

FOREWORD

Title

United States v. The William and The Phenomena of Jury Nullification in Early 19th Century
America

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Abstract

In September 1808, Judge John Davis upheld the constitutionality of the Embargo Act of 1807 under the Constitution's Article I, Section 8, Clause 3 Interstate Commerce power. Judge Davis's original opinion curiously lacks any reference to Marbury v. Madison. Judge Davis defends judicial review and rejects the notion of jury nullification. While Judge Davis upheld the embargo's constitutionality, a subsequent jury trial on the facts resulted in the return of The William to its rightful owners. This case reflects the attempts by early American judges to carve out the power of judicial review and maintain the appearance of an impartial judiciary.

I. Introduction:

In 1807, President Thomas Jefferson confronted a dilemma of catastrophic proportions. France and Britain were once again engaged in hostilities.¹ In response to Jefferson's declaration of American neutrality, France and Britain committed numerous acts of aggression against American interests. Impressment constituted the most odious act of aggression to the American people, as it relegated American citizens into forced labor.

The practice of impressment dated back to medieval times. Britain's existence as an island nation necessitated a strong navy during wartime and ensured that Britain maintained a lower population compared to neighboring European powers. Faced with an existential crisis due to an inability to protect the high seas from encroachment, the British developed impressment to forcibly "press" men into service aboard naval ships.² British law granted a wartime power to the navy, to sweep through the streets of Great Britain, arrest men and place them in the Royal Navy.³ In addition to street press gangs, any officer of the Royal Navy retained the power to stop English vessels on the high seas and press crewmen into service. Technically, foreigners were protected from this power to "press" Englishmen.⁴ However, the Royal Navy interpreted this power to mean that all Englishmen were available for service even if they were on the ship of a

¹ As Secretary of State, Jefferson served as a staunch supporter of the French government. Contradictorily, Jefferson lobbied consistently in support of neutrality to President Washington. Jefferson did not believe that the United States should enter a foreign war. On one occasion, Jefferson noted that the 1778 Treaty of Amity and Commerce with France remained in force, but did not require American belligerency to support the French versus the British. Jefferson reminded Washington and the public of this exception to the treaty, despite entreaties by the French to intervene on their behalf in the war. Secretary of State Jefferson's efforts to avoid foreign wars were reflected in Washington's issuance of the Neutrality Proclamation, even at the cost of Jefferson's personal sympathies for the French. Jefferson's aversion to costly wars defined his actions throughout his presidency. Daniel J. Leab, 1 *Encyclopedia of American Recessions and Depressions* 45 (2014).

² The Mariners Museum, *Prelude to the War of 1812* (2000), <https://www.marinersmuseum.org/sites/micro/usnavy/08/08a.htm>

³ Only certain individuals were protected from the naval press gangs including: apprentices already indentured to a master, seamen with less than two years' experience at sea, fishermen, and others associated with maritime trade and industry such as riggers, shipwrights, and sailmakers. These individuals were deemed essential to the economic well-being of the empire and were not to be conscripted by press gangs. Each "protected man" was required to carry with him a document called a protection that identified him and his trade. If he could not produce his protection on demand by the press gang, he could be pressed without further question. *See id.*

⁴ *Id.*

foreign nation. Under this interpretation of British naval impressment power, Royal Naval officers stopped foreign ships to search for English crewmen.⁵

During the Napoleonic Wars, the demand for seamen surged immensely. Prior to the Napoleonic Wars, the Royal Navy numbered only 10,000 men. By the War of 1812, the British Navy numbered 140,000 men.⁶ The majority of these men were pressed into service. In addition to this large increase in number of seamen required, wartime deaths and desertion caused numerous vacancies. Lord Horatio Nelson, a vice-admiral of the British Navy and the most famous British naval commander from the Napoleon Wars, estimated that between 1793 and 1801, as many as 40,000 men deserted the navy.⁷ The growing British demand for manpower directly impacted America. From 1793 until 1812, the British Navy pressed over 15,000 American sailors into service.⁸ While the Jay Treaty and other diplomatic negotiations attempted to address the practice of impressment, all efforts by the U.S. government to curtail impressment failed.

The practice of impressment festered resentment amongst the American public and flouted the American view on citizenship. As former British citizens, the colonies were forced to create a new definition of citizenship after the Revolutionary War. John Adams stated, America was destined to “break the grip of feudal laws and customs” and allow men to “free themselves from an irrational, often tyrannical past.” Americans believed that the definition of citizenship had changed and that men were now free to choose their allegiances.⁹ Impressment rejected the

⁵ Thorp Lanier Wolford, *Democratic-Republican Reaction in Massachusetts to the Embargo of 1807*, 15 *The New England Quarterly* 35, 37-38 (1942).

⁶ The Mariners Museum, *Prelude to the War of 1812* (2000), <https://www.marinersmuseum.org/sites/micro/usnavy/08/08a.htm>.

⁷ *Id.*

⁸ Susan Haberle, *The War of 1812* (2003).

⁹ John Adams, *Diary of John Adams*, February 21, 1765, *Diary 10: 24 January - 21 February 1765*, August 1765, Massachusetts Historical Society,

American view of citizenship and allowed British Naval officers to seize “British sailors” aboard American vessels for the purposes of forced labor. While Americans vilified these actions, British sailors often deserted to American merchant ships, obtained American citizenship paper with relative ease, or in many cases received fraudulent documents to maintain their employment.¹⁰ In addition to impressment, blockades by both the French and the British devastated the American economy and inflamed diplomatic tensions.

In response to Napoleon’s military successes across Europe, Britain enacted a blockade of mainland Europe on May 16, 1806.¹¹ Britain’s navy patrolled the European coastline to ensure that naval ships were prevented from conducting commerce with the European continent.¹² Initially, America benefited from this arrangement due Britain’s decision to only enforce the naval blockade from “the Seine to the Ostend.”¹³ However, Napoleon quickly responded with the Berlin Decree banning all British exports to Europe. Napoleon’s Continental Blockade, also known as the Continental System, prompted Britain to ban neutral port trade with France and her occupied territories.¹⁴ These actions by both countries dramatically reduced American exports and ensured that American cargoes were seized across the Atlantic.

American ire towards the perceived aggressions of Britain and France culminated in the *Chesapeake Leopard* Affair. On June 22, 1807, an American warship (*Chesapeake*) was attacked and boarded by the British warship (*Leopard*).¹⁵ Faced with a public outcry, Thomas Jefferson

<http://www.masshist.org/digitaladams/archive/doc?id=D10&numrecs=1&archive=all&hi=on&mode=&query=opening%2520of%2520a%2520grand%2520Scene&queryid=&rec=1&start=1&tag=text>.

¹⁰ American State Papers: Documents, Legislative and Executive of the Congress of the United States (Gales and Seaton eds., 1832).

¹¹ Thorp Lanier Walford, *Democratic-Republican Reaction in Massachusetts to the Embargo of 1807*, 15 *The New England Quarterly* 35, 37-38 (1942).

¹² *Id.* at 37-38.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The American warship suffered three casualties and 18 wounded. The British proceeded to take five sailors as prisoners. *Id.* at 38. See also Spencer C. Tucker and Frank T. Reuter, *Injured Honor: The Chesapeake-Leopard Affair, June 22, 1807* (1996).

considered several unappealing options. President Jefferson could declare war on Great Britain, France, or both countries. However, Jefferson had made a political career out of avoiding armed conflict and prohibiting the expansion of the American army and the navy.

Jefferson's avoidance of military expenditures is evident in his actions and letters. In a 1798 letter sent to James Madison, Thomas Jefferson referred to the Federalists as a "war party" and believed that the Federalist's desire to expand the Army to 20,000 men would inevitably lead to conflict, if allowed to succeed. In this letter, Jefferson stated how the Democrat-Republican party could ascertain the votes to prevent this bill from becoming law.¹⁶

On a separate occasion, Jefferson opposed the expansion of the Navy in a letter to James Madison. "The questions about building a navy, to be sure must be discussed out of respect to the speech: but it will only be to reject them."¹⁷ Jefferson's steadfast dissent against the expansion of the military illustrates his preference for avoiding conflicts and his belief that a strong military could be used to create a tyrannical regime.

Jefferson's actions also ensured that America's military would require a rapid expansion in funding, manpower, and equipment to effectively wage an armed conflict. The United States lacked any means of funding the war apart from land sales, or tariffs. Due to these difficulties and Jefferson's own natural predilection against leading the young country into a disastrous war, Jefferson chose to fight an economic war. Jefferson believed that the European powers would be willing to discuss more amenable terms after suffering the deleterious effects of the American

¹⁶ Thomas Jefferson to James Madison, (16 Jan. 1799), in 11 *The Papers of Thomas Jefferson* (Barbara B. Oberg & J. Jefferson Looney eds., 2008–2016).

¹⁷ *Id.*

embargo. Jefferson chose an embargo, despite objections from his own cabinet, who questioned the effectiveness of this measure.¹⁸

On December 22nd, 1807, Congress passed the embargo of 1807.

An Act Laying an Embargo on all ships and vessels in the ports (a).
.... That an embargo be, and hereby is laid on all ships and vessels in the ports and places within the limits of the United States, cleared or not cleared, bound to any foreign port or place; and that no clearance be furnished to any ship or vessel bound to such foreign port or place, except vessels under the immediate direction of the President of the United States: and that the President be authorized to give such instructions to the officers of the revenue, and of the navy and revenue cutters of the United States, as shall appear best adapted for carrying the same into full effect: *Provided*, that nothing herein contained shall be construed to prevent the departure of any foreign ship or vessel, either in ballast, or with the goods, wares and merchandise on board of such foreign ship or vessel, when notified of this act.¹⁹

The original act authorized an embargo on all U.S. ships and vessels that partook in foreign trade. The act authorized the President to make exceptions to the embargo and enforce the embargo via instructions to revenue officers and the Navy.²⁰

In response to a series of exploits and loopholes that rendered the Embargo ineffective, a supplemental act was passed on January 9th, 1808.²¹ The act prevented the guise of fishing and other domestic actions to be used to smuggle goods to foreign vessels, or Canadian territory.²²

President Jefferson himself addressed these coastal smuggling attempts in a letter to his former Secretary of State and current Lieutenant Governor of Massachusetts, Levi Lincoln. “You are not unapprised that in order to check the evasions of the embargo laws effected under coastal trade, we found it necessary to prevent the transportation of flour coast-wise, except to the States not

¹⁸ Albert Gallatin, Papers of Albert Gallatin (1808), *reprinted in* From Thomas Jefferson to Albert Gallatin, 11 August 1808, National Archives (2016.)

¹⁹ 2 Stat. 451.

²⁰ *See* 2 Stat. 451.

²¹ 2 Stat. 453. The 1808 embargo specifically covers a loophole that granted an exemption from the embargo for coasting vessels, fishing, and whaling boats. Ingenuitive individuals employed the guise of these legitimate activities to conduct illegal international trade. 2 Stat. 453 (1808). Library of Congress, U.S. Congressional Documents and Debates, 1774–1875.

²² *Id.*

making enough for their own consumption...”²³ This letter shows that President Jefferson knew of the attempts to smuggle items out of the country under the guise of legal activities.

The same letter also shows that President Jefferson feared that his own party attempted to condone smuggling. The embargo granted a “discretionary power” to the Governor of each state to grant licenses for the amount of flour they deemed necessary for importation. President Jefferson believed that Governor Sullivan of Massachusetts, a Democratic-Republican, used his license power to approve over 60,000 barrels in the two months after first receiving this power.²⁴ Clearly, President Jefferson’s letter to Levi Lincoln attempted to garner the aid of his former Secretary of State to help curtail smuggling in the State of Massachusetts. By doing so, President Jefferson circumvented the state’s governor, whom he had contacted on numerous previous occasions to prevent smuggling to no avail.²⁵ Jefferson’s letters illustrate his exasperation with Governor Sullivan and Massachusetts attorney general George Blake. Jefferson believed both of these Democratic-Republicans were acting surreptitiously to protect smugglers from federal law.²⁶ The facts show that Governor Sullivan undoubtedly issued an unreasonable amount of flour licenses for local consumption. No facts exist to corroborate Jefferson’s belief that other state officials including attorney general George Blake were involved in the scheme. Faced with flagrant smuggling, Congress and President Jefferson took further action.

Five days prior to the seizure of *The William*, a second supplemental act passed Congress on March 12th 1808.²⁷ This act prevented all export by land or sea. Furthermore, it allotted a \$10,000 fine per offense and port authorities were allowed to seize suspected cargoes without a

²³ Thomas Jefferson to Levi Lincoln (Aug. 22, 1808), in 11 *The Papers of Thomas Jefferson* (Barbara B. Oberg and J. Jefferson Looney eds., 2008–2016).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ 2 Stat. 473.

warrant.²⁸ It is possible that the seizure of *The William* resulted from executive pressure to crackdown on smuggling. However, this crackdown only served to fuel prices for American goods. As George Cabot, for example, pointed out, “profits were so great that if only one vessel in three escaped capture, her owner could make a handsome profit.”²⁹

While profits for individuals who successfully flouted the embargo were enormous, the embargo devastated the fledgling American economy. Legitimate business declined 70 percent from 1807 until 1808.³⁰ The state of Massachusetts faced particular hardship as it represented 50 percent of the nation’s ship tonnage.³¹ The embargo inflicted irreparable damage to the fishing industry and numerous sailors were forced to emigrate to Canada.³² New England textile and manufacturing industries benefited from cheaper labor, resources, and the inability to export during this period.³³ While the benefits of an industrialized New England economy would prove beneficial later in the 19th century, public opinion in New England responded negatively to the embargo and its negative impact on the economy. Contrary to popular belief, Jefferson’s embargo did have some successes and negatively impacted the British economy.

Britain experienced higher commodity prices and the destruction of numerous manufacturing jobs due to the American embargo. Riots and worker unrest were not uncommon

²⁸ *Id.*

²⁹ Samuel Eliot Morison, *The Maritime History of Massachusetts, 1783-1860*, 191-192 (1979). While some merchants were able to profit handsomely from the embargo, fishermen were devastated as they lacked monetary reserves. In Massachusetts, 5571 fishermen signed a petition asking for repeal, and some of the signers were selectmen, representing a large number of men. Louis Martin Sears, *Jefferson and the Embargo* 152-153 (1927). George Cabot was an American merchant, seaman, and prominent Massachusetts politician. A prominent Federalist and supporter of Alexander Hamilton, George Cabot remained a prominent critic of the Jefferson and Madison administrations. He died in 1823. Henry C. Lodge, *Life and Letters of George Cabot* (1974).

³⁰ American exports declined from over \$108 million in 1807 to less than \$23 million in 1808. Daniel J. Leab, 1 *Encyclopedia of American Recessions and Depressions* 49 (2014).

³¹ *Id.* at 50.

³² *Id.* at 50.

³³ Jeffrey A. Frankel, *The 1807-1809 Embargo Against Great Britain*, 42 *The Journal of Economic History* 291, 301-303 (1982).

in areas heavily impacted by job losses during this period.³⁴ In 1808, British production fell 4.8 percent and textile production plummeted by 32.8 percent.³⁵ To offset these prodigious economic maladies, the British economy benefitted from wartime expenditures to defeat Napoleon.³⁶ During peacetime, President Jefferson's gamble may have forced the British to make concessions due to popular unrest. President Jefferson miscalculated and underestimated the willingness of the British government to withstand economic malaise to defeat Napoleon.³⁷ The British government viewed Napoleon as an existential threat that merited numerous hardships to defeat and that the American embargo ensured that Napoleon could not benefit from American trade throughout the war.

II. Factual Summary

Port authorities seized *The William*, an American brigantine vessel, in violation of the federally imposed embargo.³⁸ The authorities alleged that the sailors of *The William* transferred goods to another vessel the Brigantine *Nancy* for the purposes of smuggling on March 17th 1807.³⁹ The goods were later transferred from the Brigantine *Nancy* to another vessel, the *Mary* for purposes of transport to a foreign port or place. In addition to *The William*, the *Sukey* and the *Nancy* were seized in conjunction with the smuggling operation.⁴⁰ Authorities seized the *Sukey* on suspicion that it had a connection to the nefarious transactions that occurred aboard *The William*.

³⁴ *Id.* at 302.

³⁵ *Id.* at 302 (citing Arthur Gayer, W. W. Rostow, and Anna Schwartz, *The Growth and Fluctuation of the British Economy, 1790-1850*, vol. 1, 83-83 (1953)).

³⁶ *Id.* at 300.

³⁷ *Id.* at 308.

³⁸ *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808) (No. 16,700).

³⁹ *Id.*

⁴⁰ *Id.*

III. Important Individuals:

John Davis presided as the United States district court judge in the case. A lifelong New Englander, Davis graduated from Harvard University in 1781 before going on to read the law.⁴¹ In 1788, he served as a Plymouth delegate to the Massachusetts state convention that ratified the U.S. Constitution. He served three terms in the Massachusetts House of Representatives and became a State Senator in 1795.⁴² However, his political term ended prematurely when President Washington appointed Davis as Comptroller of the United States Treasury in 1795.⁴³ In 1801, President Adams appointed the prominent Federalist, John Davis, as judge of the United States District Court for the District of Massachusetts.⁴⁴ President Adams's 1801 judicial appointees to the federal court system proved to be his most important action as president of the United States. In *United States v. The William*, Davis acted to protect the Federalist view of the Constitution while safeguarding New England shipping interests. Judge Davis retired as a district court judge in 1841.⁴⁵ *The William* and similar embargo cases proved to be his most notable achievements.

George Blake, the United States Attorney assigned to the case, and his brother, Francis Blake, represented the government. George Blake served as the U.S. District Attorney for the State of Massachusetts from 1802 until 1829. George Blake would later serve as a state senator for the Democratic-Republican party.⁴⁶ In addition, the government retained a young Salem

⁴¹ Federal Judicial Center, *History of the Judiciary* (2016), <http://www.fjc.gov/servlet/nGetInfo?jid=576&cid=999&ctype=na&instate=na>

⁴² *Id.*

⁴³ William E. Nelson, *Marbury, Madison, Marshall, and Massachusetts*, 9 Mass. Legal Hist. 49, 60 (2003).

⁴⁴ *Id.* at 60.

⁴⁵ Federal Judicial Center, *History of the Judiciary* (2016), <http://www.fjc.gov/servlet/nGetInfo?jid=576&cid=999&ctype=na&instate=na>

⁴⁶ Senate Exec. Proceedings, *Journal of the Executive Proceedings of the Senate of the United States of America* 1 400-405 (1828).

Democratic-Republican attorney, Joseph Story, who would go on to Congress and later the Supreme Court.⁴⁷ The appearance of Joseph Story illustrated the importance of this case.

The brigantine *The William* was represented by Samuel Dexter, William Prescott, and Christopher Gore. Mr. Dexter attended Harvard with Judge Davis. He also served as a Federalist in the Massachusetts state legislature and later in the United States Senate. He resigned his office after less than a year in order to accept an appointment as the Secretary of War for President John Adams. He later became Secretary of the Treasury for President Adams and diligently remained as Secretary of the Treasury for the first two months of President Jefferson's first term of the presidency.⁴⁸ Mr. Dexter returned to Boston in 1805 to practice law. Mr. Dexter represented the lone moderate Federalist of the three individuals representing the *William* owners.⁴⁹ Ironically, Mr. Dexter left the Federalist party for the Democratic-Republican party over his support for the War of 1812.⁵⁰

William Prescott, Jr., the only child of prominent Revolutionary War Colonel William Prescott, graduated from Harvard two years after Judge Davis and Mr. Dexter. Mr. Prescott attended the Hartford convention and was not considered a moderate Federalist.⁵¹ Christopher Gore graduated from Harvard and was a member of the Essex Junto, which represented the ultraconservative wing of the Federalist party.⁵² In 1788, Mr. Gore made his fortune by purchasing Continental debt with a face value of \$90,000 for about \$20,000. Mr. Gore benefited immensely in 1790 when Alexander Hamilton succeeded in convincing Congress to assume all

⁴⁷ Gerald T. Dunne, *Joseph Story: The Germinal Years*, 75 Harv. L. Rev. 707 (1962).

⁴⁸ Federal Judicial Center, *History of the Judiciary* (2016), <http://www.fjc.gov/servlet/nGetInfo?jid=576&cid=999&ctype=na&instate=na>.

⁴⁹ Charles Pelham Curtis, *A Strange Story About Marbury Versus Madison in Salem, 1808*, 13 Proceedings of the Massachusetts Historical Society, Third Series, Vol. 71, 133 (Oct., 1953 - May, 1957).

⁵⁰ William Plumer, Jr., *The Life of William Plumer* 405 (1857).

⁵¹ Charles Pelham Curtis, *A Strange Story About Marbury Versus Madison in Salem, 1808*, 13 Proceedings of the Massachusetts Historical Society, Third Series, Vol. 71, 134 (Oct., 1953 - May, 1957).

⁵² *Id.* at 134.

state debts.⁵³ He would later serve as governor and U.S. senator for the state of Massachusetts.⁵⁴ Christopher Gore and other Federalist politicians promulgated the issues relating to the embargo cases to propel the Federalists to victories in the Massachusetts state elections in 1808 and 1809.

IV. Legal Analysis:

Judge Davis' decision methodically evaluated the Federal statute, the constitutionality of the measure, and the ability of a Federal district court to review the constitutionality of a Federal statute. Conspicuously, Judge Davis fails to cite the most glaring precedent for this authority in the form of an 1803 Supreme Court decision called *Marbury v. Madison*.⁵⁵

The William opinion began by noting that the claimants (owners of *The William*) failed to contest the facts of the seizure in the proceedings.⁵⁶ *The Williams's* lawyers artfully chose to reserve their factual arguments for a later date.

... it is suggested, by the counsel for the claimants, that the case may receive material elucidations from the facts that will appear, on the trial of the brigantine Nancy; and they pray for a postponement of a decision on this libel, until a hearing shall be had, relative to that vessel. As that case is necessarily continued, and as that of the Sukey, also pending at this term, appears to have connexion with the transactions in the case of the William, I shall not make up a judgment relative to the facts on this libel, until those of the Nancy and Sukey shall have been tried, or until the further evidence suggested, shall have been heard. But it appears to be necessary to declare an opinion on the constitutional question, which has been so fully discussed, especially as the objection, if available, equally applies to many other cases before the court.⁵⁷

With no material facts at issue, the court proceeded to analyze the federal statutes.

Congress intended the embargo of 1807 to prevent U.S. ships from trading with foreign European powers.

⁵³ *Id.* at 134.

⁵⁴ Samuel Ripley, *Memoir of Christopher Gore* 199 (Cambridge, E. W. Metcalf and Co. 1833).

⁵⁵ 5 U.S. (1 Cranch) 137, 153 (1803).

⁵⁶ *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808) (No. 16,700).

⁵⁷ *Id.* at 615.

.... That an embargo be, and hereby is laid on all ships and vessels in the ports and places within the limits of the United States, cleared or not cleared, bound to any foreign port or place; and that no clearance be furnished to any ship or vessel bound to such foreign port or place...⁵⁸

In two paragraphs, Judge Davis states the provisions of the relevant embargo statutes and clarifies that their exceptions do not apply in the present case. After dealing with these procedural issues, Judge Davis proceeded to confront the more difficult Constitutional question.

Fascinatingly, Judge Davis failed to cite *Marbury v. Madison* as the precedent for a federal court reviewing the constitutionality of a federal statute.⁵⁹ Some scholars contend that Judge Davis was unaware of the case. However, the Supreme Court promulgated the decision five years prior and undoubtedly Judge Davis was aware of the decision.⁶⁰ Most importantly, Judge Davis subscribed to Cranch's Reports of Cases in the Supreme Court of the United States.⁶¹ These reports were published yearly and all six volumes were included in Judge Davis' estate.⁶² Judge Davis' decision to fail to cite *Marbury v. Madison* may be explained by Davis' desire to avoid referencing his own midnight appointment by President Adams.⁶³ While no evidence exists to support this allegation, it is rational to assume that Judge Davis wanted to avoid having his legal authority questioned by critics.

V. The Importance Of The Jury To Constitutional Review

Judge Davis' choice to spend half his decision defending judicial review stems from the unique history of governance in Massachusetts. Dating back to colonial days, ship seizures were

⁵⁸ 2 Stat. 451.

⁵⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁶⁰ Even contemporary lawyers were shocked by the glaring omission and were unable to explain the decision by Judge Davis to avoid all reference to *Marbury v. Madison*. See *Reported in Hall's American Law Journal*, 11 (1809), 255, and in 28 *F. Cas.* 614 (D. Mass. 1808) (No. 16,700).

⁶¹ Charles Pelham Curtis, *A Strange Story About Marbury Versus Madison in Salem, 1808*, 13 Proceedings of the Massachusetts Historical Society, Third Series, Vol. 71, 133, 140 (Oct., 1953 - May, 1957).

⁶² *Id.* at 140.

⁶³ Federal Judicial Center, *History of the Judiciary* (2016), <http://www.fjc.gov/servlet/nGetInfo?jid=576&cid=999&ctype=na&instate=na>.

adjudicated in admiralty courts. While admiralty courts and juries were intended to enforce British law, the distance between the colonies and Britain ensured that admiralty decisions favored local merchants rather than imperial officials.⁶⁴ While the black letter law required the seizure to be upheld by the court system, local colonial governments were forced by popular unrest to allow juries in civil cases brought by the owners of the seized ships until the late 1760s.⁶⁵ These juries proved to be a check on the power of admiralty courts and customs collectors.⁶⁶ This practice changed in 1764 with the passage of the Sugar Act, which created new Admiralty Courts with protections for the officials.

While the Sugar Act successfully changed the admiralty court system and enforced the rule of law, it proved unpopular with colonialists.

In 1764, the Sugar Act created new admiralty courts... these new courts both protected imperial officials in the enforcement of the revenue laws and prevented the colonists from using legal tactics to harass those officials. The Sugar Act, for example, provided for the admiralty courts to hold the goods or ships which had been seized until the owner proved that he was legally innocent of evading the commercial or revenue laws. Unjust seizures could not be remedied, and the burden of proof was on the owners.

For example, a shipowner could win in the admiralty court, but still be required to pay court costs in the event the judge found that “probable cause” existed for the seizure. This lower bar for a seizure protected court officials and the collector of the customs.⁶⁷ While these new rules governing admiralty courts protected the judiciary, politicians, and customs officials, the people of Massachusetts found the Sugar Act’s requirements to be offensive. It is possible that some individuals believed that Massachusetts should return to the usage of the jury as the arbiter of

⁶⁴ Douglas Lamar Jones, “*The Caprice of Juries*”: The Enforcement of the Jeffersonian Embargo in Massachusetts 24 308-309 (1980).

⁶⁵ *Id.* at 308.

⁶⁶ *Id.* at 309.

⁶⁷ *Id.* at 309.

law after the Revolutionary War. Undoubtedly, Massachusetts federalists would prefer jury nullification as their party represented a small minority of the electorate of the United States in 1808.

The passage of the American Embargo in 1807 proved remarkably similar to its British predecessor, the Sugar Act. The American Embargo empowered customs officials to seize ships with minimal evidence. Facing a similar threat, the owners of Massachusetts shipping interests utilized juries as a defense against seizures under the Embargo Acts. New England lawyers navigated two separate legal actions to regain seized vessels and cargo. The Constitution and the Federal Judiciary Act of 1789 ensured that the Embargo would be enforced in Admiralty Courts.⁶⁸ Under the Federal Judiciary Act of 1789, federal district courts obtained original jurisdiction of all admiralty claims. Under matters of admiralty jurisdiction, the district court employed in rem proceedings against the seized property. In these cases, the district court judge decided all matters of law and facts. Admiralty courts routinely approved these seizures under the embargo. Despite initial successes for the federal government in the admiralty court system, a second avenue existed for a shipowner to reclaim his ship.

Under the “savings clause” provision of the Judiciary Act, individuals charged with Embargo violations were charged in personam and allowed a common law jury trial.⁶⁹ The in personam results proved to be remarkably different when tried before a jury.⁷⁰ In 1808, Judge Davis heard 32 cases relating to seizures brought under the embargo. Of those 32, only 4 cases ended in acquittal. In contrast, 19 cases were heard by a jury relating to seized ships. The jury

⁶⁸ *Id.* at 315.

⁶⁹ *Id.*

⁷⁰ *See* Appendix 1.

returned the seized cargo and ships to their owners in all 19 of these cases.⁷¹ The incentive for the lawyer of a seized ship to seek a jury trial was clearly significant. John Quincy Adams, a Federalist until 1808 when he split with his faction over the Embargo and joined the Democratic-Republican party, acknowledged this phenomenon in his correspondence to William B. Giles, a senator for Virginia. In his letter, Adams states that the New England District Court tried forty cases in seven to eight weeks pertaining to the embargo and “not one instance has occurred of a conviction by jury, and finally one of the jurymen is said to have declared, that he never would agree to convict any person under these laws, whatever might be the facts.”⁷²

Faced with numerous successful jury trials, the ingenious lawyers in *The William* sought to argue the constitutionality of the embargo to the jury. The lawyers for *The William* were able to litigate this argument before Judge Davis because it remained a contentious area of law due to the previous history of the New England colonies using jury nullification to protect local interests from British admiralty laws. *United States v. La Vengeance* is the seminal case on whether a jury should be employed for admiralty cases.⁷³ In this 1796 Supreme Court case, the court held that a federal district court deliberating over an admiralty decision must decide the case without a jury. The court stated “we are unanimously of opinion, that it is a civil cause.”⁷⁴ The Supreme Court even created a rule for determining when a district court sat in admiralty jurisdiction over seized cargo. First, the court asked if a seizure of property occurred, or if an individual was arrested. Second, did the statute provide a civil punishment? Third, did the

⁷¹ Charles Pelham Curtis, *A Strange Story About Marbury Versus Madison in Salem, 1808*, 13 Proceedings of the Massachusetts Historical Society, Third Series, Vol. 71, 133, 142 (Oct., 1953 - May, 1957).

⁷² John Quincy Adams to William B. Giles, Boston, January 16, 1809, *Writings of John Quincy Adams*, ed. Worthington C. Ford, 7 vols. (New York, 1913-1917) 111, 287-288.

⁷³ 3 U.S. 3 Dall. 297 297 (1796).

⁷⁴ *Id.* at 301.

violation occur in the water?⁷⁵ The facts of *La Vengeance* show affirmatively that admiralty jurisdiction should have forbade a jury trial in *United States v. The William*. The question that arises is why did Judge Davis fail to cite *La Vengeance* on this issue?

While the Supreme Court ruled on the issue of juries in admiralty law in *La Vengeance*, the argument continued to be raised by admiralty lawyers for the next decade. In *The Schooner Betsy and Charlotte*, the plaintiffs' attorneys contended that a jury should determine the facts in an admiralty court.⁷⁶ Chief Justice Marshall quickly settles this point in his opinion by stating "But the case of the Vengeance settles that point."⁷⁷ The *Schooner Betsey* took place eleven years after *La Vengeance* determined that admiralty cases would be held without a jury and one year before *U.S. v. The William*. Seemingly, plaintiff's attorneys continued to argue constitutional grounds to juries in an attempt to sway the opinion of the jury.

In response to these efforts to argue admiralty seizures before a jury, a battle arose concerning the role of the jury.⁷⁸ Judges continued to assert their dominance over the law, but juries often rejected clear facts based on constitutional arguments.

By the first decade of the nineteenth century, legal certainty came to be viewed in terms of legal continuity as determined by judges, not juries; juries now decided only the facts of the case, not the law. Judges and lawyers had begun to fear the arbitrariness of juries, as the quest for legal predictability dominated judicial thought.⁷⁹

Despite being threatened with contempt by the judiciary, federalists began to argue the constitutionality of the embargo to juries. In *United States v. The William*, Judge Davis was

⁷⁵ Douglas Lamar Jones, "The Caprice of Juries": The Enforcement of the Jeffersonian Embargo in Massachusetts 24 316 (1980) citing *United States v. La Vengeance*, 3 U.S. 3 Dall. 297, 310 (1796)

⁷⁶ *United States v. The Schooner Betsey*, 8 U.S. (4 Cranch) 443 (1807).

⁷⁷ *Id.* at 443.

⁷⁸ Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, 84-85 (Harvard University Press, 2d ed. 1977).

⁷⁹ Douglas Lamar Jones, "The Caprice of Juries": The Enforcement of the Jeffersonian Embargo in Massachusetts 24 310 (1980).

forced to admonish Mr. Dexter for arguing the constitutionality of the embargo and threatened to hold him in contempt of court.⁸⁰ Despite these threats, Samuel Dexter continued to argue the constitutionality of the embargo due to a “moral obligation to his client.” Samuel Dexter recognized that his clients would be unable to win on the merits of their case. However, he realized that a Massachusetts jury would be sympathetic to the plight of local ship owners and would view the embargo as unconstitutional. While Samuel Dexter lost his attempt to litigate the constitutionality of the embargo, his efforts were rewarded by the jury’s decision that the facts failed to prove that a violation of the embargo occurred.⁸¹

The problem of jury nullification troubled numerous other judges during this time period.⁸² Judge Davis tackles the issue of jury nullification for several pages in his opinion by citing *U.S. v. Callender* for the premise that only a judge can determine the constitutionality of a federal action.⁸³ In the trial proceedings of *U.S. v. Callender*, Justice Samuel Chase, a signer of the Declaration of Independence, attempted to lecture a jury on their inability to contemplate the constitutionality of a statute in his jury instructions.

Was it ever intended, by the framers of the constitution, or by the people of America, that it should ever be submitted to the examination of a jury, to decide what restrictions are expressly or impliedly imposed by it on the national

⁸⁰ Charles Pelham Curtis, *A Strange Story About Marbury Versus Madison in Salem, 1808*, 13 Proceedings of the Massachusetts Historical Society, Third Series, Vol. 71, 133, 135-136 (Oct., 1953 - May, 1957).

⁸¹ *Id.* at 135-136, 145.

⁸² Judge Davis was not the only judge who remarked upon the unwillingness of Massachusetts juries to find shipowners guilty of evading the embargo. Justice Horace Gray, in *Sparf v. United States*, echoed this opinion in his dissent. *Sparf v. U.S.* 156 U.S. 51 (1895).

⁸³ *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808) (Case No. 16,700). The *Callender* case is a fascinating example of how tabloids and gossip are not modern creations. James T. Callender attempted to blackmail the president into appointing him as postmaster. Faced with rejection, Callender used his position as an editor at a Federalist newspaper to publish numerous articles relating to: Jefferson corruption allegations, Jefferson’s funding of pamphlets critical of the Federalists, and accused Jefferson of fathering children with his slave named Sally Hemings. See John Chester Miller, *The Wolf by the Ears* (The Free Press, 1977).

legislature? I cannot possibly believe that congress intended, by the statute, to grant a right to a petit jury to declare a statute void.⁸⁴

Justice Chase interrupted a trial to remind the jury of their duty to respect his finding of law. His actions show that the early American judiciary worried that their findings of law could be easily overridden by a jury. Justice Chase goes further to explicitly state that only a judge can properly interpret a statute.

From these considerations I draw this conclusion, that the judicial power of the United States is the only proper and competent authority to decide whether any statute made by congress (or any of the state legislatures) is contrary to, or in violation of, the federal constitution.⁸⁵

Judge Davis faced a similar problem of attorney's seeking to expound legal and constitutional arguments to a jury. Judge Davis chose to cite *U.S. v. Callender* as opposed to *Marbury v. Madison* to reject the premise of jury nullification of an illegal law. The *Callender* case shows that a jury is not qualified to deliberate on the constitutionality of a federal statute. Presumably, Judge Davis chose the well-respected Samuel Chase's opinion in place of Justice Marshall's in an effort to defend the power of the court. Judge Davis undoubtedly realized that referencing his own dubious appointment would fail to strengthen his claim to being the final arbiter of constitutionality on a matter.

VI. Judge Davis' Version of Judicial Review

Due to Judge Davis' reluctance to cite *Marbury v. Madison* as precedent for judicial review, he eloquently created his own definition for judicial review in *The William*. Judge Davis contrasts between legal discretion and political discretion. In contrast, Chief Justice Marshall

⁸⁴ United States v. Callender, 25 F. Cas. 239, 255 (C.C.D. Va. 1800) (No. 14,709). Federal Judicial Center, *The Sedition Act Trials — Historical Background and Documents* (2016), http://www.fjc.gov/history/home.nsf/page/tu_sedition_hd_sc_charge.html.

⁸⁵ *Id.*

defines judicial review as relying on fixed principles on which nearly all Americans agreed.

While both judges create separate definitions for judicial review, the impact of both definitions is a deference to the legislative branch.

Before a court can determine, whether a given act of congress, bearing relation to a power with which it is vested, be a legitimate exercise of that power, or transcend it, the degree of legislative discretion, admissible in the case, must first be determined. Legal discretion is limited... Political discretion has a far wider range. It embraces, combines and considers, all circumstances, events and projects, foreign or domestick, that can affect the national interests.⁸⁶

Under Judge Davis' interpretation of the judicial review, a federal court could act to enforce a prohibition or restriction specifically stated in the Constitution. In cases where no violation of the constitution exists, a federal court should defer to the political discretion of the legislative branch.

Judge Davis determined that the Embargo of 1807 and subsequent acts passed constitutional review. Judge Davis found that the framers of the Constitution intended for the new government to be able to tackle national problems that implicate interstate commerce.

It is well understood, that the depressed state of American commerce, and complete experience of the inefficacy of state regulations, to apply a remedy, were among the great, procuring causes of the federal constitution... The care, protection, management and controul, of this great national concern, is, in my opinion, vested by the constitution, in the congress of the United States; and their power is sovereign, relative to commercial intercourse...⁸⁷

Judge Davis determined that the power to regulate interstate commerce is specifically stated within the Constitution's Article I, Section 8, Clause 3 Interstate Commerce power. With no specific prohibition or restriction contained within the Constitution, Judge Davis found that Congress legally exercised its interstate commerce power by enacting the Embargo of 1807.

⁸⁶ United States v. The William, 28 F. Cas. 614 (D. Mass. 1808) (No. 16,700).

⁸⁷ *Id.*

Judge Marshall believed in “fixed principles on which nearly all Americans agreed.”⁸⁸

Marshall stated that only government actions contrary to these fixed principles could be overturned.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.⁸⁹

For Marshall, the majority of Americans believed in a set of principles that were codified within the U.S. Constitution. In effect, Justice Marshall is also deferring to the legislative branch, except in specific cases that violate the principles enshrined in the Constitution. While Justice Marshall never ruled on the Embargo of 1807, Marshall acknowledged the “universal power to of the Government to impose embargoes” in *Gibbons v. Ogden*.⁹⁰

Justice Marshall and Judge Davis’ apolitical stances and deference to the Democratic-Republican administration may be linked to Jefferson’s attempts to impeach Federalist judges. During the Jefferson administration, John Pickering, Samuel Chase, Richard Peters, and Peter Bruin were all investigated by the House of Representatives at the request of the executive branch. Of the four judges, Congress only voted in favor of impeaching Judge Pickering.⁹¹ President Jefferson’s actions against the judiciary undoubtedly reverberated throughout the legal community.

This theory of Federalist judges supporting the embargo due to a fear of impeachment is supported by Judge William Johnson’s brave decision to invalidate key provisions of the

⁸⁸ William E. Nelson, *Marbury, Madison, Marshall, and Massachusetts*, 9 Mass. Legal Hist. 49, 61 (2003).

⁸⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)

⁹⁰ *Gibbons v. Ogden*, 22 U.S. 191 (9 Wheat.) 1 (1824).

⁹¹ As of 2016, Congress has investigated only sixty-one judges for impeachment. See Warren S. Grimes, *Hundred-Ton Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA Law Review 1209 (1991).

embargo. Judge William Johnson, a South Carolinian Democratic-Republican politician and a Jefferson appointee to the Supreme Court, invalidated provisions of the original embargo in *Gilchrist v. The Collector of Charleston*.⁹² Judge Johnson found that the embargo law only allowed the President to detain vessels. Johnson determined that the President unlawfully deputized the customs collectors via executive order to enforce the embargo.⁹³ Subsequently, Congress passed the Enforcement Act and customs collectors were empowered to follow “instructions as the President may give and such general rules as he may prescribe for the purpose...”⁹⁴ Judge Johnson’s decision to invalidate parts of the embargo may show that federalist judges were more careful to avoid conflicts with the executive branch for fear of impeachment.

VII. Aftermath

Judge Davis ruled in favor of the embargo and protected the Constitution. Nonetheless, *The William* ended up being returned to the claimants in remand at admiralty court.⁹⁵ The result illustrates that *The William*’s attorneys chose the best outcome for their clients by failing to appeal the decision by Judge Davis. Marshall’s decision in *Gibbons v. Ogden* shows that an appeal to the Supreme Court would have failed on its merits.⁹⁶ *The William*’s lawyers almost certainly realized that a jury trial on the facts yielded a higher chance of success.

⁹² *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 361 (C.C.D.S.C. 1808) (No. 5,420).

⁹³ *Id.*

⁹⁴ 2 Stat. 506, 509 (1809).

⁹⁵ Ironically, the British seized the *William* on October 11, 1814 during the War of 1812. Bud Hannings, *The War of 1812: A Complete Chronology with Biographies of 63 General Officers* 146 (McFarland 2012).

⁹⁶ *Gibbons v. Ogden*, 22 U.S. 191 (9 Wheat.) 1 (1824). Charles Pelham Curtis, a member of the Massachusetts Historical Society, contends that Samuel Dexter knew all along that Judge Davis would reject the Constitutional argument. Mr. Curtis also contends that Samuel Dexter realized that Chief Justice Marshall would have affirmed Judge Davis’ decision. Mr. Curtis bases this analysis on Samuel Dexter’s residence in Washington D.C. from 1799 until 1805 and Mr. Dexter’s personal dealing with Chief Justice Marshall. Little evidence exists to support this conjecture by Mr. Curtis. However, his theory is supported by the decision of the lawyers for *The William* to refuse to appeal the case and their subsequent victory at trial. See Charles Pelham Curtis, *A Strange Story About Marbury*

The Federalist party benefitted immensely from the negative public opinion towards President Jefferson's administration surrounding the embargo cases. The Federalist party recaptured the Massachusetts state legislature in 1808. In 1809, Christopher Gore, an attorney for the owners of *The William*, successfully campaigned against the embargo and became governor. The success would prove short lived as Governor Gore would proceed to lose reelection the following year.⁹⁷ In response to a series of Federalist victories in 1809, the newly elected Madison administration successfully petitioned President Jefferson to repeal the Embargo as one of his last acts as President. The Federalist decision to focus primarily on the embargo as a platform backfired, as they failed to retain votes upon its appeal.

Joseph Story's varied, moderate stances on the embargo doomed his local political career as a member of the Massachusetts Democratic-Republican party. Two weeks after Justice Davis's decision in the *The William*, the Democratic-Republican Caucus selected a little known physician over Mr. Story as their candidate for Congress.⁹⁸ Even in today's political climate, it would be unusual for an incumbent to lose their party's nomination for re-election. As an explanation for this upset, a prominent Democratic-Republican Doctor Bentley stated, "The principal cause of our suffering is from the young lawyer Story whose duplicity has been very injurious to us. We could not agree to put him up and many were attached to him because we rejected him."⁹⁹

Versus Madison in Salem, 1808, 13 Proceedings of the Massachusetts Historical Society, Third Series, Vol. 71, 133 (Oct., 1953 - May, 1957).

⁹⁷ Samuel Ripley, *Memoir of Christopher Gore* 217 (Cambridge, E. W. Metcalf and Co. 1833). To illustrate how devastating the embargo impacted Democratic-Republican popularity in New England, Thomas Jefferson won Massachusetts in the 1804 President Election. Jefferson's liberal land policies in District of Maine proved to be a huge boon to his voting bloc. Only the states of Delaware and Connecticut failed to allot their votes to Jefferson in the 1804 election. By 1808, Massachusetts and Rhode Island joined Delaware and Connecticut in voting against the Democratic-Republican candidate. The Federalist resurgence in 1808 was directly tied to Jefferson's decision to champion and maintain the embargo. *Id.*

⁹⁸ Gerald T. Dunne, *Joseph Story: The Germinal Years*, 75 Harv. L. Rev. 717 (1962).

⁹⁹ *Id.* at 717.

Despite his party's decision to nominate Daniel Kilham as a replacement, Joseph Story proceeded to serve as a lame duck representative in the second session of the Tenth Congress.¹⁰⁰ Story proceeded to heroically campaign for an end to the embargo. Story's personal efforts to gather votes to repeal the embargo resulted in Story earning the lifetime ire of Thomas Jefferson.¹⁰¹ Story later stated that he had "(n)ever considered the embargo a measure which went to the utmost limit of constructive power under the Constitution."¹⁰² Joseph Story's later statements and actions justified the lack of faith shown to him by the Massachusetts Democratic-Republican Party and their ultimate decision to replace him on the ticket.

Despite the lack of faith showed to Joseph Story by local party members and Jefferson, President Madison chose to successfully nominate Story as an associate justice of the United States Supreme Court. President Madison decided to appoint Story against the counsel of Thomas Jefferson and his own reservations.¹⁰³ Madison's final decision to nominate Story came only after several other individuals declined the nomination and Story remained as one of the few qualified Democratic-Republican New Englanders. Ironically, Joseph Story is today remembered as one of the most prodigious Supreme Court Justices and is renowned for writing more opinions during the Marshall era of the Supreme Court than any other Justice except for Marshall himself.

¹⁰⁰ Shockingly, the Federalists defeated Story's replacement for the House of Representatives in the election. It is possible that the Democratic-Republican party negatively impacted its representation in Congress by replacing the popular Story. *Id.* at 717.

¹⁰¹ Thomas Jefferson, *The Writings of Thomas Jefferson 1808*, at ix, 277 (Paul Leicester Ford ed., 1898).

¹⁰² Gerald T. Dunne, *Joseph Story: The Germinal Years*, 75 Harv. L. Rev. 717 (1962) (citing Letter to William W. Story, Jan. 23, 1821, in *Miscellaneous Writings of Joseph Story* 34 (W. W. Story ed., 1852)).

¹⁰³ *A Companion to James Madison and James Monroe* 122 (Stuart Leibiger et al. eds., 2012).

Joseph Story did not represent President Madison's first choice for the nomination to the Supreme Court. President Madison's first choice declined the nomination and Alexander Wolcott's nomination failed to pass the senate. After John Quincy Adams rejected Madison's offer for the seat, Madison viewed Joseph Story as one of the last remaining Democratic-Republican New Englander's remaining. As such, President Madison chose to abandon his reservations and nominate Story. *Id.*

President Jefferson, a proponent of an agrarian society for the United States who lambasted manufacturing as an evil, extolled the growth of the manufacturing sector in the United States as a positive result of the embargo.¹⁰⁴ The embargo is today viewed as President Jefferson's greatest failure and one of the worst financial calamities to befall the United States of America. Nevertheless, President Jefferson maintained his belief in the embargo, even after appeal. After the War of 1812 began, Jefferson stated "That a continuance ... for two months longer would have prevented our war."¹⁰⁵ Jefferson continued to defend the embargo for the rest of his life and a few months before his death stated that the embargo was "a measure which persevered in a little longer... would have effected its object completely."¹⁰⁶

VIII. Legal Conclusion:

Judge Davis' decision represents one of the last judicial opinions on jury nullification to be litigated before a Federal Court. Despite efforts by the judiciary to control juries, juries remain a check on unpopular laws in the modern era. In addition, Judge Davis' opinion helped to irreparably assert the fact that an United States admiralty court will hear a case without the presence of a jury.

¹⁰⁴ See Messages and Papers of the Presidents 1, 443 (James D. Richardson 1897).

¹⁰⁵ Jefferson, Writings, ix, 521.

¹⁰⁶ Jefferson, Writings, x, 354.

Appendix

1.

Cases decided by:	1808	1809	Total
Judge John Davis			
Convictions	14	12	26
Acquittals	4	20	24
No Contest	14	6	24
Total	32	38	70
Federal Juries			
Convictions	0	12	12
Acquittals	19	34	53
Total	19	46	65
Grand Total:	51	84	135

¹⁰⁷

¹⁰⁷ Douglas Lamar Jones, “*The Caprice of Juries*”: *The Enforcement of the Jeffersonian Embargo in Massachusetts* 24 326 (1980) (citing File Papers, United States District Court for Massachusetts, September 1803 through December 1812, boxes 5). It is also important to note three districts were added to the jury pool in 1809 (from 13 in 1808). The addition of these two districts decreased the amount of jurors derived from Salem and Boston.