

FEDERALISM IN THE BILL OF RIGHTS: UNREASONABLE SEARCHES AND UNUSUAL PUNISHMENTS

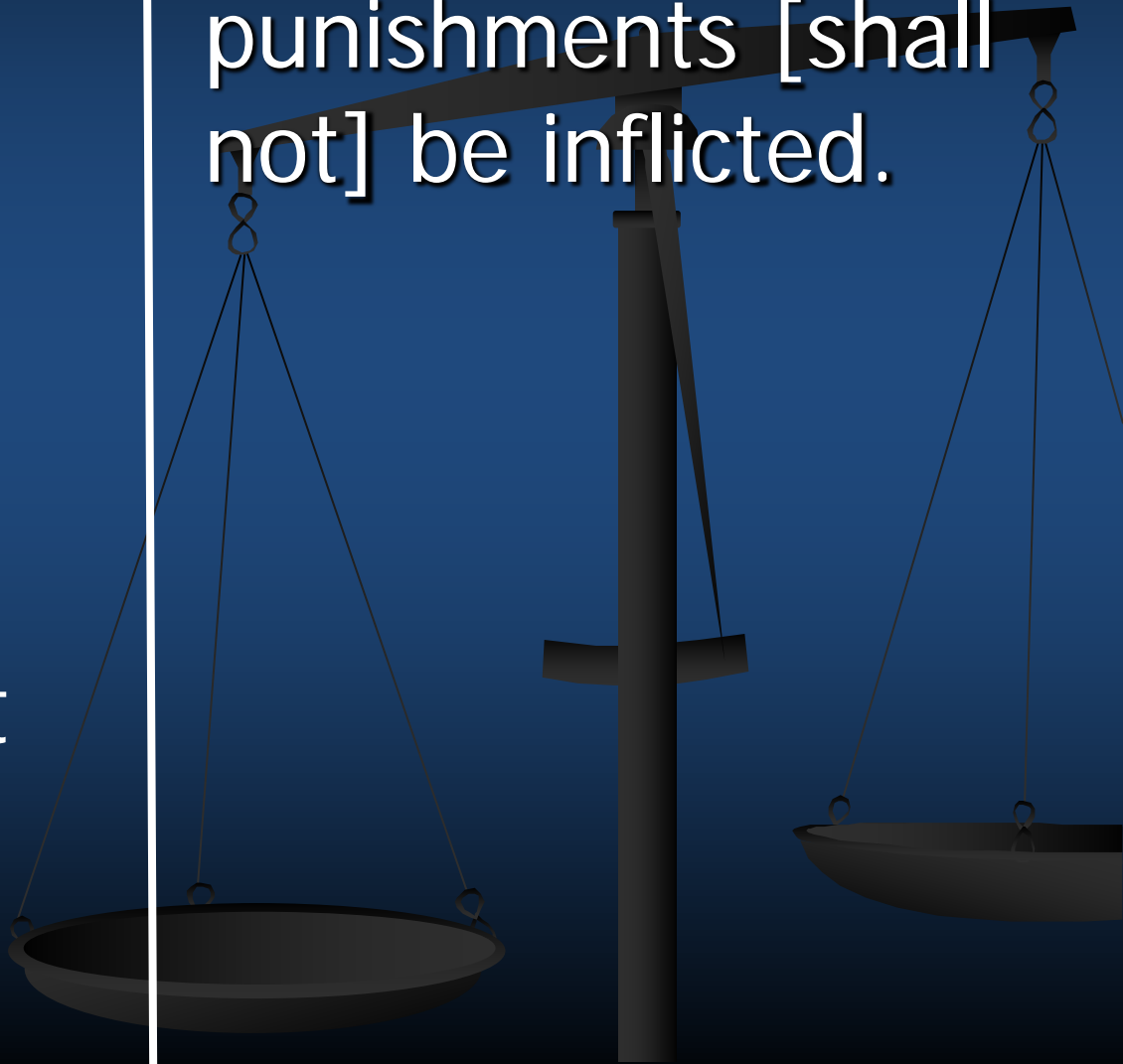


Michael J. Zydney Mannheimer
Salmon P. Chase College of Law
Northern Kentucky University
Highland Heights, KY
mannheimem1@nku.edu

May 25, 2016

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated

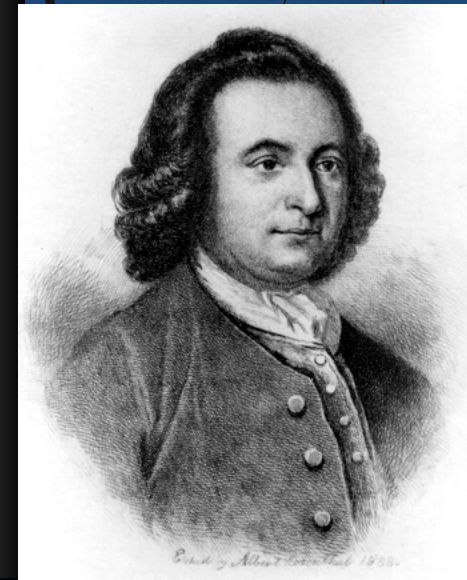
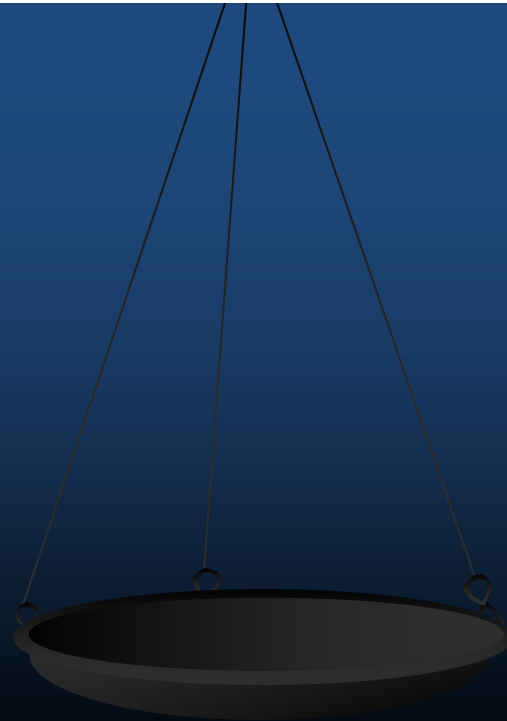
[C]ruel and unusual punishments [shall not] be inflicted.





Objections to the Constitution of Government formed by the Convention.—(1787)

There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security.¹ Nor are the people secured even in the Enjoyment of the Benefits of the common-Law: which stands here upon no other Foundation than it's having been adopted by the respective Acts forming the Constitutions of the several States.

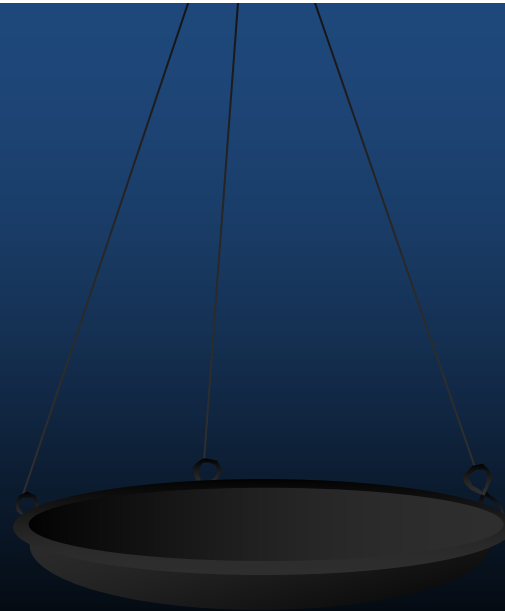


Letters of Centinel

To the People of Pennsylvania.

Friends, Countrymen, and Fellow-Citizens,

From the foregoing illustration of the powers proposed to be devolved to Congress, it is evident, that the general government would necessarily annihilate the particular governments, and that the security of the personal rights of the people by the state constitutions is superseded and destroyed; hence results the necessity of such security being provided for by a bill of rights to be inserted in the new plan of federal government. What excuse can



assertions that there are no wolves in our country, if we see their footsteps in every public path, we should be very credulous and unwise to trust our flocks abroad, and to believe that those who advised us to do it were very anxious for their preservation.

In this Constitution, sir, we have departed widely from the principles and political faith of '76, when the spirit of liberty ran high, and danger put a curb on ambition. Here we find no security for the rights of individuals, no security for the existence of our state governments; here is no bill of rights, no proper restriction of power; our lives, our property, and our consciences, are left wholly at the mercy of the legislature, and the powers of the judiciary may be extended

to any degree short of almighty. Sir, in this Constitution we have not only neglected, — we have done worse, — have openly violated, our faith, — that is, our public faith.

The seventh article, which is in these words, "The ratifications of the Conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same," is so flagrant a violation of the public faith of these states, so solemnly pledged to each other

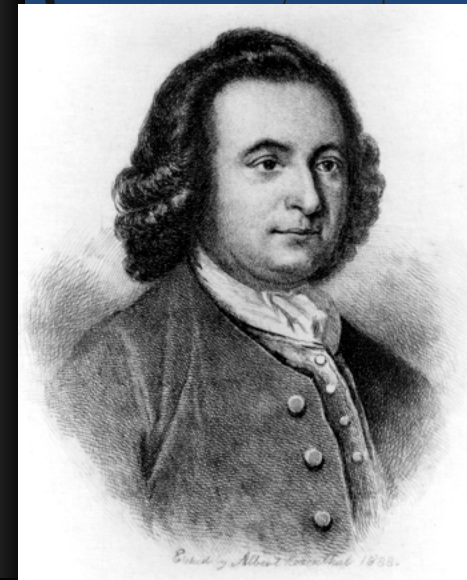


The Treadwells.
HON. THOMAS TREADWELL,
A Statesman of the Revolution, and a
"Gentleman of the Old School."
For 24 Years Surrogate of
Clinton County.

hands, may not cast a gloom upon the temple of freedom, the recent purchase of our toil and treasure. When, therefore, I consider it as the means of annihilating the constitutions of the several States, and consequently the liberties of the people, I should be wanting to my constituents, to myself and to posterity, did I not exert every talent with which heaven has endowed me to counteract the measures that have been taken for its adoption. That it was the design of the late federal convention to absorb and abolish the individual sovereignty of the States, I seek no other evidence but this system; for as the honorable delegate to that body has recommended, I am also satisfied to judge of the tree by its fruit. When, therefore, I behold it thus systematically constructed for the accomplishment of that object, when I recollect the talents of those who framed it, I cannot hesitate to impute to them an intention corresponding with the principles and operation of their own work. Finally, Sir, that the dissolution of our State constitutions will produce the ruin of civil liberty is a

Objections to the Constitution of Government formed by the Convention.—(1787)

There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security.¹ Nor are the people secured even in the Enjoyment of the Benefits of the common-Law: which stands here upon no other Foundation than it's having been adopted by the respective Acts forming the Constitutions of the several States.





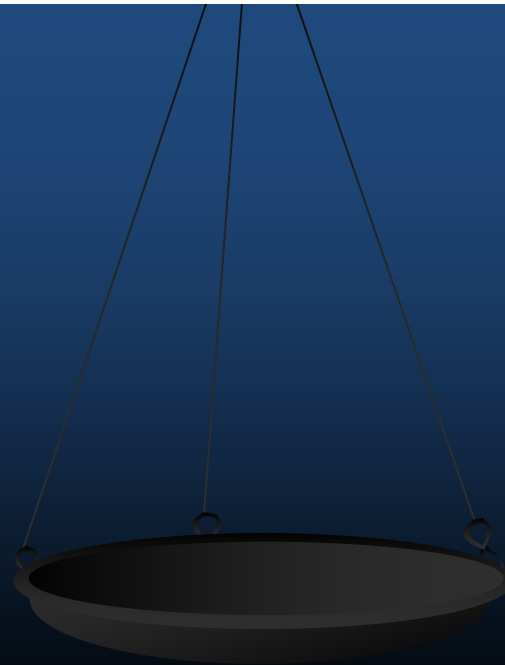
Thirteen sovereigns



One sovereign

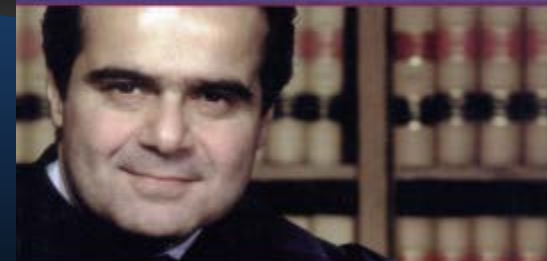


be *the legislator*.”⁶ I do not suggest that Madison was saying that common-law lawmaking violated the separation of powers. He wrote in an era when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely “discovered” rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact “make” the common law, and that each state has its own.



A MATTER OF INTERPRETATION

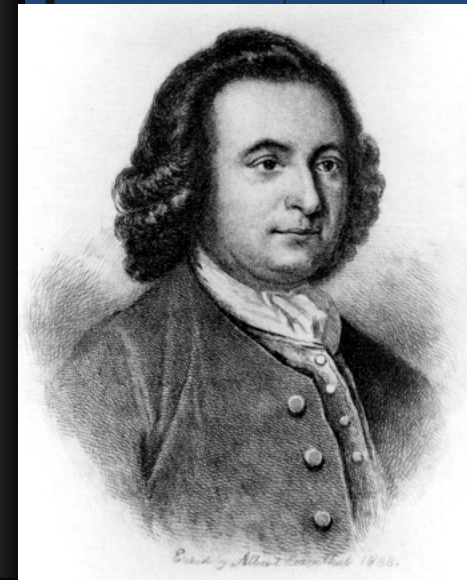
FEDERAL COURTS AND THE LAW



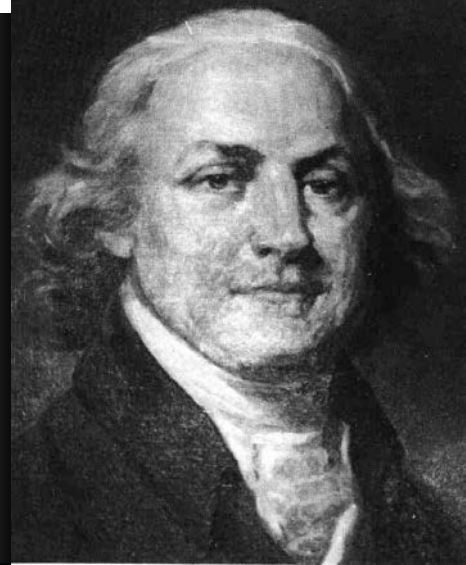
BY ANTONIN SCALIA

Objections to the Constitution of Government formed by the Convention.—(1787)

There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security.¹ Nor are the people secured even in the Enjoyment of the Benefits of the common-Law: which stands here upon no other Foundation than it's having been adopted by the respective Acts forming the Constitutions of the several States.



If a citizen of Maryland can have no benefit of his own bill of rights in the **confederal** courts, and there is no bill of rights of the United States—how could he take advantage of a natural right founded in reason, could he plead it and produce Locke, Sydney, or Montesquieu as authority? How could he take advantage of any of the common law rights, which have heretofore been considered as the birthright of Englishmen and their descendants, could he plead them and produce the authority of the English judges in his support? Unquestionably not, for the authority of the common law arises from the express adoption by the several States in their respective constitutions, and that in various degrees and under different **modifications**—If admitted at all, I do not see to what extent, and if admitted, it must be



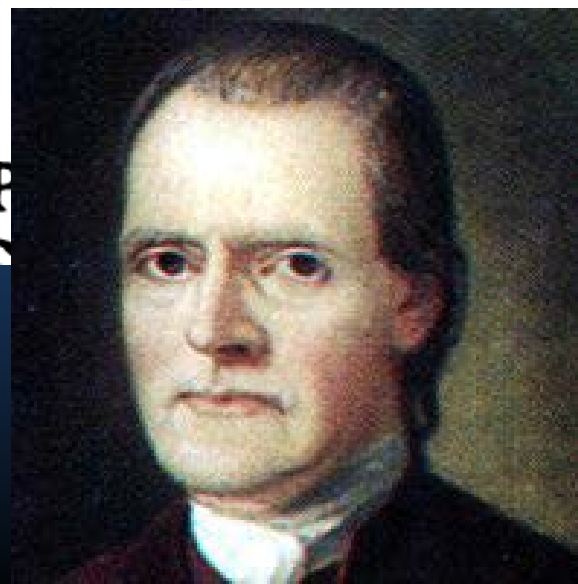
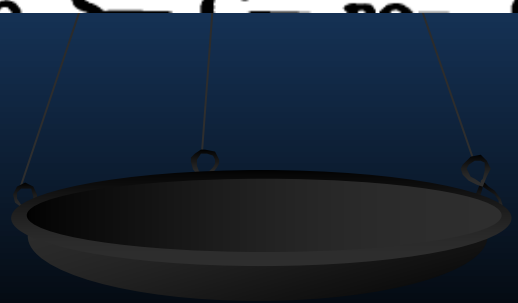
the State declarations, a bill might be prepared in a few hours.⁶

Mr Gerry concurred in the idea & moved for a Committee to prepare a Bill of Rights. Col: Mason 2ded the motion.

Mr. Sherman. was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient — There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.

Col: Mason. The Laws of the U. S. are to be paramount to State Bills of Rights. On the question prepare a Bill of Rights

N. H. no. Mas. abst. Ct no. N— J— no. P
Md no Va no N— C no S— C no O



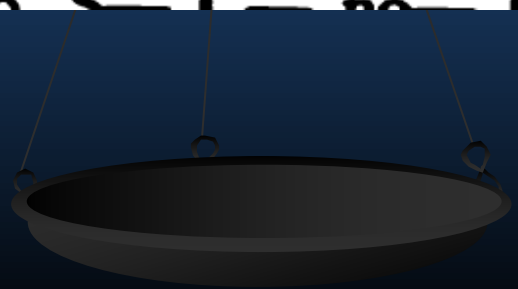
the State declarations, a bill might be prepared in a few hours.⁶

Mr Gerry concurred in the idea & moved for a Committee to prepare a Bill of Rights. Col: Mason 2ded the motion.

Mr. Sherman. was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient — There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.

Col: Mason. The Laws of the U. S. are to be paramount to State Bills of Rights. On the question for prepare a Bill of Rights

N. H. no. Mas. abst. Ct no. N— J— no. Pa. n
Md no Va no N— C no S— C no Co



TRIAL

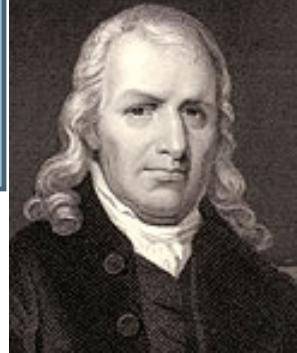
OF

ROBERT WORRALL

OPINION OF COURT.

197

it must, I presume, be that of England; and, yet, it is impossible to trace when, or how, the system was adopted, or introduced. With respect to the individual States, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither, as a birth-right and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition; and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different States, will soon discover, that the whole of the common law of England has been nowhere introduced; that some States have rejected what others have adopted; and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one State, is not the common law of another; but the common law of England, is the law of each State, so far as each State has adopted it; and it results from that position, connected with the



H. OF R.]

Punishment of Crime.

[JULY, 1798.]

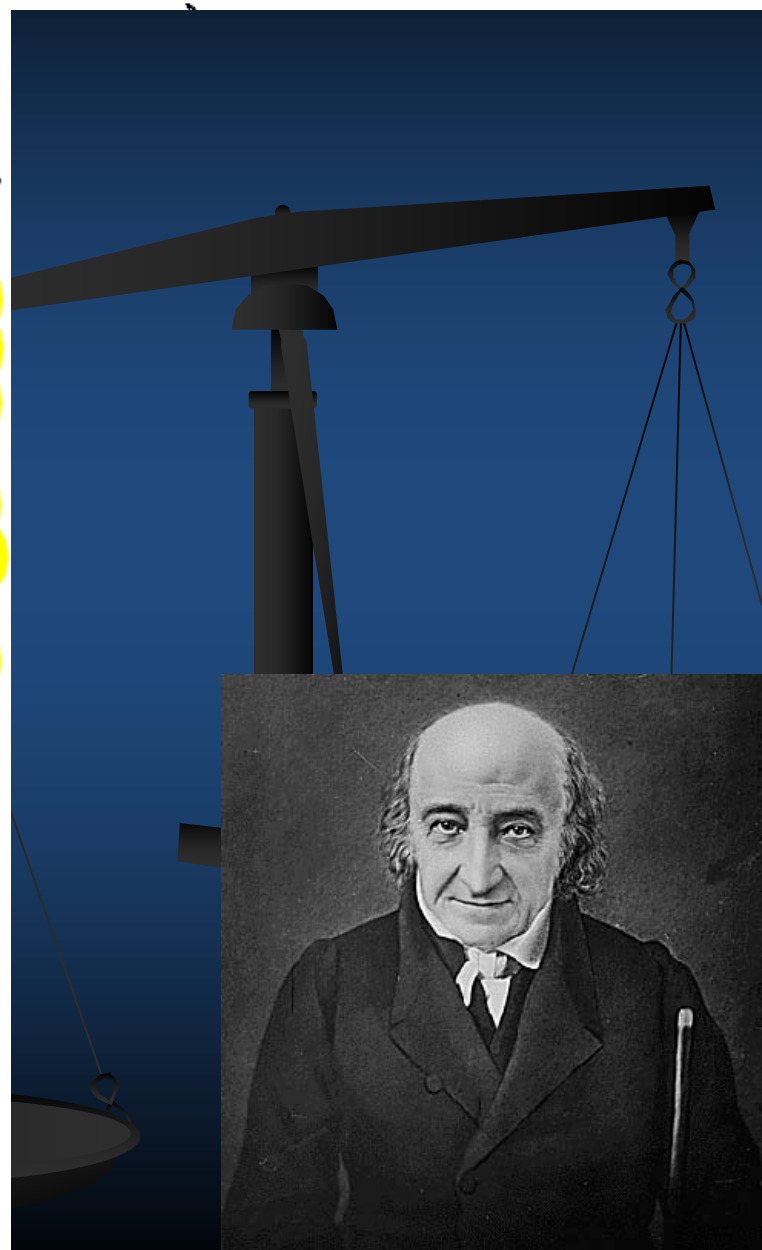
amendment had become necessary in order to restore to juries their Constitutional power.

How far a similar doctrine might have prevailed in the United States, it was difficult to ascertain; but if it was questionable in any one of the States, it was proper to settle it in this law.

There is not, Mr. G. said, any such thing as a common law of the United States. The common law of Great Britain received in each colony, had in every one received modifications arising from their situation; those modifications differed in the several States; and now each State had a common law, in its general principles the same, but in many particulars differing from each other.

The Courts of the Union had no common law jurisdiction, and the object of the second section of this bill was to give them that jurisdiction in the case of libels against Government. If, therefore, there be in that very case any principle not perfectly settled by the common law of Great Britain, or not uniformly recognised by the common law of the respective States, it becomes necessary to settle the point in the same law which gives this new jurisdiction.

The objection that the amendment would give



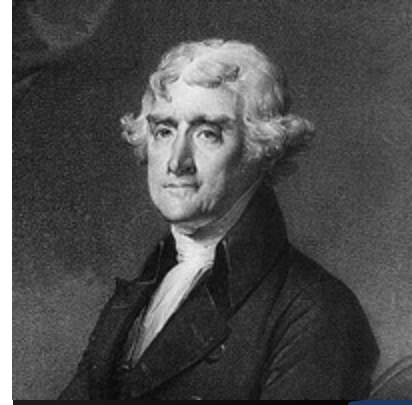
TO EDMUND RANDOLPH.

MONTICELLO, August 18, 1799.

DEAR SIR,—I received only two days ago your favor of the 12th, and as it was on the eve of the return of our post, it was not possible to make so prompt a despatch of the answer. Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force and cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The bank law, the treaty doctrine, the sedition act, alien act, the undertaking to change the State laws of evidence in the State courts by certain parts of the stamp

act, &c., &c., have been solitary, unconsequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the United States, without the adoption of their Legislature, and so infinitively beyond their power to adopt. If this assumption be yielded to, the State courts may be shut up, as there will then be nothing to hinder citizens of the

same State suing each other in the federal courts in every case, as on a bond for instance, because the common law obliges payment of it, and the common law they say is their law. I am happy you have taken up the subject; and I have carefully perused and considered the notes you enclosed, and find but a single paragraph which I do not approve. It is that wherein (page two) you say, that laws being emanations from the legislative department, and, when once enacted, continuing in force from a presumption that their will so continues, that that presumption fails and the laws of course fall, on the destruction of that legislative department. I do not think this is the true bottom on which laws and the administering them rest. The whole body of the nation is the sovereign legislative, judiciary and executive power for itself. The inconvenience of meeting to exercise these powers in person, and their inaptitude to exercise them, induce them to appoint special organs to declare their legislative will, to judge and to execute it. It is the will of the



The novelty, and, in the judgment of the committee, the extravagance of this pretension, would have consigned it to the silence, in which they have passed by other arguments, which an extraordinary zeal for the act has drawn into the discussion; but the auspices under which this innovation presents itself, have constrained the committee to bestow on it an attention, which other considerations might have forbidden.

In executing the task; it may be of use to look back to the colonial state of this country, prior to the Revolution; to trace the effect of the Revolution which converted the colonies into independent States; to inquire into the import of the articles of confederation, the first instrument by which the union of the States was regularly established; and, finally, to consult the Constitution of 1787, which is the oracle that must decide the important question.

In the state prior to the Revolution, it is certain that the common law, under different limitations, made a part of the colonial codes. But whether it be understood that the original colonists brought the law with them, or made it their law by adoption, it is equally certain, that it was the separate law of each colony within its respective limits, and was unknown to them, as a law pervading and operating through the whole, as one society.

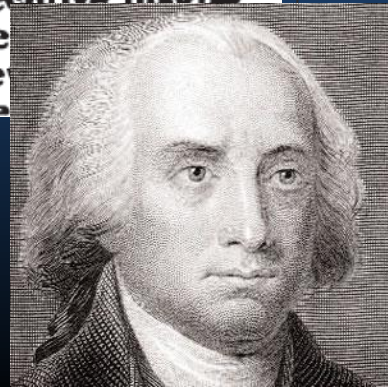
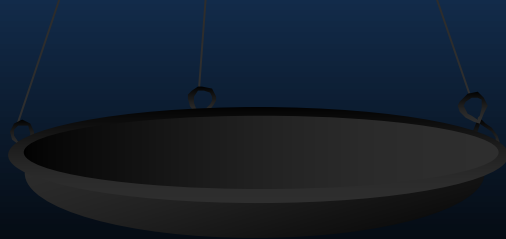
It could not possibly be otherwise. The common law was not the same in any two of the colonies; in some the modifications were materially and extensively different. There was no common Legislature, by which a common will could be expressed in the form of a law; nor any common magistracy, by which such a law could be carried into practice. The will of each colony, alone and separately, had its organs for these purposes.

This stage of our political history furnishes no foothold for the patrons of this new doctrine.

Did, then, the principle or operation of the great event which made the colonies independent States, imply or introduce the common law, as a law of the Union?

The fundamental principle of the Revolution was, that the colonies were co-ordinate members with each other, and with Great Britain, of an empire, united by a common executive sovereign, but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American parliament, as in the British parliament. And the royal prerogative was in force in each colony, by virtue of its acknowledging the King for its executive magistrate, as it was in Great Britain, by virtue of a like acknowledgment there. A de

There was a time, indeed, when an exception to the legislative separation of the se



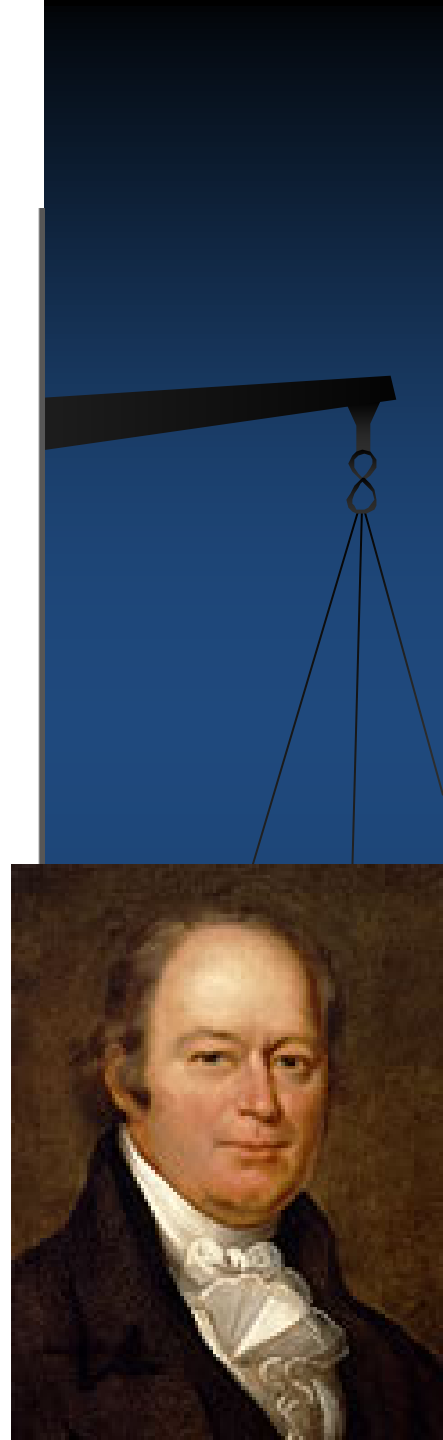
The United States v. Hudson and Goodwin.

7 Cranch's Reports, 32.

which congress possesses to create courts of inferior jurisdiction necessarily implies the power to limit the jurisdiction of those courts to particular objects ; and when a court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction much more extended ; in its nature very indefinite ; applicable to a great variety of subjects ; **varying in every state in the union** ; and with regard to which there exists no definite criterion of distribution between the district and circuit courts of the same district.

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that upon the formation of any political body, an implied power to preserve its own existence, and promote the end and object of its creation necessarily results to it. But without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government ; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.



II. For what causes of suspicion an arrest may be.

By the statute of 34 *Ed. 3. c. 1.* power is given to the justices of the peace, to arrest all those whom they find by indictment, or by *suspicion*, and to put them in prison.

And the causes of suspicion, which are generally agreed to justify the arrest of an innocent person, for felony, are these that follow :

(1) The common fame of the country ; but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. 2 *Haw.* 76.

(2) The being found in such circumstances, as induce a strong presumption of guilt ; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand ; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. 2 *Haw.* 76.

(3) The behaving one's self in such a manner as betrays a consciousness of guilt ; as where a man accused of felony, on hearing that a warrant is taken out against him doth abscond. *id.*

But the party who flies from an arrest, for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him. 2 *Haw.* 122.

(4) The being found in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 *Haw.* 76. 2 *Inst.* 52.

(5) The living an idle, vagrant, and disorderly life, without having any visible means to support it. 2 *Haw.* 76.

(6) The being pursued by hue and cry. 2 *Haw.* 76.

For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted ; he may be attached and imprisoned by the law of the land. 2 *Inst.* 52.

But generally, no such cause of suspicion, as any of the above mentioned, will justify an arrest, where in truth no such crime hath been committed ; unless it be in the case of hue and cry. 2 *Haw.* 76.

THE MANNER, AND LEGALITY, OF ARRESTS.
SUSPICION.

THE Causes of Suspicion to justify an Arrest are as followeth.

All such Circumstances as induce a Presumption of Guilt; as, coming out of a House wherein Murder hath been committed with a bloody Knife in One's Hand.

The being found in Possession of any Part of stolen Goods, without being able to give a probable Account of coming honestly by them.

Any Behaviour which betrays a Consciousness of Guilt; as, where a Person absconds on hearing a Warrant is taken out against him.

The being found in Company with a notorious Offender at the Time of the Offence, or generally keeping Company with Persons of such Reputation.

The VIRGINIA JUSTICE.

17

But it is to be observed that none of those Causes of Suspicion will justify an Arrest where no Crime has been committed, unless in the Case of an Arrest pursuant to a Hue and Cry. *2 Hawk. 76.*

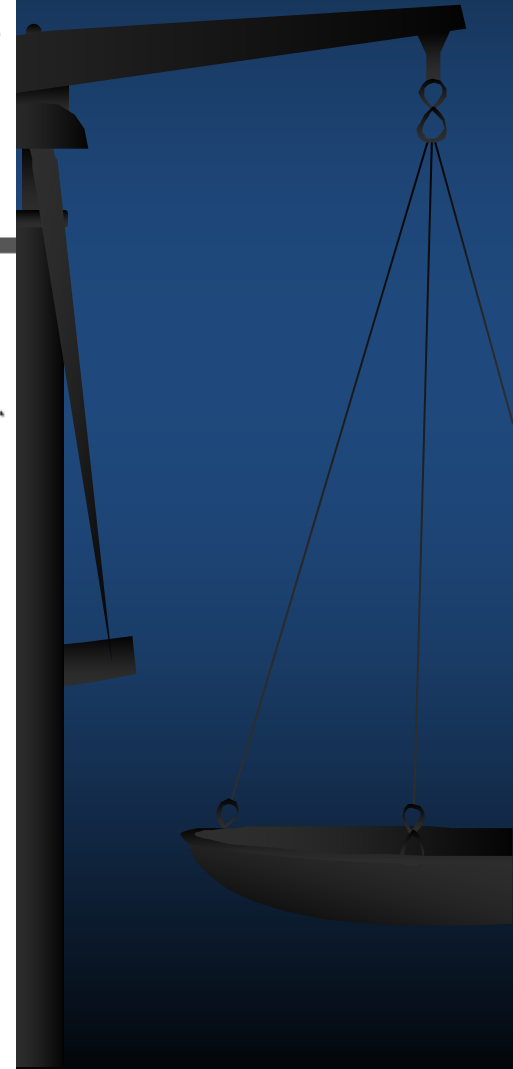
An Arrest in the Night is good, both at the Suit of the Party and of the King. *9 Co. 61.*

Any Justice, Sheriff, or Constable, upon *good Cause*, may take of the County any Number he shall think fit to pursue, arrest, and imprison Felons, or such as break, or are about to break, the Peace; and every Person called upon to aid and assist is to do it, on Pain of Fine and Imprisonment, *Dalt. Chap. 171.*

An Officer sworn, and commonly known, and acting in his own *Precinct*, need not show his Warrant; but if out of it, and not generally known, he must show his Warrant, if required. *2 Hawk. 85. 16.*

But if a Sheriff or Constable arrest *ex Officio*, it is sufficient to notify that he is Sheriff or Constable, and arrest in the King's Name. *1 H. H. 583.*

Bare Words will not make an Arrest, without laying Hold on the Person. *2 Hawk. 219.*



II. For what causes of suspicion an arrest may be.

By the statute of 34 *Ed. 3. c. 1.* power is given to the justices of the peace, to arrest all those whom they find by indictment, or by *suspicion*, and to put them in prison.

And the causes of suspicion, which are generally agreed to justify the arrest of an innocent person for felony, are these that follow:

(1) The common fame of the country; but it seems, that it ought to appear upon evidence in an action brought for such arrest, that such fame had some probable ground. 2 *Haw.* 76.

(2) The being found in such circumstances, as induce a strong presumption of guilt; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. 2 *Haw.* 76.

(3) The behaving one's self in such a manner as betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him doth abscond. *id.*

But the party who flies from an arrest, for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him. 2 *Haw.* 122.

(4) The being found in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 *Haw.* 76. 2 *Inst.* 52.

(5) The living an idle, vagrant, and disorderly life, without having any visible means to support it. 2 *Haw.* 76.

(6) The being pursued by hue and cry. 2 *Haw.* 76.

For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be attached and imprisoned by the law of the land. 2 *Inst.* 52.

But generally, no such cause of suspicion, as any of the above mentioned, will justify an arrest, where in truth no such crime hath been committed; unless it be in the case of hue and cry. 2 *Haw.* 76.

THE MANNER, AND LEGALITY, OF ARRESTS.
SUSPICION.

THE Causes of Suspicion to justify an Arrest are as followeth.

All such Circumstances as induce a Presumption of Guilt; as, coming out of a House wherein Murder hath been committed with a bloody Knife in One's Hand.

The being found in Possession of any Part of stolen Goods, without being able to give a probable Account of coming honestly by them.

Any Behaviour which betrays a Consciousness of Guilt; as, where a Person absconds on hearing a Warrant is taken out against him.

The being found in Company with a notorious Offender at the Time of the Offence, or generally keeping Company with Persons of such Reputation.

The VIRGINIA JUSTICE.

17

But it is to be observed that none of those Causes of Suspicion will justify an Arrest where no Crime has been committed, unless in the Case of an Arrest pursuant to a Hue and Cry. *2 Hawk. 76.*

An Arrest in the Night is good, both at the Suit of the Party and of the King. *9 Co. 61.*

Any Justice, Sheriff, or Constable, upon *good Cause*, may take of the County any Number he shall think fit to pursue, arrest, and imprison Felons, or such as break, or are about to break, the Peace; and every Person called upon to aid and assist is to do it, on Pain of Fine and Imprisonment, *Dalt. Chap. 171.*

An Officer sworn, and commonly known, and acting in his own *Precinct*, need not show his Warrant; but if out of it, and not generally known, he must show his Warrant, if required. *2 Hawk. 85. 16.*

But if a Sheriff or Constable arrest *ex Officio*, it is sufficient to notify that he is Sheriff or Constable, and arrest in the King's Name. *1 H. H. 583.*

Bare Words will not make an Arrest, without laying Hold on the Person. *2 Hawk. 219.*



II. For what causes of suspicion an arrest may be.

By the statute of 34 *Ed. 3. c. 1.* power is given to the justices of the peace, to arrest all those whom they find by indictment, or by *suspicion*, and to put them in prison.

And the causes of suspicion, which are generally agreed to justify the arrest of an innocent person for felony, are these that follow:

(1) The common fame of the country; but it seems, that it ought to appear upon evidence in an action brought for such arrest, that such fame had some probable ground. 2 *Haw.* 76.

(2) The being found in such circumstances, as induce a strong presumption of guilt; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. 2 *Haw.* 76.

(3) The behaving one's self in such a manner as betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him doth abscond. *id.*

But the party who flies from an arrest, for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him. 2 *Haw.* 122.

(4) The being found in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 *Haw.* 76. 2 *Inst.* 52.

(5) The living an idle, vagrant, and disorderly life, without having any visible means to support it. 2 *Haw.* 76.

(6) The being pursued by hue and cry. 2 *Haw.* 76.

For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be attached and imprisoned by the law of the land. 2 *Inst.* 52.

But generally, no such cause of suspicion, as any of the above mentioned, will justify an arrest, where in truth no such crime hath been committed; unless it be in the case of hue and cry. 2 *Haw.* 76.

THE MANNER, AND LEGALITY, OF ARRESTS.
SUSPICION.

THE Causes of Suspicion to justify an Arrest are as followeth.

All such Circumstances as induce a Presumption of Guilt; as, coming out of a House wherein Murder hath been committed with a bloody Knife in One's Hand.

The being found in Possession of any Part of stolen Goods, without being able to give a probable Account of coming honestly by them.

Any Behaviour which betrays a Consciousness of Guilt; as, where a Person absconds on hearing a Warrant is taken out against him.

The being found in Company with a notorious Offender at the Time of the Offence, or generally keeping Company with Persons of such Reputation.

The VIRGINIA JUSTICE.

17

But it is to be observed that none of those Causes of Suspicion will justify an Arrest where no Crime has been committed, unless in the Case of an Arrest pursuant to a Hue and Cry. *2 Hawk. 76.*

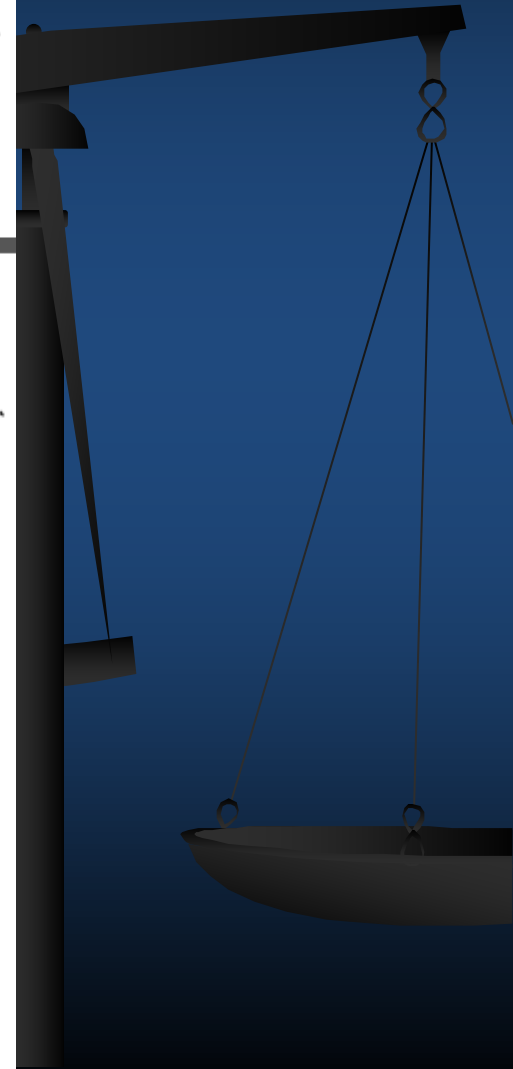
An Arrest in the Night is good, both at the Suit of the Party and of the King. *9 Co. 61.*

Any Justice, Sheriff, or Constable, upon *good Cause*, may take of the County any Number he shall think fit to pursue, arrest, and imprison Felons, or such as break, or are about to break, the Peace; and every Person called upon to aid and assist is to do it, on Pain of Fine and Imprisonment, *Dalt. Chap. 171.*

An Officer sworn, and commonly known, and acting in his own *Precinct*, need not show his Warrant; but if out of it, and not generally known, he must show his Warrant, if required. *2 Hawk. 85. 16.*

But if a Sheriff or Constable arrest *ex Officio*, it is sufficient to notify that he is Sheriff or Constable, and arrest in the King's Name. *1 H. H. 583.*

Bare Words will not make an Arrest, without laying Hold on the Person. *2 Hawk. 219.*



1. In criminal cases, a person may be apprehended and restrained of his liberty,

ARREST.

23

erty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept.

2. Thus all persons, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect. 2 *Haw.* 74.

Also, every private person is bound to assist an officer demanding his help, for the taking of a felon, or the suppressing of an affray. 2 *Haw.* 75.

Also by the vagrant act of 17 G. 2. Every private person may apprehend beggars and vagrants.

3. Also, a watchman may arrest a night walker, without any warrant from a magistrate. 2 *Inst.* 52.

4. In like manner, a constable may arrest any offender against the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice. 1 *H. H.* 587.

5. Or any person whatsoever, if an affray be made to the breach of the king's peace, may without any warrant from a magistrate, restrain any of the offenders, to the end the king's peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52.

6. So much concerning an arrest without a warrant; next follows arresting with such warrant.

7. The warrant is ordinarily directed to the sheriff or constable, and they are indictable, and subject thereupon to a fine and imprisonment, if they neglect or refuse it. 1 *H. H.* 581.

8. If it be directed to the sheriff, he may command his bailiff, under-sheriff, or other sworn and known officer, to serve it, without writing any precept. But if he will command another man, that is no such officer, to serve it, he must give him a written precept, otherwise, false imprisonment will lie. *Lamb.* 89.

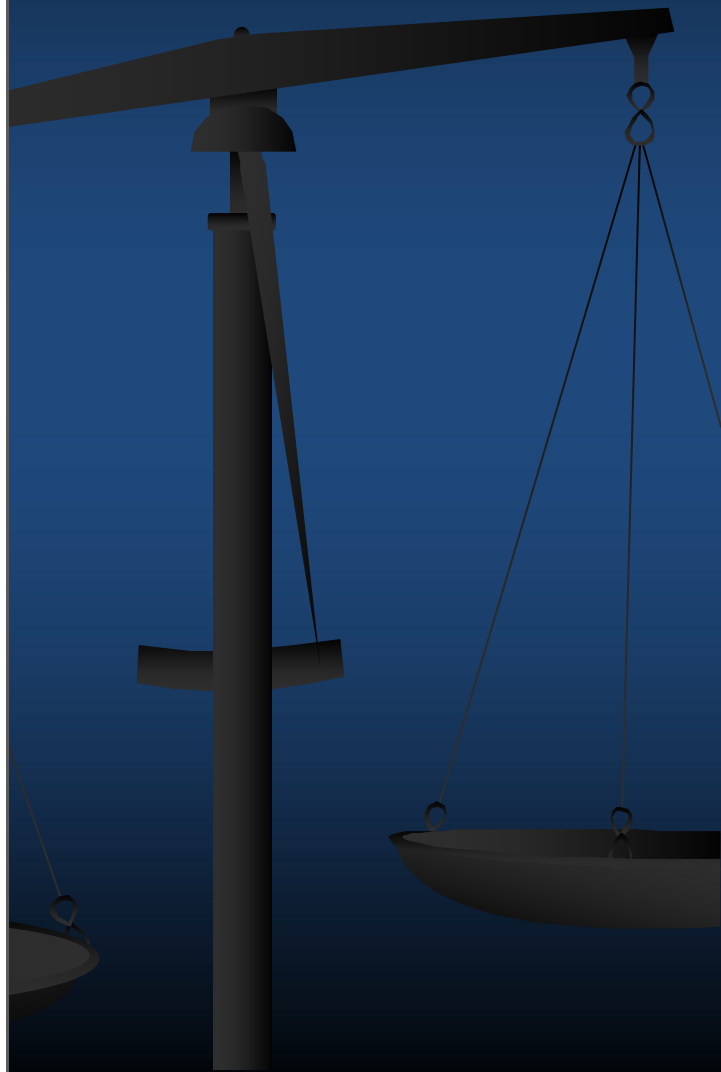
9. But every other person, to whom it is directed, must personally execute it; yet it seems, that any one may lawfully assist him. 2 *Haw.* 86.

10. If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another; but if it be directed to a particular constable (Mr. *Hawkins* says, to a particular constable by name,) he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. *Lord Raym.* 546. 1 *H. H.* 581. 2 *H. H.* 110. 2 *Haw.* 86.

11. The justice that issues the warrant, may direct it to a private person if he pleaseth, and it is good; but he is not compellable to execute it, unless he be a proper officer. 1 *H. H.* 581.

12. But by the justices oath, the warrant ought not to be directed to the party, but to some indifferent person, to execute it.

13. If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt.* c. 169.



WHO CAN ARREST WITHOUT WARRANT.

PRIVATE PERSON.

IN criminal Cases a Person may be apprehended by a private Person, Sheriff, or Constable, without Warrant or Precept; as where a Felony is committed, or dangerous Wound given, all Persons are bound to apprehend the Offender, as well as to assist an Officer who demands their Help in taking a Felon, or suppressing an Affray. 2 *Hawk.* 75.

SHERIFF, OR CONSTABLE.

A Sheriff or Constable may, *ex Officio*, arrest a Disturber of the Peace in *his View*, and confine him in his House, or in the Stocks, till he can carry him before a Justice. 1 *H. Hist.* 587.

All Persons whatsoever, in Case of an *Affray*, may, without Warrant from a Magistrate, restrain any of the Offenders for the Preservation of the Peace; but after the Affray is ended, the Affrayers cannot be arrested without Warrant. 2 *Inst.* 52.

BY WARRANT.

SHERIFF OR CONSTABLE.

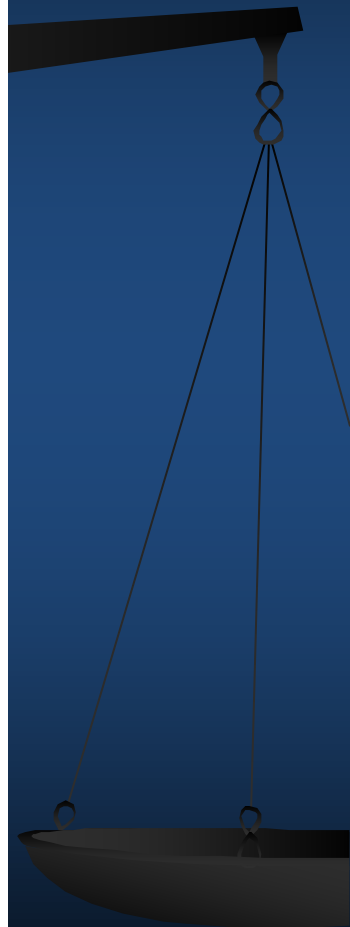
Those are usually directed to the Sheriff or Constable, who are to execute them with all Diligence; and if they neglect, or refuse, are subject to Fine and Imprisonment. 1 *H. H.* 581.

If directed to the Sheriff, he may command his under Sheriff to execute it; but a Constable cannot depute, and must personally execute it. 2 *Hawk.* 86.

A Warrant directed to all Constables is to be taken respectively to each of them within their several Counties, and no One can execute it out of his County. 2 *Hawk.* 86. *Lord Raym.* 546.

PRIVATE PERSONS.

A Justice may direct his Warrant to a private Person if he pleases, and it is good; but such private Person is not obliged to execute it, unless he be a proper Officer. *H. H.* 581. And by the Oath of a Justice of Peace he ought not to direct any Warrant to the Party, but to some indifferent Person.



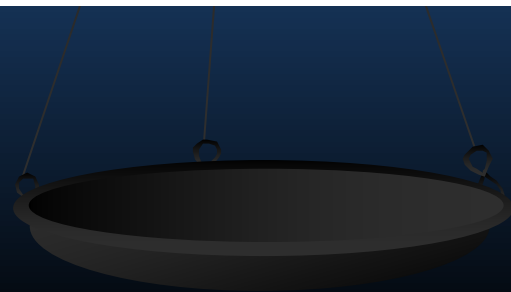
And be it further enacted, That when any person shall give information on oath, and shall lodge the same in writing with the Collector or Naval-Officer, or either of their Deputies, that he has just cause to suspect that dutied goods have been taken out of any particular vessel or float, contrary to law, and put into any other vessel or float, store, building, or place whatever, such Collector, Naval-Officer, or Deputy, is hereby authorized to enter, with proper assistance, in the day time only, into the vessel or float, store, building or place (dwelling-houses excepted) and there to search for the said goods; and if he shall find any dutied goods in such search, to seize and secure the same for trial, and the dutied goods seized and secured as aforesaid, shall be adjudged forfeited, except those identical goods which on trial it shall be proved were not taken from such vessel or float, store, building or place, in the manner specified in the said information; and any person giving information as aforesaid, shall, on the condemnation of the goods, receive twenty-five per cent. on the net proceeds; the Collector, Naval-Officer or Deputy, making the seizure, shall receive twenty-five per cent. and the remainder shall be paid into the public treasury, and be applied solely for the purposes prescribed in this act. *Provided nevertheless,*

And be it enacted by the authority aforesaid, That when any person shall have just cause to suspect that dutied goods have been brought into this Commonwealth and put into any dwelling-house, the impost duties thereon not being paid, or security not being given for the payment thereof, and give satisfactory information thereof on oath, to any Justice of the Peace for the same county, such Justice may, and he is hereby authorized to issue his warrant, directed to the Collector of excise in the same county, or either of his Deputies, therein specially named, commanding him to take with him the Sheriff of the county, or either of his Deputies, or any Constable of the town where such house is, and in the



VII. And be it enacted, That it shall and may be lawful to and for any naval officer, or his deputy, by warrant, under the hand of a justice of the peace (which warrant shall not be granted but upon information made upon oath or affirmation before the said justice), accompanied with a constable, to break open, in the day time, any house, warehouse, store-house, or cellar, to search for, seize, and carry away, any goods, wares, or merchandise, subject to duty by law, and for which the said duty shall not have been paid or secured to be paid as aforesaid; and if any naval officer, or his deputy, or constable, shall be sued or molested for any thing done in execution of the powers by this act given, such naval officer, deputy, or constable, may plead the general issue and give this act in evidence; and if in such suit the plaintiff be nonsuit, or judgment pass against him, the defendant shall recover double costs; and in all actions, suits, or informations, to be brought, or where any seizure shall be made pursuant to this act, if the property thereof be claimed by any person as owner thereof, in every such case the *onus probandi* shall be upon such owner or claimer; and if any person shall, with clubs or other weapons, forcibly hinder, beat, wound, or in any wise oppose, impede, or prevent, the said naval officer, or his deputy, or constable, in the execution of any such warrant granted as aforesaid, or shall offer any violence to any of them, such person shall forfeit and pay not exceeding three hundred pounds current money, or suffer imprisonment not exceeding six months, for every such offence, at the discretion of the court where the offence

masters. If one man shall not be competent, he shall be attended with an host.—Whether that host shall be the posse of your country or a file of armed soliders, shall depend upon circumstances. They are to determine, and you are to make no laws inconsistent with such determination, whether such Collectors shall carry with them any paper, purporting their commission, or not—whether it shall be a general warrant, or a special one—whether written or printed—whether any of your goods, or your persons shall be exempt from distress, and in what manner either you or your property is to be treated when taken in consequence of such warrants. They will have the liberty of entering your houses by night as well as by day for such purposes.—All these points are given in letter and in spirit to the New Constitution, and the subject has not a shadow of security that they will not be executed.—Nay, if they ever should mean to exercise the right of taxation at all, I affirm it can be done with success by them in no other way, but in an arbitrary manner, and by previously subduing the spirit and strength of this Commonwealth.



It is a fact that lands have been sold for five shillings, which were worth one hundred pounds: if sheriffs, thus immediately under the eye of our state legislature and judiciary, have dared to commit these outrages, what would they not have done if their masters had been at Philadelphia or New York? If they perpetrate the most unwarrantable outrage on your person or property, you cannot get redress on this side of Philadelphia or New York; and how can you get it there? If your domestic avocations could permit you to go thither, there you must appeal to judges sworn to support this Constitution, in opposition to that of any state, and who may also be inclined to favor their own officers. When these harpies are aided by excisemen, who may search, at any time, your houses, and most secret recesses, will the people hear it?



13. Nothing in this constitution shall deprive a citizen of any state of the benefit of the bill of rights established by the constitution of the state in which he shall reside, and such bills of rights shall be considered as valid in any court of the United States where they shall be pleaded.

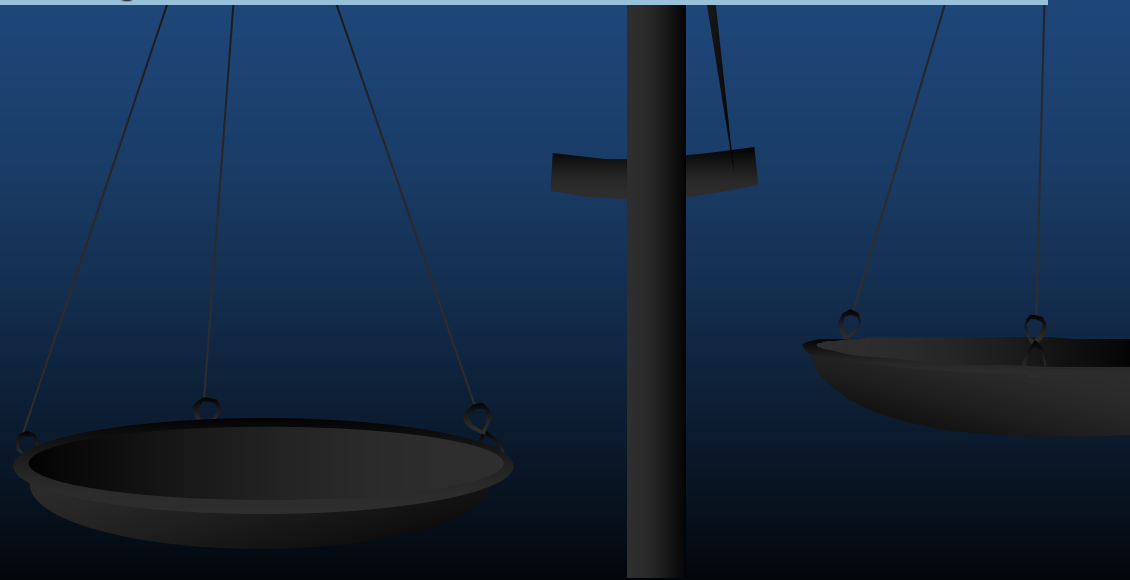


MONDAY, *July 7*, 1788.— The secretary continued reading the 4th and 5th articles without interruption. To the 2d clause of article 6th, Mr. LANSING proposed the following amendments : —

“ *Resolved*, as the opinion of this committee, that no treaty ought to operate so as to alter the constitution of any state ; nor ought any commercial treaty to operate so as to abrogate any law of the United States.”

To the 3d clause of article 6th, Mr. M. SMITH moved the following addition : —

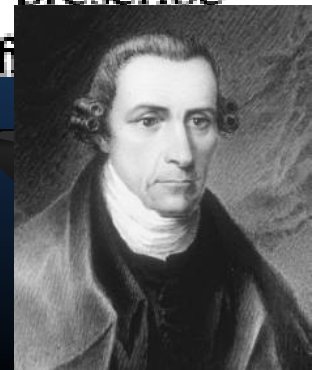
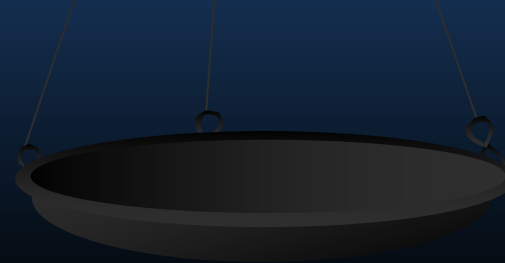
“ *Resolved*, as the opinion of this committee, that all the officers of the United States ought to be bound, by oath or affirmation, not to infringe the constitutions or rights of the respective states.”



16 June 1788⁵⁰

Mr. Chairman.—The necessity of a Bill of Rights appear to me to be greater in this Government, than ever it was in any Government before.

check of a Bill of Rights now, than then. Congress from their general powers may fully go into the business of human legislation. They may legislate in criminal cases from treason to the lowest offence, petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise Representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of Representatives. What says our Bill of Rights? “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁵⁴ Are you not therefore now calling on those Gentlemen who are to compose Congress, to prescribe trials and define punishments without this controul? Will they f



Objections to the Constitution of Government formed by the Convention.—(1787)

There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws and Constitutions of the several States, the Declaration of Rights in the separate States are no Security.¹ Nor are the people secured even in the Enjoyment of the Benefits of the common-Law: which stands here upon no other Foundation than it's having been adopted by the respective Acts forming the Constitutions of the several States.

Under their own Construction of the general Clause at the End of the enumerated powers the Congress may grant Monopolies in Trade and Commerce, constitute new Crimes, inflict unusual and severe Punishments, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.

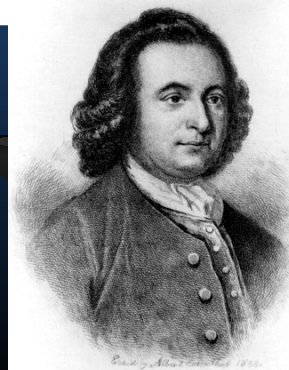
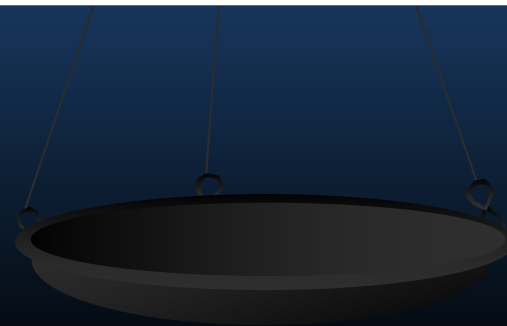


TABLE 2: SEARCH-AND-SEIZURE CONSTRAINTS PLACED BY STATES ON CONFEDERAL AUTHORITIES IN IMPOST RATIFICATION LEGISLATION, 1783-86

Requirement that confederal authorities obtain <i>specific</i> warrant to search any building	Requirement that confederal authorities obtain <i>specific</i> warrant to search; unclear what premises this applied to	Requirement that confederal authorities obtain warrant to search dwelling, storehouse, or warehouse	Requirement that confederal authorities obtain warrant to search dwelling	Requirement that confederal authorities adhere to state law	Requirement that State authorities enforce impost	No constraints on confederal authorities
NC	DE	GA	PA	CT	NY	NJ
RI	MD	MA				
		NH				
		SC				
		VA				

ANSWER OF THE GOVERNOR OF NEW-YORK, to the first Recommendation, and the RESOLUTIONS of CONGRESS consequent thereon.

N E W - Y O R K :

Printed by CARROLL & PATTERSON, No. 32, Maiden-Lane.

M.DCC.LXXXIII.

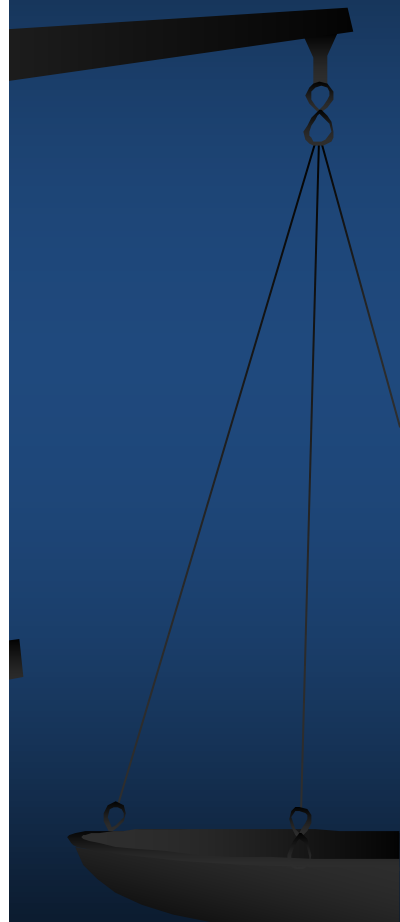
be collected under such regulations as the United States in Congress assembled shall direct.

Provided that such regulations do not extend so far as to subject any citizen of this state to be carried out of the same for trial, or to compel him to answer to any action without the state, or to deprive him of a trial according to the constitution and laws of this state, or to convict him criminally without a trial by jury or his own voluntary confession in open court, or to impose excessive fines, or to inflict punishments which are either cruel or unusual in this state, or to break open any dwelling-house, store or ware-house, at any other than the day time, and between the rising and setting of the sun, nor then without a warrant from a lawful magistrate, and issued upon the oath of the party requesting the same; and also provided that the trial on all seizures and questions under this act shall be before the superior court in this state; and that a forfeiture shall not in any case exceed the goods seized, and the vessel in which such goods may be imported, with her cargo, or the value of such goods and vessel: and provided also, that the collectors of the said duties shall be appointed by the general assembly of this state, or during their recess by the governor, with the advice of the

N E W - Y O R K :

Printed by CARROLL & PATTERSON, No. 32, Maiden-Lane.

M.DCC.LXXXIII.



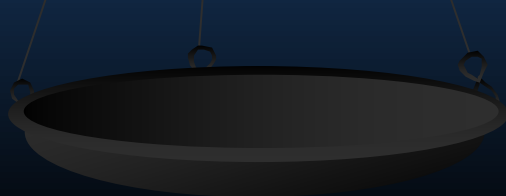
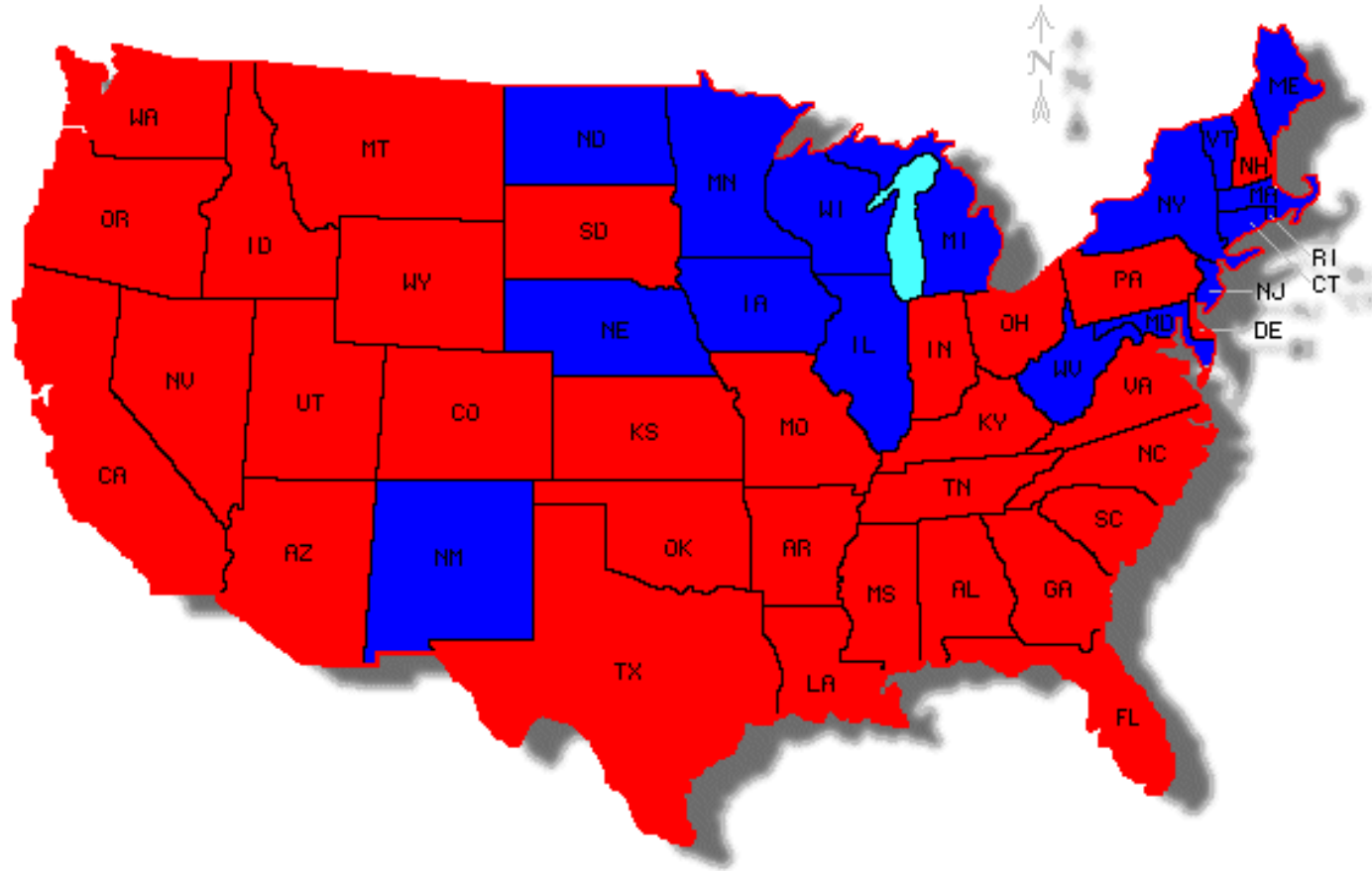
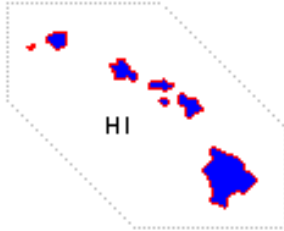
United States v. Young, 766 F.3d 621 (6th Cir. 2014)

- D convicted of four counts of burglary and seven counts of aggravated burglary in Tennessee in 1990-92
- Released from prison in 1996
- In 2011, possessed 7 shotgun shells in dresser drawer in violation of 18 U.S.C. § 922(g)(1) (possession of ammunition by a felon).

YOU MAKE THE CALL: How much prison time, if any, should Young be sentenced to?

Mandatory minimum = 15 years

- - Non-Death Penalty
- - Death Penalty States



1791 to present: One Federal Execution in a Non-Death Penalty State

U.S. v. Anthony Chebatoris



Changes to Federal Capital Case Protocols – June 2001

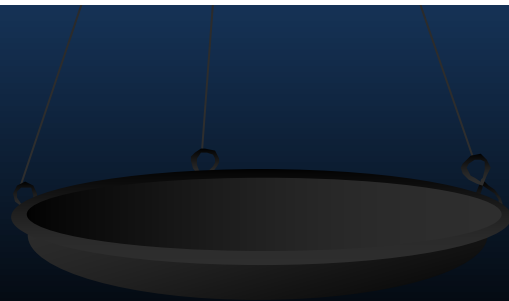
- Anecdotal evidence of greater willingness on part of A.G. to go against recommendation of local U.S. Attorneys



9-10.080 Submissions from the United States Attorney or Assistant Attorney General

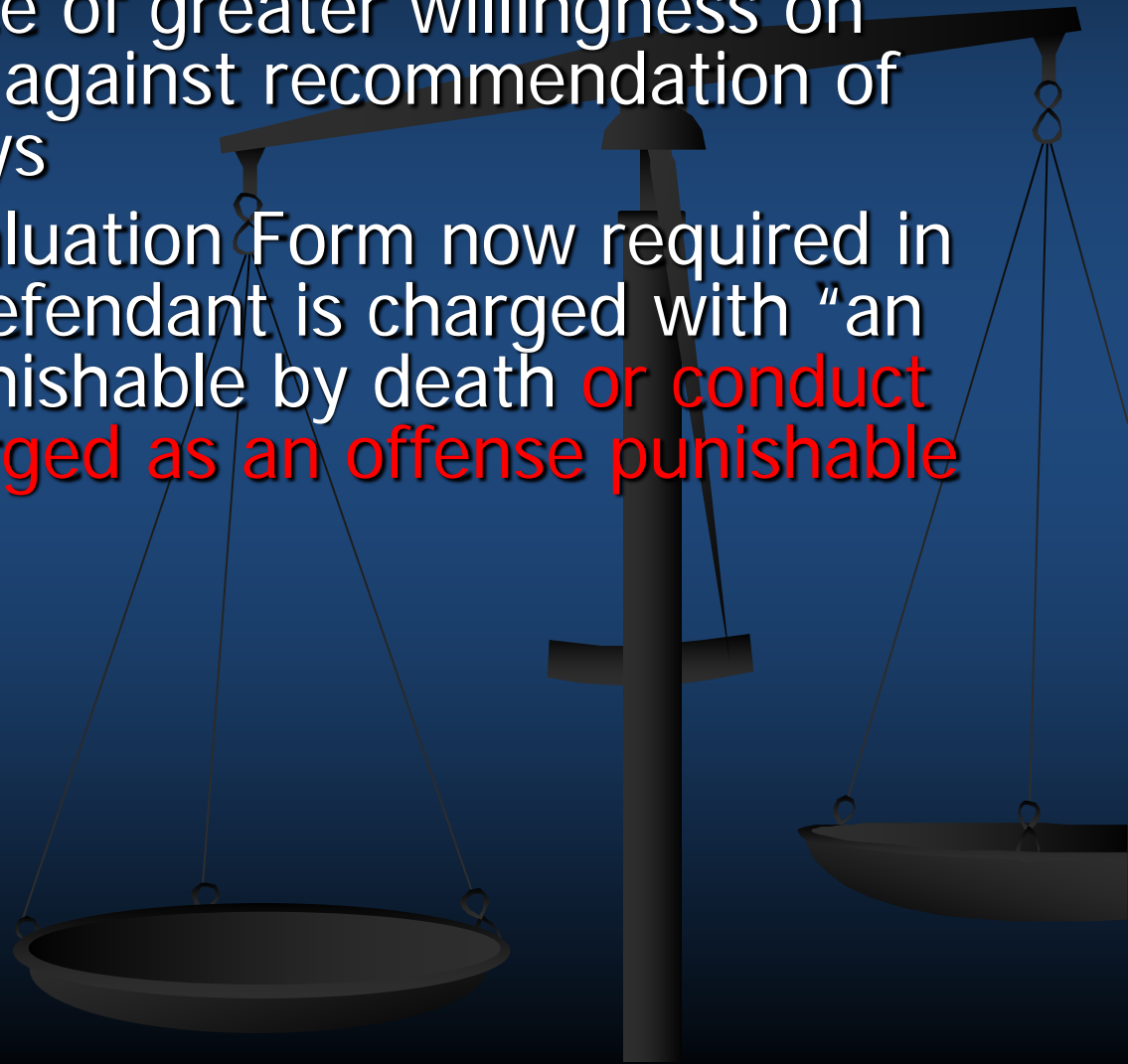
The United States Attorney or Assistant Attorney General must submit to the Assistant Attorney General for the Criminal Division every case in which an indictment has been or will be obtained that charges an offense punishable by death or alleges conduct that could be charged as an offense punishable by death. In any case in which the United States Attorney or Assistant Attorney General is considering whether to request approval to seek the death penalty, the United States Attorney or Assistant Attorney General shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, for the consideration of the United States Attorney or Assistant Attorney General.

The United States Attorney or Assistant Attorney General must make submissions to the Assistant Attorney General for the Criminal Division as expeditiously as possible, but no fewer than 90 days before the Government is required, by an order of the court, to file a notice that it intends to seek the death penalty. In the absence of a court established deadline for the Attorney General's death penalty decision, the United States Attorney or Assistant Attorney General must make the submission sufficiently in advance of trial to allow for both the 90 day time period encompassed by the review process plus any additional time necessary to ensure that a notice of intent to seek the death penalty is timely filed under 18 U.S.C. § 3593(a). If a case is not submitted 90 days in advance of a deadline for the Attorney General's decision or 150 days in advance of a scheduled



Changes to Federal Capital Case Protocols – June 2001

- Anecdotal evidence of greater willingness on part of A.G. to go against recommendation of local U.S. Attorneys
- Death Penalty Evaluation Form now required in any case where defendant is charged with "an offense that is punishable by death or conduct that could be charged as an offense punishable by death."

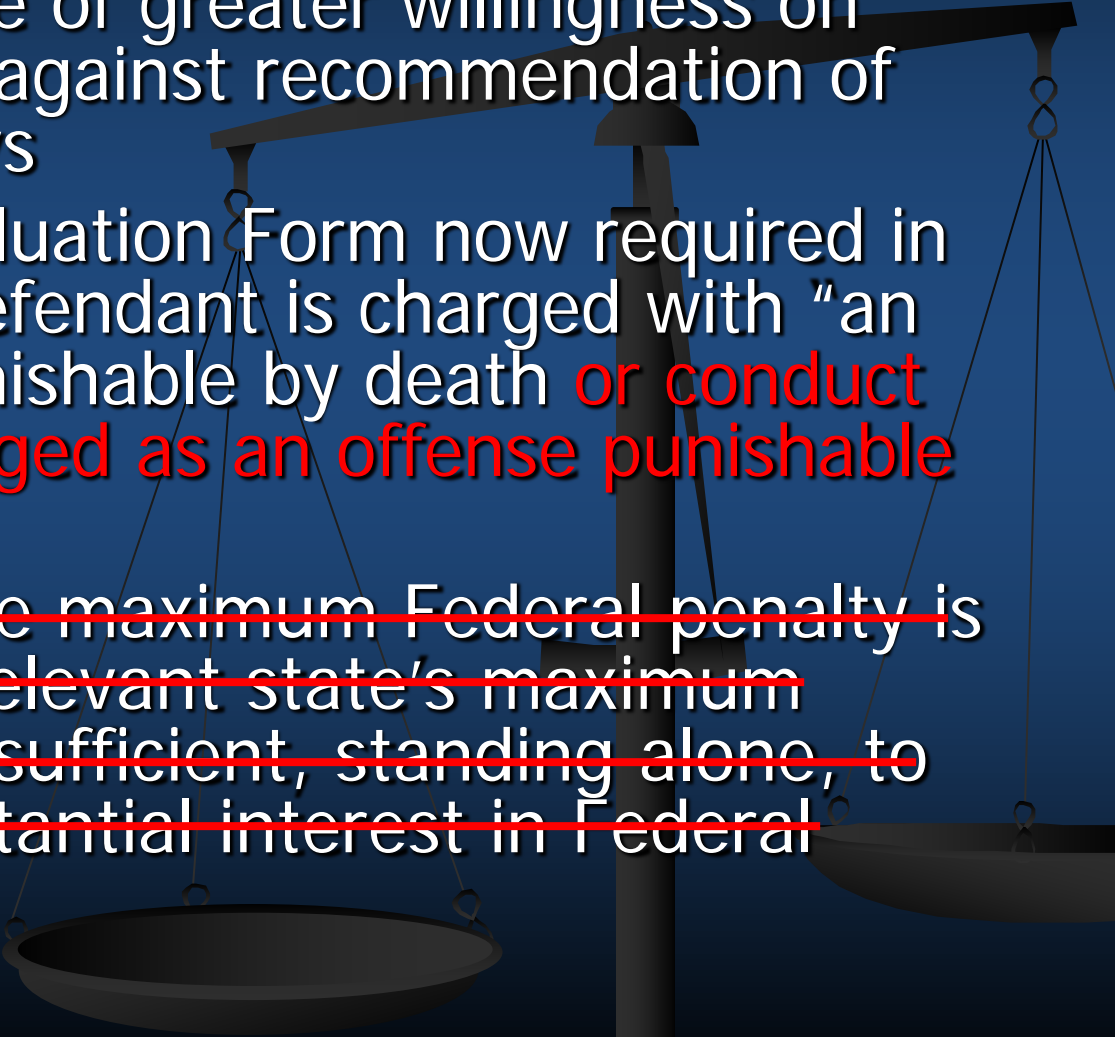


9-10.090 Substantial Federal Interest

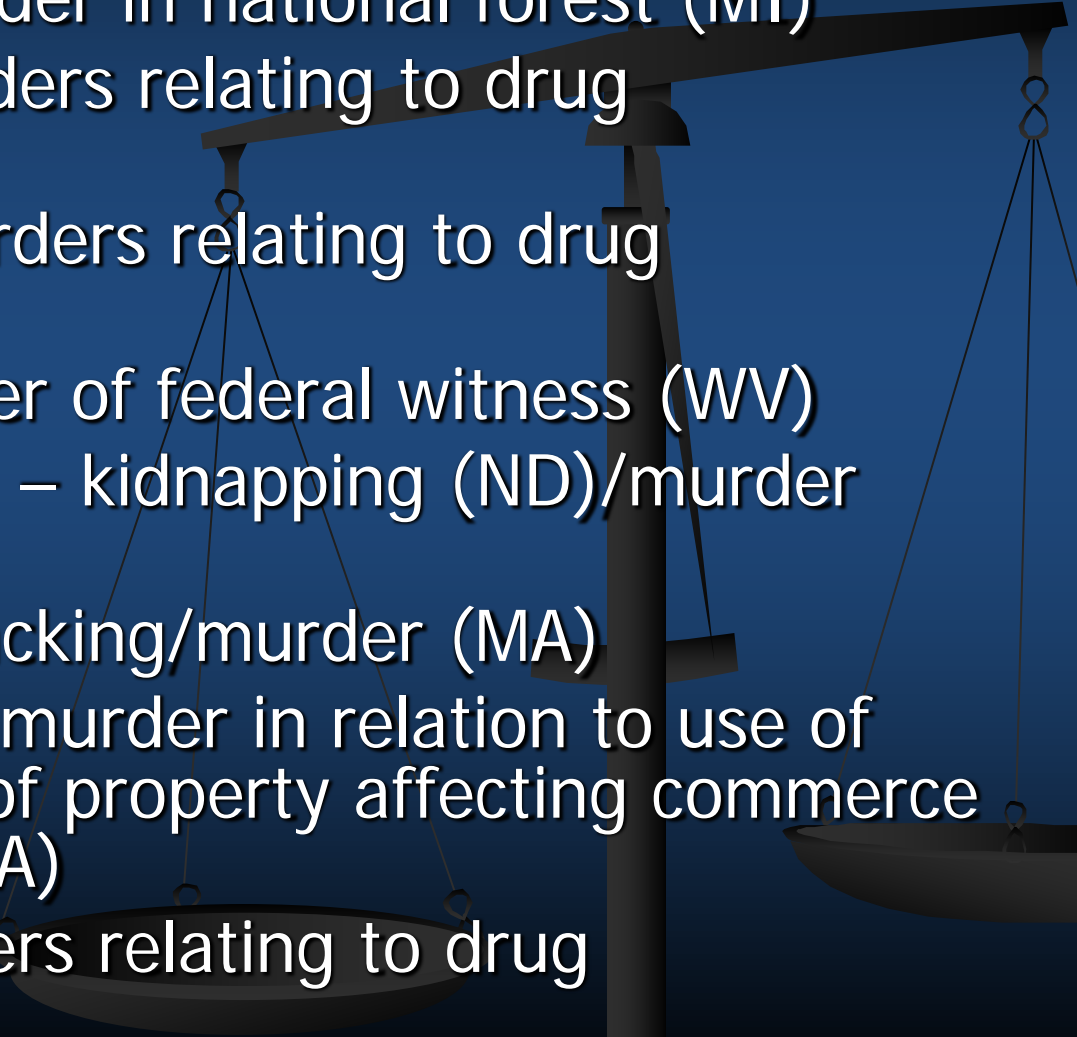
When concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities. See Principles of Federal Prosecution, USAM Chapter 9-27.000. The judgment as to whether there is a more substantial interest in Federal, as opposed to State, prosecution may take into account any factor that reasonably bears on the relative interests of the State and the Federal Governments, including but not limited to the following:

- A. The relative strength of the State's interest in prosecution as indicated by the Federal and State characteristics of the criminal conduct. One jurisdiction may have a particularly strong interest because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by its investigators or through its informants or cooperators, or the possibility that prosecution will lead to disclosure of violations that are peculiarly within the jurisdiction of either Federal or State authorities or will assist an ongoing investigation being conducted by one of them.
- B. The extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction. Relevant to this analysis are the nature, extent, and impact of the criminal activity upon the jurisdictions, the number and location of any murders, and the need to procure evidence from other jurisdictions, in particular other States or foreign countries.
- C. **The relative ability and willingness of the State to prosecute effectively and obtain an appropriate punishment upon conviction.** Relevant to this analysis are the ability and willingness of the authorities in each jurisdiction, the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively, legal or evidentiary problems

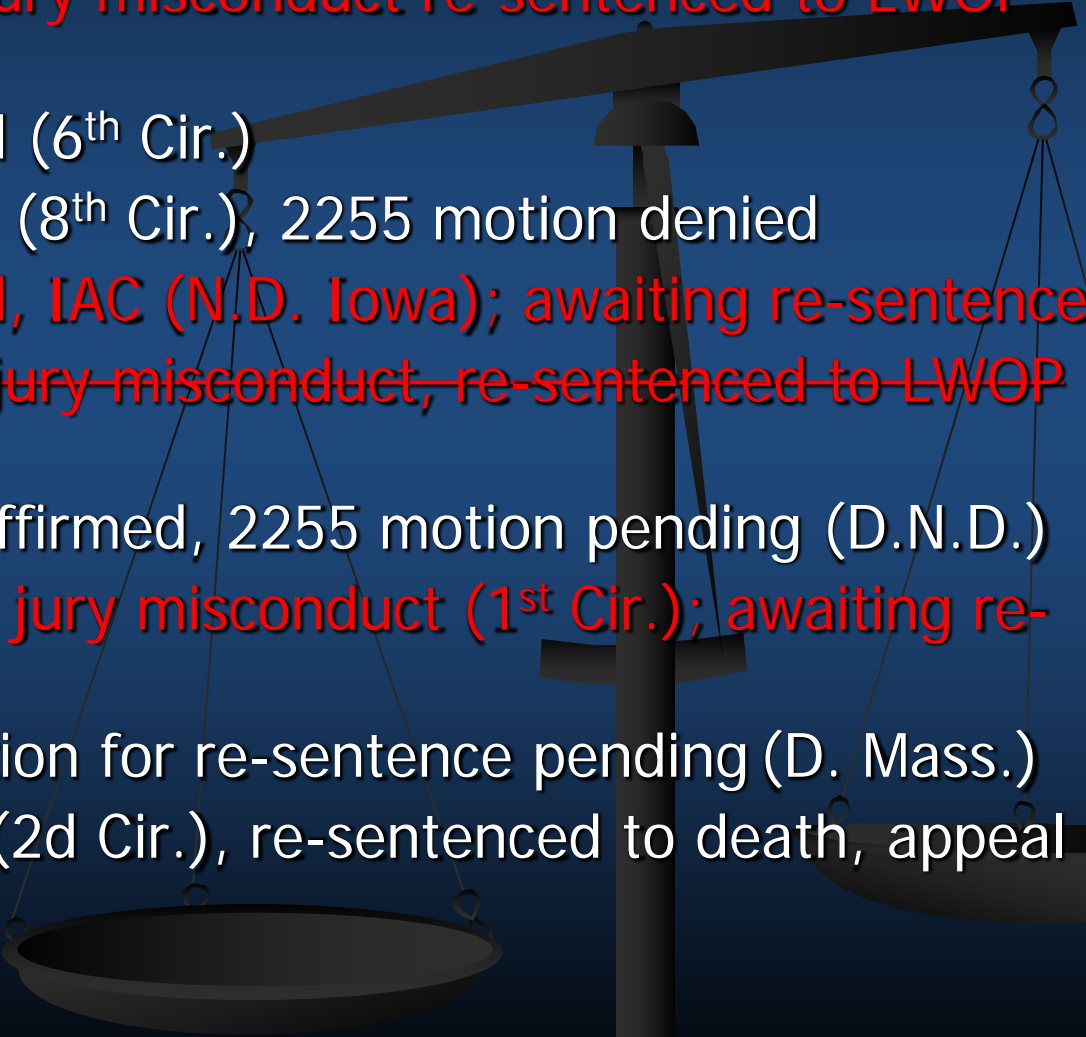
Changes to Federal Capital Case Protocols – June 2001

- Anecdotal evidence of greater willingness on part of A.G. to go against recommendation of local U.S. Attorneys
 - Death Penalty Evaluation Form now required in any case where defendant is charged with "an offense that is punishable by death or conduct that could be charged as an offense punishable by death."
 - ~~"[T]he fact that the maximum Federal penalty is death where the relevant state's maximum penalty is not is insufficient, standing alone, to show a more substantial interest in Federal prosecution."~~
- 

Sentenced to Death in Non-Death States

- Donald Fell – carjacking (VT)/murder (NY)
 - Valerie Friend – murder of federal witness (WV)
 - Marvin Gabrion – murder in national forest (MI)
 - Dustin Honken – murders relating to drug trafficking (IA)
 - Angela Johnson – murders relating to drug trafficking (IA)
 - George Lecco – murder of federal witness (WV)
 - Alfonso Rodriguez, Jr. – kidnapping (ND)/murder (MN)
 - Gary Sampson – carjacking/murder (MA)
 - Dhzokhar Tsarnaev – murder in relation to use of WMD/destruction of property affecting commerce using explosive (MA)
 - Ronell Wilson – murders relating to drug trafficking (NY)
- 

Sentenced to Death in Non-Death States

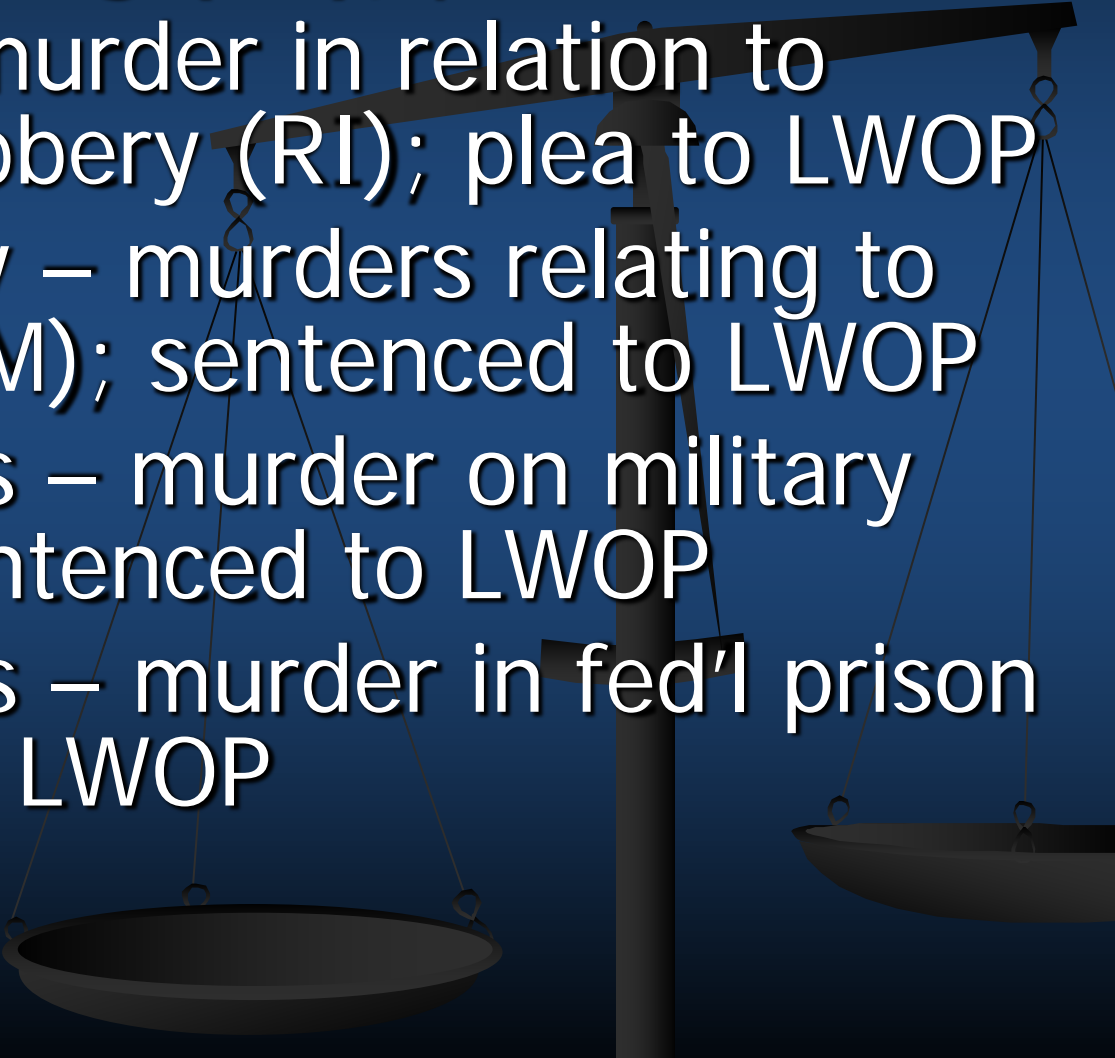
- Donald Fell – vacated, jury misconduct (D. Vt.); awaiting re-sentence
 - ~~Valerie Friend – vacated, jury misconduct re-sentenced to LWOP (S.D. W. Va.)~~
 - Marvin Gabrion – affirmed (6th Cir.)
 - Dustin Honken – affirmed (8th Cir.), 2255 motion denied
 - Angela Johnson – vacated, IAC (N.D. Iowa); awaiting re-sentence
 - ~~George Lecco – vacated, jury misconduct, re-sentenced to LWOP (S.D. W. Va.)~~
 - Alfonso Rodriguez, Jr. – affirmed, 2255 motion pending (D.N.D.)
 - Gary Sampson – vacated, jury misconduct (1st Cir.); awaiting re-sentence
 - Dzhokhar Tsarnaev – motion for re-sentence pending (D. Mass.)
 - Ronell Wilson – reversed (2d Cir.), re-sentenced to death, appeal pending
- 

Pending Capital Cases in Non-Death States

- James Watts – murder in relation to bank robbery (IL)



Recent Capital Cases in Non-Death States

- Michael Jacques – murder in relation to federal kidnaping (VT); plea to LWOP
 - Jason Pleau – murder in relation to Hobbs Act robbery (RI); plea to LWOP
 - John McCluskey – murders relating to carjacking (NM); sentenced to LWOP
 - Naeem Williams – murder on military base (HI); sentenced to LWOP
 - Patrick Andrews – murder in fed'l prison (WV); plea to LWOP
- 

18 U.S.C. § 1951(a): Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 924(c)(1)(A)(iii): [A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(j)(1): A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall if the killing is a murder . . . be punished by death or by imprisonment for any term of years or for life

18 U.S.C. § 1207(a)(1)

Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, **shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or imprisonment in committing or in furtherance of the commission of the offense . . .**

