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The Full Story of U.S. v. Smith, America's Most Important Piracy Case

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**THE FULL STORY OF
UNITED STATES V. SMITH,
AMERICA'S MOST IMPORTANT PIRACY
CASE**

*Joel H. Samuels**

INTRODUCTION

Many readers would be surprised to learn that a little-explored nineteenth-century piracy case continues to spawn core arguments in modern-day civil cases for damages ranging from environmental degradation in Latin America to apartheid-era investment in South Africa, as well as criminal trials of foreign terrorists.¹ That case, *United States v. Smith*,² decided by the United

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¹ See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 239, 249-50 (2d Cir. 2003); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009); *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1269-70 (A.C.M.R. 2011); *United States v. Said*, 757 F. Supp. 2d 554, 560 (E.D. Va. 2010); *United States v. Hasan*, 747 F. Supp. 2d 642 (E.D. Va. 2010). A multitude of private civil cases have relied heavily on *Smith*, *infra* note 2, in large measure as a result of the Alien Tort Statute (ATS), which was contained in the Judiciary Act of 1789. Many of the modern ATS cases have directly analogized the alleged crimes in dispute to piracy and those analogies have helped to persuade courts to assert jurisdiction over disputes with no connection to the United States. See 28 U.S.C. § 1350. The statute reads in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS has been modified several times since the

States Supreme Court in 1820 on appeal from a Circuit Court decision in a trial presided over by Chief Justice John Marshall, offers a unique window into a formative period in American law. For all its modern-day implications, however, that case was both a product and a mirror of its time.

The full story—as will be discussed further in Part II—is complicated, involving multiple ships, multiple parties, multiple versions of events, and (by the end of the tale) all strata of society—from pressed seamen to leading citizens of Baltimore and Richmond to the President of the United States and his cabinet members. The jury called to serve on the *Smith* case in July of 1819, however, heard relatively straightforward testimony. They heard, that is, about what began as a mutiny on board one vessel (the *Creola*), turned immediately to an attack on another (the *Irresistible*), and culminated in further attacks on a number of others while the crew sailed back to Baltimore, the home port for many of the accused. The jury could not deliver a final verdict *about* those facts, however, because they had no answer for a single legal question: What was the definition of piracy? With the judges split on this question, the jury rendered a special verdict:

If the plunder and robbery [that the jury had found] be piracy under the act of the Congress of the United States, entitled, ‘An act to protect the commerce of the United States, and punish crime of piracy,’ then we find the said prisoner guilty; if the plunder and robbery, above stated, be not piracy under the said act of Congress, then we find him, not guilty.³

In a still-small and evolving America, the case involved many of the leading legal minds of the day. Chief Justice Marshall, riding

first Congress passed its original version as part of the Judiciary Act of 1789, which provided that the new federal district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 (1789).

² United States v. Smith, 18 U.S. 153, 161-62 (1820).

³ *Id.* at 153.

circuit, was one of two judges sitting as the judges of first instance (in the circuit court). William Wirt, the longest serving U.S. Attorney General and a man often credited with giving meaningful power to that position, argued on behalf of the United States before the Supreme Court. Daniel Webster represented the accused pirates on appeal. And Justice Joseph Story authored the opinion that rejected that appeal and established several important legal baselines for future development.

Smith has had a profound effect on the development of international law in the United States;⁴ it is for this very reason that so many cases in so many different areas all reach back to *Smith* in order to understand how domestic law should treat international, and, in particular, customary international law. But in spite of its importance, the circumstances of the *Smith* case have never been fully studied.

The case still resonates today, not only for its profound impact on legal developments in the nearly two centuries since the case ended but also for the multitude of other important issues of the day raised by the case, including the role of the press, prison conditions, the purpose of different forms of punishment and the power of religion to rehabilitate wrongdoers. The convergence of many of these issues can be seen in an excerpt from an editorial about the case in one of the leading newspapers of the day:

We have taken some little pains to report these cases to the public. The scenes of outrages on the high seas which they devolope [sic], belong to the history of the times. Such scenes ought to be understood. To repress them, should be the wish of every American, who values his country, her character and her laws. We owe it to the civilized world to arrest such lawless outrages, perpetrated by vessels and by crews

⁴ For a fuller discussion on the role of piracy cases (including *Smith*) in the formation of the relationship between international law and domestic law in the United States, see Joel H. Samuels, *Troubled Waters: How Piracy Has Shaped the Relationship Between American Law and International Law*, 59 AM. U. L. REV. 1231 (2010).

who have their equipment and their sanctuary in our ports. If the law be so weak that pirates can escape through its meshes, let us strengthen it. Let congress do their duty, and not leave it to judges and juries to do it for them. *If* the law then be undefined in its provisions, let them give clearer and more practical definitions.⁵

The men involved in the events leading up to the piracy trial held in Richmond, Virginia in July 1819 were all crewmembers of vessels involved in the intricate world of maritime operations in the eighteenth and nineteenth centuries. In its first fifty years, as the United States was forging an identity, piracy was a central issue for all maritime nations. As such, to understand the chaos on the high seas at the time of the formation of the Republic, it is important to understand the way that states enforced their maritime power.

Today, maritime powers have large naval forces.⁶ Even smaller littoral states invest in navy vessels to protect the waters within their maritime boundaries, if not beyond them.⁷ In the eighteenth and nineteenth centuries, however, national navies of even the strongest maritime states were small.⁸ Instead, littoral states—

⁵ *Law Intelligence: Crew of the Irresistible*, 16 NILES' WKLY. REG. (Baltimore, MD) Aug. 7, 1819, at 395 [hereinafter NILES' WKLY. REG. (Aug. 7, 1819)].

⁶ For example, in 2005, the United States Navy was estimated to have slightly more than 325,000 active naval troops and 522 naval vessels of various kinds, while China was estimated to have 250,000-plus naval troops and 965 naval vessels. *See* INT'L INST. FOR STRATEGIC STUDIES, THE MILITARY BALANCE 2012, at 57-58, 235-36 (2012) [hereinafter MILITARY BALANCE 2012]. The United Kingdom, one of the key naval powers of the eighteenth century, was estimated to employ nearly 35,000 naval troops with 111 vessels. *Id.* at 170. Notably, the U.K.'s naval forces had dropped significantly in less than a decade, as those same forces had been estimated at more than 50,000 people and 152 vessels as recently as 2005. *See* INT'L INST. FOR STRATEGIC STUDIES, THE MILITARY BALANCE 2005, at 101-02 (2005).

⁷ In 2012, Vietnam had 40,000 members of its naval forces and 140 vessels. At the same time, Ghana, along Africa's west coast, had 2,000 individuals and seven vessels, while Qatar in the Middle East had 1,800 individuals and 22 vessels in its navy. *See* MILITARY BALANCE 2012, *supra* note 6, at 292-93, 437, 345.

⁸ As one author has noted, "at the start of the American Revolution the Continental Navy consisted of just thirty-one ships having a total of 1,242 guns.

strong and weak alike—relied on private vessels for maritime support.⁹ Those private vessels, known as privateers, were invested with power to act on behalf of a state through letters of marque and reprisal.¹⁰ Instead of oceans policed by national navies, private vessels and their captains sailed their vessels on behalf of states.¹¹ Thus a vessel that had been private one day might carry a letter of marque the next. Once the term of the letter expired, that vessel might return to its prior private activities or it might renew the letter and continue in the service of the territory whose letter it had carried.¹² Or, under a third option, the vessel captain or owner might choose to accept a

The real maritime force of the colonies was its fleet of over 800 privateers sailing under 1700 letters of marque issued on a per voyage basis.” Rod Sullivan, *A Constitutional Approach to Maritime Personal Injury Law*, 43 J. MAR. L. & COM. 393, 407-08 (2012) (internal citations omitted).

⁹ See, e.g., Letter from Elbridge Gerry to John Adams (Dec. 4, 1775) in 3-4 PAPERS OF JOHN ADAMS: MAY 1775-AUGUST 1776, at 349-50 (Robert J. Taylor et al. eds., 1977) (congratulating Adams on “the Success of the Continental privateers” and discussing “the growing ranks of such vessels fitt[ed] out by Private Persons”).

¹⁰ See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 210-12 (2004). In the United States, the power to vest private vessels with state authority is contained in the Constitution, where Congress is authorized to “grant Letters of Marque and Reprisal.” U.S. CONST. art. I, § 8, cl. 11. For a discussion of the history of privateering, see also JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS* 26 (1996); Daphné Richemond-Barak, *Rethinking Private Warfare*, 5 LAW & ETHICS HUMAN RIGHTS 159, 163 (2011).

¹¹ By way of reference, while the Continental armies at the time of the Revolutionary War numbered about 11,000, in the same year there were 11,000 seamen serving as privateers in the Atlantic and Caribbean oceans. The Continental Navy and privateers captured 16,000 British prisoners and confiscated massive amounts of gunpowder and other cargo. See generally ROBERT H. PATTON, *PATRIOT PIRATES: THE PRIVATEER WAR FOR FREEDOM AND FORTUNE IN THE AMERICAN REVOLUTION* (2008). See also Sullivan, *supra* note 8 at 408.

¹² For discussion of the chaos that often reigned as a result of confusion over vessels after losing the sanction of the state, see Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43, 43-46 (2009). See also Matthew C. Houghton, *Comment: Walking the Plank: How the United Nations Security Council Resolution 1816, While Progressive, Fails to Provide a Comprehensive Solution to Somali Piracy*, 16 TULSA J. COMP. & INT’L L. 253, 271 (2009).

letter of marque from another territory, thus shifting the vessel's allegiance overnight.¹³

The existence of shifting, largely private naval forces created chaos in itself.¹⁴ In addition, the power of private vessels opened the door for pirates—acting under the authority of no state. In a relative vacuum of power, private vessels carrying letters of marque were loathe to take on powerful pirates, where the risk was high and the potential benefit low. Moreover, the very fact that private vessels could be empowered through the marque and reprisal system opened another opportunity for pirates—to feign letters and thus falsely legitimize piratical acts.¹⁵ Indeed, much of this played into what one author has described as the “cycle of piracy.”¹⁶

¹³ See *infra* note 68 (describing how Captain Daniels discarded one letter of marque for another on board the *Irresistible*).

¹⁴ By the mid-nineteenth century, privateering had become such a force of maritime operations and had wreaked so much havoc on the seas that the major maritime nations of the day met in Paris and signed an agreement abolishing it. See Int'l Comm. of the Red Cross, Declaration Respecting Maritime Law, Gr. Brit.-Austria-Fr.-Pruss.-Russ.-Sardinia-Turk., Apr. 16, 1856, <http://www.icrc.org/ihl.nsf/INTRO/105?OpenDocument>. Fifty years later, in 1907, the responsibility of states with respect to privateering was clarified as part of a new treaty mandating, among other things, that non-military vessels converted into military vessels be under the immediate command of a sovereign government in order for the crew not to be considered pirates. See Int'l Comm. of the Red Cross, Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, <http://www.icrc.org/ihl.nsf/FULL/240>.

¹⁵ For an account of ways that privateers negotiated and used letters of marque to their advantage, see LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400-1900, at 112-18 (2010).

¹⁶ See J.L. Anderson, *Piracy and World History: An Economic Perspective on Maritime Predation*, 6 J. WORLD HISTORY 175, 183-184 (1995). Anderson described the cycle as follows:

[P]iracy is initially conducted by small and independent groups of individuals using their boats for piracy as desperation of poverty dictates or as the opportunity presents. Success in this venture equips the groups with more and larger vessels, and an organization can emerge to coordinate their activities, these changes making predation increasingly effective. With further success the pirates' strength becomes such as to make them a virtually independent power, when they may choose to enter into an alliance with some recognized state. At that point the pirates

Thomas Smith and his shipmates aboard the *Irresistible* were part of this cycle of piracy and the confusion that grew out of the thin line between pirates and privateers. This article will explore their predicament by tracing the development of the law leading up to the *Smith* decision and will provide the most complete account to date of the circumstances of the case and its immediate aftermath. Part I of this article will lay out the development of the law on piracy in the United States in the years before Smith and his crewmates were brought to trial in Richmond, Virginia. Part II will present the story of the acts for which the men were brought to trial in 1819 as well as the details of the trial itself. In addition, this part will look into the events that occurred in the months that followed the Supreme Court's decision in *Smith* in 1820, focusing in particular on the interactions related to the case behind the scenes at the highest reaches of government. Part III concludes by reviewing the notable aspects of the case and by discussing the implications of *Smith* today.

I. THE DEVELOPMENT OF PIRACY LAW IN THE UNITED STATES LEADING UP TO THE INDICTMENTS AGAINST THOMAS SMITH

As the American Republic was taking shape, the framers of the Constitution were keenly aware of the problems of piracy.¹⁷ Initially, the colonial states themselves had been responsible for developing their own laws on piracy. But after gaining independence from Britain, the federal legislature sought to develop a unified national plan for combating it.¹⁸

have become in effect a mercenary navy, paid by plunder. Success will legitimize their power; failure and defeat will lead to disintegration of the organization into the small, furtive outlaw groups from which the force originated.

¹⁷ See, e.g., THE FEDERALIST NO. 42 (James Madison).

¹⁸ Article 9 Section 1 of the Articles of Confederation, approved for ratification in 1777 and officially ratified by the states in 1781, provided that Congress was to “have the sole and exclusive right . . . [and] States shall be restrained from . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures . . .” ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1.

Pursuant to Article 9 of the Articles of Confederation, on March 17, 1781, a congressional “committee [was] appointed to devise and report the mode of appointing courts for the trial of piracies and felonies committed on the high seas”¹⁹ Three weeks later, the committee had completed a draft of a bill to establish courts for the trial of piracy, and Congress agreed to an Ordinance outlining the procedures for creating such courts.²⁰ Under the Ordinance, any person who committed piracy or a felony on the high seas would be tried according to common law courts as if the piracy or felony had been committed on land. The Ordinance provided that these cases were to be judged by “the justices of the supreme or superior court of judicature, and judge of the court of admiralty of the . . . states.”²¹

After a report to Congress on February 4, 1783 explaining that the Legislature of Pennsylvania found the piracy courts Ordinance to be so obscure “that they were at a loss to adapt their laws to it,” a committee was appointed to amend the Ordinance.²² The amended version passed on March 4, 1783, clarifying which judges were to preside over the court.²³

¹⁹ 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 354 (Gaillard Hunt ed., 1912).

²⁰ *Id.* at 354–56.

²¹ *Id.* A letter by one of the Ordinance’s drafters, penned less than a week after it had been completed, explained how the piracy courts were expected to operate, noting that:

Congress have determined that the superior Judges in each State with the Judge of Admiralty (or such one of the Judges of Admiralty where there are several as the Executive shall chuse to commissionate) shall be Judges for trying Piracies on the high Seas; any two or more to be a Quorum. The Tryals were to be under all the Forms of prosecuting such Crimes on Land by grand & petit Juries.

Letter from James Lovell to Elbridge Gerry (Apr. 10, 1781), *in* 17 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 427-432 (Paul H. Smith ed., 1990).

²² 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 888–89 (Gaillard Hunt ed., 1922).

²³ *Id.* at 164. The following language was removed: “the Judge of the Court of Admiralty, or, in case there shall be several judges of the said court in the state where the trials hereafter mentioned are to be had, any one of such judges, to be commissioned for that purpose by the supreme executive power of such State, and the justices of the supreme or superior court of judicature of the several and

Nonetheless, it appears that there were continued imperfections with Congress' approach to mandating that the states try piracy under their common law. On September 6, 1785, South Carolina delegate Charles Pinckney²⁴ made a motion before Congress expressing the opinion that "similar crimes should be punished in a similar manner," and that the "Ordinance of April, 1781, respecting the punishment of piracies and felonies has a different operation in some of the States."²⁵ On Pinckney's recommendation, on September 6, 1785, a resolution was made directing John Jay, the Secretary of the United States for the Department of Foreign Affairs, to institute courts that would punish piracy and felonies committed on the high seas in the same manner in all the states.²⁶ The motion notes that at that point in time, different states punished piracy differently per their interpretations of the 1781 ordinance.²⁷ The September 6, 1785 resolution underscores the importance of legislating against piracy and states that it "has been the policy of all civilized nations to punish crimes so dangerous to the welfare and destructive to the intercourse and Confidence of Society in an exemplary manner."²⁸

In response to that resolution, the Secretary for Foreign Affairs reported back to the Congress on September 29, 1785.²⁹ While the Secretary agreed that "Piracy is War against all mankind, which is the highest Violation of the Laws of Nations. . .," he argued that Congress did not in fact have the power "to declare what is or shall be Felony or Piracy . . . but merely to appoint Courts for the Trial of Piracies and Felonies committed on the high Seas."³⁰

respective states, or any two, or more, of them, (of whom the said Judge of the Admiralty shall always be one)." *Id.*

²⁴ A committee that included Pinckney drafted Article 19, an amendment to the Articles of Confederation that would have created a federal court to handle cases of treason, misprision of treason, and piracy or felony on the high seas, and put it before Congress on August 7, 1786. 31 JOURNALS OF THE CONTINENTAL CONGRESS 1786, at 494-98 (John C. Fitzpatrick ed., 1934).

²⁵ 29 JOURNALS OF THE CONTINENTAL CONGRESS 1785, at 682 (John C. Fitzpatrick ed., 1933).

²⁶ *Id.* at 682, 797-806.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 797.

³⁰ *Id.*

Nevertheless, the Secretary reasoned “that Congress would not exceed their Powers by ordaining, the Punishment to be inflicted throughout the United States in Cases of Piracy,” and proceeded to lay out an exceedingly detailed “Ordinance for the Trial of Piracies and Felonies Committed on the High Seas” to replace the 1781 Ordinance.³¹ Ultimately, Jay’s draft ordinance was not passed, and no action appears to have been taken on the proposed amendment.³²

Several states followed the Congressional mandate laid out in the 1781 Piracy Ordinance. Massachusetts, for one, established piracy courts in 1783 in response to the Ordinance.³³ The Massachusetts Act was entitled “An Act for Carrying into Execution an Ordinance of Congress for Establishing Courts for the Trial of Felonies and Piracies Committed on the High Seas.”³⁴

At its October 1786 session, the Virginia General Assembly passed “An act concerning treasons, felonies, and other offences committed out of the jurisdiction of this commonwealth.”³⁵ This act gave the general courts of Virginia counties the authority to try cases of treason and other felonies, “except piracies and felonies on the high seas,” which were committed “by any citizen of this commonwealth, in any place out of the jurisdiction of the courts of common law in this commonwealth, and all felonies committed by

³¹ *Id.* at 798–804.

³² Letter from Charles Thomson to William Samuel Johnson (May 16, 1789), in 25 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 525-26 (Paul Hubert Smith et al. eds., 1976).

³³ 1783 Mass. Acts, ch. 45, 116-18, reprinted in 1782-3 ACTS AND RESOLVES OF MASSACHUSETTS 116–18 (Boston, Wright & Potter 1890). Massachusetts had established its first maritime court as early as 1775 to exercise jurisdiction in prize matters. THE LEGAL PAPERS OF JOHN ADAMS 353 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965). Several years after establishing the 1783 court, Massachusetts passed a resolution dealing with the fate of two pirates who had been found guilty of piracy and faced a death sentence. *See* “Resolve on the Petition of Richard Squire and John Matthews, Authorizing the Justices of the Court Appointed for the Trial of Piracies and Felonies on the High Seas, to Sentence Said Convicts to Hard Labour, and not to Pass Sentence of Death,” reprinted in ACTS AND RESOLVES OF MASSACHUSETTS 882 (Boston, Wright & Potter 1890).

³⁴ 1783 Mass. Acts, ch. 45, 116-18, *supra* note 33.

³⁵ 1786 Va. Acts, ch. XLVI 330.

citizen against citizen in any such place.” This act, coupled with the 1785 acts of the Virginia legislature confirmed that cases of piracy on the high seas would fall under the exclusive jurisdiction of admiralty courts.

In 1787, New York enacted legislation to clarify the role of its courts of admiralty.³⁶ The New York Act was designed to make clear “that the court of admiralty of this State shall not meddle or hold plea of any thing done within this State, but only of things done upon the sea, as it hath formerly been used,” but “nevertheless of the death of any person and of maihem [sic] done in ships or vessels being and hovering in the main stream of great rivers out of the body of any county, or nigh to the sea, and in none other places of the same rivers, the court of admiralty shall have cognizance.”

Such was the importance of piracy to the framers of the Constitution that Article 1 Section 8 explicitly provides Congress with the power “to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”³⁷ The First Congress under the Constitution drafted the Judiciary Act of 1789, which, among other things, established the power and composition of courts at all levels of the federal system.³⁸ A primary goal of this portion of the act was to clarify the role of federal courts vis à vis state courts, in particular with regard to cases where conflicts had arisen, including cases involving piracy. Under

³⁶ See ACT TO PREVENT ENCROACHMENTS OF THE COURT OF ADMIRALTY (1787), reprinted in NEW YORK STATE, LAWS OF THE STATE OF NEW YORK, PASSED AT THE SESSIONS OF THE LEGISLATURE HELD IN THE YEARS 1785, 1786, 1787 AND 1788, INCLUSIVE, BEING THE EIGHTH, NINTH, TENTH AND ELEVENTH SESSIONS, REPUBLISHED BY THE SECRETARY OF STATE, PURSUANT TO CHAPTER THREE HUNDRED AND FORTY-ONE OF THE LAWS OF EIGHTEEN HUNDRED AND EIGHTY-FIVE 394 (1886).

³⁷ U.S. CONST. art. I, § 8, cl. 10. See Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009) (discussing the scope and role of this clause).

³⁸ Judiciary Act of 1789, 1 Stat. 73 (1789). See generally Alison LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205 (2012). Chapter 20, §§ 3, 4, of the Act explicitly enumerates the powers of the federal courts at all levels. The Judiciary Act divided the courts into thirteen judicial districts and three circuits. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

the Judiciary Act, circuit courts were established to hear appeals from cases of the district court as well as certain cases with direct recourse to the circuit court.³⁹ Circuit court panels were to be made up of two Supreme Court justices and one district court judge (though a quorum existed if any two of those three were present), so long as any appeal being heard did not involve a decision by the district judge on the panel.⁴⁰

In terms of maritime jurisdiction, the circuit and district courts had jurisdiction depending on the extent of punishment. The district court had exclusive jurisdiction for

crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted⁴¹

Circuit courts had jurisdiction when the punishment was greater—i.e., over “all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides”⁴² With regard to piracy, then, circuit courts had exclusive jurisdiction given that the punishment at the time was death.⁴³

In 1801, Congress passed an act, pressed by President John Adams at the end of his term, that had the effect of reducing the scope of the judiciary. Among other things, this Act reduced the number of Supreme Court justices and eliminated the requirement that the justices ride circuit.⁴⁴

³⁹ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789).

⁴⁰ *Id.* § 4. See Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003) (describing circuit riding by the justices of the Supreme Court).

⁴¹ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789).

⁴² *Id.*

⁴³ See Act of Mar. 3, 1819, ch. 77, 5 Stat. 510 (1819).

⁴⁴ See Judiciary Act of 1801, 2 Stat. 89 (1801).

The next year, with Adams out of office and Thomas Jefferson in his place, that Act was repealed⁴⁵ and replaced by new legislation revising both the 1789 and 1801 Acts.⁴⁶ These revisions included an expansion of the number of circuit courts to six, with the Chief Justice assigned to the fifth circuit, which covered Virginia and North Carolina.⁴⁷ The Act also contained an unusual provision (later relevant in the *Smith* case), namely that:

whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the supreme court, at their next session to be held thereafter; and shall, by the said court, be finally decided.⁴⁸

The first Congressional legislation to focus specifically on piracy was contained in the 1790 Act for the Punishment of Certain Crimes Against the United States.⁴⁹ The Act covered, among other things, murder and robbery on the high seas, finding that they would be punishable by death if those same acts committed on land “would by the laws of the United States be punishable by death.”⁵⁰ The Act represented an effort both to bring harmony to the prosecution of pirates and to lay out the standard for identifying who could be

⁴⁵ Judiciary Act of 1802, 2 Stat. 132 (1802).

⁴⁶ See Judiciary Act of 1802, 2 Stat. 156 (1802) (establishing that the function of the federal courts was contained in the pertinent sections of Chapter 31 of the 1802 Act). See also Alison LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345 (2007) (providing a thorough treatment of the nation’s first judiciary acts)

⁴⁷ See Judiciary Act of 1802, ch. 31, § 5, 2 Stat. 156 (1802).

⁴⁸ *Id.* § 6

⁴⁹ See Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112 (1790).

⁵⁰ *Id.* at 113.

punished with death for acts that occurred on the high seas, i.e., in territory belonging to no state.⁵¹

In the first federal court decision to meaningfully grapple with the 1790 statute, a district court judge in Massachusetts discussed whether force was necessary as an element of the crime of piracy.⁵² Two American crewmen were charged with piracy after running away with a ship and ending up in St. Lucia.⁵³ The court reasoned that, according to the law of nations, “[a] pirate is one . . . , who, to enrich himself, either by surprise or force, sets upon merchants or other traders, by sea, to spoil them of their goods. . . .”⁵⁴ However, the court found that “[p]iracy, by the common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed on shore, would amount to felony there.”⁵⁵ The court went on to conclude that the statute, while “analogous to the common law description, . . . ma[d]e certain other acts piracy, which would not be so at common law,” including breach of trust committed “piratically and feloniously.”⁵⁶ In other words, the court acknowledged that the statute expanded the crime of piracy beyond the common law definition, which corresponded with piracy as understood by the law of nations.

The Massachusetts district court’s opinion in *Tully* foretold a debate that would be litigated in the federal courts over the next several years—the scope of the 1790 Act and the manner in which Congress had exercised its Constitutional prerogative to define and punish piracy. In its first decision addressing piracy, the Supreme Court took a narrow view of piracy and the scope of the Act.⁵⁷ In

⁵¹ See ALFRED P. RUBIN, *THE LAW OF PIRACY* 128-37 (1988) (detailing a thorough review of the legislative history of the 1790 Act).

⁵² See *United States v. Tully*, 28 F. Cas. 226 (C.C. Mass. 1812).

⁵³ See *id.* at 228.

⁵⁴ *Id.* at 229.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *United States v. Palmer*, 16 U.S. 610 (1818). See also Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112 (1790). In this Act by the First Congress, piracy was defined as the commission of certain acts, prohibited by domestic laws that occur “upon the high seas, or in any river, haven, bason, or bay, out of the jurisdiction of any particular state,” *id.* These prohibited acts include “murder or robbery, or any

United States v. Palmer, Justice Marshall, writing for the Court, stated that “the crime of robbery, committed by a person on the high seas, on board of any ship . . . belonging exclusively to subjects of a foreign state . . . is not piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.”⁵⁸ According to this reasoning, the Court found that because the crime of robbery was not punishable by death on land, robbery committed on the high seas was likewise not punishable by death.⁵⁹

Congress acted swiftly to respond to the Supreme Court’s decision in *Palmer*. On March 3, 1819, Congress enacted legislation regarding the prohibition of piracy, but it defined piracy differently than it had in the 1790 Act.⁶⁰ The 1819 Act to Protect the Commerce of the United States, and Punish the Crime of Piracy set forth that “any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations . . . shall, upon conviction thereof [sic] . . . be punished with death.”⁶¹ The reference to the law of nations reflected a willingness by American lawmakers to incorporate international law into domestic law.⁶²

other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death,” *id.* The Act further lists scenarios that would qualify as piratical acts under the legislation, such as the revolt of seamen against their captain or the voluntary yielding of a vessel to pirates, *id.* For a comprehensive discussion of piracy as a window into the Marshall Court’s jurisprudence, see G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT’L L. 727 (1989).

⁵⁸ *Palmer*, 16 U.S. at 633–34.

⁵⁹ *Id.* at 636.

⁶⁰ Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510 (1819).

⁶¹ *Id.*

⁶² Thomas Jefferson recognized that “[t]he Law of Nations, by which [a] question is to be determined, is composed of three branches. 1. the Moral law of our nature. 2. the Usages of nations. 3. their special Conventions.” 25 THE PAPERS OF THOMAS JEFFERSON 609 (Julian P. Boyd ed., 1992). In a letter to Thomas Jefferson, Edmund Randolph stated that “[t]he law of nations, tho’ not specially adapted by the constitution, or any municipal act, is essentially a part of the law of the land.” Letter from Edmund Randolph to Thomas Jefferson (June 26, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 127 (Julian P. Boyd ed., 1990).

The legislative history for the 1819 Act is sparse, but Edwin Dickinson, writing in the *Harvard Law Review* a century after the Act, wrote that:

From [*Palmer*] it was only natural to infer that the Supreme Court regarded Section 8 as exclusively a statutory definition of piracy by the municipal law of the United States, not including provisions for the trial and punishment in United States courts of pirates by the law of nations.

Thus interpreted, however, the decision in *United States v. Palmer* would have limited much the scope and efficacy of this section. The decision was not well received. That it left the law with respect to piracy more restricted than it had been supposed to be was made evident when Congress promptly enacted a new statute, the Act of March 3, 1819, to supply the omission which the Supreme Court had discovered.⁶³

This was the state of the law on piracy when the crew of the *Creola* made the fateful decision off the island of Margarita that eventually led to their arrest and trial in the United States.

II. THE TRIALS OF THOMAS SMITH AND HIS SHIPMATES

A. The Alleged Acts of Piracy

The story of Thomas Smith and his shipmates is not a typical tale of marauding pirates.⁶⁴ Certainly the men attacked, boarded, and robbed a number of vessels during a relatively short cruise in 1819,

⁶³ Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 345 (1925) (internal citations omitted).

⁶⁴ Although Thomas Smith was the named defendant in the case before the Supreme Court, he was not the most important figure onboard either ship. In fact, he was the servant to Captain Paul, the captain of the *Creola*, the vessel on which most of the accused pirates originally served. *Crew of the Irresistible*, CITY GAZETTE AND COMMERCIAL DAILY ADVERTISER (Charleston, SC), Aug. 5, 1819, at 2 [hereinafter *Crew of the Irresistible* (Aug. 5, 1819)].

flying a variety of flags in order to dupe their victims into coming closer. But—as discussed fully below—the voyage grew out of the war for independence in South America; there was no buried treasure (indeed, the take was minimal); the men seem to have committed no assaults once the ships had been taken; and they apparently respected their victims' nationality, taking more from vessels of Spanish origin and less from those sailing under, for example, an American flag.

The story begins with two vessels, the *Creola* and the *Irresistible*.⁶⁵ At the relevant time, both vessels carried letters of marque. The *Creola* carried a letter issued by the government of what was then known as Buenos Aires, which was engaged in a struggle for independence from Spain.⁶⁶ The *Irresistible* carried a letter from General José Artigas, who led a movement by the United Provinces of River Plate—in opposition not only to Spain but also to the government of Buenos Aires.⁶⁷ Notably, the captain of the *Irresistible*,

⁶⁵ The vessel itself is spelled “*Irresistible*” in some sources of the period and “*Irresistable*” in other sources. For the sake of uniformity, this article will refer to the ship as the “*Irresistible*,” except where quoting directly. This same rule will apply to other circumstances, as well, including instances where different spellings exist for the Island of Margarita (Margaritta) and Buenos Aires (Buenos Ayres) and the men known as Daniels (Dannels).

⁶⁶ United States v. Chapels, 25 F. Cas. 399 (C.C. Va. 1819); NILES' WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 393. (N.B.: The *Law Intelligence* article repeats the case verbatim. Because the journal is paginated and the case is not, all relevant citations to testimony will be to the journal and will identify the witness giving testimony.) As the *Carolina Gazette* reported, the *Creola* was “a private armed vessel commissioned by the Government of Buenos Ayres, a Spanish Colony at war with Spain” *Crew of the Irresistible*, XIX CAROLINA GAZETTE (Charleston, SC), Aug. 7, 1819, at 4 [hereinafter *Crew of the Irresistible* (Aug. 7, 1819)]. That ship's letter of marque expressly allowed the vessel to take “property of the subjects of the king of Spain,” but not “South American Spanish property.” NILES' WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 392 (testimony of John McFadden).

⁶⁷ The testimony and articles also indicate that the letter of marque came from the “Government of Artigas.” NILES' WKLY. REG. (Aug. 7, 1819), *supra* note 5. General Artigas fought against Spain but also in opposition to the government of Buenos Aires. JOHN STREET, ARTIGAS AND THE EMANCIPATION OF URUGUAY 147 (1959) (“[General Artigas] began to work, not for the government of Buenos Aires, but wholly for his own people Artigas was able, after years of struggle, to free his native province from dependence on both Spaniards and *Portenos*.”). The disagreement between Artigas and the government of Buenos Aires stemmed in large measure from Artigas' commitment to setting up a federal state modeled on

John Daniels, had initially agreed to sail under a letter of marque from Buenos Aires before changing his mind on the eve of departure and sailing instead under a letter from Artigas.⁶⁸ Both vessels found at

the United States, including adaptation of the Articles of Confederation, state constitutions and the U.S. Constitution itself. The government of Buenos Aires, by contrast, wanted a centralized state along the lines of traditional European monarchies of the time. See GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE* 123, 132–34 (2009). Interestingly enough, it appears that General Artigas also supplied a letter of marque for the *Antelope*. Carol Necolet Browne, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 *BUFF. L. REV.* 65, 130 (2005) (reprinting Circuit Court case).

⁶⁸ The *Gran Para*, 20 U.S. (7 Wheat.) 471, 471–72 (1822) (In June 1818, after the *Irresistible* “left the port, a commission from General Artigas, as Chief of the Oriental Republic, was produced, under which [John D. Daniels] declared that he intended to cruize, and [the letter of marquee] granted by the government of Buenos Ayres was sent back.”). For a riveting account of Daniels’ adventures, see Fred Hopkins, *For Flag and Profit: The Life of Commodore John Daniel Danels of Baltimore*, 80 *MD. HIST. MAG.* 392, 395 (1985). About the competing letters of marque, Hopkins explained:

After clearing the mouth of the Rio de la Plata, Danels mustered his crew and announced that he also had a commission from Banda Oriental, modern Uruguay, signed by that country’s revolutionary leader Jose Artigas, giving Danels authority to attack both Spanish and Portuguese seaborne commerce. Bearing letters of marque and reprisal from two separate governments was not legal according to international law. Danels was later to claim he returned the Buenos Airean commission to Buenos Aires via a passing schooner. Officials in Buenos Aires claimed never to have received the documents and declared Danels a pirate. The exact reasons for Danels’ securing two commissions are uncertain. Several possibilities do exist. Recent evidence gives the date of the Banda Oriental commission as 14 February 1818, two months before Danels departed Baltimore. By accepting the commission in Baltimore, Danels would have been in violation of the Neutrality Act of 1817. The entire affair of the Buenos Airean commission may have been an attempt to somehow cover Danels’ earlier violation of American law. Another possibility is that for some reason Danels wanted a Buenos Airean commission more than a Banda Oriental one. Banda Oriental was the less stable of the two governments. Upon arrival in the Rio de la Plata, Buenos Aires would only give commissions against Spanish and not Portuguese shipping. Also Buenos Aires at least attempted to exert some control over its

least some of their crew members in Baltimore and, in mid- to late March of 1819, both came to the island of Margarita, off the coast of Venezuela.⁶⁹

Although the two vessels were technically enemies, it appears that neither of the captains was interested in pursuit of the other.

privateers. This control may have been unwanted and unexpected by Danels.

After clearing the mouth of the Rio de la Plata and announcing the Banda Oriental commission to the crew, Danels renamed his vessel *La Irresistible*, the name which supposedly appears on the February 1818 commission. Danels cruised for a month and a-half in the western Atlantic. His success among the unsuspecting Portuguese merchant vessels was phenomenal as he plundered and sunk over twenty-six of them. Specie from twenty-four of the vessels totalled \$68,000. The *Globo*, bound from Bombay to Lisbon, with a cargo of spices and specie, netted Danels \$30,000 in specie and a cargo valued at \$90,000. But his most valuable prize was the *Gran Para*, Rio de Janeiro to Lisbon, with \$300,000 in specie. Suddenly, John Danels became an international figure. Already his name was better known in Lisbon and Madrid than his adopted hometown of Baltimore.

Id. (internal citations omitted.)

⁶⁹ CAROLINA GAZETTE, Apr. 17, 1819, at 471-72 (reprinting article from the BALTIMORE AMERICAN, dated Apr. 3, 1819) (announcing that the *Irresistible* had arrived at Margarita on March 16, 1819, “bringing in with her His Catholic Majesty’s late brig Nereyda, of 18 guns”); NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 391 (testimony of Samuel Stanley); *id.* at 392 (testimony of John Donald). The Island of Margarita, or Margarita Island, is a Venezuelan Island in the Caribbean, first discovered by Christopher Columbus in 1498. H. MICHAEL TARVER & JULIA C. FREDERICK, THE HISTORY OF VENEZUELA 25–26 (2005). It was on that island, famous for its pearls, that Simon Bolivar was commissioned to lead the Venezuelan independence movement. *See* H. L. V. DUCOUDRAY HOLSTEIN, MEMOIRS OF SIMON BOLIVAR, PRESIDENT LIBERATOR OF THE REPUBLIC OF COLOMBIA; AND OF HIS PRINCIPLE GENERALS; SECRET HISTORY OF THE REVOLUTION, AND THE EVENTS WHICH PRECEDED IT, FROM 1807 TO THE PRESENT TIME 152 (Boston, S. G. Goodrich & Co. 1830) (“On the day of his being received as commander-in-chief of the armies of Venezuela and Caracas, in the island of Margarita, he published a proclamation, in which he said, ‘he had not arrived to conquer, but to protect the country, and that he invited the inhabitants of Venezuela to unite and join him, if they would be considered by their *Liberators* as pure and good patriots”). *See also* FELIPE LARRAZABAL, THE LIFE OF SIMON BOLIVAR; LIBERATOR OF COLOMBIA AND PERU, FATHER OF BOLIVIA 281 (1866); TARVER & FREDERICK, *supra*, at 53–54.

Samuel Stanly (“a youth of 18” aboard the *Irresistible*) stated that “[w]e had it in our power to take Buenos Ayrean privateers from Baltimore, but we did not attempt it.”⁷⁰ And according to the testimony of John McFadden, first lieutenant of the *Creola*, the officers of that vessel “did not think themselves authorised [sic] to take a vessel under the Artigas flag; on the contrary, he had known the two flags cruise together.”⁷¹ Perhaps not surprisingly, then, some of the members of the crew of the *Creola* must have come into contact with Captain Daniels, who led the *Irresistible*, and with some of his crew.

At this time, it at least appears that the crews of both vessels were unhappy. Onboard the *Irresistible*, the men presumably knew that “[t]he *Irresistible* had been engaged by the governor [of Margaritta] to sail to Venezuela in two days.”⁷² And some of the crewmembers later stated “that Daniels, while they were under his command, treated them improperly; that he had confined, in the fort at Margarita, three of his crew, and who were under sentence of death, in consequence of some alledged [sic] disrespect to his person.”⁷³

The men aboard the *Creola* were—by all accounts—about to be drawn into South America’s bid for independence from Spain. At best, as crew member John Donald testified, the *Creola* had been sold, “and they had none [i.e., no ship] to return home in.”⁷⁴ But James

⁷⁰ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 391 (testimony of Samuel Stanly).

⁷¹ *Id.* at 392 (testimony of John McFadden). Indeed, in response to a question from U.S. Attorney Robert Stanard as to whether the commission from Buenos Aires specifically restricted the *Creola* from taking South American Spanish property, McFadden answered in the affirmative, noting that the commission (letter of marque) “is against the property of the subjects of the king of Spain.” *Id.*

⁷² *Id.* at 393 (testimony of Captain Daniels). See also John Quincy Adams, Diary Entry (April 11, 1820), in MEMOIRS OF JOHN QUINCY ADAMS 62, 64 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875) (denouncing Captain Daniels as “the man who had seduced them [i.e., the crewmembers] to their crime”).

⁷³ CITY GAZETTE AND COMMERCIAL DAILY ADVERTISER (Charleston, SC), May 18, 1819, at 1 (reprinting article from unnamed periodical from Wilmington, NC dated May 8, 1819).

⁷⁴ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 392, 394 (explaining that the trial court viewed *Creola* crewmember John Donald as a credible witness

Black—a key figure who later turned state’s evidence in exchange for immunity—maintained that the crew had initially been told they would cruise for three months but in fact “were carried direct to Margaritta as recruits for admiral Brion—being fairly kidnapped. When they arrived at that island, bread and water in the dungeons of the castle or the yard arm, on the one hand, —and their service to Brion, on the other, was tendered to them.”⁷⁵ His account, although perhaps reported in a hyperbolic manner, meshed with Donald’s further testimony. In Donald’s words, the crew had been “told that the governor of Margaritta meant to press them,” probably, again, into South America’s continuing fight for independence from Spain. And he further stated that Captain Daniels wished the crew “to enlist with him in the service of Venezuela, to which he had become attached, that if they did not join him, he would have them put into the fort, and fed on bread and water.”⁷⁶

On March 24, 1819, crew members John Ferguson and James Black led most of the *Creola*’s crew in a mutiny. John Donald testified that “when he was asleep below, one of the crew of the *Creola* (who rose upon the [*Irresistible*]) came down to his birth [sic], and threatened to blow out his brains if he did not join them”⁷⁷ And John McFadden, the first lieutenant, testified similarly that “fifty men armed” “seized all the small arms; threatened to blow out the brains of the officer on deck.”⁷⁸ He further testified that he tried to persuade them to give up their mutiny—indeed at one point believing he had succeeded in quelling it. However, McFadden stated at trial that James Black then “told [the mutineers], they would be strung on the beach and hung like dogs” At that point, according to McFadden, “they then sung out, ‘as we have begun, let us go through

because he had been acquitted by the grand jury on his testimony that he had been “forced on board the vessel”).

⁷⁵ *Case of the Irresistible*, 6 NILES’ WKLY. REG. (Baltimore, MD), June 17, 1820, at 275 [hereinafter NILES’ WKLY. REG. (June 17, 1820)]. According to John Quincy Adams, Black’s tale “was found, upon enquiry, to be wholly without foundation.” John Quincy Adams, Diary Entry (June 12, 1820), in MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 72, at 150.

⁷⁶ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 392 (testimony of John Donald).

⁷⁷ *Id.* (testimony of John Donald).

⁷⁸ *Id.* at 392 (testimony of John McFadden).

with it;’ they took all the arms from the *Creola*; they said all might stay who chose; they wished none but volunteers; only four or five remained behind”⁷⁹

The witnesses agreed that the mutineers took the *Creola* only as an interim measure. Captain Paul, the *Creola*’s commander, testified that he understood the mutineers “did not intend to injure his vessel, but to take possession of the *Irresistible*. . . .”⁸⁰ In McFadden’s words, the mutineers “said that they were not going to take our brig, but [the *Irresistible*], ours not sailing fast enough”⁸¹ In Stanly’s words, “the *Irresistible* was the strongest vessel; she mounted 16 guns”⁸²

In accordance with their plan, the *Creola* mutineers took two smaller boats from their ship, sailed to the *Irresistible* and led a combined attack on and incitement to mutiny aboard that vessel.⁸³ Upon arrival, the 50 or 60 mutineers met little resistance from the *Irresistible*’s smaller crew of “25 or 30” since most were “gone asleep” or “below and drunk” when the 1 a.m. attack began⁸⁴ or, in the case of Captain Daniels, “happening to be on shore.”⁸⁵ Rather than fighting, then, they “drove the men below” before “the boarding crew loosed [the *Irresistible*’s] sails, and stood out to sea.”⁸⁶ As they sailed, according to the *Irresistible*’s first officer, the attackers “overhauled his and Captain Daniels’ trunks for the vessel’s commission”⁸⁷ – apparently hoping for the appearance of legitimacy.

⁷⁹ *Id.*

⁸⁰ *Id.* at 393 (testimony of Captain Paul).

⁸¹ *Id.* at 392 (testimony of John McFadden).

⁸² *Id.* at 391 (testimony of Samuel Stanly).

⁸³ *Id.* at 392 (testimony of John Donald).

⁸⁴ *Id.* at 391-93 (testimonies of Samuel Stanly, Samuel Beaver, and the first officer of the *Irresistible*, Henry Child, who testified that he was below deck when the *Creola*’s crew arrived and that his efforts to defend the ship were quickly quashed).

⁸⁵ Captain Daniels & Juan B. Arismendi, *Proclamation*, CITY GAZETTE AND COMMERCIAL DAILY ADVERTISER (Charleston, SC), Apr. 24, 1819, at 2.

⁸⁶ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 391-92 (testimonies of Samuel Stanly and Samuel Beaver).

⁸⁷ *Id.* at 392 (testimony of Henry Child). Apparently, Captain Daniels had taken his papers (including the letter of marque) with him to be stored at the government house when he first arrived at Margarita. *Id.*

“[F]inding none, Ferguson said he could easily make papers for himself.”⁸⁸

The next morning, it appeared the decision by the crew of the *Creola* to seize the *Irresistible* for its speed was a valuable one for them. According to Captain Daniels, he was ordered by the governor of Margarita to pursue the *Irresistible*, but the chase proved fruitless.⁸⁹ Corroborating that point with detail, John McFadden testified that “capt. Daniels’ other vessel tried to pursue the *Irresistible* next morning, then in sight (about twenty miles off) from the mast head.”⁹⁰ Captain Paul of the *Creola*, further noted that he “went on board Captain Daniels’ other vessel, which chased [the *Irresistible*] eight hours in vain.”⁹¹

That same morning, the mutineers “hove to” and clarified their plans.⁹² First, the mutineers appointed the two ringleaders—John Ferguson and Black—as captain and first lieutenant respectively, while Israel Denny was appointed second lieutenant.⁹³ Second, they sought additional volunteers, allowing those who wished to stay to remain on board, and giving one of the ship’s boats to those who wished to leave.⁹⁴ The nature of this offer was the subject of some disagreement at trial. On direct examination, for instance, Samuel Stanly testified that “[s]uch of the crew of the *Irresistible* as wished to go ashore, were permitted to do so.”⁹⁵ On cross, “in a desultory way,” he stated “that some of the old crew of the *Irresistible* were not willing to join; that when told they might go ashore, it was too late, being as much as fifty miles from land”⁹⁶

⁸⁸ *Id.* at 393.

⁸⁹ *Id.* at 393 (testimony of Captain Daniels). *See also* Daniels & Arismendi, *supra* note 85.

⁹⁰ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 392 (testimony of John McFadden).

⁹¹ *Id.* at 393 (testimony of Captain Daniels).

⁹² *Id.* at 391 (testimony of Samuel Stanly).

⁹³ *Id.* at 392 (testimony of John Donald); *see also id.* at 391 (testimony of Samuel Stanly). Black was later “broken.” *Id.* at 391 (testimony of Samuel Stanly).

⁹⁴ *Id.* at 391-93 (testimonies of Samuel Stanly, Samuel Beaver, and Henry Child).

⁹⁵ *Id.* at 391.

⁹⁶ *Id.*

Samuel Beaver concurred, stating that “eighteen of the crew of the *Irresistible* were set ashore at Margaritta,” but adding “that he did not try to get ashore, because he did not wish to be drowned; the boat being leaky and full of men and clothes”⁹⁷ Nonetheless, at least nineteen men were allowed to leave “in a leaky boat.”⁹⁸ At least according to the *Irresistible*’s original first officer, “had any more been willing to go with him, the baggage would have been thrown overboard.”⁹⁹

By March 29th (i.e., 3 days later), the crew had officially become pirates. Back on Margarita, Captain Daniels and Juan Bautista Arismendi, governor of the island, had together issued a proclamation, which described how “both crews mutinied,” “made their escape” and allowed the officers to leave “as adverse to their plans of piracy and plunder.”¹⁰⁰ The Proclamation then publicly branded the crew as criminals:

Such iniquitous conduct sets the criminals out of the protection of the laws; and to prevent in as much as possible, their future depredations, under the pretence [sic] of commission to cruize [sic] from the Republic of Venezuela—I do hereby declare, that the said brig *Irresistible* has no commission from the Oriental Republic of La Plata, since the 24th of this month, nor from the Republic of Venezuela; and that he ought to be considered as a pirate, and sailing under no authority and sanction from any government whatever¹⁰¹

On board ship—and despite the Proclamation’s rhetoric—there is some uncertainty as to how much the individual mutineers in fact had “plans of piracy and plunder.” According to *Irresistible* crewmember Samuel Beaver, at least some of the crew initially

⁹⁷ *Id.* at 392.

⁹⁸ *Id.* at 393 (testimony of Henry Child).

⁹⁹ *Id.*

¹⁰⁰ Daniels & Arismendi, *supra* note 85 (following the *Proclamation*, the announcement listed by name each of the members of the *Irresistible* under Daniels’ command and of the *Creola* (*Criolla*) under Paul’s command).

¹⁰¹ *Id.*

believed they were legitimate privateers since “[C]apt. Ferguson had told them at first, he had a commission; but two days after, he told them that he had not.” It was at that point, according to Beaver, that “they determined to board every thing.”¹⁰² In slightly different terms, he testified that the mutineers “said at first that she was coming home to Baltimore, but they went a cruising” instead.¹⁰³ Another account blames Black, stating that he “wished to make his fortune” out of his “commission as lieutenant in the navy of Buenos Ayres By persuasion and threats, and from the heterogeneous mixture of the crew, he prevailed upon a majority of them to give a partial assent to his scheme.”¹⁰⁴

Regardless of who cajoled whom, the *Irresistible* boarded somewhere between ten and forty from various nations during its cruise,¹⁰⁵ rotating among “flags of different nations”¹⁰⁶ —such as Spain, Buenos Aires, England and Margarita.¹⁰⁷ Since the pirates were indicted for boarding Spanish, Dutch and American vessels, those three ships were the primary focus of the trial, perhaps because the prosecution was only able to elicit sufficient detail about those events to merit indictments.¹⁰⁸ In the incident that formed the basis for the first indictment, the crew boarded a Spanish vessel off Cape Antonio, where they took \$2,300 according to two witnesses¹⁰⁹ and \$3,700 according to two others,¹¹⁰ and the money was shared.¹¹¹ In the

¹⁰² NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 392 (testimony of Samuel Beavers).

¹⁰³ *Id.*

¹⁰⁴ NILES’ WKLY. REG. (June 17, 1820), *supra* note 75, at 275.

¹⁰⁵ *Id.* (quoting Black as testifying that they boarded about thirty vessels). *See also* NILES’ WKLY. REG. (June 17, 1820), *supra* note 5, at 391-92 (testimony of Samuel Beavers stating “they boarded 8 or 10, Dutch, French, American, 2 Spaniards,” and testimony of Samuel Stanly stating the crew “spoke about 30 or 40 vessels”).

¹⁰⁶ NILES’ WKLY. REG. (June 17, 1820), *supra* note 75, at 275; *see also* NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 391-92.

¹⁰⁷ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 391-92 (testimonies of Samuel Stanly, John Donald, and Samuel Beaver).

¹⁰⁸ *See infra* note 120 and accompanying text.

¹⁰⁹ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 391-92 (testimonies of Samuel Stanly and Samuel Beaver).

¹¹⁰ *Id.* at 392 (testimony of John Donald). *See also* NILES’ WKLY. REG. (June 17, 1820), *supra* note 75, at 275.

incident that formed the basis for the second indictment, the crew boarded a Dutch vessel where they took “hampers of gin” (“because [they] wanted it”) among other things.¹¹² In the incident that formed the basis for the third indictment, the crew boarded an American vessel bound for St. Jago, stealing jewelry after a search of the ship.¹¹³

It appears that the group acted with at least some restraint during this period since none of the witnesses described any violence toward crews aboard the captured ships—beyond, of course, the implicit violence inherent in the capture itself.¹¹⁴ According to one newspaper account—published before their arrest—the men had treated one ship “politely,” had taken only the “eighteen cases of gin” from a Dutch vessel, and had invited the captain of a third vessel on board.¹¹⁵ Using similar language, a later account turned to Black’s testimony to make the following statement in the *Irresistible* crew’s support:

They boarded about thirty vessels and treated them all well, except a *truly* piratical vessel, whose means of annoyance they destroyed . . . a *Spanish* brig, . . . and one American schooner All else were used in the most respectful manner; and, at the request of the commander of the brig Commodore Hull, of Boston, they convoyed him round a certain point of the island of Hayti, where picaroon pirates were exceedingly dangerous. They supplied several vessels with provisions, and purchased of others what they wanted, which they fairly paid for.¹¹⁶

¹¹¹ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 391-92 (testimony of Samuel Stanly and Samuel Beaver).

¹¹² *Id.* at 392 (testimony of Samuel Stanly).

¹¹³ *Id.* at 391 (testimony of Samuel Stanly). *See also Crew of the Irresistible* (Aug. 5, 1819), *supra* note 64 (only one defendant, John Chapels, was indicted under this count).

¹¹⁴ *See, e.g.,* NILES’ WKLY. REG. (June 17, 1820), *supra* note 75, at 275. *See generally* NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 390-95.

¹¹⁵ CITY GAZETTE, *supra* note 73.

¹¹⁶ NILES’ WKLY. REG. (June 17, 1820), *supra* note 75, at 275.

It appears, however, that Ferguson may at some point have begun to lose control of his men. A newspaper published less than a month before their capture stated that Ferguson told his men after taking an American vessel “to respect American property,” but the crew refused to comply.¹¹⁷ Instead, they “with one voice exclaimed, ‘that they had risked their lives in taking the brig, that they were in search of plunder, and plunder they would have.’”¹¹⁸

Although the men certainly stole and plundered, moreover, the proceeds received by each crewmember appear to have been relatively small. The men allegedly took “two dozen finger rings, a large number of ear-rings, bracelets, breast-pins and other valuable articles” from the American vessel.¹¹⁹ And Samuel Stanly testified that he received \$29 as his portion of the prize for the plundering, seven dollars of that coming from his portion of the proceeds from the sale of the jewelry taken from the American vessel.¹²⁰

B. The Arrest and Trial of Thomas Smith and His Shipmates

The fate of the crew of the *Irresistible* was sealed when, after less than three months at sea, they turned toward the Chesapeake Bay. The accounts suggest that the crewmembers simply wished to come home and believed they could escape serious repercussions. According to one account, they first put Black under arrest “and then they sailed direct for the Chesapeake, in which they arrived without much apprehension that they had done wrong”¹²¹ According to Samuel Beaver, “the crew was called together, and divided; those who were for going out against went to one part of the vessel, the rest to another; the strongest party was for coming in, and the vessel was

¹¹⁷ *Piratical Proceeding*, CAROLINA GAZETTE (Charleston, SC), June 5, 1819, at 1.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 392 (testimony of Samuel Stanly).

¹²¹ NILES’ WKLY. REG. (June 17, 1820), *supra* note 75, at 275. This testimony meshes at least partly with that of Samuel Stanley, who stated that Black “was 1st lieut. at first, but they broke him.” NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 391 (testimony of Samuel Stanly).

brought into the Patuxent.”¹²² Once on land, the men attempted to disperse but, it appears, were quickly arrested.¹²³ Ultimately, the men were charged under different indictments that would be tried by different judges and juries in different places.¹²⁴

At least seven crewmembers—most notably John Ferguson and Israel Denny—remained and were tried in Baltimore.¹²⁵ On July 2, 1819, the rest of the *Irresistible*'s crew members, including Thomas Smith, were transported from Baltimore to Richmond, Virginia.¹²⁶ Four days later, Smith and sixteen others were charged with piracy under the 1819 Act for plundering a Spanish vessel.¹²⁷ Two men, John Alan Steadman and John Waldon, were indicted on a second count for piracy against a Dutch vessel since neither man was part of

¹²² NILES' WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 392 (testimony of Samuel Beaver). *See also id.* at 390 (editor noting that “they entered the Chesapeake bay and generally dispersed themselves”).

¹²³ *Id.* at 391 (testimony of Samuel Stanly) (stating that “Commodore Daniels sent down and took possession of [the *Irresistible*.] Witness said the crew had abandoned and dispersed.”).

¹²⁴ Thomas Smith and sixteen others were sent to Richmond for trial, with their appeals eventually reaching the Supreme Court. *United States v. Smith*, 18 U.S. 153 (1820). Others from the vessel remained in Baltimore where they were tried. On March 3, 1820, John Ferguson and Israel Denny, along with five others who had been aboard the *Irresistible*, were sentenced to death in Baltimore for their activities “after a short but impressive address” by the sentencing judge, Theodorick Bland, who had been appointed to the federal bench just three months earlier. Ferguson and Denny were executed on April 13, 1820, while the others were spared. *See* JOHN THOMAS SCHARF, CHRONICLES OF BALTIMORE (1874). *See also* NILES' WKLY. REG. (June 17, 1820), *supra* note 75, at 275; *Law Intelligence, Chronicle*, 18 NILES' WKLY. REG. (Baltimore, MD), Apr. 8, 1820, at 112 [hereinafter NILES' WKLY. REG. (Apr. 8, 1820)] (“Death warrants for the execution of John F Ferguson and Israel Denny two of the persons convicted of piracy and now confined in Baltimore jail have been received by the marshal of the district of Maryland.”).

¹²⁵ SCHARF, *supra* note 124.

¹²⁶ CITY GAZETTE AND COMMERCIAL DAILY ADVERTISER, July 10, 1819, at 3; Letter from John Marshall to Peter V. Daniel (July 2, 1819), in 8 THE PAPERS OF JOHN MARSHALL 334, 334-35 (Charles F. Hobson ed., 1998).

¹²⁷ *Crew of the Irresistible* (Aug. 5, 1819), *supra* note 64. *See also Smith*, 18 U.S. at 158. One defendant (William Chapels) also was indicted on an additional count for piracy against an American vessel under the 1790 Act. Frances Oglesby was the only member of the original *Irresistible* crew to be tried in Virginia. *Crew of the Irresistible* (Aug. 5, 1819), *supra* note 64.

the crew of the *Creola* or the *Irresistible*.¹²⁸ The nineteen men faced trial in the federal circuit court in Richmond.¹²⁹ Chief Justice Marshall was assigned to the fifth circuit (Virginia and North Carolina), so with a trial set for Richmond, Marshall would be one of two presiding judges joined by St. George Tucker, the district judge for the district of Virginia.¹³⁰

Over the space of three days, nine separate trials were held for the nineteen men facing piracy charges in Virginia. On Monday, July 26, Samuel Poole was tried on the first indictment, with all of the evidence in the case presented on that day.¹³¹ The court sequestered the jury overnight.¹³² The next morning, before sending the jury out to deliberate, the court allowed the lawyers in the case to make their closing arguments.¹³³ Robert Stanard, the U.S Attorney for Virginia, presented an hour-long closing. Stanard analyzed the law and evidence in the case and called on the jury to “lend their aid in cutting down that system of brigandage which was tarnishing the reputation of our country, and demoralizing our seamen.”¹³⁴

The two defense attorneys in the case, John Wickham and Andrew Stevenson, appeared in turn, arguing for nearly two hours between them. They argued that “the words of the act of congress were too vague and loose to authorize the jury to dip their hands in the blood of a fellow citizen”¹³⁵ They turned next to the works of the leading international jurists of the day—Grotius Puffendorf, Montesquieu and others—finding that they all had failed to provide a definition of piracy as a law of nations. Instead, the defense lawyers

¹²⁸ See *Crew of the Irresistible* (Aug. 5, 1819), *supra* note 64 (explaining how the two men had served on the crew of the *Atlas*, where they met up with the *Irresistible* at sea).

¹²⁹ See *supra* notes 41-48 and accompanying text (explaining that the men appeared in the circuit court rather than district court due to the severity of their alleged crimes).

¹³⁰ See *Chapels*, 25 F. Cas. 399. See also Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789); Judiciary Act of 1802, ch. 31, § 4, 2 Stat. 156 (1802).

¹³¹ See *Crew of the Irresistible* (Aug. 5, 1819), *supra* note 64.

¹³² See *Chapels*, 25 F. Cas. 399.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

argued “the municipal laws of different countries” —and not the law of nations—defined piracy.¹³⁶ Defense counsel made other legal arguments before turning to the evidence in the case and arguing, *inter alia*, that the witnesses who had appeared at trial, as accomplices who had themselves been imprisoned had ulterior motives in presenting their testimony, at least some of which had been contradictory.¹³⁷

Stanard, the U.S. Attorney, made a lengthy rebuttal argument. On the definition of piracy, Stanard contended that, while many definitions existed, several commentators, including the Dutch scholar Bynkershoek and the British jurist William Blackstone both offered suitable definitions of pirates as villains to be prosecuted and enemies of the human race.¹³⁸ On the evidence, Stanard urged the jury to give credit to the testimony of the defendants’ accomplices, noting that, without giving effect to such testimony, “the most atrocious offences might escape with impunity.”¹³⁹ Stanard concluded by calling on the jury to enforce the law “against brigands who not only sailed from its waters to collect plunder but returned to them as the scene for its partition, and as a sanctuary where they expected to escape the punishment of their crimes.”¹⁴⁰

Justice Marshall and Judge Tucker asked the jury to investigate three questions.¹⁴¹ First, had the defendants boarded and plundered a Spanish vessel?¹⁴² On this point, the court felt that ample evidence had been presented, in spite of the problems of accomplice testimony, particularly given the corroborative effect of the testimony of John Donald, the witness who had been acquitted by the grand jury months earlier.¹⁴³ Second, if such cruising and plundering (described by the court as robbery) had occurred, had the defendants cruised on the high seas without a commission?¹⁴⁴ Here, too, the

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

court felt the issue was quite simple and indeed found that “the facts given in evidence were totally incompatible with the idea of sailing under any authority whatever.”¹⁴⁵

In the event that the jury found that the defendants had engaged in robbery while cruising without a commission, the court then recommended that the jury find a special verdict on the third and closer question: “whether the case came within the act of congress.”¹⁴⁶ The jury took the court’s instructions and “retired but for a few moments.”¹⁴⁷ When the members of the jury returned, they found Poole guilty on the first two questions and presented a special verdict on the third question.¹⁴⁸ Immediately thereafter, a new jury was impaneled for the purpose of trying the ten others indicted with Poole, and the jury returned with identical verdicts.¹⁴⁹

On the following day, Wednesday, July 28, the seven other trials began and ended. In three of the trials—involving John Green, Thomas Smith, Henry Andy a/k/a Henry Andris, and John Fuller (the latter two tried together) —the defendants sought to plead not guilty based on duress, but the jury convicted them under the special verdict.¹⁵⁰ Francis Oglesby, the only original *Irresistible* crewmember tried under the first indictment, was also convicted under the special verdict.¹⁵¹ His lawyer had argued that “he was innocent of the plot of piracy, and that after the *Creola* seized upon the *Irresistible*, he could not avail himself of the permission to leave her; the boat being in a leaky trim and full of men and baggage.”¹⁵²

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *Crew of the Irresistible* (Aug. 5, 1819), *supra* note 64.

¹⁵¹ *Id.*

¹⁵² *Id.* Henry Child’s testimony obviously contradicted this testimony since—he at least claimed—that although the boat was leaky and had “much baggage in it . . . had any more been willing to go with him, the baggage would have been thrown overboard.” See NILES’ WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 393.

Steadman and Waldon, who were tried on the second indictment, were found not guilty. Like them, Thomas Watson had belonged to neither the crew of the *Creola* nor that of the *Irresistible*, and, like them, Watson, “the most unoffending of all the prisoners,” was found not guilty.¹⁵³ Unlike Steadman and Waldon, Watson had been charged under all three indictments. However, after he was acquitted under the first indictment, the United States attorney “ordered a *Nolle Prosequi* to be entered in his favor, on the other two indictments.”¹⁵⁴

Finally, the eighth trial involved William Chapels, who had already been convicted the day before on the first indictment. His trial on July 28 fell under the third indictment and resulted in an acquittal.¹⁵⁵

On July 30, Justice Marshall and Judge Tucker split on the legal question raised in the special verdicts.¹⁵⁶ As a result of the split between the two presiding judges, the case was sent to the Supreme Court for a hearing in that same term.¹⁵⁷ In a pair of letters to Bushrod Washington, his colleague on the Supreme Court, Chief Justice Marshall expressed his concern about the enforceability of the 1819 statute. In the first letter, written on August 3, Marshall briefly discussed the recent piracy case he had been involved in, noted that the case had been taken to the Supreme Court, and expressed “serious doubts of the sufficiency of the law to authorize the infliction of punishment in a case of as notorious piracy as ever occurred.”¹⁵⁸ Nearly three months later, on October 31, 1819, while the case was pending before the Supreme Court, Chief Justice Marshall wrote another letter to Washington, expanding on his concerns and noting that:

¹⁵³ *Crew of the Irresistible* (Aug. 5, 1819), *supra* note 64.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See John Marshall, *United States v. Smith*, Charge to Jury, U.S. Circuit Court, Virginia (27 July 1819), in VIII THE PAPERS OF JOHN MARSHALL 370, 372 n.6 (Charles F. Hobson ed., 1995); handwritten docket from Eastern District of Virginia in *Smith* case, available at National Archives.

¹⁵⁷ See *supra* note 48 and accompanying text.

¹⁵⁸ Letter from John Marshall to Bushrod Washington (Aug. 3, 1819), in VIII THE PAPERS OF JOHN MARSHALL, *supra* note 156, at 373.

[i]n the trials at Richmond the evidence was perfectly clear & the case was unequivocally a case of piracy according to the laws of every civilized nation. The doubt I entertain is whether there is any such thing as Piracy as ‘defined by the law of nations.’ All nations punish robbery committed on the high seas by vessels not commissioned to make captures yet I doubt seriously whether any nation punishes otherwise than by force of its own particular statute.¹⁵⁹

In February 1820, the Supreme Court issued its ruling in the case. Justice Story, writing for the Court, rejected the contention that piracy was not sufficiently defined and reasoned that the definition of piracy was understood with sufficient certainty under both Acts.¹⁶⁰ Turning first to the 1790 Act, Justice Story found that the Act’s language was wholly appropriate to the extent that it defined piracy by reference to common law terms.¹⁶¹ The Court held that “the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law” and that “[i]n fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act.”¹⁶²

Next, the Court considered the 1819 Act, which defined piracy not by reference to domestic law but rather by reference to the law of nations, or international law.¹⁶³ The Court further concluded that the 1819 Act applied to the acts of the sixteen men who had been convicted in Richmond.¹⁶⁴ The Court concluded that all of the

¹⁵⁹ Letter from John Marshall to Bushrod Washington (Oct. 31, 1819), in VIII THE PAPERS OF JOHN MARSHALL, *supra* note 156, at 374.

¹⁶⁰ *Smith*, 18 U.S. at 153, 159-60, 162.

¹⁶¹ *Id.* at 160.

¹⁶² *Id.*

¹⁶³ *Id.* By contrast, in *Palmer*, perhaps because only the domestically focused 1790 Act had been passed, the Court did not look at the relationship between the law of nations and domestic law or turn to external sources of law to interpret the nature of piracy. *United States v. Palmer*, 16 U.S. 610, 610 (1818).

¹⁶⁴ *See Smith*, 18 U.S. at 160; *see also* *United States v. Furlong*, 18 U.S. 184 (1820) (reasoning that “[r]obbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all” and explaining that “a vessel, by assuming a piratical character, is no longer included in

international law sources demonstrated that under the law of nations, the “true definition” of piracy is “robbery upon the sea.”¹⁶⁵ That clear definition refuted Smith’s primary argument to the Court.¹⁶⁶

Having used international sources to identify a concrete definition of piracy, the Court returned to Smith’s arguments about the 1790 Act and noted that the law of nations is part of the common law¹⁶⁷ and that, as a result, the common law definition of piracy incorporated the international law understanding that piracy as “an offence against the universal law of society, a pirate being deemed an enemy of the human race.”¹⁶⁸

the description of a foreign vessel . . .’). In *Furlong*, decided by the Supreme Court less than one week after *Smith*, the Court considered several indictments from the circuit courts of Georgia and South Carolina involving prisoners of various nationalities and aboard ships cruising under flags both domestic and foreign, convicted for acts of piracy. The Court construed the Act of 1790 and found that regardless of the nationality of the accused or the national character of the ship involved, piratical acts were punishable under the Act. *Furlong*, 18 U.S. at 193. The Court rejected an argument by petitioners that section 5 of the 1819 Act essentially repealed section 8 of the 1790 Act. The Court held that both Acts remained applicable. *Id.* The court found that the crew in the case “assumed the character of pirates, whereby they lost all claim to national character or protection.” *Id.* at 205.

¹⁶⁵ *Smith*, 18 U.S. at 162.

¹⁶⁶ *Id.* Almost twenty five years later, in *The Malek Adhel*, ship-owners appealed the seizure of their vessel for alleged violations of the 1819 Act. Among their defenses, the ship-owners argued that the “aggressions, restraints, and depredations” alleged were not “piratical” within the language of the Act, and they argued that, in order to establish piracy the Act required the express intent to steal for the sake of gain and for no other purpose. The Supreme Court ruled that such a narrow reading of the Act would defeat the object and purpose of the legislation, which they believed to be “designed to carry into effect the general law of nations on the same subject in a just and appropriate manner.” The Court interpreted “piratical” in this context to be general, including any aggression belonging to a class of behavior commonly attributed to pirates, regardless of their motives. Reaffirming the views expressed in *Smith*, the Court noted that “a pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority.” *The Malek Adhel*, 43 U.S. 210, 221, 232 (1844).

¹⁶⁷ *Smith*, 18 U.S. at 161.

¹⁶⁸ *Id.* The Court also noted that Blackstone considered the common law definition of piracy indistinguishable from the law of nations definition. *Id.* at 162

The manner in which modern courts determine what constitutes international law can be directly traced to the Supreme Court's analysis in *Smith*¹⁶⁹ and its efforts to define piracy under the law of nations.¹⁷⁰ The Court reasoned that "What the law of nations [is on a subject], may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law."¹⁷¹ That statement of the sources of international law incorporates three of the primary sources of international law recognized by tribunals worldwide today as codified in the Statute of the International Court of Justice.¹⁷²

On May 29, 1820, all sixteen of the prisoners who had been convicted nearly a year earlier, appeared before the court to face sentencing.¹⁷³ Each defendant had an opportunity to make remarks on why the mandatory sentence should not be imposed on them; some made short statements emphasizing their claims of duress, while others claimed they had been deceived into thinking the vessel was lawfully commissioned, and still others chose not to make any remarks at all.¹⁷⁴ One of the defendants went so far as to claim that John Black had later confessed to giving false testimony.¹⁷⁵ After all of the defendants had been heard, Judge Tucker pronounced the

(citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK 4 ch. 5 (1796)).

¹⁶⁹ *Smith*, 18 U.S. at 160-61.

¹⁷⁰ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 239 (2d Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932, 948 (9th Cir. 2002); *Kadic v. Karadzic*, 70 F.3d 232, 238-39 (2d Cir. 1995).

¹⁷¹ *Smith*, 18 U.S. at 160-61.

¹⁷² Statute of the International Court of Justice art. 38, 59 Stat. 1031, 33 U.N.T.S. 993.

¹⁷³ John Marshall, *United States v. Smith*, Sentence, U.S. Circuit Court, Virginia (May 29, 1820), in IX THE PAPERS OF JOHN MARSHALL 44 (Charles F. Hobson ed., 1998).

¹⁷⁴ John Marshall, *United States v. Smith*, Sentence, *supra* note 173, at 44-45.

¹⁷⁵ *Id.* at 45. That claim was dismissed by Chief Justice Marshall, who noted that Black was but one of three witnesses, and indeed had been the witness whose testimony was least credible in any event.

sentence for all sixteen defendants: they would all be executed on June 19, 1820.¹⁷⁶

C. The Aftermath

At the start of the legal proceedings against the crew of the *Irresistible*, the press routinely spoke sharply about the dangers of pirates just like these men. In the words of the *Niles' Weekly Register*,

[w]e have taken some little pains to report these cases to the public. The scenes of outrages on the high seas which they devolope [sic], belong to the history of the times. Such scenes ought to be understood. To repress them, should be the wish of every American, who values his country, her character and her laws. We owe it to the civilized world to arrest such lawless outrages, perpetrated by vessels and by crews who have their equipment and their sanctuary in our own ports.¹⁷⁷

While the Virginia case was pending before the Supreme Court, however, John Ferguson and Israel Denny—who had been tried in Baltimore—were convicted and sentenced to death.¹⁷⁸

At around this point, at least some public opinion began to turn. In early April of 1820, four thousand citizens of Baltimore petitioned President Monroe to pardon the two men, and Judge Bland—the sentencing Judge—sent a letter “pleading for them.”¹⁷⁹ A few days later, Secretary of State John Quincy Adams attended a

¹⁷⁶ *Id.* at 45.

¹⁷⁷ NILES' WKLY. REG. (Aug. 7, 1819), *supra* note 5, at 395 (quoting THE ENQUIRER).

¹⁷⁸ John Quincy Adams, Diary Entry (Apr. 11, 1820), in MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 72, at 63. See also NILES' WKLY. REG. (June 17, 1820), *supra* note 75, at 275; NILES' WKLY. REG. (Apr. 8, 1820), *supra* note 124, at 112 (“Death warrants for the execution of John F. Ferguson and Israel Denny two of the persons convicted of piracy and now confined in Baltimore jail have been received by the marshal of the district of Maryland.”).

¹⁷⁹ John Quincy Adams, Diary Entry (April 11, 1820), in MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 72, at 63.

meeting during which he, President James Monroe, and several members of the cabinet spoke about the possibility of granting the pardon.¹⁸⁰ Opinions were divided. Adams had three reasons for wishing the men to be reprieved. First, he believed the punishment for piracy should be “long imprisonment . . . for these and all the other cases of simple piracy, and executing only those which had been complicated with murder.”¹⁸¹ Second, he believed the defendants had been “seduced” into crime by men such as Captain Daniels, who had escaped without punishment. Indeed, Adams wrote in his diary, “[a]ll the principals and ringleaders in these privateering piracies had escaped. They were triumphant against every prosecution, while these poor ignorant creatures, the mere mortal instruments of their guilt, were to suffer death.”¹⁸² Finally, he cautioned President Monroe that “a popular movement” against the execution might arise in Baltimore and, at the least, “a great odium would be excited against the Administration for it.”¹⁸³ Other cabinet members, such as Treasury Secretary William Harris Crawford, believed the law provided for execution in the case of piracy, and the law should be followed. “If [the law is] not executed in this case, it ought not to be executed in any of the others; and the law would then be a dead letter. That this was a case of mere piracy without murder, made it so much the better as a test for the execution of the law.”¹⁸⁴

In this instance, President Monroe sided with Crawford, and Ferguson and Denny were executed on April 13, 1820.¹⁸⁵ Public opinion turned even more decidedly in favor of the pirates, focusing on Adams’ first two points—they were justified in attempting to escape South America, and they may have robbed, but they did not murder.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 64.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ John Quincy Adams, Diary Entry (April 12, 1820), in MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 72, at 66; SCHARE, *supra* note 124.

Their acts were piracy, no doubt; but less so than many committed which are sanctioned by the laws. Treated as they appear to have been—trepanned and sold to a foreign service without their consent, they stand justified in the seizure of the *Artigan* vessel Irresistible, their enemy, to make their escape from a detested servitude; and if they had destroyed those who thus treated them, they might still have been justified: but they used them with all gentleness consistent with the object that they had in view. . . . No act of cruelty marked their progress—they were *pirates*, it is true, by their acts, but not so in their motives; and there is an immense distinction between them and those who are to be hung at Boston for that offence [sic]¹⁸⁶

Given these extenuating circumstances, that same author “trust[ed] that mercy will be extended” to the Virginia defendants.¹⁸⁷

Perhaps not surprisingly, almost immediately after the sentencing, the executive branch acted to reduce the sentences that had been handed down. On the same day that sentence was pronounced, most notably, Secretary of State Adams sent a letter to U.S. Attorney Stanard, asking him to identify any prisoners who should have their sentences reduced and, further, to identify two people who deserved execution.¹⁸⁸ The Attorney General, William Wirt, sent Chief Justice Marshall a similar request.¹⁸⁹ Justice Marshall replied promptly, sending a letter on May 30 in which he expressed reservations about making distinctions among the prisoners but did “select & recommend” two—Francis Oglevie and Samuel Pool—as possible candidates for “mercy.” In addition, he had asked those in charge of the prisoners to rank them “in the order of their behavior

¹⁸⁶ NILES’ WKLY. REG. (June 17, 1820), *supra* note 75, at 275.

¹⁸⁷ *Id.*

¹⁸⁸ Letter from John Marshall to John Quincy Adams (May 30, 1820), in IX THE PAPERS OF JOHN MARSHALL, *supra* note 173, at 46; Letter from John Quincy Adams to James Monroe (June 15, 1820), in MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 72, at 44.

¹⁸⁹ Letter from William Wirt to John Marshall (April 11, 1820), in IX THE PAPERS OF JOHN MARSHALL, *supra* note 173, at 29.

placing last those who had behaved the worst” on the understanding that the bottom two would be executed.¹⁹⁰

Despite having asked for Chief Justice Marshall’s recommendations, however, President Monroe’s office had already begun to consider even greater clemency—probably at least in part out of concern for public opinion.¹⁹¹ Secretary Adams evinced concern, for instance, that the two men lowest on the jailer’s list were a “man of color” (Peter Johnson) and a “foreigner” (Daniel Livingston).¹⁹² And he took a meeting with a concerned citizen who sought clemency for the sake of the men’s souls. Adams was approached on June 11, more specifically, by a Mr. William Fenwick of Richmond, who came “to solicit mercy for the convicts at Richmond.”¹⁹³ Although he had a petition “signed by the Judges of the Virginia Court of Appeals, and by many other respectable persons,” he himself spoke with “much unction” out of a hope that at least some of the men had or would turn to religion.¹⁹⁴

He had also a number of other papers, certificates from clergymen, and letters, with which he proposed to go to the President; among the rest, two letters from a young woman at Portland, Maine, sister to Samuel G. Poole, expressing very fervent religious sentiments. Fenwick himself spoke with much unction upon the case, and told me that Poole had

¹⁹⁰ Letter from John Marshall to William Wirt (May 30, 1820), in IX THE PAPERS OF JOHN MARSHALL, *supra* note 173, at 46.

¹⁹¹ Joseph Charles Burke, William Wirt: Attorney General and Constitutional Lawyer 104 (1965) (unpublished Ph.D. dissertation, Indiana University) (on file with author) (stating that President Monroe was “always sensitive to public opinion”). *See also* John Quincy Adams, Diary Entry (April 11, 1820), in MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 72, at 64 (pointing out the danger of “great odium” being “excited against the Administration” if Denny and Ferguson were executed).

¹⁹² John Quincy Adams, Diary Entry (June 9, 1820), in MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 72, at 44.

¹⁹³ *Id.* at 148.

¹⁹⁴ *Id.*

become a very earnest preacher of the gospel to his brother convicts.¹⁹⁵

So great was Mr. Fenwick's concern for the prisoners' souls that, upon learning that the death sentences would be commuted, he exclaimed, "Do not let those wicked ones know it!" because "they had not yet all been awakened to religious impressions."¹⁹⁶ And he further expressed concern "that the treatment of the prisoners since they were sentenced had been rather more rigorous than was necessary, and mentioned particulars very disagreeable to think of: such as the men being chained together two and two, and not allowed single moments of retirement from the presence of their guards."¹⁹⁷

Even before Fenwick's arrival, however, President Monroe had already expressed an inclination to remit all of the prisoners' sentences and, given the shortage of time, Secretary Adams took it upon himself to do just that. As he stated in his diary:

The day fixed for the execution at Richmond is the 19th, and, as the post-office arrangement is not yet made for conveying letters to the President, there would scarcely be time to write to him to receive his answer and then to transmit the warrant of reprieve in season. I concluded, therefore, to presume upon the President's approbation, and include the whole fourteen in the reprieve, which I directed to be made out to-morrow.¹⁹⁸

No evidence suggests that the President in any way objected.

III. CONCLUSION

Nearly two hundred years after the voyage that led to the trials of Thomas Smith and sixteen others in Richmond, the details of

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 149.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 147.

the case still resonate. In one sense, the story opens a window into the world of nineteenth century privateers. The men who were arrested had been part of a network of seafarers who helped colonies struggling for independence to gain an advantage over their colonial powers. The United States and its regional neighbors relied heavily on these men—and those like them—not only in their struggles for independence but also to consolidate their power in their early years post-independence. But, at the same time, the reliance on private individuals to perform essentially military functions of the state left a gap of power that could be (and often was) exploited.

In another sense, the case—about pirates on the high seas and international law—exposes numerous aspects of domestic, prosaic life in early nineteenth century America. Lurking in the background (and sometimes even the foreground) of the case and its aftermath are concerns with religion and prisons, the growing nation's still-primitive infrastructure, the structure of courts, public opinion, and the role of the press in forming that opinion. The ultimate reduction in punishment for the men tried in Richmond speaks as much to many of these issues as it does to the acts for which the men were initially tried and convicted.¹⁹⁹

In still other ways, the case is notable for myriad other issues, revealed often in small details and coincidences. For example, Chief Justice Marshall was the trial judge in the case only because of the Amendatory Act of 1802, which forced the justices to continue to ride circuit. Because Marshall was the trial judge in the case, he had a role to play at the trial level—and in the split that allowed the case to be heard by the Supreme Court. But, at the same time, because the trial was held in the Fifth Circuit, Marshall did not get a chance to weigh in officially when the Supreme Court heard and decided the case.²⁰⁰

¹⁹⁹ It is also notable that virtually all of the defendants were from the *Creola* and the cooperating witnesses were from the *Irresistible*, demonstrating the need for the government to find some help to build a case against the others and perhaps a sense that the crew of the *Irresistible* were viewed as less culpable than the men who had boarded their ship in the middle of the night off Margarita.

²⁰⁰ Not without his lack of trying at least in his letters to Bushrod Washington. See *supra* notes 158 and 159 and accompanying text.

One other notable element of this case rests on reasonable inference. As discussed above, Congress acted quickly and decisively to “correct” the Supreme Court’s decision in *Palmer*. Had Marshall’s view prevailed on whether the law of nations was sufficient to define piracy in domestic law—namely, that it was not sufficient—we can thus infer that Congress would have acted with equal haste in amending or redrafting the piracy statute. Interestingly, because his view did not prevail, Congress to this day has never taken action to amend that statute.

The fact that the 1819 statute remains on the books as the federal law on piracy is of more than trivial importance. Less than two months apart in 2010, for instance, two district court judges in the Eastern District of Virginia faced with essentially identical facts, reached two different conclusions about whether the 1819 statute covers a failed effort to overtake a vessel on the high seas.²⁰¹ In both cases, Somali pirates unsuccessfully *attempted* to rob U.S. naval vessels disguised in cover of night to appear like merchant ships. In the first of the two cases to be decided at the district court level, the court concluded that the “clear and authoritative” definition in *Smith* “of piracy as sea robbery” meant that the 1819 statute requires that a robbery actually occur.²⁰² Since the alleged pirates had been apprehended before boarding the vessel (and as captives who could therefore not plunder the vessel in any case), the court concluded that they could not be charged with the crime of piracy under the statute.²⁰³ Ultimately, the Fourth Circuit, interpreting *Smith* and the 1819 statute, weighed in and decided that the law of nations had evolved over time and did cover violent attacks on the high seas.²⁰⁴

²⁰¹ See *United States v. Hasan*, 747 F. Supp. 2d 642 (E.D. Va. 2010); *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010).

²⁰² *Said*, 757 F. Supp. 2d at 559.

²⁰³ *Id.* at 566-67 (explaining that, if “the definition of piracy [were adopted] from the [] debatable international sources whose promulgations evolve over time, defendants in United States courts would be required to constantly guess whether their conduct is proscribed by § 1651[,] render[ing] the statute unconstitutionally vague”).

²⁰⁴ *Hasan*, 747 F. Supp. 2d at 642 (holding attempted piracy was piracy); *Said*, 757 F. Supp. 2d at 554, *vacated by* 680 F.3d 374 (holding, before Fourth Circuit ruling, that attempted piracy was not piracy).

Through the years, federal courts have regularly returned to *Smith*, not only for its support of the law of nations as a source of law in domestic law but also for its approach to ascertaining international law. At the end of the day, from a lawmaking perspective, the ultimate importance of *Smith* is its validation of the use of the law of nations to create binding domestic law. But from a legal and historical perspective, the case has—somewhat paradoxically—a perhaps equally great importance for the light it sheds on the purely domestic concerns of a still-struggling, still-growing nation.