supported allowing truth as a defense. Specifically, he wrote that the trials "confined to an appeal to truth only . . . cannot lessen the useful freedom of the press."[189] In the same letter, Jefferson twice more advocated limiting the press "within the legal & wholesome limits of truth" and "recalling [the press] within the pale of truth."[190] Thereafter, Judge Edwards interpreted Section 34 of Judiciary Act of 1789 to require him to follow an 1804 Connecticut law that allowed defendants to prove the truth of their statements as a defense.[191] If, as he stated in his April 1806 grand jury instruction, Judge Edwards was following the opinion of the Supreme Court Justices favoring a federal criminal common law, then he would not need to invoke the Judiciary Act; federal common law is distinct from the state law that the Judiciary Act authorized federal courts to apply. Therefore, when Judge Edwards had a choice as to what law to apply, his ruling apparently responded to Jefferson's wishes. Indeed, considering that Jefferson never mentioned a truth defense in his prior discussions of seditious libel, the timing of his letter and Judge Edwards' ruling suggest that, at a minimum, Jefferson's views influenced Judge Edwards' decision.

In 1809, Congressman Dana told the House of Representatives that his constituents believed that "considering the manner in which appointments were made in [Connecticut], and under the belief that it was through the means of certain influential characters, that the District Attorney did institute those prosecutions."[192] More

A more likely explanation for Jefferson's apparent encouragement of these seditious libel prosecutions was to skewer the Federalists with their own political weapon, the common law crime of seditious libel. Although some principled Republicans disapproved of the prosecutions, both Jefferson and some Connecticut Republicans likely relished the thought of a Supreme Court filled with Federalist judge having to punish Federalist newspaper editors. While the Court's membership did change before *Hudson and Goodwin* reached its docket in 1812, Federalists outnumbered Republicans on the bench until 1811.[213] In 1807, therefore, the Republicans could anticipate that for quite a few years the Connecticut defendants would live in fear that the Supreme Court would affirm the court's power to punish them, a prospect which Jefferson and his fellow Republicans certainly enjoyed.

Consequently, it was by a stroke of luck that the ultimate disposition of *Hudson and Goodwin* also contributed to Jefferson's campaign to limit the federal judiciary's powers. Besides temporarily allowing his fellow Republicans to intimidate Connecticut's Federalists with the threat of federal punishment, the case led to a rejection of the doctrine that federal courts could base their decisions on sources of law besides those authorized by the federal Constitution and federal statutes. This result was certainly more than Jefferson had hoped for, and provided him with a welcome victory in his often unsuccessful campaign to check the emerging power of the Supreme Court.[214]

NOTES

[1] Common law consists of the rules developed over time through judicial opinions, in contrast to statutory law, which is created by a legislature. *Black's Law Dictionary* (St. Paul: West Publishing Group, 1991), 276.

[2] See R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 102.

[3] Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic," *Law and History Review*, 4 (1985) 236 & n.43 (stating that "Federalist leader [ ] Robert Goodloe Harper took the position that there was no common law jurisdiction with the federal courts").

[4] Stephen B. Presser, "The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer," *Law and History Review*, 4 (1985), 329-33.

[5] 11 U.S. 32 (1812).

[6] Warren Burger, "Address at the Supreme Court Historical Society Annual Lecture" (June 3, 1991) (transcript available at http://www.supremecourthistory.org/04_library/subs_volumes/04/c09_m.html)

[7] Ibid.

[8] Ibid.; Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (New York: Knopf, 1997), 221-227, discussing Jefferson's antagonism towards the federal judiciary.

[9] *Black's Law Dictionary*, 1357, defines seditious libel as a "communication written with the intent to incite the people to change the government otherwise than by lawful means, or to advocate the overthrow of the government by force or violence." However, the definition used in the 1798 Alien and Sedition Acts may better reflect the contemporary understanding of seditious libel. Those Acts "made it a criminal offense to utter or publish any false, scandalous and malicious writings against the federal government with intent to defame it, or bring it into contempt or disrepute or to excite hatred of people or stir up sedition against it." Ibid.,72.

[10] *United States Constitution*, art. III, § 2 cl. 1.

[11] Ibid. at § 2 cl. 3.

[12] Ibid.

[13] *United States Constitution*, Amendment X.

[14] Newmyer, 98.

[15] 1 Stat. 73 at § 34 (1789).

[16] Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 609; 1 Stat. 112 (1790).

[17] Newmyer, 98.

[18] Preyer, 227-231; see also Robert C. Palmer, "The Federal Common Law of Crime," *Law and History Review*, 4 (1985), 272: the "early history of Congress and of the Judiciary provide no basis for a federal common law of crime."

[19] 1 Stat. 112-19 (1790).

[20] 2 George L. Haskins and Herbert A. Johnson, *History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15* (New York: Macmillan, 1981), 634.

[21] 1 Stat. 73 (1789).

[22] Preyer, 224-25.

[23] Haskins and Johnson, 634-35.

[24] Palmer, 273-74. Citing Blackstone, Professor Palmer defined crimes under the law of nations as violations of safe conducts, infringements on ambassadors' rights and piracy. Ibid., 287 & n.124.

[25] Ibid., 273-74.

[26] Presser, 326.

[27] Ibid.

[28] This disagreement is displayed clearly in a 1985 symposium appearing in *Law & History Review*. There, Professors Kathryn Preyer, Robert Palmer and Stephen Presser presented evidence of federal judges' reliance on or rejection of a federal common law of crimes. See *Law and History Review*, 4 (1985), 223-335.

[29] *See* Preyer, 232; Palmer, 285; and Presser, 326-28.

[30] Presser, 326-27.

[31] Newmyer, 102.

[32] Stanley Brubaker, "Original Intent and Freedom of Speech and Press," in Eugene W. Hickok, Jr., ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville: Univ. of Va., 1991), 87.

[33] Stewart Jay, "Origins of Federal Common Law: Part One," *University of Pennsylvania Law Review*, 133 (1985), 1003, 1040 (quoting *United States v. Hopkins and Brown*, Ms. Mins. Circuit Ct. New York Dist. 1790-1808, *sub* Apr. 13 and 14, 1790); see also Preyer, 231 and Presser, 326; but see Palmer, 286.

[34] Goebel, 646 n.133 (Ellsworth); Haskins and Johnson, 639 (Marshall); see also Preyer, 229 (Ellsworth); but see Palmer, 300 (Ellsworth) and Presser, 237 (Marshall).

Adams appointed Tories to federal offices); and *United States v. Cooper*, 25 F. Cas. 631 (C.C.D. Penn. 1800) (newspaper publisher who criticized President Adams). Goebel, 638-51.

[84] *Callender*, 25 F. Cas. at 240.

[85] Ibid., 239.

[86] Ibid., 253. This belief in a jury's power to nullify the law reflected the opinion of the radical wing of the Republican party; moderate Republicans, including Jefferson, did not support jury nullification because they believed the American Revolution had cleansed the English common law (as it operated in the individual states) of its aristocratic traits and that courts were necessary parts of the federal government. Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford Univ. Press, 1971), 202—205. Jefferson's concern, in contrast, was the extent of federal courts' jurisdiction.

[87] Ibid., 256. It is important to observe that *Callender* occurred three years before the Court's landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803), where the Court established the judiciary's power to review legislation. Accordingly, at the time, Justice Chase's claim was controversial.

[88] *Callender*, 25 F. Cas. at 258.

[89] Thomas Jefferson to Abigail Smith Adams, July13,1804, www.memory.loc.gov/ammem/mtjquery.html.

[90] Warren,168.

[91] Willard Sterne Randall, *Thomas Jefferson: A Life* (New York: Harper Perennial, 1993), 432.

[92] Mapp, 372.

[93] Thomas Jefferson, *Draft of the Kentucky Resolutions*, in *Jefferson: Writings*, 449.

[94] Ibid., 453.

[95] Ibid., 450 (quoting U.S. Const. amend. X) (internal quotation marks omitted).

[96] Ibid.

[97] Thomas Jefferson to William Duane, May 23, 1801, www.memory.loc.gov/ammem/mtjquery.html.

[98] Thomas Jefferson to Edward Livingston, Nov. 1, 1801, ibid.

[99] Letter from Thomas Jefferson to Abigail Smith Adams, July 13, 1804, ibid. However, Jefferson's interest in emancipating persons convicted under the Sedition Act appears also to have been personal. Specifically, "[o]ne historian has described [one person convicted of seditious libel] as the then vice-president's 'paid hireling,'" Stephen B. Presser & Jamil S. Zainaldin, *Law and Jurisprudence in American History: Cases and Materials* (St. Paul: West Publishing Company, 2000), 210 (quoting Merrill Peterson, *Adams and Jefferson: A Revolutionary Dialogue* (New York: Oxford University Press, 1976), 98), and Jefferson later described his "contributing to the relief of Callender." Thomas Jefferson to Abigail Smith Adams, July 13, 1804, www.memory.loc.gov/ammem/mtjquery.html.

[100] Thomas Jefferson to Edmund Randolph, Aug. 18, 1799, *in Jefferson: Writings*, 1066.

[101] Ibid.

[102] Ibid., 1068.

[103] Ibid.

[104] Ibid., 1068-69.

[105] Dumas Malone, *Jefferson The President: Second Term 1805-1809* (Boston: Little, Brown & Co., 1974), 375.

[106] Thomas Jefferson to Gideon Grander, Aug. 13, 1800, *in Jefferson: Writings*, 1079.

[107] Jay, 1052.

[108] *Henfield's Case*, 11 F. Cas. 1099, 1117 (C.C.D. Penn. 1793).

[109] Thomas Jefferson to Albert Gallatin, Aug. 11, 1808, www.memory.loc.gov/ammem/mtjquery.html.

[110] Schlesinger, 188. In 1803, Jefferson again ignored his advocacy of strict constitutional interpretation while effecting the Louisiana Purchase. In an August 12, 1803 letter to his Virginia political ally John C. Breckinridge, Jefferson admitted that buying Louisiana was "an act beyond the Constitution." Thomas Jefferson to John C. Breckinridge, August 12, 1803), *Jefferson: Writings*, 1139; see also ibid. at 1139-41 (containing Jefferson's September 7, 1803 letter to Virginia's United States Senator Wilson Cary Nicholas regarding the appropriateness of a Constitutional amendment to legitimize the Louisiana Purchase). He wrote that after ratifying the treaty, Congress "must then appeal to the nation for an additional article to the Constitution, approving & confirming an act which the nation had not previously authorized. The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union." Ibid., 1138. Nevertheless, calling the Constitution's limitations "metaphysical subtleties," Jefferson justified his act because it "so much advance[d] the good of [the] country," which America's citizens "would have done for themselves had they been in a situation to do it." Ibid., 1139. Although he did not justify his action on a common law doctrine, Jefferson ignored the Constitutional limits on the federal government, specifically its the Executive Branch, that he otherwise advocated forcefully.

[111] Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (New York: Quadrangle/The New York Times Book Company, 1963), 46.

[112] Ibid., 43; Thomas Jefferson to James Madison, Aug. 28, 1789, www.memory.loc.gov/ammem/mtjquery.html (recommending that Madison revise his "declaration of rights" to read "[t]he people shall not be deprived or abridged of their right to speak, to write or otherwise publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations.").

[113] Thomas Jefferson to Levi Lincoln (1802), http:etext.virginia.edu (no month or date provided for letter).

[114] Thomas Jefferson to Thomas McKean (Feb. 19, 1803), www.memory.loc.gov/ammem/mtjquery.html.

[115] Ibid.

[116] Levy, 59, citing *Respublica v. Dennie*, 4 Yeates' (Penn.) Reports 267 (1805).

[117] Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in *Jefferson: Writings*, 521.

[118] Levy, 59.

[119] *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812).

[120] *Connecticut Courant*, May 7, 1806.

[121] Ibid.

[122] Ibid.

[123] Malone, 372.

[124] Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), 343. For a concise biography of Edwards, see Charles A. Heckman, "A Jeffersonian Lawyer and Judge in Federalist Connecticut: The Career of Pierpont Edwards," *Connecticut. Law Review*, 28 (1992), 669.

[125] Malone, 373.

[126] Levy, 344. Some historians erroneously pinpoint the origin of *Hudson and Goodwin* at Judge Edwards' first grand jury proceeding in April 1806. See, e.g., Heckman, 697. However, an April 30,

[176] Thomas Jefferson to Wilson Cary Nicholas, June 13, 1809, www.memory.loc.gov/ammem/mtjquery.html.

[177] Levy, *Jefferson and Civil Liberties*, 65 n.71 (quoting Letter from Thomas Jefferson to Robert Smith (July 1, 1805)) (internal quotation marks omitted).

[178] Thomas Jefferson to Thomas Seymour, Feb. 11, 1807, www.memory.loc.gov/ammem/mtjquery.html. Since the event had already been a public scandal in 1805 (Levy, *Jefferson and Civil Liberties*, 65.), Jefferson's statement to Seymour may have meant that there were no *other* unflattering events that he feared would become public.

[179] Levy, *Jefferson and Civil Liberties*, 65.

[180] Other collections of Jefferson's writings are similarly unhelpful on this specific topic and Judge Edwards' papers at the Yale Library's Manuscript and Archive Division contain no correspondence between 1808 and 1812, the period covering most of *Hudson and Goodwin*'s developments. Indeed, one researcher has concluded that someone apparently sanitized the entire Edwards Collection. Heckman, 672 (observing that "the existing collections of his papers have been purged of almost everything not relating to the rather humdrum operations of his law practice and land investments [and considering Edwards'] notorious adulterous liaisons and that both his professional and political life were marred by bad decisions, it is no surprise that either Edwards or his survivors destroyed the more interesting correspondence.").

[181] Heckman, 698. For example, in 1800, Hudson and Goodwin's *Connecticut Courant* warned that electing Jefferson meant that "[m]urder, robbery, rape, adultery and incest will all be openly taught and practiced." Randall, 543 (quoting the *Connecticut Courant*, Sept. 15, 1800).

[182] Thomas Jefferson to Wilson Cary Nicholas, June 11, 1801, www.memory.loc.gov/ammem/mtjquery.html. Note that Nicholas served first in the United States Senate, between 1799 and 1804, and later in the United States House of Representatives from 1807-1809; Dennis Golladay, *Nicholas, Wilson Cary*, http://www.anb.org/articles/03/03-00356-article.html.

[183] Ibid.

[184] Crosskey, 771.

[185] Malone, 374.

[186] Thomas Jefferson to Thomas Seymour, Feb. 11, 1807, www.memory.loc.gov/ammem/mtjquery.html.

[187] 16 *Annals of Congress* 248 (1807).

[188] 20 *Annals of Congress* 75-76 (1809).

[189] Thomas Jefferson to Thomas Seymour, Feb. 11, 1807, www.memory.loc.gov/ammem/mtjquery.html.

[190] Ibid.

[191] Levy, *Emergence of a Free Press*, 345 (quoting "Hampden," *A Letter to the President of the United States, touching the Prosecutions under his Patronage, before the Circuit Court in the District of Connecticut* iii (1808); *see also* 20 *Annals of Congress* 78 (1809) (statement of Rep. Dana) (describing Judge Edwards' decision "that he should consider the act of the State of Connecticut relative to giving the truth in evidence as binding on the Federal court in that State.").

The text of the May, 1804 law, entitled An Act to secure the Freedom of the Press, read as follows:

> Be it enacted by the Governour [sic] and Council and House of Representatives in General Court assembled, That if any person shall be prosecuted for the writing or publishing any libel, it shall be lawful for the defendant upon the trial of the cause, to give in evidence in his defence [sic] the truth of the matters contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court as in other cases.

I *Public Statute Laws of the State of Connecticut* 355 (1808). Ironically, Hudson and Goodwin published the book in which the law appeared. See ibid. at cover page. If Hudson and Goodwin had been able to show the truth of the article for which they were indicted, the court would have had to acquit them because the *Utica (New York) Patriot* article that they reprinted correctly identified Jefferson's plan. For an excellent account of Jefferson's plan to pay France to compel Spain to sell eastern Florida to the United States, see Herbert B. Fuller, *The Purchase of Florida* (Gainesville, Fla.: University of Florida Press, 1964), 146-165. References to Jefferson's plan also appear in his correspondence. *See, e.g.*, Letter from Thomas Jefferson to Congress (Dec. 6, 1805); Letter from Thomas Jefferson to Albert Gallatin (Oct. 23, 1805); Thomas Jefferson to James Madison, Oct. 11, 1805, www.memory.loc.gov/ammem/mtjquery.html, and at 19 *Annals of Cong.* 1136-38 (1806).

[192] 20 *Annals of Congress*. 79 (1809).

[193] Ibid.; see also Malone, 374 (reporting that the state Republican party chairman regularly attended court and consulted with District Attorney Huntington).

[194] Robert E. Wright, "Granger, Gideon," http://www.anb.org/articles/03/03-00194-article.html.

[195] Thomas Jefferson to James Madison, Oct. 15, 1810 in Paul Leicester Ford, ed., *Jefferson's Writings* (New York: G. P. Putnam's Sons, 1904), 282-283.

[196] George Dargo, *Jefferson's Louisiana: Politics & the Clash of Legal Traditions* (Cambridge, Ma.: Harvard University Press, 1975), 97 n.109.

[197] 20 *Annals of Cong*. 85 (1809).

[198] Schlesinger, 184-85.

[199] Ibid.,185.

[200] Randall, 575.

[201] John C. Yoo, "The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power," *Minnesota Law Review*, 83 (1999), 1435, 1442 (citing Letter from Thomas Jefferson to George Hay (May 20, 1807)).

[202] Ibid.

[203] John Dos Passos, *The Shackles of Power: Three Jeffersonian Decades* (Garden City, NY: Doubleday, 1966), 109, 126. Another of Jefferson's biographers agreed, describing how Jefferson "personally meddled" in the trial and "had become obsessed with Burr and ruthlessly kept up the pressure for his conviction, despite the lack of evidence of treason." Randall, 576.

[204] Dargo, 74-101.

[205] Ibid., 74-75.

[206] Ibid., 76.

[207] Ibid., 95.

[208] Ibid., 96.

[209] Ibid., 97-98.

[210] Malone, 371.

[211] Heckman, 669.

[212] See notes 26 and 132 above and accompanying text.

[213] See Epstein, et al., *The Supreme Court Compendium: Data, Decisions, and Developments* (Washington, D.C.: Congressional Quarterly, Inc. 1994), 175, 274-275, 284.