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Missourian efforts to extradite Joseph Smith and the ethics of Governor Thomas Reynolds of Missouri

A Keith Thompson

The University of Notre Dame Australia, keith.thompson@nd.edu.au

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MISSOURIAN EFFORTS TO EXTRADITE JOSEPH SMITH AND THE ETHICS OF GOVERNOR THOMAS REYNOLDS OF MISSOURI

A. Keith Thompson

Abstract: *This is the second of two articles discussing Missouri's requisitions to extradite Joseph Smith to face criminal charges and the Prophet's recourse to English habeas corpus practice to defend himself. In the first article, the author discussed the English nature of pre-Civil War habeas corpus practice in America and the anachronistic modern idea that the Nauvoo Municipal Court did not have jurisdiction to consider interstate habeas corpus matters. In this article, he analyzes the conduct of Governor Thomas Reynolds in the matter of Missouri's requisitions for the extradition of Joseph Smith in light of 1840s legal ethics in America. That analysis follows the discovery that Governor Reynolds had dismissed the underlying 1838 charges against Joseph Smith when he was a Missouri Supreme Court judge. It also responds to the revelation that Missouri reissued indictments based on the same underlying facts in June 1843 despite the existence of a double-jeopardy provision in the Missouri Constitution of 1820.*

In my earlier article entitled “The Habeas Corpus Protection of Joseph Smith from Missouri Arrest Warrants,”¹ I explained that the steps taken to protect Joseph Smith from Missouri warrants were both reasonable and legal when read in their 1840 Illinois context. The criticism regarding the use of the English writ of habeas corpus to defend Joseph Smith came

1. A. Keith Thompson, “The Habeas Corpus Protection of Joseph Smith from Missouri Arrest Requisitions,” *Interpreter: A Journal of Mormon Scripture* 29 (2018): 273–306, <http://www.mormoninterpreter.com/>.

from two corners: first, Governor Thomas Ford, who had guaranteed the Prophet's safety in transit and while at Carthage and was being blamed by Smith's followers for his death, and second, Thomas Sharp, editor of the *Warsaw Signal*, who had become an avowed anti-Mormon by late 1841 in large part because he was concerned about "the political power of the growing number of Mormons in Hancock County" and because the Saints had overreacted to his criticism of John C. Bennett's appointment as mayor of Nauvoo.² I took time to explain the English habeas corpus practice followed in the United States before the Civil War because many are apt to think Ford and Sharp were right in their criticism. It might appear to 21st-century readers that a city court in a frontier town like Nauvoo did not have the legal authority to invalidate an interstate arrest warrant. That anachronistic understanding had not yet been rebutted by contemporary LDS historians, and an understanding of the history of habeas corpus in America before the Civil War provides the background to do so.

In the course of clarifying that history, I drew attention to a concern that Jeffrey Walker raised in his research about the conduct of Missouri Governor Thomas Reynolds. Walker did not press this point home,³ perhaps out of respect to the governor in light of his tragic and premature death.⁴ The purpose of this article is to explain Walker's insight and take it further, since Andrew Hedges has uncovered more evidence of Missouri's continuing conspiracy against the Latter-day Saints after they were expelled during the so-called "Mormon War" of 1838.⁵

After he served as the Chief Justice of Illinois, Thomas Reynolds worked as a Missouri Second Circuit judge before he was elected to succeed Lilburn W. Boggs as governor of Missouri.⁶ In his role as

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

3. Jeffrey N Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism, Joseph Smith's Legal Bulwark for Personal Freedom," *BYU Studies Quarterly* 52, no. 1 (2013), 35, 37.

4. Governor Reynolds committed suicide on February 9, 1844.

5. Andrew H. Hedges, "Extradition, the Mormons, and the Election of 1843," *Journal of the Illinois State Historical Society* 109, no. 2 (Summer 2016): 143n1.

6. Reynolds served as Chief Justice of Illinois from 1822–1825 as representative and speaker of the Illinois House of Representatives from 1826–1828 and moved to Missouri around 1829. He also served in that state as a representative and speaker of the House of Representatives (1832–1834) before serving as a judge of the second judicial circuit (1837–1840) before his election as Governor in 1840.

"Thomas Reynolds," People, *The Joseph Smith Papers*, last updated 2018, <http://www.josephsmithpapers.org/person/thomas-reynolds>.

a Missouri Supreme Court judge, Governor Reynolds had dismissed the Mormon War charges against Joseph Smith and his colleagues in August 1839, more than twelve months before he took office as governor of Missouri in September 1840.⁷ While that knowledge probably did not infect his requisition for Joseph Smith's arrest in connection with the attempted murder of Governor Boggs, it likely did infect the various requisitions which Missouri issued for Joseph Smith's arrest in connection with the Mormon War charges. Nor is this bad faith act mitigated by Andrew Hedges' discovery that a subsequent effort was made to reissue the Missouri War warrants from a different Missouri judicial district in 1843,⁸ despite the existence of a double-jeopardy provision in the Missouri Constitution of 1820.

Governor Reynolds' involvement in the requisition for Joseph Smith's arrest in connection with the attempted murder of former Missouri Governor Boggs is also ethically suspect, since an objective governor arguably would not have issued such a warrant based only on suspicion expressed in media reports.

I have approached the task of analyzing Governor Thomas Reynolds' possible bad faith in four parts. First, I summarize the charges and the extradition attempts that Missouri made against Joseph Smith in connection with the Mormon War of 1838 and the attempted assassination of former Governor Boggs in 1842.

Second, I review Governor Reynolds' personal knowledge of those facts and of the law and legal ethics that applied to lawyers and judges during the 1840s in the United States.

In Part III, I discuss the political pressures that might have caused a governor of Missouri to want to hide the dismissal of the Mormon War charges against Joseph Smith in August 1839 and then reissue very similar indictments in 1843.

Finally, in Part IV, I discuss what a reasonable governor who had held office as both a supreme court judge of one state (Missouri), and as the chief justice of the supreme court of another state (Illinois), should have done given his knowledge.

I conclude that Governor Reynolds' conduct in relation to the attempted extradition of Joseph Smith to face criminal charges in Missouri in connection with the Mormon War was unethical and likely

7. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 34–37, particularly n94.

8. Andrew H. Hedges, "Thomas Ford and Joseph Smith, 1842–1844," *The Journal of Mormon History* 42, no.4 (October 2016): 106n29.

calculated to protect Missouri's reputation against damage caused by the Latter-day Saints redress petitions in Washington. I also suggest that the warrants Governor Reynolds issued for Smith's arrest in connection with the attempted murder of former governor Boggs were flawed by the lack of an evidential base and because of his anti-Mormon prejudice; Governor Reynolds should have declined to issue them.

Part I — Joseph Smith's Alleged Crimes in Missouri and Extradition Attempts

When they "escaped" from Missouri custody in 1839 while they were being transferred to a new trial venue, Joseph Smith and other Latter-day Saint leaders became fugitives from Missouri justice on charges "ranging from arson, burglary and robbery to treason and even murder" (the "Mormon War charges").⁹ These were the charges under which Joseph Smith had been imprisoned first at Richmond, Missouri, and then, following an earlier transfer, in Liberty Jail near modern-day Kansas City. There is debate as to whether these Latter-day Saint leaders escaped or were unofficially released, but the cause of their departure from Missouri to Illinois did not negate their position as fugitives from justice under Missouri law for four months until August 1839, when then-Judge Thomas Reynolds of the Missouri Supreme Court's Second Circuit dismissed all those charges.

The second Missouri warrant for Joseph Smith's arrest asserted that he was an accessory before the fact in the attempted murder of former Governor Lilburn W. Boggs on May 6, 1842 (the "Accessory Before the Fact charges"). The suggestion that Joseph Smith was complicit in this attempted murder was spawned by anti-Mormons in Illinois, including former Nauvoo Mayor John C. Bennett.¹⁰

Since I have already discussed these charges in some detail in my earlier article, I will summarize only the legal problems with the Missouri extradition requisitions which were premised on these charges.

9. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 34–37. The other leaders who escaped with Joseph Smith were Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin. They were *en route* to the jail in Boone County because the assigned judge at Liberty (Judge Thomas Burch) had been the prosecuting attorney in the preliminary hearing before Judge Austin King and needed to recuse himself from officiating at the trial.

10. Richard Bushman, *Rough Stone Rolling, A Cultural History of Mormonism's Founder* (New York: Alfred A. Knopf, 2005), 468.

The Mormon War Indictments — Legal Problems with the Warrants and the Underlying Extradition Requisitions

The essential problem with any warrant premised on the Mormon War charges is that the underlying charges had been dismissed by Judge Thomas Reynolds in the second judicial district of the Missouri Supreme Court in August 1839, even though Joseph Smith and his colleagues and counsel did not know of that dismissal.¹¹ If those dismissals had been disclosed to either of the Illinois governors who issued warrants based on the 1840 or the 1843 Missouri requisitions, it is unlikely they would have issued those warrants because they would have been seen in their true light as the vexatious writs Joseph Smith claimed them to be.

English courts had developed a common-law rule that would allow them to dismiss indictments deemed invalid or suits premised upon facts already ruled upon.¹² That rule was called the *res judicata* principle, literally, “the thing had already been decided.” Because the English Crown had proven dexterous in making small changes to indictments to get around the *res judicata* principle, particularly in the case of colonial revolutionaries, many of the United States included written double-jeopardy protections into their state constitutions to prevent vexatious lawsuits in criminal cases.¹³ The practice was to interpret those constitutional provisions liberally to avoid the use of criminal litigation for the purposes of harassment or persecution by the State.¹⁴ The 1818

11. Walker, “Habeas Corpus in Early Nineteenth-Century Mormonism,” 35.

12. See for example, Robert Von Moschzisker, “Res Judicata,” 38 *Yale Law Journal* 3 (1929). <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3328&context=yjl>. The principle has earlier origins in Roman law.

13. Jay A Sigler, “A History of Double Jeopardy,” *The American Journal of Legal History*, Vol. 7, No. 4, (October 1963): 298–301, <https://www.jstor.org/stable/pdf/844041.pdf?refreqid=excelsior%3A5ce02b96211c915d2b2234f8e5dc927f>.

14. See, for example, “Fifth Amendment — Double Jeopardy,” *The Journal of Criminal Law and Criminology* 66, no. 4, (Northwestern University School of Law, 1975): 428–35, https://www.jstor.org/stable/1142881?seq=8#page_scan_tab_contents. In response to a newly amended Criminal Appeals Act, the Supreme Court found that once jeopardy had attached, “the Constitution bars appeal of those decisions which would require a second trial to finalize proceedings” (435). But note also the concern of Ronald Jay Allen, Bard Ferrall, and John Ratnaswamy in “The Double Jeopardy Clause, Constitutional Interpretation and the Limits of Formal Logic,” *Valparaiso University Law Review* 26, no. 1 (1991): 281–310, <https://scholar.valpo.edu/cgi/viewcontent.cgi?article=2138&context=vulr>, that dual sovereignty was an illogical exception to the double-jeopardy principle in *Heath v Alabama* 474 U.S. 82 (1985).

and 1820 constitutions of Illinois and Missouri included such provisions. The Missouri clause said:

That the general, great, and essential principles of liberty and free government may be recognized and established, we declare . . .

That no person, after having been once acquitted by one jury, can, for the same offence, be again put in jeopardy of life or limb, but if, in any criminal prosecution, the jury be divided in opinion at the end of the term, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial at the next term of such court.¹⁵

The first Missouri requisition to Illinois for Joseph Smith's arrest was issued by Governor Boggs as one of his final acts as governor on September 1, 1840, 16 months after Joseph Smith and his colleagues had escaped to Illinois. Governor Boggs had obtained certified copies of the indictments in July 1839, but it is unclear whether he knew they had been dismissed by Judge Reynolds in August 1839 when he issued his requisition for Joseph Smith's arrest 13 months later in September 1840.¹⁶ However, it is certain that when Governor Reynolds took office later that month, he knew the underlying indictments had been dismissed, making the requisitions invalid under the Missouri State Constitution because he was the judge who had dismissed them. But before we consider whether Governor Reynolds had an ethical obligation to recall his State's requisition for Joseph Smith's arrest before it was carried out on June 5, 1841, it is worth examining Governor Reynolds' actions following the failure of both the first Mormon War requisition in Judge Stephen A. Douglas' courtroom in Monmouth, Illinois, and the requisition for attempted murder in Judge Nathaniel Pope's US Circuit Court in Springfield, Illinois.

Judge Stephen A. Douglas found that Governor Carlin's warrant to arrest Joseph Smith was already dead (*functus officio*) by the time it was used to arrest Joseph Smith in June 1841, as the officer first assigned to arrest Joseph Smith had not been able to find him in Nauvoo and had returned the warrant unfulfilled to the governor. The governor's procedural mistake, according to Judge Douglas, was that he had not issued a new warrant but simply gave the old warrant to a new official to try and arrest Joseph Smith again. As a result, the question was if

15. 1820 Missouri State Constitution; <http://librarytrekker.x10host.com/MOConstitution/1820Page3.html>. Clause 10 of Article XIII endured until 1865.

16. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 35.

the whole process had to start again in Missouri, or whether the Illinois governor could issue a new warrant based on Governor Boggs' original requisition. Perhaps because Judge Douglas had also heard abundant testimony that the warrant was fraudulent, Governor Carlin in Illinois did not issue a new warrant after Judge Douglas' decision, which decision put the ball back in the Missouri governor's court.

When Governor Reynolds became involved in efforts to extradite Joseph Smith back to Missouri, there was an allegation that Joseph Smith was an accessory before the fact in the attempted murder of former Governor Boggs. But when that extradition attempt failed in Judge Pope's US Circuit Court in January 1843 and perhaps because of the noise the Mormon redress petitions were causing in Washington, Missouri sought to resurrect the old Mormon War treason charges as the foundation for a new extradition attempt.¹⁷

Since Judge Douglas' dismissal of the warrant based on the Mormon War facts responded only to the inadequacy of Governor Carlin's arrest warrant in Illinois, Governor Reynolds should have been able to simply ask the new governor of Illinois, Thomas Ford, to issue a new warrant premised on the existing unsatisfied requisition. But since Governor Carlin had not voluntarily taken that step, and since Governor Ford had been skeptical about Missouri's requisition for Joseph Smith's arrest for the attempted murder of former Governor Boggs even before Judge Pope ruled it invalid, it appears that Missouri thought it better to start again with the 1838 Missouri War extradition request.

But Andrew Hedges' research has shown that Missouri chose not to simply issue a new requisition premised on the original 1838 indictments that had been certified by former Governor Boggs in July 1839. Rather, Missouri chose to issue fresh indictments in a different Missouri judicial circuit as the foundation for a brand new, third requisition. Absent additional evidence explaining Missouri's reason for that course, we do not know for sure whether the third requisition was issued because Missouri wished to avoid formally disclosing that the original Boone County indictments had been dismissed in August 1839 or not. But it is difficult to discern any other reason for that change. That there was a change at all demonstrates that Joseph Smith was justified in labelling this third requisition by Missouri as vexatious. The double-jeopardy principle written in many state constitutions, including the Missouri Constitution of 1820, was intended to prevent just such gerrymandering of criminal charges by government officials. That is, if the underlying

17. Bushman, *Rough Stone Rolling*, 397, 405.

facts upon which indictments had been issued were the same facts as those upon which earlier indictments had been issued, then any new indictments were constitutionally unsound regardless of where they were filed and whether they had been tweaked in some way.

Even though Governor Reynolds may not have conceived the idea of avoiding or hiding the Boone County dismissal of the first indictments, when he issued the third Missouri requisition for Joseph Smith's arrest he was fully aware of the abuse of process involved and its breach of both *res judicata* and the constitutional double-jeopardy principle.

The only possible mitigation of that conduct may be found in the words of the double-jeopardy clause in the 1820 Missouri Constitution quoted above, but that possibility is a stretch. That interpretation rests on a technical interpretation of the words regarding double jeopardy, for although Joseph Smith had not been tried by a jury when Judge Reynolds dismissed the indictments against him, he had been "put in jeopardy of life or limb." But that interpretation ignores the reason double-jeopardy provisions were included in American state constitutions in the first place. This gerrymandering by Missouri was exactly the kind of official mischief that double-jeopardy provisions were designed to prevent.

While this interpretation may enable some historians to dismiss Governor Reynolds' official involvement in Missouri's state persecution of Joseph Smith as the sophistry of a careful lawyer, a review of the ethical obligations of a lawyer, particularly one who had held office as both a supreme court judge and chief justice of a supreme court, suggest otherwise. Before discussing the ethical considerations involved in the three Missouri requisitions for Joseph Smith's arrest, however, I have briefly identified the reason that the requisition for Joseph Smith's arrest and extradition to Missouri in connection with the attempted murder of Governor Boggs failed, suggesting once more that Missouri's willingness to press that requisition, despite its obvious flaws, can be reasonably interpreted as evidence of persecution of Joseph Smith by the state of Missouri.

The Attempted Murder of Former Governor Boggs

On May 6, 1842, someone attempted to murder former Missouri Governor Lilburn W. Boggs by shooting him through a window in his house while he was reading a newspaper. Though suspicion initially fell on a man named Tompkins¹⁸ because of a tense Missouri Senate election

18. Tompkins was a silversmith alleged to have told others of his intent to kill Boggs (Monte B. McLaws, "The Attempted Assassination of Missouri's ex-Governor

campaign,¹⁹ anti-Mormon newspaper reports implicated Joseph Smith within two weeks of the attempted murder, and thereafter, other avenues of inquiry were not pursued. In due course, former Governor Boggs swore an affidavit attesting his belief that Joseph Smith was an accessory before the fact in his attempted murder. On the strength of those allegations, Governor Reynolds addressed a requisition for the extradition of both Joseph Smith and Orrin Porter Rockwell to Illinois Governor Thomas Carlin, but both were released following habeas corpus hearings in Nauvoo. (Because I explained pre-Civil War habeas corpus practice in detail in my earlier article, I will not belabor those details here.)

While Governor Carlin believed that the Nauvoo Municipal Court did not have the judicial authority to rule on his warrant and that the ordinance passed by the Nauvoo City Council exceeded its legislative authority,²⁰ he did not appeal the Nauvoo decision and relied instead on the issue of a proclamation offering a reward for the capture and arrest of Smith and Rockwell.²¹ When Thomas Ford became governor of Illinois in November of that year (1842) in company with other prominent lawyers, he agreed with the suggestion to Joseph Smith's delegation that the Boggs' extradition requisition could be acceptably resolved if Joseph would voluntarily appear before a clearly independent court in Springfield.²² Though Governor Ford considered that his predecessor's arrest warrant was probably illegal, he was not certain that he had the legal authority to rescind it.²³

The legal problems did not end with Governor Carlin's arrest warrant. If the State of Illinois were to defeat Joseph Smith's habeas corpus challenge on behalf of Missouri, the Illinois defenders of the warrant would need to prove both that there was substance to the allegations and that Joseph Smith had fled Missouri justice in relation to this matter. The first point of proof would be difficult if a habeas corpus hearing looked behind the allegations at the substance of the case, but the second problem was insuperable because Joseph Smith had not been present in Missouri since April or May 1839. The significance of the first flaw may have been a matter of legal opinion, though it is likely a former state supreme court

Lilburn W. Boggs," *Missouri Historical Review* 60, no. 1 (1965): 50). Tompkins was acquitted within a week (55).

19. Bushman, *Rough Stone Rolling*, 468.

20. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 49–51.

21. *Ibid.*, 52.

22. *Ibid.*, 53–54.

23. *Ibid.*, 53n153.

justice would have considered that an extradition request based solely on suspicion could not be maintained. But the second deficiency must have been obvious to Governor Reynolds as a former supreme court justice. The question to be addressed is whether it was unethical for him to have issued a flawed extradition requisition and for Governor Carlin to have issued an arrest warrant premised upon that.

Part II — Governor Reynolds’ Knowledge of Missouri Law and Legal Ethics

Legal ethics in the first half of the 19th century were not codified but were rather a combination of the variable dictates of a lawyer’s personal conscience and the sense of honor required by his profession.²⁴ The concept of a lawyer acting as an officer of the court does not appear to have been defined until 1854.²⁵ However, it still seems inconsistent with any sense of honor for Governor Reynolds to have concealed the fact that the underlying Mormon War indictments against Joseph Smith had been dismissed 13 months before Governor Boggs sought his extradition from Illinois on those charges. Michael Ariens says that the legal and ethical duty of a lawyer to zealously represent his client underwent a transition in the 1830s.²⁶ He explains that transition with a reference to David Paul Brown’s 1856 statement that there was a world of difference between a lawyer unknowingly defending an unjust case for a client and that same lawyer doing so knowingly, however much he might “plate sin with gold.”²⁷ If Governor Reynolds had revealed that the indictments against Joseph Smith and his colleagues had been dismissed, it is doubtful a governor of another state would have issued an arrest warrant based on those indictments or pursued a warrant that had thus been issued by mistake but which was still alive.

Richard Bushman has suggested that the reason Missouri pursued Joseph Smith on the old 1838 charges in 1840 was that the Latter-day Saints had argued in Washington, DC, that Missouri’s failure to bring extradition proceedings against Joseph Smith was a tacit admission that Missouri was culpable and even complicit in the atrocities and

24. Michael Ariens, “Lost and Found: David Hoffman and the History of American Legal Ethics,” *Arkansas Law Review* 67 (2014): 571.

25. Ariens, “Lost and Found: David Hoffman and the History of American Legal Ethics,” 606.

26. *Ibid.*, 598.

27. *Ibid.*

destruction of property which were committed against the Mormons.²⁸ One reading of this implication is that Joseph Smith was the author of his own misfortune in the extradition cases since he had shamed Missouri by his entreaties in Washington, however unsuccessful those entreaties may have been. That argument continues that, despite any ethical duties which Governor Reynolds may have owed the justice system as a lawyer and judge, he may have felt politically justified in taking whatever steps he could against Joseph Smith to preserve the honor of the State of Missouri. However, it remains difficult to understand how he could have remained mute in the matter of his predecessor's request for Joseph Smith's extradition to Missouri on the strength of charges he knew had been dismissed.²⁹

But it is more difficult to understand how Governor Reynolds could have issued a second requisition for Joseph Smith's arrest in 1843 based on the Mormon War treason charges, since he had personally dismissed the underlying indictments even though they had been reissued in a different judicial district.³⁰ Not only did Governor Reynolds know that the underlying indictments had been dismissed, he also knew that the Missouri Constitution of 1820 contained a double-jeopardy provision intended to prevent someone from facing trial twice on the same underlying charges.³¹

Perhaps Governor Reynolds justified his action in avoiding the double-jeopardy provision in the 1820 Missouri Constitution because that clause could be interpreted to mean that no double jeopardy would attach unless the accused had been subject to a formal jury trial before the case against him was dismissed. But that interpretation is doubtful even by the ethical standards of the 1840s, since the dismissal of a case that was to be heard by a jury was a legal end to that case.

28. Bushman, *Rough Stone Rolling*, 397, 405, 505.

29. Walker, "Habeas Corpus in Early Nineteenth-Century Mormonism," 36n94.

30. Andrew H. Hedges, "Thomas Ford and Joseph Smith, 1842–1844," *The Journal of Mormon History* 42, no.4 (October 2016): 97, 106. While Hedges acknowledges that the new indictment for treason "amounted to a renewal of the charges that led to his release in Monmouth two years earlier," he does not discuss the double-jeopardy provision in the 1820 Missouri Constitution or the fact that Governor Reynolds must have known that the charges on which he was issuing an extradition warrant were an abuse of process. See also Hedges, "Extradition, the Mormons, and the Election of 1843."

31. 1820 Missouri State Constitution, Article XIII, Clause 10; <http://librarytrekker.x10host.com/MOConstitution/1820Page3.html>.

The likely reason for Missouri's decision to reissue indictments against Joseph Smith for treason and other crimes during the Mormon War of 1838 was a concern that the Boone County dismissal of the original indictments in July 1839 might be discovered by Joseph Smith's legal team if they relied upon the old charges. But that deceptive logic does not escape *res judicata* and double-jeopardy principle. Ironically, the discovery of the dismissal of the original Boone County indictments appears to have come about as a consequence of the issue of the third Missouri requisition by the Daviess County Circuit Court. Indeed, the words of a new ordinance passed by the Nauvoo City Council when the new Missouri indictments were discovered show that the third requisition greatly concerned the Saints because it showed that Missouri was willing to abuse legal process to pursue Joseph Smith without regard to underlying legal principle or ethics. The new ordinance says:

Whereas Joseph Smith has been three times arrested and three times acquitted upon writs founded upon supposed crime or charges preferred by the State of Missouri; which acquittals were made from investigations upon writs of Habeas Corpus; namely, one in the United States Court for the district of Illinois; one in the Circuit Court of the State of Illinois and one in the Municipal Court of Nauvoo; and whereas a *nolle prosequi* has once been entered in the Courts of Missouri upon all the cases of Missouri against Joseph Smith and other: and whereas there appears to be a determined resolution by the State of Missouri to continue these unjust (Illegible Line) for the body of General Joseph Smith; and whereas it has become intolerable to be thus continually harassed and robbed of our money to defray the expences of these prosecutions; and whereas, according to the Constitution of Illinois "all men are born equally free and independent; and have certain inherent and indefeasible rights; among which are those of enjoying and defending, life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness;" And whereas it is our bounden duty by all common means, if possible, to put a stop to such vexatious law suits and save expense: Therefore

SEC. 1 Be it ordained by the City Council of the city of Nauvoo, according to the intent and meaning of the Charter for the 'benefit and convenience' of Nauvoo that hereafter, if any person or persons shall come with process, demand or

requisition founded upon the aforesaid Missouri difficulties, to arrest said Joseph Smith, he or they shall be subject to be arrested by any officer of the city, with or without process, and tried by the Municipal Court; upon testimony and if found guilty, sentenced to imprisonment in the city prison for life, which convict or convicts can only be pardoned by the Governor with the consent of the Mayor of said city.

SEC. 2. And be it further ordained that the preceding section, shall apply to the case of every and all persons that may be arrested, demanded or required, upon any charge founded in the aforesaid Missouri difficulties.

SEC. 3. And be it further ordained, that the Jury that makes the presentment, in any case above specified, shall not, nor either of them, act as Jurors on the final trial, but the trial shall be conducted according to the fifth and sixth articles of the amendment to the constitution of the United States.

Passed December 8, 1843.

JOSEPH SMITH, Mayor. L. A.

WILLARD RICHARDS, Recorder.³²

While the words of the new Nauvoo municipal ordinance did not expressly refer to the *res judicata* and double-jeopardy doctrines, the ordinance's reference to Missouri's *nolle prosequi* in the preamble made it clear that Joseph Smith and his legal team knew by December 1843 that the 1838 indictments had been dismissed. Both requisitions based on the Mormon War charges were vexatious because the underlying indictments had been dismissed before the requisitions were issued. And the accessory before the fact requisition was simply unsustainable because Joseph Smith had not been in Missouri at the time of the attempted murder.

Part III — Political Pressures on Missouri Arising Because of the Mormon Redress Petitions

Bushman attributes the idea to present redress petitions in Washington to Sidney Rigdon. Rigdon wanted “to ask state legislatures for resolutions in support of the Saints, and then request reparations for the Missouri

32. *Nauvoo Neighbor*, 13 December 1843. It was described as “an extra Ordinance for the extra case of Joseph Smith and Others.” This amendment was passed five days earlier on 8 December 1843.

losses from Congress,”³³ and he had obtained letters of introduction for that purpose. But ultimately, Joseph Smith, and “Judge” Elias Higbee bore the weight of the mission to Washington because Rigdon fell ill with a recurrence of malaria.³⁴ Joseph Smith and Elias Higbee visited President Martin Van Buren on November 29, 1839, in the company of John Reynolds, an Illinois congressman who was happy to assist an influential constituent. Though President Van Buren did not make his famous statement that their “cause was just but he could do nothing for them” until two months later, that was the spirit of his response from the outset. The President faced an election the following year, and he did not wish to disturb Missouri, which had been one of his strongholds in 1836.³⁵

Joseph Smith and Elias Higbee were better received by Illinois’ congressmen and senators, who heard them in a committee room of the Capitol and arranged for them to make a presentation to Congress. But the discussion and result there was not a lot different than it had been with President Van Buren. One congressman even repeated the president’s view that the Latter-day Saints should take their redress petitions to the Missouri court, although others recognized that would not work.³⁶ Ultimately, Senator Richard Young from Illinois offered to present the collected Latter-day Saint petitions to the Senate.³⁷

While modern Latter-day Saints are apt to think that the general response in Washington was indicative of general antipathy toward any minority sect in the United States, particularly at a time when a new presidential election campaign was about to begin, that interpretation treats the politicians and the president a little unfairly.³⁸ The new republic

33. Bushman, *Rough Stone Rolling*, 391.

34. *Ibid.*

35. *Ibid.*, 393.

36. *Ibid.* There were 678 redress petitions in total, and the claims made ranged from 63 cents to \$505,000 for a total of approximately \$2 million. See also Clark V. Johnson, ed, *Mormon Redress Petitions: Documents of the 1833-1838 Missouri Conflict*, Vol 16, *Religious Studies Center Monograph Series*, Bookcraft, Inc. 1992, <https://rsc.byu.edu/out-print/mormon-redress-petitions-documents-1833-1838-missouri-conflict>.

37. *Ibid.*, 393–94.

38. Bushman says that “[c]ommentators have overemphasized the relevance of states’ rights doctrine in tying Van Buren’s hands” since the Saints were asking for compensation rather than intervention. He says that “states’ rights was a background issue” (Bushman, *Rough Stone Rolling*, 638n20). But Bushman himself ignores the practical question of where such compensation would come from if not from Missouri, and compensation could only be justified if the Saints’ claims were upheld against Missouri in a full and fair hearing.

and its Constitution were barely 50 years old, and the federal government did not yet have the power to hold the states to the letter of the Federal Constitution, much less to the religion clauses in the First Amendment. That federal power did not begin to be recognized until after the post-Civil War reconstruction nearly 30 years later, when the Fourteenth Amendment began to make the Bill of Rights' protections binding upon the states. Even those reforms did not offer minority religion any practical protection until the Jehovah's Witnesses began to make some headway in the US Supreme Court during the Second World War.³⁹

After these initial meetings in November 1839, the Prophet preached to congregations in the eastern states and returned to Washington at the end of January 1840. Then he and Higbee worked with sympathetic Illinois senators and congressmen to polish the combined petition for presentation before the senate judiciary committee to which it had been referred.⁴⁰ The Missourians were invited to attend, since their State was accused, and they responded by replaying the script from Judge Austin King's initial hearings at the end of the Mormon War in November 1838. That script maintained that the Saints had been the aggressors, the action taken was necessary for the defense of the peace, and that the Mormons did whatever their Prophet told them regardless of the law of the land, and there was no reasoning with them.

The senate judiciary committee could not resolve the matter because they lacked the tools to do so, and they did not have the resources or the time to conduct a full investigation. The senate judiciary committee retreated to the position that the Prophet and Judge Higbee had been told from the beginning in their meeting with the President: that the matter could only be dealt with in the Missouri courts. Higbee stayed on in Washington until the Senate accepted that recommendation on March 23, 1840, and the Saints ignored the recommendation because they considered it futile. Higbee wrote to Joseph Smith that the mission for redress in Washington had failed.⁴¹ However, he and Joseph Smith had argued that Missouri's failure to follow up the escapes of early 1839 with extradition requests demonstrated that the Missourians did not think they could succeed in court because their position was unjust⁴² and that many other politicians and officials had considered that the Latter-

39. See *Cantwell v Connecticut*, 310 U.S. 296 (1940) and *West Virginia Board of Education v Barnette*, 319 U.S. 624 (1943).

40. The hearing took place between February 20 and 22, 1840.

41. Bushman, *Rough Stone Rolling*, 397.

42. *Ibid.*, 397, 405, 505.

day Saints had been poorly dealt with. The result of this experience was that however much the doctrine of the Mormons was maligned in the press afterward, they were ever afterward “a persecuted minority who had suffered unjustly for their religious beliefs.”⁴³

So why did Governor Reynolds wait until 1843 to issue his own version of Governor Boggs’ 1840 requisition for the arrest of Joseph Smith in connection with the Mormon War charges? Probably because he believed that Joseph Smith was implicated in the attempted murder of Boggs and had escaped those charges because of technicalities. He probably also harbored some residual anger that his state’s reputation had been sullied nationally by the Mormon arguments in Washington that continued in the press afterwards. In that context, a non-lawyer governor might have felt that a further requisition was justified since Smith had used the law to avoid justice. But Reynolds was a lawyer with continuing ethical obligations of justice and honesty.

Part IV — What Governor Reynolds Should Have Done Given What He Knew

If Governor Reynolds suspected that Joseph Smith was complicit in the murder of Governor Boggs, then he had a variety of choices. None of them were very appealing, though that remains the nature of the enforcement of criminal law to this day. He could have instructed state officers to investigate further, although that would likely not have accomplished much against Joseph Smith, since Orrin Porter Rockwell was taken before a grand jury in Independence, Missouri, but not indicted for the attempted murder of Boggs.⁴⁴ The gathering of additional material confirming that Joseph Smith had prophesied Boggs’ death within a year did not have the potential to prove Joseph Smith’s complicity in attempted murder beyond reasonable doubt and accordingly would have been a fruitless exercise. That Tompkins was also charged, tried, and acquitted within a week⁴⁵ suggests either that the investigation in that matter was substandard or that the investigators had already left no stone unturned.

But the legitimate options for criminal process against Joseph Smith in connection with the Mormon War were even more limited. That is, unless a credible account of Joseph Smith’s personal involvement in some criminal atrocity that had not been alleged in the original 1838 indictments came to

43. *Ibid.*, 398.

44. Walker, “Habeas Corpus in Early Nineteenth-Century Mormonism,” 47n129.

45. *Ibid.*, 45n123.

light, the governor's hands were legally tied if he chose to be law-obedient and to signal law-obedience to his staff and other officials in the State of Missouri. Anything more than that amounted to state harassment or persecution, since Joseph Smith had been indicted, arrested, incarcerated, and otherwise subjected to criminal process for months in respect to those same matters before the state decided to dismiss those charges of its own volition. The prospect of a credible account of uncharged crime against Joseph Smith coming to light was negligible because nothing else had come to light despite his unpopularity. The scrutiny which his life attracted ever since confirms that there was nothing new and damning against Joseph Smith that could be discovered.

The result was that Governor Reynolds could legitimately defend the reputation of the State of Missouri only in the press; allegations of atrocities against the Mormons could be met with printed rebuttals of the charges, descriptions of the evil the Mormons had done, and denigrations of their faith. There was plenty of anti-Mormon material available, and with time, many newspaper editors obliged.

While much of the damage that was the subject of the Mormon reparation petitions in Washington was personal to individual Latter-day Saints, Governor Reynolds' personal involvement suggests it was reasonable to attribute much of the Mormon losses to the State of Missouri; the extermination order remained in place, and the state did not use its militia resources to protect the saints nor to return and protect their property.

Conclusion

In my earlier article, I explained that Joseph Smith's use of habeas corpus practice was legally and morally unobjectionable, despite the contrary claims of his detractors. In this article, I have shown that Governor Reynolds of Missouri knew that all the Mormon War charges against Joseph Smith had been dismissed, yet he not only allowed his State's unfounded 1840 requisition for Joseph Smith's extradition to remain in place, but he issued a new requisition for Joseph Smith's extradition on the strength of contrived new indictments. That is abuse of process which amounts to official state persecution of an innocent man who had been released because the prosecutor had abandoned a case he could not prove.

Governor Reynolds' involvement in the requisition for Joseph Smith's arrest on suspicion of complicity in the murder of former Governor Boggs is less objectionable on legal and ethical grounds, as there is no suggestion from available records that Governor Reynolds knew those allegations were contrived. But as a former chief justice of the Illinois Supreme Court,

it is likely he recognized how thin the underlying case was. In the context of Missouri's obsession with the persecution of Joseph Smith and his followers, he should have paused before adding his personal imprimatur to the interstate pursuit of Joseph Smith on those charges.

While legal ethics on the frontier were still developing, Governor Thomas Reynolds' involvement in requisitions for the arrest and extradition of Joseph Smith to face contrived charges was dishonorable from start to finish.

A. Keith Thompson, LLB (Hons); M Jur; PhD is an associate professor and the associate dean at the University of Notre Dame Australia School of Law, Sydney. He also practices commercial and property law in New South Wales and Victoria, Australia. He formerly served 20 years as International Legal Counsel for the Church in the Pacific and Africa Areas and has also served in the Church as bishop, stake president, and mission president. He and his wife, Anita, have eight children and twelve grandchild.'