

Nineteenth-century lithograph of the Tinsley Building in Springfield, Illinois, where proceedings in Joseph Smith's extradition case took place in January 1843. The courtroom was located in rented facilities on the second floor. In August 1843, Abraham Lincoln and Stephen T. Logan moved their law practice to the third floor of the Tinsley Building.

# The Boggs Shooting and Attempted Extradition Joseph Smith's Most Famous Case

*Morris A. Thurston*

When the Mormons were driven out of Missouri during the winter of 1838–39, they found the people of Illinois to have sympathetic hearts and welcoming arms. The *Quincy Whig* noted that the Mormons “appear, so far as we have seen, to be a mild, inoffensive people, who could not have given a cause for the persecution they have met with.” The *Alton Telegraph* declared that in Missouri’s treatment of the Mormons “every principle of law, justice, and humanity, [had] been grossly outraged.”<sup>1</sup> Over the next six years, however, feelings toward the Mormons gradually deteriorated, newspaper sentiment outside Nauvoo turned stridently negative, and in June 1844 their prophet was murdered by an enraged mob.

What propelled this downward spiral of public opinion? The exploitation of political and economic power by the Mormons, the private practice (but public disavowal) of polygamy, the outspokenness of apostates like John C. Bennett, and religious bigotry all played roles, to be sure. A sometimes overlooked factor, however, was the widespread view that Joseph Smith took advantage of legal technicalities to avoid punishment for crimes he had allegedly committed. A heretofore understudied, but critical, element in turning public opinion against Smith and the Mormons was the successful repulsion of three well-publicized bids by Missouri to extradite the Mormon prophet. This is the story of the second of these three legal proceedings, the attempt to forcibly return Joseph to Jackson

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1. *Quincy (Ill.) Whig*, February 23, 1839, 1; “The Mormon War,” *Alton (Ill.) Telegraph*, November 17, 1838, 2.

## Morris A. Thurston

After graduating from law school, I began what became a thirty-five-year career as a litigation partner in a global law firm. Even while practicing law, however, my passion was LDS history. Following my retirement as an active lawyer, I began serving with the Joseph Smith Papers Project (Legal Series), which enabled me to combine my legal expertise with my love of Church history. I have also enjoyed team teaching a course on Joseph Smith and the law at BYU's J. Reuben Clark Law School.



I find the attempts of the state of Missouri to extradite Joseph Smith to be particularly fascinating; this article focuses on the second of the three extradition attempts. Here we read about Joseph's trip to Springfield and his hearing before federal district judge Nathaniel Pope, where he was prosecuted by the Illinois attorney general and defended by the United States attorney for Illinois. It was a proceeding of enormous interest throughout the land; the courtroom was packed, ladies of society flanked the judge (including the recently married Mary Todd Lincoln), and newspapers in Illinois and beyond gave the case headline status. Judge Pope's decision was formally published and became one of the leading American authorities on habeas corpus and extradition for decades to come.

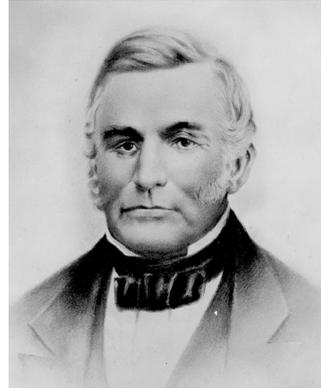
I am currently working on articles that will tell the stories of the equally gripping first and third attempts by Missouri to extradite Joseph. Among my other interests is the trial of the accused murderers of Joseph Smith. I have reviewed the notes of the trial taken by various recorders and, using recreated condensed versions of the testimony of the key witnesses in that case, have structured a mock trial that I have presented at a variety of venues.

I am also interested in the art of life story writing; my wife, Dawn, and I lecture (and have coauthored a book) on the subject. I enjoy researching the lives of historical figures such as Joseph Smith and trying to make their experiences accessible as stories. This article covers only eight months of the Prophet's life and focuses on just one of his many legal battles, but the events make an engrossing story as well as a revealing legal study.

County, Missouri, to stand trial for his alleged participation in a plot to murder Lilburn W. Boggs, the former governor.<sup>2</sup>

### A Shot from the Dark

On the evening of May 6, 1842, Lilburn Boggs was relaxing in the private family room of his Independence home, reading a newspaper. His six-year-old daughter rocked her infant sister in a cradle nearby. His wife and other members of his large family were in the dining room finishing their evening meal. Without warning, the tranquility of this domestic scene was broken by the crash of a pistol shot fired through a window. Boggs slumped back, blood gushing from wounds in his neck and head. The screams of his wife brought neighbors and then doctors, who found that two balls had penetrated Boggs's skull and one or two others his neck, causing profuse bleeding. He was not expected to survive.<sup>3</sup>



Lilburn Boggs

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2. To my knowledge, this is the first scholarly article to focus on the second extradition attempt from a legal perspective, although most general histories of the Mormon experience in Nauvoo give it passing mention. Many of the facts surrounding the extradition attempts are noted in the *History of The Church of Jesus Christ of Latter-day Saints*, compiled by various LDS scribes and historians, published in serial form in several newspapers, finally edited by Brigham H. Roberts, and published by the Church as a six-volume work in 1902 (hereafter referred to as *History of the Church*). A concise legal discussion of the extradition attempts can be found in Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of The Church of Jesus Christ of Latter-day Saints, 1830–1900* (Urbana: University of Illinois Press, 1988), 95–101. Monte B. McLaws, in “The Attempted Assassination of Missouri’s Ex-Governor, Lilburn W. Boggs,” *Missouri Historical Review* 60 (October 1965): 50–62, provides detail on the Boggs shooting and its aftermath, focusing on allegations that O. Porter Rockwell was the assailant. I am currently working on articles dealing with the first and third extradition attempts, which relate to treason charges brought by Missouri against Joseph Smith and others in connection with the 1838 Mormon War in Missouri.

3. Contemporaneous newspaper accounts disagree on whether Boggs was hit by three or four balls. “A Foul Deed,” *St. Louis Daily Missouri Republican*, May 12, 1842; “Governor Boggs,” *Jefferson City (Mo.) Jeffersonian Republican*, May 14, 1842. Further details concerning the shooting can be found in two pieces written decades later, both apparently based on the recollections of Boggs’s son. See F. A. Sampson, ed., “A Short Biographical Sketch of Lilburn W. Boggs by His Son,”

On the night Boggs was shot, twenty-eight-year-old Orrin Porter Rockwell was also in Independence. He had brought his wife, Luana, there in February so she could be with her parents when she gave birth to their fourth child.<sup>4</sup> Rockwell left for Illinois shortly after the Boggs assault, arriving back in Nauvoo in due course.<sup>5</sup> Nine days later, on May 15, 1842, the Boggs shooting was mentioned from the stand in Nauvoo at a general meeting.<sup>6</sup> Apostle Wilford Woodruff recorded in his diary that Boggs had “just Been assassinated in his own house & fallen in his own Blood. . . . Thus this ungodly wretch has fallen in the midst of his iniquity & the vengeance of God has overtaken [Boggs] at last & he has met his Just deserts though by an unknown hand.”<sup>7</sup> A letter to the *Nauvoo Wasp*, a Mormon newspaper edited by the prophet’s brother William, exulted, “Boggs is undoubtedly killed, according to report; but Who did the Noble Deed remains to be found out.”<sup>8</sup>



Orrin Porter Rockwell

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*Missouri Historical Review* 4 (January 1910): 106–8; Lyman L. Palmer, *History of Napa and Lake Counties, California* (San Francisco: Slocum, Bowen, and Co., 1881), 380–81. See also Harold Schindler, *Orrin Porter Rockwell: Man of God, Son of Thunder*, 2d ed. (Salt Lake City: University of Utah Press, 1983), 65–69.

4. During his stay in Missouri, Rockwell reportedly had been using the alias name of “Brown.” William F. Switzler, *Illustrated History of Missouri, from 1541 to 1877* (St. Louis: C. R. Barns, 1879), 251. This was perhaps an understandable precaution in a state from which the Mormons had been expelled a few years earlier by executive order.

5. John C. Bennett claimed that Rockwell arrived the day before the report of the Boggs assault. John C. Bennett, *The History of the Saints; or, an Exposé of Joe Smith and Mormonism* (Boston: Leland and Whiting, 1842), 282.

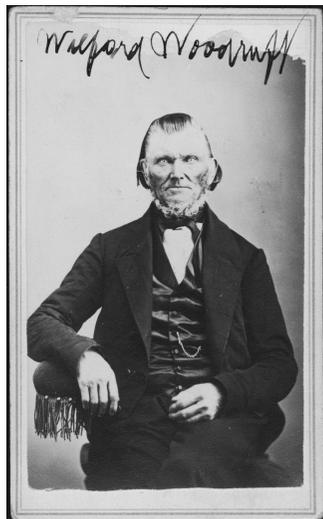
6. *History of the Church*, 5:9.

7. Woodruff later corrected his journal to note that Boggs had not died. Susan Staker, ed., *Waiting for World’s End: The Diaries of Wilford Woodruff* (Salt Lake City: Signature Books, 1993), 55–56 (May 15, 1842).

8. *Nauvoo (Ill.) Wasp*, May 28, 1842, 2. This letter was written anonymously by an individual who used the pseudonym “Vortex” and was in response to a *Burlington Hawkeye* article, reprinted in the *Wasp*, reporting that a Mormon was suspected in the shooting. A *Wasp* editor commented on the Vortex letter as follows: “We admit the foregoing communication to please our correspondent, not that we have any faith that any one has killed Governor Boggs. The last account we have received is that he is still living and likely to live.” *History of the Church*, 5:xxii.

The reports of Boggs's demise proved to be premature. Although he lingered on the verge of death for two weeks, eventually he recovered fully. Determining who committed the crime, however, proved difficult. A "very fine" pistol was found outside the window of Boggs's home, apparently dropped when the perpetrator hastily departed the scene. Other clues, if any existed, were not made public.<sup>9</sup>

It appears that a silversmith named Tompkins (a man "about 38 or 40 years of age") was the main initial suspect, but a citizens committee, headed by the notorious anti-Mormon militia leader Samuel D. Lucas, investigated and cleared the man of responsibility.<sup>10</sup> The committee reported to Governor Thomas Reynolds that there were no other suspects.<sup>11</sup> Nevertheless, it was not long before some began speculating that the Mormons might be involved.<sup>12</sup> On May 14, 1842, about the same time that news of the shooting reached Nauvoo, David W. Kilbourne, postmaster of nearby Montrose, Iowa, and a persistent anti-Mormon agitator, wrote a letter to Governor Reynolds opining that he "should not entertain a doubt that it was done by some of Joe's minions at his instigation."<sup>13</sup> Joseph Smith, for his part,



Wilford Woodruff

9. *Daily Missouri Republican*, May 12, 1842. The newspaper reported that "a man was suspected" but also quoted the governor's brother-in-law as saying that "suspicion does not seem to rest on any person."

10. *Jeffersonian Republican*, May 21, 1842. Lucas had been major general of the Missouri Militia during the Missouri Mormon War and had ordered Joseph Smith to be summarily executed after the latter voluntarily surrendered on November 1, 1838. Lucas's order was disregarded by Alexander Doniphan, who regarded it as patently illegal. Alexander L. Baugh, *A Call to Arms: The 1838 Mormon Defense of Northern Missouri* (Provo, Utah: BYU Studies, 2000), 149–51.

11. Citizens Committee to Thomas Reynolds, May 13, 1842, "Thomas Reynolds Letters," Missouri Archives, State Historical Society Manuscript Collection, Columbia, Mo.; quoted in Warren A. Jennings, "Two Iowa Postmasters View Nauvoo: Anti-Mormon Letters to the Governor of Missouri," *BYU Studies* 11, no. 3 (1971): 275–76.

12. "Gov. Boggs," *St. Louis Missouri Reporter*, May 14, 1842.

13. D. W. Kilbourne to Thomas Reynolds, May 14, 1842, "Thomas Reynolds Letters." Quoted in Jennings, "Two Iowa Postmasters," 277. Kilbourne claimed



John C. Bennett

denied any involvement. Still under the impression that Boggs was dead, he wrote to the *Quincy Whig* on May 22, “He died not through my instrumentality. My hands are clean, and my heart pure from the blood of all men.”<sup>14</sup>

That the Mormons would come under suspicion was not surprising. Boggs symbolized Mormon persecution in Missouri, having issued the infamous Extermination Order, the official document by which the followers of Joseph Smith had been driven from the state. Rockwell was Smith’s personal bodyguard, a fiercely loyal acolyte who was capable of using a gun when the situation demanded it.<sup>15</sup> The fires of blame

were stoked by John C. Bennett, whose spectacular rise to the top rungs of responsibility in the Church had been followed by a precipitous fall

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that Smith had “sworn Vengeance publicly against Gov Boggs ever since he settled in this neighborhood.”

14. “Assassination of Ex-Governor Boggs of Missouri,” *Whig*, June 4, 1842, 2. Smith’s letter bore the date of May 22, 1842, and was also published in several other Illinois newspapers. The relevant portion of the letter reads as follows: “In your paper . . . of the 21st inst., you have done me manifest injustice, in ascribing to me a prediction of the demise of Lilburn W. Boggs, ex-governor of Missouri, by violent hands. Boggs was a candidate for the State Senate, and I presume, fell by the hand of a political opponent, with his ‘hands and face yet dripping with the blood of murder;’ but he died not through my instrumentality. My hands are clean, and my heart is pure from the blood of all men. I am tired of the misrepresentation, calumny, and detraction heaped upon me by wicked men.”

15. For example, on September 16, 1845, Rockwell shot and killed Frank Worrell. The shooting was done on the order of Hancock County Sheriff Jacob Backenstos, who had deputized Rockwell. Worrell was leading a mob apparently bent on harming Backenstos. *History of the Church*, 7:446. Coincidentally or not, Worrell had been in charge of the Carthage Greys unit assigned to guard the jail on the day Joseph and Hyrum Smith were murdered and had refused to answer some questions about the incident on the ground that his answers might incriminate him. See George D. Watt, Minutes of Trial, *People v. Levi Williams, et al.*, manuscript copy in Church History Library, The Church of Jesus Christ of Latter-day Saints, Salt Lake City. Rockwell was eventually arrested for the Worrell shooting but, after receiving a change of venue, was released. Schindler, *Orrin Porter Rockwell*, 146–49, quoting *Whig*, May 6 and 13, 1846.

and excommunication on grounds of immoral behavior.<sup>16</sup> Not content to slink off in obscurity, Bennett had maintained a high profile by publishing and speaking on the alleged licentiousness of Smith and his followers. The Boggs assault presented an appealing opportunity for Bennett to strike further blows against Mormonism. According to Bennett, Smith had prophesied in a public meeting in 1841 that Boggs would die by violent means. When Rockwell left “for parts unknown” not long before the assault, Bennett claimed he asked Smith about it and that Smith replied Rockwell had “gone to fulfill prophecy.”<sup>17</sup>

Concern that Missouri might initiate some sort of extradition proceeding against Joseph Smith may have prompted the Nauvoo City Council to pass its first habeas corpus ordinance on July 5, 1842, which provided that no Nauvoo citizen “shall be taken out of the city by any writs without the privilege of investigation before the municipal court, and the benefit of a writ of habeas corpus.” The ordinance was enacted “for the protection of the citizens of this city [Nauvoo], that they may in all cases have the right of trial in this city, and not be subjected to illegal process by their enemies.”<sup>18</sup>

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16. On June 24, 1842, Smith wrote to Governor Thomas Carlin about the inappropriate behavior of Bennett, stating, “I have been credibly informed that he is colleaguuing with some of our former cruel persecutors, the Missourians, and that he is threatening destruction upon us; and under these circumstance I consider it my duty to give you information on the subject, that a knowledge of his proceedings may be before you in due season.

“It can be proven by hundreds of witnesses that he is one of the basest of liars, and that his whole routine of proceedings, while among us, has been of the basest kind.” Joseph Smith to Thomas Carlin, June 24, 1842, Joseph Smith Letterbook 2:233–35, Church History Library; *History of the Church*, 5:42–44.

17. “Nauvoo,” *Warsaw Signal*, July 9, 1842, 2; “Bennett’s Second and Third Letters,” *Springfield (Ill.) Sangamo Journal*, July 15, 1842, quoting from a letter by John C. Bennett to the editor of the newspaper dated July 2, 1842.

18. Nauvoo City Council Proceedings, 1841–45, July 5, 1842, Church History Library (hereafter “Nauvoo City Council Minutes”); *History of the Church*, 5:57. “A writ of habeas corpus is an order in writing, signed by the judge . . . directed to any one having a person in his custody or under his restraint, commanding him to produce, such person at a certain time and place, and to state the reasons why he is held in custody, or under restraint.” John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America, etc.*, rev. 6th ed. (1856), s.v. *habeas corpus*, online at [http://www.constitution.org/bouv/bouvier\\_h.htm](http://www.constitution.org/bouv/bouvier_h.htm). The Nauvoo Charter provided that “the municipal court shall have power to grant writs of habeas corpus in all cases arising under the ordinances of the city council.” Section 17 of “An Act to Incorporate the City of Nauvoo,” Laws of the State of Illinois passed by the Twelfth General Assembly (Springfield, Ill.: Wm. Walters, 1841), 55.

On July 12, 1842, Postmaster Kilbourne wrote another letter to Governor Reynolds reporting on a conversation with Bennett in which the latter claimed he had strong evidence that Rockwell was the triggerman in the Boggs assault and was acting as the agent of Joseph Smith. According to Kilbourne's thirdhand report, just before the news of the attempted assassination reached Nauvoo, Smith said God had told him that "*Boggs would not die in his bed.*"<sup>19</sup> Also in July, Bennett wrote several letters to various newspapers, expounding on his theory that Smith was involved in the matter.<sup>20</sup>

In early July 1842, Rockwell paid a visit to Bennett. According to Bennett, Rockwell said he had been wrongly accused of wishing to assassinate Boggs or of being ordered by Smith to do so. "If you say that Joe Smith gave me fifty dollars and a wagon to shoot Boggs, I can whip you, and will do it in a crowd." Rockwell also maintained, "I never done an act in my life that I was ashamed of." Bennett's self-reported reply: "I know nothing of what you did, as I was not there, I only know the circumstances, and from them I draw my own inferences."<sup>21</sup>

Unless further evidence is uncovered in some musty archive or attic, historians will never agree on whether Rockwell was the Boggs assailant.<sup>22</sup>

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19. David Wells Kilbourne to Thomas Reynolds, July 12, 1842, "Thomas Reynolds Letters," emphasis in original; cited in Jennings, "Two Iowa Postmasters View Nauvoo," 278.

20. "Bennett's Second and Third Letters"; "Gen. Bennett's 4th Letter," *Sangamo Journal*, July 22, 1842.

21. Bennett's affidavit detailing his version of the meeting with Rockwell on July 5, 1842, was printed in the *St. Louis American Bulletin*, July 14, 1842, and reprinted in "Disclosures—the Attempted Murder of Boggs!" *Sangamo Journal*, July 22, 1842.

22. Rockwell, who was illiterate, never left a written journal or memoir in which he might have addressed the question directly, although he told the story of his incarceration in Missouri, and it was printed in the *Millennial Star* 22, no. 33 (August 18, 1860): 518–20 and no. 34 (August 25, 1860): 535–36. See also *History of the Church*, 6:134–42. Joseph Smith, dictating in "The Book of the Law of the Lord" during the period Rockwell was exiled in the East, said, "But there is one man I would mention namely Porter Rockwell, who is now a fellow-wanderer with myself—an exile from his home because of the murderous deeds and infernal fiendish disposition of the indefatigable and unrelenting hand of the Missourians. He is an innocent and a noble boy; may God Almighty deliver him from the hands of his pursuers. He was an innocent and a noble child, and my soul loves him; Let this be recorded for ever and ever. Let the blessings of Salvation and honor be his portion." Joseph Smith, Journal, August 23, 1842, as published in Dean C. Jessee, ed., *The Papers of Joseph Smith*, 2 vols. (Salt Lake City: Deseret Book, 1989–92), 2:439. As this paper went to press, the second volume of *The Joseph Smith Papers*:

Evidently, however, Lilburn Boggs thought the Mormons were involved. On July 20, 1842, Boggs signed an affidavit (fig. 1) stating that “he believe[d], and ha[d] good reason to believe from Evidence and information [then] in his possession, that Joseph Smith commonly called the Mormon Prophet was accessory [*sic*] before the fact of the intended murder.”<sup>23</sup> As we shall see, the wording of that affidavit became critical in the legal proceedings that followed.

### Requisition and Arrest

Based on Boggs's affidavit, Governor Reynolds issued a requisition for the extradition of Smith and Rockwell and sent it to Illinois governor Thomas Carlin. The requisition went beyond the information in the Boggs affidavit by claiming that Joseph Smith was a “fugitive from Justice” who had fled to the state of Illinois and by naming “O. P. Rockwell” as the assailant. No evidence was cited to support these additional claims.<sup>24</sup>

The Boggs affidavit and Reynolds requisition were prepared in accordance with Article IV of the United States Constitution and a 1793 federal statute covering interstate extradition. These authorized the governor of

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*Journals*, ed. Dean C. Jessee, Ronald K. Esplin, and Richard Lyman Bushman (to be published by the Church Historian's Press) had not been released. Therefore, in citing Joseph Smith's journals, I have used the 1992 edition of *The Papers of Joseph Smith*, edited by Jessee. However, since journals published by Jessee end in the middle of my story, I have used Scott Faulring's *An American Prophet's Record* for citations to Joseph's journal after December 21, 1842. The portion of the 1842 journal that is contained in the Jessee volume was originally written in a large leather-bound book with the title “The Book of the Law of the Lord” in ornate handwriting on the fourth leaf. This book also contains copies of certain revelations and lists of donations. Jessee, *Papers of Joseph Smith*, 2:335. Since I am using the journal entries from this book, I shall, for simplicity, refer to it as “Smith, Journal” rather than “The Book of the Law of the Lord.”

I am indebted to my coeditors of the Joseph Smith Papers Project for numerous insights that were useful in researching and writing this paper.

23. State of Missouri, Affidavit of Lilburn W. Boggs, Jackson County, Missouri, July 20, 1842, Abraham Lincoln Presidential Library, Springfield, Ill.; copied in Smith, Journal, December 9–20, 1842, in Jessee, *Papers of Joseph Smith*, 2:499–500.

24. The requisition stated that “one Joseph Smith is a fugitive from Justice, charged with being accessory before the fact, to an assault with intent to kill, made by one O. P. Rockwell on Lilburn W Boggs in this State, and it is represented to the Executive Department of this State, has fled to the State of Illinois.” State of Missouri, Requisition of Thomas Reynolds, Jackson County, Mo., July 22, 1842, Abraham Lincoln Presidential Library; copied in Smith, Journal, December 9–20, 1842, in Jessee, *Papers of Joseph Smith*, 2:503–4.

State of Missouri } This day personally appeared  
County of Jackson } before me Samuel Weston a  
Justice of the peace within and for the County of  
Jackson the subscriber Lilburn W. Boggs who  
being duly sworn doeth depose and say that on the  
night of the sixth day of May 1842 while sitting  
in his dwelling in the Town of Independence in  
the County of Jackson, he was shot with intent  
to kill, and that his life was despaired of for  
several days, and that he believes, and has good  
reason to believe from evidence and information  
now in his possession, that Joseph Smith  
commonly called the Mormon Prophet was  
accessary before the fact of the intended murder;  
and that the said Joseph Smith is a citizen or  
resident of the State of Illinois, and the said deponent  
hereby applies to the Governor of the State of  
Missouri to make a demand on the Governor  
of the State of Illinois to deliver the said Joseph  
Smith commonly called the Mormon Prophet  
to some person authorized to receive and convey  
him to the State and County aforesaid, there  
to be dealt with according to law.

Sworn to and subscribed  
before me this 20<sup>th</sup> day  
of July 1842

Samuel Weston J.P.

Lilburn W. Boggs

FIG. 1. Lilburn W. Boggs affidavit, July 20, 1842.

a state to requisition a fugitive from the governor of the state to which the fugitive had fled.<sup>25</sup> In addition, the Illinois legislature had passed a law requiring the Illinois governor to comply when a proper demand was made by the governor of another state.<sup>26</sup>

In due course, warrants were issued by Governor Carlin for Joseph Smith and Porter Rockwell, and on August 8, 1842, lawmen led by Adams County undersheriff Thomas King arrived in Nauvoo to make the arrests.<sup>27</sup> King was no stranger to Smith, having been the officer in charge of a posse that had taken him into custody the previous year when Missouri was attempting to bring him back to stand trial for charges of treason.<sup>28</sup> This earlier extradition attempt was foiled when circuit court judge Stephen A. Douglas released Smith on a legal technicality following a habeas corpus hearing. Now, finding himself once again under arrest by King, Joseph again applied for a writ of habeas corpus. This time, however, instead of appearing before an Illinois circuit court judge, Smith applied to the Nauvoo Municipal Court, which granted the writ. This home court maneuver apparently caught Sheriff King by surprise, so he left Smith and Rockwell in the custody of Nauvoo marshal Dimick B. Huntington and returned to Quincy for further



Thomas Carlin

25. The Constitutional provision and the enabling statute also applied to runaway slaves. U.S. Constitution, art. 4, sec. 2; An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters (February 12, 1793), 2d Cong., 1st sess., ch. 152, sec. 1, *Laws of the United States of America, from the 4th of March, 1789, to the 4th of March, 1815, Including the Constitution of the United States, the Old Act of Confederation, Treaties, and Many Other Valuable Ordinances and Documents; with Copious Notes and References* (Philadelphia: Bioren and Duane, 1815), 2:331.

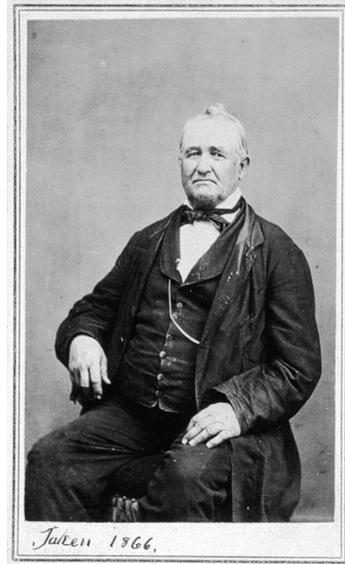
26. "An Act Concerning Fugitives from Justice" (January 6, 1827), *The Public and General Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), 318–20.

27. Smith, Journal, August 8, 1842, in Jessee, *Papers of Joseph Smith*, 2:402–3.

28. The earlier arrest of Smith by King occurred just outside Quincy on June 5, 1841, shortly after Smith had left a meeting with Governor Carlin. "The Late Proceedings," *Times and Seasons* 2 (June 15, 1841): 447. See also *History of the Church*, 4:364–71.

instructions, taking the arrest warrants with him.<sup>29</sup> There, an incensed Carlin told King that the Nauvoo Municipal Court did not have authority to override a warrant issued by the governor.<sup>30</sup>

The habeas corpus obtained by Joseph Smith and Porter Rockwell was issued pursuant to the July 5 city council ordinance mentioned above. The council believed they were acting under the authority of the Nauvoo Charter, which gave the municipal court “power to grant writs of habeas corpus in all cases arising under the ordinances of the City Council.”<sup>31</sup> An addendum to the charter provided that the city council could pass ordinances that were “necessary and proper for carrying into execution the powers specified in [the charter],” so long as they were neither “repugnant



Dimick B. Huntington

to, nor inconsistent with, the constitution of the United States or of this State.”<sup>32</sup> Carlin (as became clear from his subsequent correspondence) felt strongly that his arrest warrant did *not* fall within the ambit of the habeas

29. Petition of Joseph Smith, August 8, 1842, Joseph Smith Collection, Church History Library; *History of the Church*, 5:86. Eliza R. Snow’s journal for August 14, 1842, records: “King, the deputy sheriff, and Pitman from Quincy, with the Sheriff and his associate from Mo.; are yet watching about the City for Prest. S[mith] who had absented himself while they were on their return to Quincy.” Maureen Ursenbach [Beecher], ed., “Eliza R. Snow’s Nauvoo Journal,” *BYU Studies* 15, no. 4 (1975): 396.

30. “When Govenor [sic] Carlin was informed of the proceedings of the Municipal Court, his anger got the master of his judgement and he disregarded our Charter and would not pay any attention to it. Thereby impeaching the proceedings of Congress and proving himself to be not a whit better than his Colleague Boggs of Missouri. He dispatched the Sheriff, back with orders to take me at all hazards and pay no regard to our charter.” Joseph Smith to Dr. J. M. Bernhisel, September 7, 1842, Joseph Smith Collection, Church History Library.

31. Nauvoo City Charter, sec. 17, published as “An Act to Incorporate the City of Nauvoo,” *Times and Seasons* 2 (January 15, 1841): 281–85; see also *History of the Church*, 4:239–45.

32. Nauvoo City Charter, sec. 17; “Of the Legislative Powers of the City Council,” sec. 36, *Times and Seasons* 2 (January 15, 1841): 286; *History of the Church*, 4:245–47.

corpus right granted under the charter because Smith's alleged crime did not arise under an ordinance of the city council. Taking a contrary view, Smith and his lawyers reasoned that the city ordinance granting *any citizen arrested in Nauvoo* the right to apply to the municipal court for habeas corpus was a proper extension of power under the charter addendum because it was not inconsistent with either the Illinois or the United States constitution.<sup>33</sup>

It is unclear whether the Nauvoo Municipal Court merely granted Smith's petition for a writ of habeas corpus or held a hearing on the return at the same time.<sup>34</sup> In any event, Carlin was exasperated by the municipal court's assumption of habeas corpus power in connection with a warrant issued by the governor for a crime that had nothing to do with a Nauvoo ordinance.

As soon as King left Nauvoo for Quincy on August 8, the Nauvoo City Council got busy. Before the end of the day, they had already passed another ordinance concerning writs of habeas corpus, an even broader extension of the municipal court's power. This ordinance provided that even if the court were to determine that the writ had been *properly issued*, it could hear testimony on the *merits* of the underlying action and dismiss the defendant if it found that the action had been brought through "private pique, malicious intent, or religious or other persecution, falsehood or misrepresentation."<sup>35</sup>

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33. "Persecution," *Times and Seasons* 3 (August 15, 1842): 886–89; also published in *History of the Church*, 5:98–103.

34. It may be useful to briefly review habeas corpus procedure. A person who was arrested could challenge the circumstances of his detention by having his attorney prepare a petition for a writ of habeas corpus. This petition could be presented to a low-level local judicial magistrate, such as a justice of the peace or a master in chancery. If it appeared to the magistrate that there was merit in the petition on its face, he could command the officer having custody to bring the defendant before a court. The command and the original warrant were called a "return." If the court was not ready to hear the return on the writ, or if the attorneys for either side requested a continuance to prepare their arguments, the prisoner could petition to be released on bail. At the hearing on the return, evidence and arguments would be made by the attorney for the prisoner, as well as an attorney for the state, concerning the propriety of the arrest. See Timothy Walker, *Introduction to American Law*, 9th ed. (Boston: Little, Brown and Company, 1887), 631–32.

35. Nauvoo City Council Minutes, August 8, 1842; *History of the Church*, 5:87–88. This ordinance further expanded the reach of the municipal court's habeas corpus power by providing that not only citizens of Nauvoo but any persons *arrested* in Nauvoo could have their habeas corpus petitions heard by the municipal court.

This expanded habeas corpus inquiry—permitting a court to hear testimony on the merits of the case—went well beyond what had been allowed under the common law, which viewed the purpose of habeas corpus as permitting the prisoner to challenge whether the arresting documents had been properly issued. Indeed, even the Mormon press understood that “a writ of habeas corpus [could] only test the *validity*, not the virtue of a process, (as testimony to prove the *guilt* or *innocence* of a person—under an investigation by habeas corpus, is inadmissible).”<sup>36</sup>

An argument can be made that in Illinois the statutory habeas corpus power was more expansive than it had been at common law. An Illinois rule permitted a petitioner for habeas corpus to “allege *any facts* to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge” and gave the judge authority to “proceed in a summary way to settle the said facts, by hearing the testimony . . . and dispose of the prisoners as the case may require.”<sup>37</sup>

How does one interpret the key words “any facts” in this statute? Do they mean that a court hearing a return of habeas corpus on an arrest pursuant to an extradition request was entitled to inquire into the facts of the underlying substantive allegations against the petitioner?<sup>38</sup> If those facts

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36. “Persecution,” 888–89; *History of the Church*, 5:102–3 (parentheses and italics in original). As if to emphasize the common understanding of the scope of inquiry on a habeas corpus hearing, the *Times and Seasons* article went on to explain why Smith and Rockwell had not presented themselves to the district court in order to clear themselves: “If they appealed to the district court it might have availed them nothing, . . . as their dismissal would rest upon some technicalities of law, rather than upon the merits of the case; *as testimony to prove the guilt, or innocence of the [persons] charged, could not be admitted on the investigation on a writ of habeas corpus, the question, not being, whether the persons are guilty or not guilty; but merely to test the validity of the writ; which if proved to be issued in due form of law, however innocent the parties might be, would subject them to be transported to Missouri*” (brackets in original, italics added).

It should be noted that during this time, Joseph Smith was the editor of *Times and Seasons*. Terence A. Tanner, “The Mormon Press in Nauvoo,” in Roger D. Launius and John E. Hallwas, *Kingdom on the Mississippi Revisited* (Urbana: University of Illinois Press, 1996), 94, 103–6.

37. Illinois Revised Statutes, sec. 3 at 324 (1833), emphasis added.

38. At least one commentator has suggested they *may* have. See Dallin H. Oaks, “The Suppression of the *Nauvoo Expositor*,” *Utah Law Review* 9 (Winter 1965): 883–84. Oaks acknowledges that “at common law and under the law of most states it would have been an abuse of the writ of habeas corpus to use it to consider questions of guilt or innocence, for the historical role of habeas corpus was simply to determine whether the arrest warrant was free from any formal defects and perhaps whether the warrant had been based on sufficient written

concerned actions that had taken place in another state, such an inquiry would seem to place an unusually heavy burden on the arresting authority. Should Missouri be expected to produce witnesses and elicit testimony in an Illinois court about a crime allegedly committed in Missouri? Or do the words “any facts” simply mean that the court hearing the habeas corpus could delve into any facts that had a bearing on whether proper procedures had been followed to obtain the Illinois arrest warrant?<sup>39</sup>

The non-Mormon press had a field day with the new habeas corpus ordinance. The *Warsaw Signal* printed the ordinance in full, expressing its outrage:

We copy the above ordinances in order to show our readers the barefaced affrontery with which the holy brotherhood at Nauvoo set at defiance the civil authorities of the State. No man having claims to even an ordinary

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evidence.” But he explains that while “the Nauvoo Municipal Court may have erred in its application of these principles . . . the power that the court exercised was clearly authorized by law, not in defiance of it.” Oaks, “The Suppression of the *Nauvoo Expositor*,” 883–84. There is no evidence, however, that Smith or his attorneys raised the cited statute at the habeas corpus hearing, and it is fair to say that most people felt it was improper (or, at least of questionable propriety) to try the facts of the underlying case at a habeas corpus hearing. Although evidence as to the underlying merits had been presented to Illinois Supreme Court Justice Stephen A. Douglas when Smith appeared before him on a writ of habeas corpus in connection with Missouri’s first extradition attempt, Douglas declined to base his ruling on such evidence. Likewise, United States District Judge Nathaniel Pope (as will be discussed below in connection with his decision in this case) disregarded submitted evidence that Joseph was not a fugitive from Missouri. Governor Thomas Carlin, as noted above, strongly believed the municipal court had overstepped its bounds in freeing Joseph. Carlin’s successor, Thomas Ford, also felt that a court might not properly consider evidence of whether an alleged fugitive had fled from justice (as will be further discussed in the postscript section of this article). Finally, both Mormon and anti-Mormon newspapers accepted that a court could not, on a habeas corpus hearing, inquire into the underlying merits of the case. These were important factors in creating a widely held belief outside Nauvoo that Smith stood above the law.

39. The Alabama case of *Ex parte Mahone*, 30 Ala. 49 (1857), which is cited in footnote 128 of Oaks, “The Suppression of the *Nauvoo Expositor*,” 883, holds that a prisoner who is in custody can “claim as a matter of right that such officer shall hear and pass on all legal evidence which he offers, touching the question of his guilt. If, on such examination, ‘it appear that no offense has been committed, or that there is no probable cause for charging the defendant therewith,’ the prisoner must be discharged.” It should be noted, however, that this case was specifically decided under applicable Alabama statutory law and Oaks points out that it is an “unusual opinion.” Dallin H. Oaks, “Habeas Corpus in the States—1776–1865,” 32 *University of Chicago Law Review* 243 (1965–65) at 259 (footnote 71).

share of common sense, can ever believe that there is the least shadow of authority in the City Council of Nauvoo, to pass such an ordinance. . . . [T]his Mormon ordinance, not only extends to all cases of arrest; but sets the laws of the United States at defiance, by giving authority to the Municipal Court to enquire into the *causes* of the arrest; a power which even the legislature of this State cannot confer.

. . . The guilt or innocence of the accused must be determined by the Courts of the State from whence the requisition issued.<sup>40</sup>

While Sheriff King was in Quincy consulting with Governor Carlin, the Nauvoo marshal released Joseph Smith and Porter Rockwell. The prisoners had challenged their detention on the grounds that the marshal had no authority to continue holding them, since King had taken the warrants for their arrest with him. The attorneys for the accused men considered petitioning the local master in chancery for a writ of habeas corpus, which would have avoided the jurisdiction issue; however, such a writ likely would have required a hearing on the return before a circuit court outside Nauvoo, and so they decided against pursuing that course. Joseph and his advisors were concerned that applying for a writ from the master in chancery would have amounted to a tacit admission that the Nauvoo Municipal Court lacked jurisdiction, and they knew that a court outside Nauvoo would decline to rule on the merits of the underlying action.<sup>41</sup>

### “When They Returned, I Was Away”

Joseph Smith did not linger in Nauvoo. As he put it, when the lawmen returned to Quincy, “a report went abroad that the matter would end there, but we did not expect it and consequently I kept out of their way, and when they returned I was away.”<sup>42</sup> This, of course, outraged his enemies. “No termination of the affair could be less satisfactory than the one which has taken place. If [Smith] had resisted, we should have had the sport of

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40. “An Ordinance,” *Warsaw Signal*, August 20, 1842. The *Signal*’s editor was Thomas Sharp, the noted anti-Mormon agitator, later to be tried and acquitted of conspiracy in the murder of Joseph Smith. Dallin H. Oaks and Marvin S. Hill, *Carthage Conspiracy: The Trial of the Accused Assassins of Joseph Smith* (Urbana: University of Illinois Press, 1975), 56–57, 185.

41. “Persecution,” *Times and Seasons*, 889; see also *History of the Church*, 5:102–3.

42. Smith to Bernhisel, September 7, 1842. Porter Rockwell first went to Philadelphia and then to New Jersey. He sought to find employment in both places, but with little success, and seemed to be suffering from depression. Orrin Porter Rockwell per S. Armstrong to Joseph Smith, December 1, 1842, in *History of the Church*, 5:198.

driving him and his worthy clan out of the State *en masse*, but as it is we are mortified that there is no efficacy in the law to bring such a scamp to justice.”<sup>43</sup>

During the next three months, Joseph Smith was seldom seen in public, hiding out in various safe houses in Nauvoo and surrounding Mormon communities in Illinois and Iowa. On August 11, he called an unusual council meeting after nightfall on a small island in the Mississippi River between Nauvoo and Montrose, Illinois. His wife Emma, his brother Hyrum, and other Church leaders and Mormon lawmen, including Newell K. Whitney, George Miller, William Law, William Clayton, and Dimick Huntington, set off from the Nauvoo shore in a skiff. Shortly after they arrived on the island, Joseph Smith and Erastus H. Derby arrived in a skiff from the Iowa side. There in the darkness they discussed the state of affairs and what to do about them. Judge James H. Ralston of Quincy, Illinois, and lawyer Stephen W. Powers of Keokuk, Iowa, were nearby, having promised to stay vigilant and to provide legal assistance on both sides of the river as needed by the Mormon prophet.<sup>44</sup>

During the time he was in hiding, Joseph continued to maintain that he was innocent in the Boggs affair, but the forced exile undoubtedly weighed heavily on a man who thrived on interactions with his family and his people. His frustrations showed in his correspondence, in which he characterized the proceedings against him as a “farce . . . gotten up, unlawfully and unconstitutionally, . . . by a mob spirit.”<sup>45</sup> In an open letter to the members of the Church in Nauvoo, he stated that his enemies pursued him “without cause, and have not the least shadow, or coloring of justice, or right on their side.”<sup>46</sup> In a letter to Emma, he considered the possibility of escaping with her and “20 or 30 of the best men we can find” to the Wisconsin pine country. “Then we will bid defiance to the world, to Carlin, Boggs, Bennett, and all their whorish whores, and motly [*sic*] clan, that follow in their wake.”<sup>47</sup>

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43. “Recent Attempt to Arrest the Prophet,” *Warsaw Signal*, August 13, 1842, 3.

44. Smith, Journal, August 11, 1842, in Jessee, *Papers of Joseph Smith*, 2:403–5. According to a newspaper report, Ralston advised Smith that he had little hope of prevailing in his case. “Recent Attempt to Arrest the Prophet,” 3.

45. Joseph Smith to Wilson Law, August 15, 1842, Jessee, *The Papers of Joseph Smith*, 2:407–10.

46. Joseph Smith to All the Saints in Nauvoo, September 1, 1842, in Jessee, *Papers of Joseph Smith*, 2:455–57.

47. Joseph Smith to Emma Smith, August 16, 1842, in Jessee, *Papers of Joseph Smith*, 2:429–32.

In the same letter to Emma, Joseph discussed the advisability of her visiting Governor Carlin to try to convince him to rescind the arrest warrant. Emma had a personal relationship with Carlin based on previous visits, both with and without her husband, to the governor's home in Quincy.<sup>48</sup> Joseph, however, did not think highly of Carlin, writing that "on the whole, he is a fool," that a visit by Emma would be of no use, and that "the more we notice him, and flatter him, the more eager he will be for our destruction. You may write to him, whatever you see proper, but to go and see him, I do not give my consent at present."<sup>49</sup>



Emma Smith

Responding immediately to her husband's suggestion, Emma wrote Carlin a letter of supplication dated August 16, 1842. "I find myself almost destitute of that confidence, necessary to address a person holding the authority of your dignified, and respectable office," she wrote, "and I would now offer, as an excuse for intruding upon your time and attention, the justice of my cause." Emma then stated what seemed obvious to her—that her husband was not guilty of the crime alleged against him. "Indeed it does seem entirely superfluous for me, or any one of his friends in this place, to testify his innocence of that

crime; when so many of the citizens of [Illinois] . . . do know positively that the statement of Governor Boggs is without the least shadow of truth."<sup>50</sup>

48. In late July, before Carlin had received the requisition from Reynolds, Emma had traveled to Quincy with Eliza R. Snow and Amanda Barns Smith to visit the governor. The women presented a petition to him seeking executive protection in the event mobs from Missouri came to attack or arrest Joseph unlawfully. Linda King Newell and Valeen Tippetts Avery, *Mormon Enigma: Emma Hale Smith* (Garden City, N.Y.: Doubleday, 1984), 121. Eliza R. Snow wrote in her journal of this visit, "He [Governor Carlin] manifested much friendship, and it remains for time and circumstance to prove the sincerity of his professions." However, in a life sketch written much later, she commented, "But alas! soon after our return, we learned that at the time of our visit, and while making protestations of friendship, the wily Governor was secretly conniving with the basest of men to destroy our leaders." Ursenbach [Beecher], "Eliza R. Snow's Nauvoo Journal," 395, 395 n. 4.

49. Joseph Smith to Emma Smith, in Jessee, *Papers of Joseph Smith*, 2:430.

50. Emma Smith to Thomas Carlin, August 16, 1842, in Jessee, *Papers of Joseph Smith*, 2:433–34. The letter was written on August 17 and was personally delivered

Emma reiterated the persecutions the Saints had endured in Missouri and then closed with a personal entreaty. “And now I appeal to your excellency as I would unto a father, who is not only able but willing to shield me and mine from every unjust prosecution. I appeal to your sympathies and beg you to spare me, and my helpless children. I beg you to spare . . . our aged mother,—the only surviving parent we have left,—the unsupportable affliction of seeing her son, who she knows to be innocent of the crimes laid to his charge, thrown again into the hands of his enemies.”<sup>51</sup>

Governor Carlin replied on August 24, 1842. Writing in a formal and verbose style, he apologized for his delay in responding, citing press of business. He was firm, however, in rejecting Emma’s plea to intervene in her husband’s behalf. Carlin viewed his duty as “entirely of an executive, and not a judicial character,” leaving him no discretion in the matter.<sup>52</sup> He explained that the Illinois extradition statute required “that when ever the Executive of any other State . . . shall demand of the executive of this State, any person as a fugitive from justice, and shall have complied with the requisitions of the act of congress . . . , it shall be the duty of the executive of this State to issue his *warrant* . . . to apprehend the said fugitive.” Carlin concluded, “With the Constitution and laws before me, my duty is so plainly marked out, that it would be impossible to err, so long as I abstain from usurping the right of adjudication.”<sup>53</sup>

Emma was far from satisfied by Carlin’s response and promptly replied. Sensing that the governor was unlikely to be swayed by further

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by William Clayton to Carlin in Quincy on August 19. After reading it in Clayton’s presence, Carlin “expressed astonishment at the judgement [*sic*] and talent manifest in the manner of her address.” Smith, Journal, August 21, 1842, in Jessee, *Papers of Joseph Smith*, 2:437.

51. Smith, Journal, August 21, 1842, in Jessee, *Papers of Joseph Smith*, 2:436.

52. Thomas Carlin to Emma Smith, August 24, 1842, in Jessee, *Papers of Joseph Smith*, 2:451. Contrast Carlin’s view of gubernatorial discretion with that of his successor, Thomas Ford, as discussed in the “Postscript” section below.

53. Carlin to Smith, August 24, 1842, in Jessee, *Papers of Joseph Smith*, 2:451. The Illinois law to which Carlin referred was An Act Concerning Fugitives from Justice (January 6, 1827), sec. 1, *The Revised Code of Laws of Illinois*. The “act of congress” to which Carlin referred was An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters (February 12, 1793), sec. 1–2, which contained three “requisitions” or prerequisites to a governor’s duty to deliver up a fugitive from justice to the governor of another state: (1) a demand had to be made to the governor of the state to which he fled; (2) an indictment or an affidavit charging the fugitive with a crime had to be given; and (3) the governor of the demanding state had to certify that the charges were true. *Laws of the United States of America*, 2:331.

appeals for mercy, her second letter, dated August 27, 1842, focused on the legal issues involved in the Missouri requisition. She assured Carlin that neither she nor her husband wanted the governor to abrogate his executive duty. There was, however, legal justification for Carlin's leaving Smith in peace. The Nauvoo City Council had passed a habeas corpus ordinance giving the Nauvoo Municipal Court the right "to try the question of identity," and her husband could prove that "the Mr. Smith refer'd to in the demand from Missouri, is not the Joseph Smith of Nauvoo, for he was not in Missouri . . . [and] is not a fugitive from justice." She asked, "Why then, be so strenuous to have my husband taken, when you know him to be innocent of an attempt on the life of Governor Boggs, and that he is not a fugitive from justice?"<sup>54</sup>

Carlin responded to Emma's second letter on September 7, 1842. Again his air was formal, but his undertone betrayed irritation, and his decision was unchanged. With regard to the Nauvoo City Charter, he expressed his "surprise at the extraordinary assumption of power by the board of Aldermen as contained in said ordinance." In Carlin's view, any claim that the municipal court had the power "to release persons held in custody under the authority of writs issued by the courts, or the executive of the State of [Illinois], is most absurd & ridiculous, and an attempt to exercise [the writ of habeas corpus in this manner], is a gross usurpation of power, that cannot be tolerated."<sup>55</sup>

Emma might have known that Carlin would be unsympathetic to any claim that the Nauvoo charter provided a basis to challenge a warrant issued by the governor pertaining to a matter that had nothing to do with a Nauvoo ordinance. Her more persuasive argument was that Joseph manifestly had not *fled* from Missouri justice. The extradition demand was based on Article IV of the Constitution of the United States, which provides that "a Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State,

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54. Emma Smith to Thomas Carlin, August 27, 1842, in Jessee, *Papers of Joseph Smith*, 2:452–54. Emma's letter also explained that it was not the fear of a just decision against him that had deterred Smith from going to Missouri, but his knowledge that it was never intended he should have a fair trial. She claimed she had evidence that twelve men from Jackson County, Missouri, had lain in wait between Nauvoo and Warsaw with the intent to take Smith from the hands of the lawmen who had come to Nauvoo to arrest him. Emma railed at some length against the "tyranny, treachery and knavery of a great portion of the leading characters of the State of Missouri."

55. Thomas Carlin to Emma Smith, September 7, 1842, in Jessee, *Papers of Joseph Smith*, 2:476.

shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.”<sup>56</sup> To Emma, it stood to reason that her husband could not have “fled” from Missouri justice if he had not been in Missouri at the time the crime was perpetrated.

Carlin did not respond directly to that argument, but his letter contained the suggestion that Smith “of course . . . would be entitled to a writ of Habeas Corpus issued by the circuit court, and entitled to a hearing before said court.” Nevertheless, Carlin was vehement in his opinion that “to claim the right of a hearing before the municipal court of the city of Nauvoo is a burlesque upon the charter itself.”<sup>57</sup>

That Carlin had become testy concerning the Smith affair is perhaps understandable. Newspapers were critical of his unwillingness to use force to apprehend the Mormon prophet. The *Sangamo Journal* complained that the “State authorities have quietly acquiesced and submitted to be bullied, and see the laws set at open defiance by the Mormon Prophet!” Carlin, it was said, “never seriously intended to deliver Joe Smith over to Missouri. . . . The Governor could have commanded force enough to take him; it was his duty to do so; but he did not do it—because the clique, by whom he is controlled, determined otherwise.”<sup>58</sup>

The Nauvoo City Council, for its part, disregarded the criticisms that it was overstepping its bounds and continued to refine the Nauvoo habeas corpus law. Its September 9, 1842, ordinance provided that the municipal court could make writs of habeas corpus “returnable forthwith,” meaning that the court could issue the writ and proceed immediately to adjudicate it. Its November 14 ordinance explained the circumstances under which the court could hear testimony and outlined procedures and fines for dealing with noncompliance with the ordinance. The latter ordinance provided a heavy penalty for anyone seeking to arrest a person in Nauvoo knowing that the writ was illegal—a fine of up to one thousand dollars and up to a year’s imprisonment.<sup>59</sup>

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56. U.S. Constitution, art. 4, sec. 2.

57. Carlin to Smith, September 7, 1842, in Jessee, *Papers of Joseph Smith*, 2:476–77. The four-letter exchange between Smith and Carlin has recently been published, with commentary, by Joseph Smith Papers coeditors Andrew H. Hedges and Alex D. Smith in “The Lady and the Governor: Emma Hale Smith’s and Thomas Carlin’s 1842 Correspondence,” *Mormon Historical Studies* 9, no. 2 (Fall 2008): 139–52.

58. “Joe Smith and the Governor,” *Sangamo Journal*, September 2, 1842.

59. Nauvoo City Council Proceedings, September 9 and November 14, 1842, published in *History of the Church* 5:161, 185–92.

On September 20, 1842, Governor Carlin, no doubt frustrated by the inability of his state law enforcement officers to capture Joseph Smith, issued a “proclamation” setting forth the legal basis for issuing the arrest warrants for Smith and Rockwell, reciting that they had “resisted the laws, by refusing to go with the officers who had them in custody” and offering a reward of two hundred dollars “for the apprehension and delivery of . . . either of the above named fugitives from justice.”<sup>60</sup>

### Exploring Legal Options

As these events were unfolding, Smith and his advisors were exploring legal avenues for avoiding extradition to Missouri. Sidney Rigdon inquired of Justin Butterfield (a prominent Illinois attorney, who, in addition to his private legal practice, served as the United States attorney for the district of Illinois) and received an encouraging response. Butterfield explained that the United States Constitution provided for extradition of *fugitives* from justice but that Smith did not fit that definition because it could not be shown that he had fled from Missouri justice—essentially the same argument Emma Smith had made in her letters to Governor Carlin. Butterfield maintained that in this case the governor of Illinois “has no jurisdiction over [Smith’s] person and cannot deliver him up.”<sup>61</sup>



Justin Butterfield

In early December 1842, Thomas Ford assumed the governorship of Illinois, his election due in part to the overwhelming support of Mormon voters in Illinois. No doubt hoping that Ford would not be emotionally

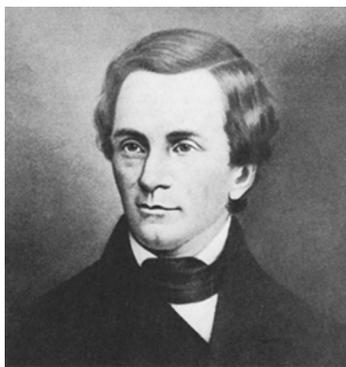
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60. Proclamation of Thomas Carlin, September 20, 1842, published in “Four Hundred Dollars Reward!” *Sangamo Journal*, September 30, 1842.

61. Justin Butterfield to Sidney Rigdon, October 20, 1842, Sidney Rigdon Collection, Church History Library. This letter later became a point of contention between Smith and Rigdon. At a conference on October 6, 1843, Smith accused Rigdon (who was postmaster of Nauvoo) of negligently or deliberately delaying delivery of the Butterfield letter for four weeks. Rigdon replied that the letter was in response to his own inquiries of Butterfield, “that he [Rigdon] received it at a time when he was sick, and unable to examine it, did not know that it was designed for the perusal and benefit of . . . Smith; that he had, consequently, ordered it to be laid aside, where it remained until inquired for by Joseph Smith.” *History of the Church* 6:47–48.

invested in an order that had been promulgated by Carlin, a delegation of Mormon leaders, including Hyrum Smith, Heber C. Kimball, Willard Richards, and William Clayton, traveled from Nauvoo to Springfield in early December. Their purpose was to appear in connection with the bankruptcy petitions of Joseph and Hyrum, as well as to canvass state leaders concerning what might be done to resolve the extradition stalemate.<sup>62</sup>

After arriving in Springfield, the delegation met with Stephen A. Douglas, “who appeared very friendly and offered to assist us in our business as much as possible.” Douglas, who years later would become the Democratic candidate for president of the United States, was at this time judge of the Illinois circuit that included Hancock County. He was well acquainted with Joseph Smith, having presided at the 1841 hearing in Monmouth involving Missouri’s initial attempt to extradite Smith on charges of treason arising out of the Mormon conflict of 1839. Douglas had visited Smith at Nauvoo the day after Boggs was shot, though, of course, neither man knew of the assault at that time. Now Douglas recommended that the delegation petition Governor Ford to revoke the writ and the proclamation for Smith’s arrest.<sup>63</sup>



Thomas Ford



Stephen A. Douglas

62. The delegation departed Nauvoo on December 9, 1842, and also included Henry Sherwood, Benjamin Covey, Peter Haws, Reynolds Cahoon, and Alpheus Cutler. Hyrum Smith and Benjamin Covey went to attend to Hyrum’s petition in bankruptcy; the others went in Joseph’s behalf. Jesse, *Papers of Joseph Smith*, 2:497–501.

63. Jesse, *Papers of Joseph Smith*, 2:499. Details concerning the earlier extradition attempt heard by Judge Douglas can be found in *History of the Church*, 4:364–71. Regarding Douglas’s presence in Nauvoo the day after the Boggs shooting, see Affidavit of Stephen A. Douglas, *State of Missouri vs. Joseph Smith*, United States Circuit Court for Illinois, January 1, 1843; *History of the Church*, 5:242.

Next, the delegation met with United States attorney Justin Butterfield, formally requesting his legal assistance. Butterfield drafted a petition to Governor Ford as well as affidavits to be signed by various members of the party averring their firsthand knowledge of Smith's being in Illinois at the time of the assault on Boggs. They also made a copy of the Boggs affidavit, and, armed with these papers, they accompanied Butterfield to meet with Ford at 4:00 PM the same day.<sup>64</sup>

Butterfield told Ford that, having reviewed the facts, he found "the arrest was based upon far weaker premises than he had previously supposed." It said nothing about Joseph having fled from justice, and the constitution authorizes only the extradition of a "*fugitive from Justice . . . of the State from which he fled.*" Ford replied that he was sure the writ of Governor Carlin was illegal, but he doubted his authority to interfere with the acts of his predecessor. He did promise, however, to "state the case" to the judges of the supreme court at their meeting the next day and would do whatever they recommended.<sup>65</sup>

The supreme court judges polled by Ford agreed that the Missouri requisition was illegal, but they were split on the propriety of Ford's simply rescinding the actions of Carlin without judicial intervention. Ford was unwilling to take a step that was of doubtful legality; however, convinced that Smith would prevail in a court hearing, he summarized his conclusions in a letter dated December 17, 1842, to be delivered to Smith when the delegation returned to Nauvoo.<sup>66</sup>

Today it would be inappropriate for a sitting governor to be granted an *ex parte* consultation with justices of a state supreme court in order

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64. Jessee, *Papers of Joseph Smith*, 2:499–501.

65. Jessee, *Papers of Joseph Smith*, 2:499–501; italics in original.

66. "I submitted your case and all the papers relating thereto, to the judges of the Supreme Court; or at least to six of them who happened to be present. They were unanimous in the opinion that the requisition from Missouri was illegal and insufficient to cause your arrest, but were equally divided as to the propriety and Justice of my interference with the acts of Governor Carlin. It being therefore a case of great doubt as to my power, and I not wishing ever in an official station to assume the exercise of doubtful powers; and in as much as you have a sure and effectual remedy in the courts, I have decided to decline interfering. I can only advise that you submit to the laws and have a Judicial investigation of your rights." Thomas Ford to Joseph Smith, December 17, 1842, in Jessee, *Papers of Joseph Smith*, 2:504–5. At this time there were nine justices of the Illinois Supreme Court: Thomas C. Browne, William Wilson, Samuel D. Lockwood, Theophilus W. Smith, Samuel H. Treat, Sidney Breese, Walter B. Scates, Stephen A. Douglas, and John D. Caton. Jessee White, ed., *Illinois Blue Book, 2007–2008* (Springfield: Secretary of State, 2007), 413.

to obtain an opinion on a legal dispute involving a private citizen in an impending case.<sup>67</sup> In 1840s Illinois, however, ethical rules were less evolved. Before becoming governor, Ford had been a justice on the Illinois Supreme Court and would likely have developed a collegial relationship with many of the judges. Such a relationship would have made it easy for him to sound them out on various legal issues.

Justin Butterfield also wrote a letter addressed to Joseph Smith, confirming that he had read Governor Ford's letter and agreed with Ford's characterization of the supreme court justices' opinion. He then encouraged Smith to "come here without delay and you do not run the least risk of [not] being protected while here and of [not] being discharged by the Sup. Court by Habeas Corpus." Butterfield further explained, "I have also a right to bring the case before the U.S. [District] Court now in Session here, and there you are certain of obtaining your discharge—I will stand by you and see you safely delivered from your arrest."<sup>68</sup>

While they were in Springfield, the delegation also consulted with James Adams, a Springfield judge who had joined the LDS Church in 1836. When they returned, they carried also a short note from Judge Adams advising Smith to come to Springfield.<sup>69</sup> Bearing the three letters, the Mormon delegation arrived back in Nauvoo on December 20, 1842.

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67. Rule 63, Canon 3A(4) of the current Illinois Code of Judicial Conduct provides that "a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."

68. Justin Butterfield to Joseph Smith, December 17, 1842, in Jessee, *Papers of Joseph Smith*, 2:505–6. That Butterfield should be the attorney Joseph Smith turned to for representation in his habeas corpus matter is somewhat curious in view of the fact that Butterfield, in his role as United States attorney (at the specific behest of United States Treasury Solicitor Charles B. Penrose), had opposed the bankruptcy filings of Joseph and Hyrum Smith. The opposition to the Smiths' bankruptcy petitions was unusual (less than one percent of bankruptcy petitions filed under the Bankruptcy Act of 1841 in Illinois were opposed) and was based primarily on John C. Bennett's claims that the Smiths had fraudulently transferred property just prior to their filings. In fact, Butterfield cited Bennett's claims in his letters to Penrose and even made a trip to Nauvoo in September 1842 to examine land records. Joseph I. Bentley, "In the Wake of the Steamboat *Nauvoo*: Prelude to Joseph Smith's Financial Disasters," *Journal of Mormon History* 35 (Winter 2009): 23, 35–38.

69. His note read, "My Son:—It is useless for me to detail facts that the bearer can tell. But I will say that it appears to my judgment that you had best make no delay in coming before the court at this place for a discharge under a habeas corpus." James Adams to Joseph Smith, December 17, 1842, in *History of the Church*, 5:206.

After considering the assurances contained in these letters, Joseph Smith determined to venture to Springfield to have his case heard on its merits. Accordingly, on Monday, December 26, 1842, he took several steps to claim his legal rights. After presiding as chief judge of the Nauvoo Municipal Court in the morning, he formally surrendered to Wilson Law, who was general of the Nauvoo Legion, on the charges that had been proffered against him under the proclamation of Governor Carlin. Then, apparently concerned that he might be waylaid by marshals en route to the state capital, Joseph sent Henry Sherwood and William Clayton to Carthage to obtain a writ of habeas corpus. When he returned home, he found Emma sick with chills and consulted with Dr. Willard Richards, his personal secretary, concerning her condition.<sup>70</sup>

### Joseph Smith Goes to Springfield

The following morning at 9:00 AM, Joseph Smith and his entourage started for Springfield. Accompanying him were his brother Hyrum, Apostles John Taylor and Orson Hyde, Nauvoo stake president William Marks, Willard Richards, Wilson Law, Levi Moffet, Peter Haws, and Loren Walker. They were joined on the way to Carthage by Henry Sherwood and William Clayton, who reported that although the Master in Chancery had been willing to issue an order for habeas corpus, they had been unable to obtain an official writ because the court clerk had been out of town. The group arrived at Plymouth and the home of the Prophet's brother Samuel about sunset. There were joined by Edward Hunter, Theodore Turley, Shadrach Roundy, and Dr. Harvey Tate.<sup>71</sup>

On Wednesday the party traveled from Plymouth to Rushville, and on Thursday from Rushville to an inn kept by Captain Ebenezer Dutch. The weather during this trip had been bitterly cold, and as the party gathered round the fire that evening, Joseph told of a similar frigid night several years earlier when he and Sidney Rigdon and their families had been making their way from Ohio to Missouri. They had tried to obtain lodging at

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70. Smith, Journal, December 26, 1842, in Scott H. Faulring, ed., *An American Prophet's Record: The Diaries and Journals of Joseph Smith* (Salt Lake City: Signature Books, 1989), 258. *History of the Church*, 5:209, states, "On my return home, I found my wife Emma sick. She was delivered of a son, which did not survive its birth." This is a misreading of the original document. This entry actually says: "Sister Emma sick, had another chill. Had a consultation concerning her with Secretary." Faulring, *American Prophet's Record*, 258. "Secretary" refers to Joseph's secretary, Willard Richards, who was a physician.

71. Smith, Journal, December 27, 1842, in Faulring, *American Prophet's Record*, 258–59.

“all the taverns,” only to be turned away by the proprietors because they were Mormons. Fearing for the families, Smith confronted one landlord, saying that he had “men enough to take the town & if we must freeze we will freeze by the burning of there [their] houses.” This had the desired effect of opening the inn to them, and in the morning the inhabitants apologized.<sup>72</sup>

The Mormon traveling party arrived in Springfield on Friday, December 30, proceeding to the home of Judge Adams, where Joseph Smith would stay during his sojourn in the state capital. The conversation turned to slavery, and Orson Hyde asked Smith what advice he would give to a man who came into the Church having a hundred slaves. Smith replied, “I have always advised such to bring their slaves into a free country, set them free, educate them & give them their equal rights.”<sup>73</sup>

While at Judge Adams’s house, Smith was introduced to his legal counsel, Justin Butterfield. Others who were present at times during the afternoon discussion included Joseph’s brother William, who was a member of the Illinois State Legislature, and Illinois Secretary of State Lyman Trumbull. Butterfield had already decided it would be best to bring Smith’s case before the United States District Court for Illinois, to be heard by Judge Nathaniel Pope, and the assembled group discussed procedural issues.<sup>74</sup>

Why did Butterfield decide to bring the case before the federal court, rather than the Illinois State Supreme Court? Butterfield knew, of course, of the opinion given by a majority of the judges of the supreme court to Governor Ford that Smith should prevail in the matter. Nevertheless, Butterfield was the United States attorney for Illinois and, as such, was accustomed to handling cases in the federal court system. More significantly, he was of the opinion that the federal court had *exclusive* jurisdiction of extradition matters because the right to demand extradition was provided by the United States Constitution, and federal law established the procedures to be followed in extradition cases. He likely also knew his opponent would be Josiah Lamborn, the Illinois State attorney general, whose “home court” was the Illinois Supreme Court. Lamborn was prepared to argue

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72. Smith, Journal, December 28, 1842; in Faulring, *American Prophet's Record*, 259–60; *History of the Church*, 5:210–11. In Rushville, measurements were taken of several of the men in attendance and Joseph and Hyrum were both found to be six feet tall.

73. Smith, Journal, December 30, 1842, in Faulring, *American Prophet's Record*, 260.

74. Smith, Journal, December 30, 1842, in Faulring, *American Prophet's Record*, 260.

that the state court system had jurisdiction over such matters because an Illinois statute specifically required the governor to honor requests for interstate extradition made by executives of sister states.<sup>75</sup>

Before Joseph Smith's case could be heard by Judge Pope, there were preliminary matters to be seen to. The original writ for Smith's arrest, one of the foundational documents for the habeas corpus petition, was still in the possession of Sheriff King of Hancock County. On Saturday, December 31, 1842, Butterfield petitioned Governor Ford on Smith's behalf for a new arrest warrant to avoid undue delay waiting for King to bring the original warrant to Springfield. This new warrant was to be issued by the Sangamon County<sup>76</sup> sheriff and would enable Butterfield to obtain a new writ of habeas corpus immediately.<sup>77</sup>

Ford complied with Butterfield's request,<sup>78</sup> Joseph was surrendered to the custody of Sangamon County sheriff William F. Elkin, and the company made its way to the federal court that was then located on the second floor of the Tinsley Building, across the street from the state capitol. There Butterfield presented Judge Pope with a petition for a writ of habeas corpus to release Smith from custody.<sup>79</sup> Pope granted the requested writ, setting Monday for a full hearing on the case and ordering that notice be given to Governor Ford and Attorney General Lamborn. Butterfield asked that Smith be released on bail, and Pope granted the request, setting the amount at four thousand dollars. Judge Adams and Wilson Law each pledged two thousand dollars, and Smith was released.<sup>80</sup> That afternoon,

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75. An Act Concerning Fugitives from Justice (January 6, 1827), *The Public and General Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), 318–20.

76. The correct spelling of the county is, and was at the time, "Sangamon." Nevertheless, a commonly used spelling in the 1840s was "Sangamo," and the county's newspaper was called the *Sangamo Journal*.

77. Smith, Journal, December 31, 1842, in Faulring, *American Prophet's Record*, 262–64. According to Smith's journal entry, Ford commented that from the reports he had heard, the Mormons were a "peculiar" people, but he found that "they look like other people" and that Smith was "a very good looking man."

78. Warrant for the Arrest of Joseph Smith, *State of Missouri vs. Joseph Smith*, Springfield, Sangamon, Ill., December 31, 1842, copy in Church History Library; *History of the Church*, 5:235–36.

79. Petition for Habeas Corpus of Joseph Smith, *State of Missouri vs. Joseph Smith*, Illinois Circuit Court, December 31, 1842, copy in Church History Library; *History of the Church*, 5:237.

80. Order for Bail on the Matter of Joseph Smith, *State of Missouri vs. Joseph Smith*, United States, Circuit Court for the District of Illinois, December 31, 1842, copy in Church History Library; *History of the Church*, 5:239–40.

Smith and Butterfield dined at the American House, Springfield's finest hotel, visiting with an ill Governor Ford in his room both before and after the meal.<sup>81</sup>

There was an unfortunate incident at the court that day. Catching sight of the Mormon party, someone observed, "There goes Smith the Prophet and a great looking man he is." Someone else added, "[and] as damned a rascal as ever lived!" Hyrum Smith took exception to this and fired off a sharp retort, to which the man responded, "God Damn you and any one that takes his part is as damned a rascal as he is." Wilson Law shot back, "I am the man and I take his part." The name-calling continued—"You are a damned rascal to[o]," and "You are a [lying scoundrel]," and so forth. The troublemaker began to take off his shirt and went out into the street, urging the Mormons to come out and fight. At this point, William Prentice, a genial marshal, appeared and was able to quiet the crowd and restore peace.<sup>82</sup>

It is difficult to overstate the commotion the arrival of Joseph Smith and his entourage caused in Springfield. At that time, the Illinois capital was considerably smaller than Nauvoo, and the Mormon city was gaining population rapidly. Smith was leader of a sizeable and controversial religious minority in the state, having considerable political power in Hancock County. It was common knowledge that he had been avoiding arrest for several months, and now he was coming to stand in a court of law. The *Alton Telegraph* noted that "quite a sensation was created in [Springfield], by the appearance of Joe Smith, the Mormon prophet, in our midst."<sup>83</sup> Illustrating how charged the atmosphere was, when a team of horses ran away from its owner and past the state house, the cry was raised, "Joe Smith is running away!" which produced "a sudden adjournment of the House of Rep[resentative]s."<sup>84</sup> Even Joseph's followers created a memorable impression. The editor of the *Alton Telegraph* observed:

[Smith] was attended by a retinue of some fifteen or twenty of as fine looking men as my eyes ever beheld. My great astonishment is, how men possessing the intellectual faculties, refinement of education, and cultivated minds, that most of his body guard apparently do, can be so outrageously blinded, and led captive by imposition, as they are by Joe

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81. Smith, Journal, December 31, 1842, in Faulring, *American Prophet's Record*, 264.

82. Smith, Journal, December 31, 1842, note A, inserted in entry for January 4, 1843, in Faulring, *American Prophet's Record*, 263–64.

83. "From the Editor," *Alton (Ill.) Telegraph and Democratic Review*, January 7, 1843, 2.

84. Smith, Journal, December 31, 1842, in Faulring, *American Prophet's Record*, 265.

Smith. As for Joe Smith, his demeanor as far as I could observe, was by no means censurable, and he apparently was as unconcerned as to what was passing around him, as though he was a perfect stranger to the whole proceedings.<sup>85</sup>

The Speaker of the House offered the Representatives Hall to the Mormons for preaching on the following day, Sunday, January 1, 1843. Joseph designated Apostles Orson Hyde and John Taylor for that assignment. Before the speakers began, the assembled Saints sang a rousing hymn, “The Spirit of God like a Fire Is Burning.” Hyde spoke in the morning meeting, giving a history of the gospel from Old Testament to modern times. Taylor spoke in the afternoon about repentance, baptism, the laying on of hands, and the need for acceptance of the restored gospel.<sup>86</sup>

The following day Joseph arose in good spirits, predicting that he should not go to Missouri, dead or alive. Judge Pope convened court at 10:00 AM, entering the courtroom with seven ladies, who took their seats beside the judge.<sup>87</sup> Nathaniel Pope was then fifty-eight years old and one



Judge Nathaniel Pope

of the most distinguished men in Illinois. He had served as the first territorial secretary of Illinois and had been a territorial delegate to Congress. He was “rather above than below the medium height and rather corpulent,” possessing a fine legal mind and considerable intellectual power. “His native judgment was strong and profound and his intellect quick and far-reaching, while both were thoroughly trained and disciplined by study.” He was a dignified man, yet courteous to those in his courtroom.<sup>88</sup>

Because of the great publicity attending Smith’s case, the courtroom was packed on each day of the hearing. The

85. “From the Editor,” *Alton (Ill.) Telegraph and Democratic Review*, January 7, 1843, 2.

86. Smith, *Journal*, January 1, 1843, in Faulring, *American Prophet’s Record*, 265–67.

87. Smith, *Journal*, January 1, 1843, in Faulring, *American Prophet’s Record*, 267–68.

88. Newton Bateman and Paul Selby, ed., *Historical Encyclopedia of Illinois* (Chicago: Munsell Publishing, 1900), 428; William A. Meese, “Nathaniel Pope,” *Journal of the Illinois State Historical Society* 3 (January 1911): 9, 20.



Mary Todd Lincoln

ladies in attendance included Judge Pope's daughters, attorney Butterfield's daughter, and also Mary Todd Lincoln, who just two months earlier had married the future president of the United States. Rather than force them to find a place among the jostling courtroom spectators, the gallant Pope furnished seats at the front of the courtroom, near the bench.<sup>89</sup> Apparently, the presence of ladies at a federal court proceeding was unusual; undoubtedly they were there to see the famous Mormon prophet—tall, striking in appearance, and only thirty-seven years old.<sup>90</sup> One anti-Mormon correspondent, the anonymous "Alpha," observed sarcastically:

During Smith's trial Judge Pope sat upon the bench with three ladies upon each side of him.—The smiles of these associate judges added very much to the solemnity of the proceedings. . . . Their attendance . . . was a compliment, I suppose, paid to the virtue of the Holy Prophet. And as they gazed upon his manly form, probably the power of imagination brought around them the fancie scenery of Nauvoo . . . there was Jo and his Mormon virgins, of which rumor, with her thousand tongues; has said so much—and there was his gilded apartments—in which the midnight orgies of barbarous incantations were never heard—and there the prophet perhaps humbly kneeling and praying as prayed the prophets of old, "mine enemies reproach me all the day long, and they are mad against me, swore against me." . . . Terror is depicted in the countenance of the prophet—his virgins in alarm rush to him, and alternately cast their white arms around his neck, and exclaim, "thou are all that this poor heart can cling to."<sup>91</sup>

89. Isaac Newton Arnold, *Reminiscences of the Illinois Bar Forty Years Ago* (1881), 5–7; *Wasp*, January 14, 1843, 1. Abraham Lincoln's law office was nearby, but there is no evidence he attended the hearing, nor is there any definitive proof that he ever met Joseph Smith, although he may have..

90. "The Marshall said it was the fi[r]st time in his administration that the Ladies had attended court." Smith, *Journal*, January 2, 1843, in Faulring, *American Prophet's Record*, 269; *History of the Church*, 5:217.

91. Letter to the *Quincy (Ill.) Herald*, quoted in *Sangamo Journal*, January 26, 1842. Alpha's letter was sharply criticized in the *Sangamo Journal*, not because of its criticism of Smith, but because of its disrespectful tone in referring to

The state of Illinois was represented by Attorney General Josiah Lamborn, a “remarkable man . . . of the tersest logic.” Only thirty-four years old, Lamborn presented an unforgettable physical appearance—tall and imposing, yet crippled by a congenitally defective foot. Despite his relative youth, he was an experienced and able lawyer, having frequently appeared before the Illinois Supreme Court. Ironically, although he opposed Joseph Smith in this case, he was appointed by Governor Ford two years later to serve as prosecuting attorney at the trial of Smith’s accused murderers.<sup>92</sup>

Lamborn promptly requested a continuance of the hearing to enable him to prepare his case more fully. Judge Pope granted the request, putting the hearing over to Wednesday. Butterfield asked for and received permission to file objections to the facts set forth in the Boggs affidavit and the Reynolds requisition.<sup>93</sup>

On the eve of the Wednesday hearing, Smith prophesied that “no very formidable opposition would be raised.”<sup>94</sup> He was not to be the only one predicting acquittal. The editor of the *Alton Telegraph* reported that “from a candid examination of the law I am satisfied the impostor, Joe Smith, will be discharged. He is clearly not a fugitive from justice within the intent and meaning of both the act of Congress and the constitution of the United States.”<sup>95</sup>

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Butterfield, Pope, and the ladies. “Rarely has an article appeared in any of our State papers which has produced a deeper and more general feelings of indignation, than that under notice. It is manifestly the production of an individual, rendered *rabid* by the fact, that he has no longer control over the person of Joe Smith, or, what is probably quite as important to him, his *money*,—and who seeks to visit his wrath upon Mr. Butterfield, Judge Pope, and some of the more intelligent and amiable ladies of which our State can boast.” “Case of Joe Smith,” *Sangamo Journal*, January 26, 1843.

92. Oaks and Hill, *Carthage Conspiracy*, 84–85. One of Lamborn’s contemporaries remarked, “He could see the point in a case as clear as any lawyer I ever knew, and could elucidate it as ably, never using a word too much or one too few.” Usher F. Linder, *Reminiscences of the Early Bench and Bar of Illinois*, 2d ed. (Chicago: Chicago Legal News, 1879), 258; Bateman and Selby, *Historical Encyclopedia of Illinois*, 327.

93. Smith, Journal, January 2, 1843, in Faulring, *American Prophet’s Record*, 268. Denial of Joseph Smith on Oath, *State of Missouri vs. Joseph Smith*, United States, Circuit Court for the District of Illinois, January 2, 1843, *History of the Church*, 5:240.

94. Smith, Journal, January 3, 1843, in Faulring, *American Prophet’s Record*, 271; *History of the Church*, 5:220.

95. “From the Editor,” *Alton (Ill.) Telegraph and Democratic Review*, January 7, 1843, 2. Although the editorial was published after Judge Pope rendered his decision, the wording suggests it was written sometime prior.

## The Return of Habeas Corpus

On Wednesday, when Judge Pope entered the courtroom, a number of ladies again took their place at either side of the bench. Josiah Lamborn rose and moved to dismiss the case for lack of jurisdiction. He meant no disrespect to Judge Pope, he said, but this case belonged in state court. In honoring the requisition of Governor Reynolds, Governor Carlin had been acting pursuant to an Illinois statute requiring him to do so. Pope said he would take Lamborn's motion under submission but would hear the matter in full before making a decision.<sup>96</sup>

Lamborn then insisted that even if Pope assumed jurisdiction over the case, he could not go behind the extradition papers. To do so would be to try the case on its merits, which was not the proper function of a habeas corpus hearing. Pope suggested that the question was not one of guilt or innocence, but of whether Smith was a fugitive. Lamborn replied that it was not the function of the governor of Illinois, or the court, to determine such an issue, since it would require an inquiry into facts outside the record, and this was improper. Lamborn also argued that whether Smith was in Missouri or Illinois on the day Boggs was shot was irrelevant. "If he prophesied that Boggs should be shot, where should he be tried?" To Lamborn, Missouri was the obvious answer.<sup>97</sup>

Two attorneys argued on behalf of Joseph Smith—Justin Butterfield and his associate, Benjamin S. Edwards. Going first, Edwards addressed the jurisdictional issues. He said he did not understand why Lamborn, the state attorney general, should prosecute this case. Lamborn was, of course,

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96. Smith, Journal, January 4, 1843, in Faulring, *American Prophet's Record*, 271–73; Motion to Dismiss, *State of Missouri vs. Joseph Smith*, Illinois Circuit Court, January 4, 1843, in *History of the Church*, 5:240. Lamborn argued, "Our own statutes cover the ground and no other courts have authority. The lawyers agree with me with few Exceptions." The state statute to which Lamborn referred was: An Act Concerning Fugitives from Justice (January 6, 1827), *The Public and General Statute Laws of the State of Illinois* (Chicago: Stephen F. Gale, 1839), 318–20.

97. Smith, Journal, January 4, 1843, in Faulring, *American Prophet's Record*, 273. Except as otherwise noted, the arguments of the attorneys set forth here are reconstructed from notes taken by Willard Richards in Joseph Smith's journal for January 4, 1843, and in the published accounts of the trial decision. This decision was published in the *Sangamo Journal*, January 19, 1843, and in the *Wasp*, January 28, 1843, 1–2, and was later published in legal case reports as *Ex parte Smith*, 6 Law Rep. 57: 3 McLean, 121 (Circuit Court, D. Illinois, Jan. 5, 1843). Richards's notes were hastily scrawled as the lawyers were speaking and are replete with abbreviated words and incomplete sentences, but it is possible to discern the gist of the major arguments.

permitted in federal court as a courtesy, but Article IV of the United States Constitution provided the basis for the return of fugitives from justice, and federal jurisdiction extended to all cases arising under United States laws. Edwards then went into a discourse on the history of extradition and why it was covered in the Constitution, noting that one of the reasons the Revolutionary War was fought was to put a halt to improper extradition from the colonies to Great Britain.<sup>98</sup>

Justin Butterfield, of course, was the star of the defense show. When he rose to speak, he was dressed “*a la Webster*” in a blue dress coat with metal buttons and a buff vest.<sup>99</sup> All eyes were on him, and he rose to the occasion, making a memorable opening statement to the court. As recalled later by an Illinois lawyer who was present at the hearing:

Mr. Butterfield . . . rose with dignity, and amidst the most profound silence. Pausing, and running his eyes admiringly from the central figure of Judge Pope, along the rows of lovely women on each side of him, he said: “May it please the Court, I appear before you to-day under circumstances most novel and peculiar. I am to address the ‘Pope’ (bowing to the Judge) surrounded by angels (bowing still lower to the ladies), in the presence of the holy Apostles, in behalf of the Prophet of the Lord.”<sup>100</sup>

Butterfield also addressed the jurisdiction issue. Lamborn had argued it was “the general opinion of the bar” that this matter should be heard by the state court. Butterfield said he had great respect for the bar, but only contempt for “barroom” opinion.<sup>101</sup> Legal precedent should control. He pointed out that the requisition and warrant purported to be based on the Constitution and federal statutes.<sup>102</sup> In issuing these documents, the

98. Faulring, *American Prophet's Record*, 273–74.

99. Daniel Webster was one of the most famous lawyers, orators, and statesmen of the day. Webster had argued many famous cases before the United States Supreme Court, was later elected to the United States Senate, and became secretary of state. See, for example, Robert V. Remini, *Daniel Webster: The Man and His Time* (New York: W. W. Norton, 1997). Butterfield was “a personal friend and warm admirer” of Daniel Webster. Bateman and Selby, *Historical Encyclopedia of Illinois*, 69.

100. Arnold, *Reminiscences of the Illinois Bar*, 6. A more contemporaneous, though abbreviated, account of Butterfield’s opening statement can be found in “Opening in Joe Smith’s Case,” *The New Orleans Daily Picayune*, February 24, 1843: “I rise under the most extraordinary circumstances in this age and country, religious as it is: I appear before the *Pope*, supported on either hand by *Angels*, to defend the *Prophet of the Lord!*” (Italics in original.)

101. Faulring, *American Prophet's Record*, 274.

102. U.S. Constitution, art. 4, sec. 2; An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of Their Masters (February 12, 1793), sec. 1, *Laws of the United States of America*, 2:331.

governors of Missouri and Illinois were acting as appointees of the United States, and both were bound to support the Constitution. When a person's rights are invaded under a law of the United States, Butterfield argued, he has no remedy except in the courts of the United States. The state legislature had no right to interfere with federal laws, and if they purported to do so, their acts would be void. Indeed, as Butterfield interpreted the law, not only did the federal court have the right to assume jurisdiction, it had the *exclusive* right to do so.<sup>103</sup>

Next, Butterfield discussed the insufficiency of the Boggs affidavit, which formed the basis for Governor Reynolds's requisition. The affidavit did not recite any facts demonstrating that Joseph Smith had committed a crime in Missouri or that he was a fugitive from justice. The governor of Illinois had no legal right to transfer Smith to Missouri unless he had *fled* from that state. Emphasizing this point, Butterfield repeated the key words of the Constitutional mandate: Only a person, charged with a crime, who "Shall Flee" from justice, should be delivered up to the governor of another state.<sup>104</sup>

Finally, Butterfield argued that his client had a right to prove facts "not repugnant to the return"—in other words, Smith could seek to prove facts that did not contradict the evidence upon which the arrest warrant was based (in this case, the Boggs affidavit). To this end, Butterfield submitted several evidentiary documents for consideration of the court. In one of them (see fig. 2), Joseph Smith stated under oath that he was not in Missouri "at the time of the commission of the alleged crime set forth in the [Boggs] affidavit."<sup>105</sup> In a second document, a number of leading Mormons averred to facts that accounted for the presence of Smith in Nauvoo from February 10 to July 1, 1842.<sup>106</sup> In a third sworn statement, several prominent

103. Faulring, *American Prophet's Record*, 274–75.

104. Faulring, *American Prophet's Record*, 275–76; U.S. Constitution, art. 4, sec. 2.

105. Denial of Joseph Smith, *State of Missouri vs. Joseph Smith*, Illinois Circuit Court, January 4, 1843, *History of the Church*, 5:240–41.

106. Affidavit of Wilson Law, et al., *State of Missouri vs. Joseph Smith*, Illinois Circuit Court, January 4, 1843, in *History of the Church*, 5:242–43. Hyrum Smith, Willard Richards, and William Marks said that they had been with Smith in his home on the evening of May 5. Hyrum Smith, Willard Richards, Henry G. Sherwood, John Gaylon, and William Clayton said that they attended an officers' drill in Nauvoo on May 6 from 10:00 AM to 4:00 PM, and that Smith had been present during the whole of that time. Willard Richards, William Clayton, Hyrum Smith, and Lorin Walker said that they had seen and conversed with Smith in Nauvoo daily from February 10 to July 1, 1842, and knew that he had never been absent

Circuit Court of the United  
States District of Illinois

In the matter

of  
Joseph Smith upon Habeas  
Corpus

Joseph Smith being brought up on Habeas Corpus  
before this Court comes and denies the matter  
set forth in the return to the same in this, that  
he is not a fugitive from the justice of the State  
of Missouri; but alleges and is ready to prove that  
he was not in the State of Missouri at the time of  
the Commission of the alleged crimes, set forth in  
the affidavit of D. W. Briggs, nor had he been in  
said State for more than three years previous  
to that time, nor has he been in that State since  
that time - but on the contrary at the time the  
said alleged assault was made upon the said  
Briggs as set forth in said affidavit the said  
Smith was at Nauvoo, in the County of Hancock,  
in the State of Illinois, and that he has not fled  
from the justice of the State of Missouri and  
taken refuge in the State of Illinois, as is mis-  
sincerely stated in the warrant upon which he  
is arrested, and that the matter set forth  
in the requisition of the Governor of Missouri  
and in the said Warrant are not supported  
by oath

Joseph Smith

State of Illinois ss. Joseph Smith being duly  
sworn saith that the matter and things set  
forth in the foregoing statement are true.

Given and subscribed to  
before me this 2<sup>d</sup> day of Jan<sup>y</sup> 1843

James F. Quincy clk

Joseph Smith

FIG. 2. Joseph Smith's denial, January 2, 1843.

non-Mormons, including Stephen A. Douglas, stated that they were in Nauvoo the day after the shooting and that they had seen Smith reviewing the Nauvoo Legion on that day (which proved that he could not have been in Independence, Missouri, on the previous day).<sup>107</sup>

These sworn statements, Butterfield argued, demonstrated that Joseph Smith had not fled from Missouri justice. To the contrary, his client had been dining with a judge of the highest court of Illinois, three hundred miles away from Jackson County, Missouri. Permitting Smith

to prove he was in Illinois at the time of the shooting was not “repugnant to the return” because Boggs had not alleged otherwise.<sup>108</sup>

To Justin Butterfield, sending a man to Missouri who had never been outside Illinois at the time the crime was allegedly committed constituted an attack on the basic liberties guaranteed by the Constitution. Joseph Smith’s fate this day might be ours tomorrow, he argued. It was a matter of history that Smith and his people had been murdered and driven from Missouri. It was better he be sent to the gallows than back to Missouri. He was an innocent and unoffending man. The only difference between his people and others was that his people believed in prophecy and most others did not.<sup>109</sup>

Willard Richards, Joseph’s personal secretary who had taken extensive notes throughout the trial, wrote that it proceeded with the utmost decorum, even though the courtroom had been crowded. Judge Pope was highly respected by all, and the lawyers, Butterfield, Edwards, and Lamborn, had conducted themselves with dignity. He praised Lamborn for avoiding the sort of inflammatory statements that had been common in



Joseph Smith

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from Nauvoo during that time long enough to have traveled three hundred miles to Independence, Missouri.

107. Affidavit of Stephen A. Douglas, et al., *State of Missouri vs. Joseph Smith*, United States Circuit Court for Illinois, January 1, 1843. The signers of this affidavit were Stephen A. Douglas, James H. Ralston, Almeron Wheat, and J. B. Backenstos.

108. Faulring, *American Prophet's Record*, 276.

109. Faulring, *American Prophet's Record*, 277–78.

other legal proceedings against the Mormons. After Butterfield concluded his arguments, the court called a recess and Smith and Butterfield retired to the judges' room. There the Mormon prophet was introduced to an unnamed senator and the ladies who had been present for the argument, including Governor Ford's wife.<sup>110</sup>

Following Lamborn's rebuttal, Judge Pope adjourned court until the following day so he could prepare his opinion. Smith retired to Judge Adams's house where he visited with Hyrum Smith, Orson Hyde, and Theodore Turley. In the evening, Smith, Hyde, and Wilson Law left in a carriage sent by Marshal William Prentice to dine and spend the evening with Prentice, his family, and others. Both Justin Butterfield and Josiah Lamborn were among the guests in attendance that evening, as well as Judge Douglas and William Pope, Judge Pope's son. Smith reported to Richards that he "had a Most splendid Supper with many interesting anecdotes and every thing to render the visit agreeable."<sup>111</sup>

### Judge Pope Delivers His Decision

On Thursday morning, January 5, the courtroom was again packed, "mostly . . . [with] a very respectable class in Society anxious to hear the decision although the public expression was decidedly in favor of an acquittal." Again, a number of ladies took their places at both sides of the bench.<sup>112</sup> Judge Pope began by thanking the lawyers for their able arguments that had "been of great assistance in the examination of the important question arising in this cause." The consequences that might flow from an erroneous decision had "impelled [him] to bestow upon it the most anxious consideration."<sup>113</sup>

The important constitutional question, as seen by the judge, was "whether a citizen of the state of Illinois . . . can be transported to Missouri, as a fugitive from justice, when he has never fled from that State." First, however, it was necessary to address the motion to dismiss made by Lamborn on jurisdictional grounds. This was an important question of the

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110. Faulring, *American Prophet's Record*, 278.

111. Faulring, *American Prophet's Record*, 278. William Prentice, the marshal, was very friendly toward the Mormon party during their stay in Springfield, spending time to socialize and exchange stories and jokes.

112. Faulring, *American Prophet's Record*, 279.

113. The discussion of Judge Pope's decision that follows is summarized from the published case report. "Circuit Court of the United States, for the District of Illinois," *Sangamo Journal*, January 19, 1843; *Wasp*, January 28, 1843, 1–2; later published as *Ex parte Smith*, 6 Law Rep. 57: 3 McLean, 121 (Circuit Court, D. Illinois, Jan. 5, 1843).

day, as federal courts were still defining the degree of their supremacy over state courts. In this instance, the state of Illinois had passed an extradition act authorizing the governor of Illinois to return a fugitive to another state when the executive of the other state demanded it. Lamborn had argued that this was the statute that should govern the Smith case, and therefore state court was the appropriate forum. Pope disagreed. Since Congress had conferred the power of extradition on the governor of Illinois, no act of Illinois could supersede that power. The Constitution and laws of the United States were the supreme law of the land. If the legislature of Illinois had merely intended to make it the duty of the governor to exercise a power granted by Congress, and no more, the executive would be acting by authority of the United States. "If it intended more, the law [was] unconstitutional and void."

Therefore, Judge Pope concluded, he had jurisdiction over the case at bar and Lamborn's motion to dismiss must be denied. The judge sidestepped the question of whether the federal courts had *exclusive* jurisdiction to hear such matters, as urged by Butterfield. That question was one that "this court is not called upon to decide."

Judge Pope then turned his attention to the merits of the case. The Boggs affidavit, which he recited, "furnished the only evidence on which the governor of Illinois could act." Butterfield had introduced affidavits proving that Joseph Smith could not have been in Missouri on the day Boggs was shot, but Lamborn had objected to consideration of those affidavits "on the ground that the court could not look behind the return." Pope deemed it unnecessary to decide that point because, in his view, the Boggs affidavit was fatally defective on its face.

To justify sending Smith to Missouri to stand trial, Boggs should have distinctly stated, first, that Smith had committed a crime and, second, that he had committed it *in Missouri*. Regarding the first point, Boggs had averred "from evidence and information now in his possession" that Smith was an "accessory before the fact" of the intended murder. If Boggs truly had evidence and information that a crime had been committed, he should have enumerated them under oath in his affidavit.

Boggs was shot on the 6th of May. The affidavit was made on the 20th of July following. Here was time for inquiry, which would confirm into certainty or dissipate his suspicions. He had time to collect facts to be laid before a grand jury, or be incorporated in his affidavit. The court is bound to assume that this would have been the course of Mr. Boggs, but that his suspicions were light and unsatisfactory.

Moreover, in claiming that Smith was accessory before the fact of the intended murder, Boggs was stating a legal conclusion. Such conclusions

were the province of the judge. “What acts constitute a man an accessory is a question of law, and not always of easy solution. Mr. Boggs’ opinion, then, is not authority. He should have given the facts.”

As to the second point, the affidavit never actually said that Joseph Smith had fled from Missouri justice. In order to show that the accused was a fugitive from justice, the affidavit should have set forth facts demonstrating that he had committed a crime in Missouri. Pope noted that the Reynolds requisition went significantly beyond the matters set forth in the Boggs affidavit:

The governor of Missouri, in his demand, calls Smith a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, made by one O.P. Rockwell, on Lilburn W. Boggs, in this state (Missouri). This governor expressly refers to the affidavit as his authority for that statement. Boggs, in his affidavit, does not call Smith a fugitive from justice, nor does he state a fact from which the governor had a right to infer it. Neither does the name of O. P. Rockwell appear in the affidavit, nor does Boggs say Smith fled.

Judge Pope could consider only the facts contained in the affidavit of Boggs as “having any legal existence.” The misstatements and overstatements in the requisition and warrant were not supported by oath and could not be received as evidence “to deprive a citizen of his liberty, and transport him to a foreign state for trial.”

Pope explained that the state of Illinois had a duty to pass laws making it criminal for one of its citizens “to aid, abet, counsel, or advise, any person to commit a crime in her sister state.” A person violating such a law “would be amenable to the laws of Illinois, executed by its own tribunals.” Lamborn had argued “with a zeal indicating sincerity” that Missouri was entitled to entertain jurisdiction of crimes committed in other states having an effect in Missouri. “But no adjudged case or dictum was adduced in support of it. The court conceives that none can be.”

A matter brought to the court on habeas corpus was to be “most strictly construed in favor of liberty.” The 1793 Act of Congress provided that a requisition had to be based on an indictment or an affidavit supporting the charges. Since the foundational evidence supporting extradition was insufficient in this case, Smith must be discharged.

One can imagine the jubilation that Pope’s decision produced in Joseph Smith and his followers in the courtroom. The Mormon prophet stood, bowed to the judge, and thanked him. Then Pope invited Smith and Butterfield to his chambers where they spent an hour in conversation together. The astounding growth of Nauvoo came up in conversation and Butterfield asked Smith to prophesy how large the city might become.

Smith refused to be pinned down to precise numbers but said he would tell them what he had told people when he first came to Commerce. The old inhabitants had said, "We'll be dammed if you can" build up a city in this place; Smith prophesied that he could. To Pope and Butterfield, he said, "We have now about 12,000 inhabitants." The Mormons would build a great city, he said, for they had the stakes, and now they had only to "fill up the interstices."<sup>114</sup>

Judge Pope, having noticed the diligent note taking of Willard Richards, asked Smith if Richards could transform Pope's oral opinion into a written one that could be given to the newspapers. Richards worked on that project for the remainder of the day.<sup>115</sup>

On the following day, January 6, Smith and Richards met Butterfield at the federal court. Richards delivered the opinion he had prepared for Judge Pope.<sup>116</sup> Smith handed over two promissory notes of \$230 each to Butterfield for his attorney fees,<sup>117</sup> which, together with \$40 that had already been paid, made a total fee of \$500 for Butterfield's work on the case.<sup>118</sup> (Apparently Butterfield had sufficient confidence in Joseph Smith



Willard Richards

114. *History of the Church*, 5:231–32; Faulring, *American Prophet's Record*, 284–85. Smith's estimate of the population of Nauvoo at that time was likely a little high, but probably not by much if the Mormon population in the nearby towns was counted. The Nauvoo population in 1842 has been estimated at four thousand, rising to twelve thousand in 1844, making it nearly as large as, if not larger than, Chicago. Susan Easton Black, "How Large Was the Population of Nauvoo?" *BYU Studies* 35, no. 2 (1995): 91–95.

115. *History of the Church*, 5:232; Faulring, *American Prophet's Record*, 285.

116. *History of the Church*, 5:232; Faulring, *American Prophet's Record*, 285. It appears that Judge Pope used Richards's write-up as the basis for his published opinion but with some modifications. See United States, Decision of Nathaniel Pope, Richards Draft, Springfield, Illinois, January 5, 1843, *Ex Parte JS for Accessory to Boggs Assault*, Church History Library; *History of the Church*, 5:223–32, 244.

117. The notes were signed by Joseph Smith, Hyrum Smith, and "Moffat & Hunter" (probably Levi Moffat and Edward Hunter). Faulring, *American Prophet's Record*, 285–86.

118. It will be recalled that Governor Carlin had offered a reward of \$200 for the capture of Joseph Smith. An anti-Mormon letter, published anonymously in the *Quincy Herald* and republished in the *Sangamo Journal*, claimed that



William Clayton

to be willing to accept his promissory notes, even though he had opposed Joseph's petition for bankruptcy on grounds of alleged fraud.)

Smith asked Pope if he could have an exclusive copy of the judge's final decision for publication in the Nauvoo newspaper, the *Wasp*. He wanted to print the decision before Springfield's *Sangamo Journal*, edited by Simeon Francis, could print it. Smith explained that Francis had published "much against the Church," and "we have a little pride in being the first."<sup>119</sup> Predictably, Judge Pope declined this request but said he would give James Adams a chance to copy it as soon as it was finished.<sup>120</sup> As it turned out, Pope's decision was published in the *Sangamo Journal* on January 19, 1843, and in the *Wasp* on January 28, 1843.

William Clayton had been busy copying key documents from the court file, and the Mormon contingent took certified copies of them to Governor Ford's office, along with a prepared order for Ford to sign.<sup>121</sup> The executive order, dated January 6, 1843, stated that "there is now no further cause for arresting or detaining Joseph Smith . . . by virtue of any proclamation or executive warrant heretofore issued by the governor of this state."<sup>122</sup>

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"Gen. Law of the Nauvoo Legion brought Smith [to Springfield] and intended to claim the reward of Smith's attorney fee, (a glorious state of things) but was shamed out of it." "Case of Joe Smith," *Sangamo Journal*, January 26, 1843.

119. The *Sangamo Journal* had published John C. Bennett's salacious charges against Joseph Smith and was generally critical of the Mormon prophet.

120. Faulring, *American Prophet's Record*, 286.

121. William Clayton, Journal, January 6, 1843, depository. The documents copied by Clayton were Boggs's affidavit, Reynolds's requisition, Carlin's arrest warrant as reissued by Ford, Carlin's proclamation, Smith's petition for habeas corpus, the writ of habeas corpus, the order of the court, Smith's affidavit, and the affidavits of the eleven others that had been submitted by Butterfield. Faulring, *American Prophet's Record*, 285–86; *History of the Church*, 5:233–44.

122. Order of Governor Thomas Ford, *State of Missouri vs. Joseph Smith*, Springfield, Illinois, District Court, January 6, 1843, Church History Library; *History of the Church*, 5:244.

Thus, Joseph Smith “had scored another victory over his old enemies in Missouri,”<sup>123</sup> but from an objective standpoint, the victory was a hollow one. Smith had wanted a victory “on the merits” and understood from his lawyer that Judge Pope would not rule on a “technicality.”<sup>124</sup> Nevertheless, Pope did not rule on the merits of the underlying charge. He did not express any opinion on the question of whether Smith had ordered the assassination of Boggs. Indeed, Pope did not even make a finding on whether or not the Mormon prophet had fled from justice. Instead, Pope ruled that the Boggs declaration was insufficient to support the claim that Joseph had fled from justice. This could be considered a ruling “on the merits” only if a narrow view of the merits was taken.

### Return to Nauvoo

The Mormon contingent departed from Springfield on Saturday, January 7, 1843. Although the “travelling [was] very bad” and the weather so cold “as to turn the horses white with frost,” there was an air of jubilation as they rode along. Their prophet once again was free. The party sang a jubilee hymn that Wilson Law had composed to commemorate the occasion. Later, when the party reached Captain Dutch’s where they were to spend the first night, more verses were added and it was sung over again.<sup>125</sup>

### Mormon Jubilee

And are you sure the news is true?  
 And are you sure he’s free?  
 Then let us join with one accord,  
 And have a jubilee.

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123. B. H. Roberts, *The Rise and Fall of Nauvoo* (Salt Lake City: Bookcraft, 1965), 157.

124. When Smith first arrived in Springfield, Butterfield had said that “Judge Pope . . . should try the case on its merits and not on any technicality.” Faulring, *American Prophet’s Record*, 261; *History of the Church*, 5:211–12.

125. “The Mormon Jubilee,” *Wasp*, January 14, 1843, 1. An earlier, less-polished version was entered in Joseph Smith’s journal; see Faulring, *American Prophet’s Record*, 287–89. The hymn came to be known as the “Mormon Jubilee.” It was to be sung to the tune of “Auld Lang Syne” or William Mickle’s “There’s Nae Luck about the House.” Apparently, the piece was composed by Law and Willard Richards as the group was riding toward Captain Dutch’s. *History of the Church*, 5:246. I have included the chorus twice because of a slight variation, although it is repeated several times in the original.

We'll have a jubilee, my friends,  
We'll have a jubilee;  
With heart and voice we'll all rejoice  
In that our Prophet's free.

Success unto the Fed'ral Court.  
Judge Pope presiding there,  
And also his associates true,  
So lovely and so fair.

We'll have a jubilee, my friends,  
We'll have a jubilee;  
With heart and voice we'll all rejoice,  
In that our Gen'ral's free.

And to our learned counsellors  
We owe our gratitude,  
Because that they in freedom's cause  
Like valiant men have stood.

Chorus

In the defence of innocence,  
They made the truth to bear;  
Reynold's and Carlin's baseness both  
Did fearlessly declare.

Chorus

Edwards and Butterfield and Pope,  
We'll mention with applause,  
Because that they like champions bold  
Support the Federal laws.

Chorus

Th' Attorney Gen'ral of the State,  
His duty nobly did,  
And ably brought those errors forth,  
From which we now are freed.

Chorus

One word in praise of Thomas Ford,  
Our Governor so true;  
He understands the people's rights,  
And will protect them too.

Chorus

There is one more we wish enroll'd  
Upon the book of fame;  
That master spirit in all jokes,  
And 'Prentice' but in name.

Chorus

The Sucker State we'll praise in song,  
She's succour'd us indeed,  
And we will succor her in turn,  
In every time of need.

Chorus

Our charter'd rights she has maintain'd  
Through opposition great;  
Long may her charter champions live,  
Still to protect the State.

Chorus

We'll stand by her thro sun and shade  
Through calm and tempest, too;  
And when she needs our Legion's aid,  
'Tis ready at Nauvoo.

Chorus

With warmest hearts we bid farewell,  
To those we leave behind;  
The citizens of Springfield all  
So courteous and so kind.

Chorus

But Captain Dutch we cannot pass,  
Without a word of praise;  
For he's the king of comic songs  
As well as comic ways.

Chorus

And the fair ladies of his house,  
The flow'rs of Morgan's plains,  
Who from the soft Piano bring  
Such soul-enchanting strains.

Chorus

And now we're bound for home, my friends,  
A *band of brothers* true,  
To cheer the hearts of those we love,  
In beautiful Nauvoo.

We'll have a jubilee, my friends,  
We'll have a jubilee;  
With heart and voice we'll all rejoice,  
In that our Mayor's free.

At Captain Dutch's, the party retired late after an evening of song and good humor. The next morning, they arose early and continued their journey to Nauvoo. Along the way, the horses pulling one of their carriages bolted, causing the carriage to slip off a bridge and suffer damage.

Not letting this dampen their spirits, all agreed they should send the bill to Governor Boggs. At every stop along the way they sang the jubilee to raise their spirits, arriving in Nauvoo on Tuesday, January 10, 1843, to welcoming throngs. Joseph Smith was especially touched when his elderly mother, Lucy, came in and grasped his arm, “overjoyed to behold her son free once more.”<sup>126</sup> Eight days later the Smiths hosted a celebratory dinner party at the Mansion House for some fifty people. The occasion coincided with the Smiths’ fifteenth wedding anniversary, and the jubilee was again sung, along with a second jubilee composed for the occasion by Eliza R. Snow.<sup>127</sup>

### Postscript

For the most part, the non-Mormon press was complimentary of Joseph Smith’s Springfield lawyers and of Judge Pope’s ruling.<sup>128</sup> The *Sangamo Journal* reported, “The arguments presented by the counsel for Smith were conclusive. . . . In our next paper we shall publish that Opinion of Judge Pope—which will be found to be a most able one—presenting all the facts and law, so clearly that all who examine it will unite in those commendations which were bestowed upon it when delivered from the bench.”<sup>129</sup> According to the *Alton Telegraph*, “The decision of Judge Pope was uncommonly clear and lucid, and gave universal satisfaction, so far as I have heard any opinion expressed.”<sup>130</sup> A correspondent for the *St. Louis Republican* was even more enthusiastic: “The decision was one of the most chaste and beautiful things I ever listened to, and the correctness of the

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126. Faulring, *American Prophet’s Record*, 290–91; *History of the Church*, 5:247. A proclamation was issued under Brigham Young’s name setting aside January 17 as “a day of humiliation, fasting, praise, prayer, and thanksgiving.” The bishops of the several wards were instructed to schedule meetings where one of the brethren who had been in Springfield could attend and give a history of the legal proceedings. *History of the Church*, 5:248–49.

127. “Jubilee Song,” *Times and Seasons* 4 (February 1, 1843): 96; *History of the Church*, 5:252.

128. “While some of JOE SMITH’S former counsel . . . were advising him to ‘secrete himself on swamps,’ and avoid an arrest under the requisition of the Governor, Mr. Butterfield, on consultation, advised him to the manly course of trying the legality of the writs for his arrest before the competent tribunal—the U.S. Circuit Court of Illinois.” “Case of Joe Smith,” *Sangamo Journal*, January 26, 1843.

129. “Joe Smith,” *Sangamo Journal*, January 12, 1843.

130. “From the Editor,” *Alton Telegraph and Democratic Review*, January 14, 1843, 2.

conclusions to which his Honor arrived, has, so far as my observation extends, been universally acquiesced in.”<sup>131</sup>

Newspapers were far less charitable, however, toward Joseph Smith. The *Louisville Daily Journal* “suppose[d]” the opinion was correct, but opined that Smith “ought to be punished for the crime under the laws of Illinois.”<sup>132</sup> The *Alton Telegraph* was more blunt: “Joe Smith, for the time being, has escaped that punishment he so richly merits, but a righteous retribution will yet be visited upon him. No man, whose hands are stained with the blood of a fellow mortal can successfully elude the punishment. The day of its visitation upon him may be far distant, but arrive it certainly will.”<sup>133</sup>

Judge Pope’s decision was destined to become an important one throughout the land on issues of extradition, habeas corpus, and federal jurisdiction and was cited in many of the leading treatises on the subject long after all the participants were dead.<sup>134</sup> Both in terms of its impact on the law, as well as the notoriety it received in its day, this was the most famous of the more than one hundred legal cases in which Joseph Smith was involved during his lifetime. Had Smith’s case come up in our day, however, a different standard would apply, as an Illinois citizen may now be extradited under state law if he commits an act, even though in Illinois, that “intentionally result[s] in a crime” in the demanding state.<sup>135</sup>

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131. The Springfield correspondent of the *St. Louis (Mo.) Republican*, writing under the date of January 5, 1843, is quoted in “Joe Smith Discharged,” *Louisville (Ky.) Daily Journal*, January 13, 1843.

132. “Joe Smith Discharged,” *Louisville (Ky.) Daily Journal*, January 13, 1843.

133. “From the Editor,” *Alton Telegraph and Democratic Review*, January 14, 1843, 2.

134. See Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus*, 2d ed. (Albany, N.Y.: W. C. Little and Co., 1876), 625–30; John Bassett Moore, *A Treatise on Extradition and Interstate Rendition* (Boston: Boston Book, 1891), 878–82, 938; Samuel T. Spear, *The Law of Extradition, International and Inter-state*, 3d ed. (Albany, N.Y.: Weed, Parsons and Co., 1885), 390–91, 463–65. As late as 1953, *In re Smith* was cited as good law in Robert T. Beam, “Interstate Extradition under the Federal Constitution and the Laws of Illinois,” 1953 *U. Illinois L. Forum*, 451, 462. Approximately forty reported cases, some decided in the twentieth century, have also cited Judge Pope’s decision in support of their holdings. *Shepard’s Citations*, computer search performed August 17, 2007.

135. “The Governor of this State may also surrender, on demand of the Executive Authority of any other state, any person in this State charged in such other state . . . with committing an act in this State . . . intentionally resulting in a crime in the state whose Executive Authority is making the demand.” Illinois Criminal Extradition Act, 725 Illinois Criminal Statutes 225, Section 6 (emphasis added). The Illinois statute, enacted in 1955, is based on the Uniform Criminal

Not long after the Smith case was decided, Governor Ford was faced with a strikingly similar situation involving a requisition by Missouri for the extradition of an Illinois citizen alleged to be a fugitive from justice. This matter involved a man named Richard Eels, apparently an abolitionist, who had been charged with stealing slaves from a citizen of Missouri. Upon investigating the incident, Ford concluded that Eels had not been in Missouri at the time of the incident and therefore could not be a fugitive from Missouri justice. Exercising his gubernatorial discretion, Ford declined to issue a warrant for Eels's arrest. After Missouri Governor Reynolds complained, Ford responded with a lengthy letter, dated April 13, 1843, explaining his decision. Ford said that he had not made any determination as to the facts of the underlying crime (which he acknowledged to be the province of the Missouri courts) but merely whether Eels had fled from Missouri. He noted Reynolds had not furnished any evidence that Eels was a fugitive. Indeed, should Reynolds provide Ford with "respectable testimony, that Eels was a fugitive from justice" and if it were to be sufficient to "make the evidence already furnished on the other side of the question at all doubtful," Ford stood "ready to issue another warrant." This suggests that if Ford (rather than Carlin) had been Illinois governor when the requisition for Joseph Smith relating to the Boggs assault was received, he might have been persuaded to exercise his discretion not to issue an arrest warrant in the first place.<sup>136</sup>

Ford recognized, however, that the judiciary might not be as free as the executive to consider the underlying merits on a return of habeas corpus: "But the question may be asked why not suffer the arrest to be made, and then leave the matter to be decided by the courts of Justice on a writ of habeas Corpus? The obvious answer to this, seems to be, that every executive warrant of arrest contains a recital, that the individual sought to be apprehended is a fugitive, the truth of which allegation the courts might have no authority to enquire into."<sup>137</sup>

Let us return briefly to Porter Rockwell, whose presence in Missouri at the time of the Boggs assault was the genesis of the allegations against

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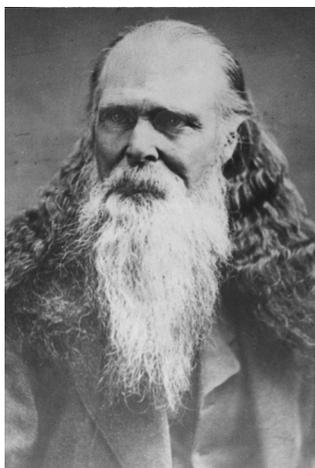
Extradition Act, adopted by most states. The change from the prior law was regarded as an important step in aiding the fight against organized crime. See Albert J. Hamo, "Some Needed Changes in Illinois Criminal Procedure," 1953 *University of Illinois Law Forum*, 425. Of course, Judge Pope might still have ruled that the Missouri requisition was inadequately supported by factual allegations in the Boggs affidavit.

136. Thomas Ford to Thomas Reynolds, April 13, 1843, copy in Church History Library.

137. Ford to Reynolds, April 13, 1843.

Smith. Apparently he found life on the lam depressing in Pennsylvania and New Jersey (whence he had fled after being released by habeas corpus in Nauvoo), and after the favorable decision by Judge Pope on Smith's extradition case, decided to risk a return to Nauvoo.<sup>138</sup> Unfortunately for him, on March 4, 1843, he was spotted by a bounty hunter in St. Louis as he was changing boats to go up river to Nauvoo. He was unceremoniously taken under guard to Independence, where he languished in jail for nine months. Twice he made unsuccessful attempts to escape, which resulted only in his being more isolated in his imprisonment. His captors promised him that if he would testify against Smith, a deal could be made that would give him freedom, but he refused to do so. When his case was finally brought before a grand jury, it determined there was insufficient evidence even to indict him, much less convict him of the crime.<sup>139</sup>

Rockwell was released from his imprisonment and made his way to Nauvoo, where he appeared unannounced at Joseph and Emma Smith's Mansion House in the midst of a party on Christmas Day 1843. As recounted in Joseph's journal, "a man apparently drunk, with his hair long and falling over his shoulders come in and acted like a Missourian. I commanded the Capt[ain] of the police to put him out of doors. In the scuffle, I looked him full in the face and to my great surprize and Joy untold I discovered it was Orrin Porter Rockwell, just arrivd from a years imprisonment in Mo [Missouri]."<sup>140</sup> According to some accounts, Smith promised that Rockwell's enemies



Orrin Porter Rockwell

138. This was risky for Rockwell, since he was undeniably in Missouri at the time of the Boggs shooting and therefore could not avail himself of the argument that he had not fled from the state.

139. "Orin Porter Rockwell, the Mormon confined in our county jail some time since for the attempted assassination of ex-governor Boggs, was indicted by our last grand jury for escaping from the county jail some weeks since. . . . There was not sufficient proof adduced against him to justify an indictment for shooting at ex-governor Boggs; and the grand jury, therefore, did not indict him for that offence." *Independent Expositor; Niles' Register*, September 30, 1843, as quoted in Hubert Howe Bancroft, *History of Utah 1540-1886* (San Francisco: The History Company, 1890), 156.

140. Smith, Journal, December 25, 1843, in Faulring, *American Prophet's Record*, 435-36.

would have no power over him so long as he remained loyal and true and did not cut his hair. Despite many dangerous and violent encounters throughout his adventure-filled life, Rockwell (with his distinctively long hair) remained alive and well until 1878, when he died of a heart attack in Salt Lake City at the age of sixty-five.<sup>141</sup>

## Conclusion

If we reflect back to that triumphal return to Nauvoo from Springfield in January 1843, when a jubilee composed in Joseph Smith's honor was sung at every stop, we sense the exhilaration he must have felt. He had been received in the state capital by some of the highest-ranking officials in Illinois. He had watched two of his Apostles deliver sermons to a full house in Springfield's Representatives Hall. Ladies of the highest society had been drawn to court to see him. A non-Mormon newspaper had noted what fine-looking figures he and his men cut. The United States attorney for the district of Illinois had stood as his lawyer. A preeminent federal judge had delivered a widely praised opinion assuring he would not be sent to Missouri to stand trial in connection with the Boggs assault.

Yet the same events, seen from the outside in, paint a more ominous picture. In response to the threat of extradition, the Nauvoo City Council had passed ordinances giving its municipal court (with Smith as chief justice) habeas corpus powers well beyond what was generally considered proper. While he was received by leading politicians in Springfield, it is clear in hindsight that Mormon votes were being courted. Governor Ford tried to warn the Prophet about exerting too much political influence, but Smith brushed him aside.<sup>142</sup> It is true that ladies had been drawn to see him, but at least part of the draw was no doubt curiosity about his rumored polygynous lifestyle. While Judge Pope's opinion was praised as legally

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141. "Death of Porter Rockwell," *Salt Lake Tribune*, June 11, 1878, 2; "Porter Rockwell," *Salt Lake Tribune*, June 12, 1878, 2; Schindler, *Orrin Porter Rockwell*, 366. Joseph F. Smith, then an Apostle, later to become Church President, delivered Rockwell's eulogy. "He had his little faults, but Porter's life on earth, taken altogether, was one worthy of example, and reflected honor upon the church." The anti-Mormon *Salt Lake Tribune* dismissed this as a "fitting tribute of one outlaw to the memory of another." "Rockwell's Funeral," *Salt Lake Tribune*, June 13, 1878, 4; Schindler, *Orrin Porter Rockwell*, 368.

142. Ford advised Smith to refrain from all "political electioneering," but Smith replied that he always "acted on principle" and that the Mormons were driven to unify their vote because of being persecuted and not because of the influence of Smith. Smith, Journal, January 6, 1843, in Faulring, *American Prophet's Record*, 286.

sound, the feeling persisted that Joseph had once again ducked through legal loopholes, and this rankled his enemies. Less than eighteen months later, the Mormon prophet would be assassinated by an enraged mob.

The tide of public opinion had already begun to turn against Smith and the Mormons when Missouri's first extradition attempt ended with a ruling by Judge Douglas on a legal technicality. Some even suggested that Carlin and Douglas had conspired to stage a sham trial.<sup>143</sup> When this second extradition attempt ended in a similar dismissal without addressing the underlying charge, even newspapers that supported the verdict on technical grounds believed that Smith should somehow be tried and punished for his crime.<sup>144</sup> When a new requisition was issued by Missouri several months later on the old treason charges, and when the Nauvoo Municipal Court purported to hear the merits of the case on a writ of habeas corpus and released Smith forthwith, it only served to strengthen conviction of the anti-Mormon element that Smith was dangerously above the law.<sup>145</sup>

The murder of Joseph Smith in Carthage Jail the following year was the result of a widely felt indignation against the Mormons in general and Smith in particular. The officially ordered destruction on public nuisance grounds of the *Nauvoo Expositor*, a newspaper Smith believed had slanderously attacked him and whose editorial content he believed was likely to provoke violence, is generally credited as being the spark that ignited the flame. Nevertheless, the Mormon prophet's successful repulsion of the three attempts by Missouri to extradite him was an important contributing factor in the anti-Mormon frenzy.

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143. *Warsaw Signal*, July 14, 1841, 2.

144. As a further example, the *Alton Telegraph* proclaimed, "We believe [Smith] combines in his composition all the elements of a base, wicked, dangerous and corrupt man. And that he has openly violated the laws of God and man for which he should be severely punished." "The Quincy Herald, Judge Pope, the Discharge of Joe Smith," *Alton Telegraph and Democratic Review*, January 28, 1843, 2.

145. As the *Alton Telegraph* sarcastically put it, "He [Joe] . . . was taken before that very *impartial and disinterested* legal tribunal, the Municipal Court of Nauvoo. The officers of this misnamed court of justice are composed of the most blinded, infatuated and unprincipled of Joe's deluded followers, and the result was precisely what every man of common sense might have known it would be—a discharge of their Prophet from the legal custody of the officers of the law." "Joe Smith," *Alton Telegraph and Democratic Review*, July 15, 1843, 2; emphasis in original. I plan to deal with the interesting facts and law of Missouri's third extradition request in a subsequent paper.

The endeavors of Missouri to bring Joseph Smith back for trial were splashed across the pages of the newspapers of the day. It mattered not to the critics that Smith turned to the law to avoid extradition; they saw him as having taken advantage of legal technicalities and raw political power. Believing their elected officials and judges lacked the power and the will to bring the Mormon prophet to justice, the mob in Carthage became judge and executioner, shoving the law aside like a troublesome boulder in the road.

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