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A Tale of a Whiskey Rebellion Judge: William Paterson, Grand Jury Charges, and the Trials of the Whiskey Rebels

Abstract: The Whiskey Rebellion of 1794 resulted in trials in the federal Circuit Court in Philadelphia in April–June 1795. US Supreme Court Justice William Paterson, who presided in several of those trials, has been represented as a partisan Federalist judge whose directed charge to the jury resulted in a treason verdict in two of those cases (*U.S. v. Mitchell* and *U.S. v. Vigol*). Sparse law reports, among other limited materials, provide little direct evidence of the trials or of the criticism of Justice Paterson's conduct of the trials. This paper provides evidence from grand jury charges that deal with the Whiskey Rebellion to add to our understanding of the trials and to test whether Justice Paterson has been fairly criticized or not. It argues, in addition, that his conduct in the trials was affected by a transition in American law from popular sovereignty to constitutional review by the courts.

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The western Pennsylvania Whiskey Rebellion of 1794 has been widely studied as the first act of treason against the new United States.[1] But few sources, either primary or secondary, shed much substantive light on the trials of the rebels—the first treason trials under the new US Constitution—and the light they shed is dim enough to be sure.[2] The Whiskey Rebellion came about as the result of the 1791 Excise Act, the first national tax on whiskey, a tax that Justice William Paterson, the central judicial figure in the federal rebellion trials, helped to pass as a member of the US Senate.[3] The federal act resulted in riots, protests, and attacks on excise officers in four counties. President Washington's administration blamed these acts on Francophile democratic-republican societies.[4] Washington feared the possible formation and secession of "Westsylvania" from the Union and the spread of contagion to other territories and states.[5] With little confidence that Pennsylvania courts could handle the outbreaks and a wish to demonstrate the authority and power of the federal government over the states, the president called out a nationalized militia in late September 1794.[6] He accompanied troops

[1] Terry Bouton rejects the term "Whiskey Rebellion" used by Alexander Hamilton and offers "Pennsylvania Regulation" to describe a much larger and longer movement to reform government, running from the 1760s to 1800. Terry Bouton, *Taming Democracy: "The People," the Founders, and the Troubled Ending of the American Revolution* (Oxford, 2007), 146, 204, 218.

[2] See Wythe Holt, "The Whiskey Rebellion of 1794: A Democratic Working-Class Insurrection" (paper presented at the Georgia Workshop in Early American History, Athens, GA, Jan. 23, 2004, available at http://colonial seminar.uga.edu/whiskeyrebellion-6.pdf), 74–81; Richard A. Ifft, "Treason in the Early Republic: The Federal Courts, Popular Protest, and Federalism During the Whiskey Rebellion," in *The Whiskey Rebellion: Past and Present Perspectives*, ed. Steven R. Boyd (Westport, CT, 1985), 171–77; Thomas Slaughter, "'The King of Crimes': Early American Treason Law, 1787–1860," in *Launching the "Extended Republic": The Federalist Era*, ed. Ronald Hoffman and Peter Albert (Charlottesville, VA, 1996), 58, 89–95, 102–4; Willard Hurst, "Treason in the United States III: Under the Constitution," *Harvard Law Review* 58 (1945): 818, 818n236, 829n263; Daniel D. Blinka, "'This Germ of Rottenness': Federal Trials in the New Republic, 1789–1807," *Creighton Law Review* 36 (2003): 167–70.

[3] Thomas Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York, 1986), 6, 27, 73; John E. O'Connor, *William Paterson: Lawyer and Statesman, 1745–1806* (New Brunswick, NJ, 1979), 175–80; and Charles F. Hickox III and Andrew C. Laviano, "William Paterson," *Journal of Supreme Court History* 17 (1992): 55.

[4] Robert Chesney, "Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic," *North Carolina Law Review* 82 (2004): 1525–79; Jeffrey A. Davis, "Guarding the Republican Interest," *Pennsylvania History* 67 (2000): 43–62; Marco M. Sioli, "The Democratic Republican Societies at the End of the Eighteenth Century: The Western Pennsylvania Experience," *Pennsylvania History* 60 (1993): 288–304; Richard H. Kohn, "The Washington Administration's Decision to Crush the Whiskey Rebellion," *Journal of American History* 59 (1972): 567–84.

[5] Slaughter, *Whiskey Rebellion*, 58.

[6] Under the Militia Act of 1792, Second Congress, session 1, chap. 28; Slaughter, *Whiskey Rebellion*, 206.

to a staging area from which General Henry Lee led the militia to a surprisingly effortless success.[7]

Treasury Secretary Alexander Hamilton privately offered that the insurrection "will do us a great deal of good and add to the solidity of every thing in this country."[8] Secretary of State Edmund Randolph added that the opportunity offered by the Whiskey Rebellion should not be lost, for, he opined, Washington's political opponents "may now, I believe, be crushed."[9] Washington offered amnesty to rebels who gave "assurances of performing, with good faith and liberality," whatever was required by the US Commission he had sent West.[10] Those who refused were prosecuted in federal circuit court in Philadelphia in May and June, and again in October, of 1795. The poor treatment of the suspects—roundups in the dead of night, forced marches, brutal winter hardships, and spurious interrogations—resulted in weak testimony, mistaken identity, and unproven facts, and all but two of those charged with treason were acquitted.[11] The Whiskey Rebellion left many feeling that the trials were bogus and others feeling that they were no more than hanging parties presided over by partisan judges beholden to Washington's Federalist administration.

We ought not to indulge too easily either outrage at the government's show of power or sympathy for the rebels, which has become the standard view.[12] Instead of the common approach stigmatizing federal judges, this study will look at how legal understanding changed from the colonial and revolutionary periods to the early republic. It contends that the central judicial figure in the trials, Associate US Supreme Court Justice William Paterson, enabled the shift to judicial review, a change from previously accepted notions of popular authority, and that he was less engaged in par-

[7] Slaughter, *Whiskey Rebellion*, 205–6, 217–19, 272n1.

[8] Alexander Hamilton to Angela Church, Oct. 23, 1794, quoted in Kohn, "Washington Administration's Decision," 582.

[9] Randolph to George Washington, Oct. 11, 1794, ser. 4, reel 106, George Washington Papers, Library of Congress; Chesney, "Limits of Political Dissent."

[10] Washington to Henry Lee, Oct. 20, 1794, in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett, 27 vols. (New York, 1961–87), 17:333; Slaughter, *Whiskey Rebellion*, 196, 218.

[11] Slaughter, *Whiskey Rebellion*, 218–19. For particulars see Hugh Henry Brackenridge, *Incidents of the Insurrection in the Western Parts of Pennsylvania, in the Year 1794*, 3 vols. (Philadelphia, 1795), 3:30–33; and William Findley, *History of the Insurrection in the Four Western Counties of Pennsylvania: In the Year 1794; and an Historical Review of the Previous Situation of the Country* (Philadelphia, 1796), 203–10.

[12] Slaughter, *Whiskey Rebellion*, 196, 212–13, 217–20, 270n20; Holt, "Whiskey Rebellion of 1794," 23; Dorothy Elaine Fennell, "From Rebelliousness to Insurrection: A Social History of the Whiskey Rebellion, 1765–1802" (PhD diss., University of Pittsburgh, 1981), 259–78; Bouton, *Taming Democracy*, 216–43.

tisan activity and more engaged in complex thought on government than he has been given credit for. Like the two other judges most intimately involved in trying the rebels—Alexander Addison, president judge of the Western Courts of Pennsylvania, and Richard Peters, federal district judge for Eastern Pennsylvania—William Paterson was much maligned by his peers for his judicial service during the rebellion. These three judges found themselves shackled with a thankless task and faced with public fears of disorder that would make the law they loved either a joke or deeply hated. We cannot, as a result, tar all Federalist judges with the same brush or insist that a Federalist "elite" maintained a uniquely singular perspective on the insurrection, for all the ideological predispositions they might have held in common. Nor can we assume that Federalist judges merely did the government's bidding, toeing a purely partisan political line on popular uprisings.

The residual world of collective sovereignty must also be recognized. Drawing on concepts brought forward from the American Revolution, members of popular movements saw the people as a primary source of legal authority. The revolutionary mob, operating as a part of—not outside of—the legal landscape of the period, expressed itself in quasilegal ritual and narrative forms, serving as the people's voice in the context of English common law. The results of the rebellion moved legal culture away from this position and toward judicial review. In tracing the relationship between the people and the law, this paper profits from work done in customary law and collective sovereignty by such legal scholars as John Phillip Reid.[13]

Belief in collective sovereignty became the context within which early American constitutionalism developed.[14] In 1787 James Iredell linked popular sovereignty and judicial review, arguing that the courts had a judicial duty "to follow the sovereign people's will as explicitly declared in written constitutions."[15] James Wilson, Iredell's contemporary on the US Supreme Court, argued that the Constitution derived its power from the

[13] See John Phillip Reid, "In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution," *New York University Law Review* 49 (1974): 1043–91; Reid, *Constitutional History of the American Revolution: The Authority to Legislate* (Madison, WI, 1986); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, 2004); Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (New York, 2008); Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (New York, 2010); and Bouton, *Taming Democracy*.

[14] Kramer, *The People Themselves*, 13, 32, 160.

[15] Bayard v. Singleton, 1 N.C. (Mart.) 5 (N.C. Super. 1797); Iredell argued the case as defense counsel; he was appointed to the US Supreme Court in 1790. Arthur E. Wilmarth Jr., "Elusive

sovereignty of the people. The people, the original sovereigns, gave the courts the power to check unconstitutional legislation. Popular law beliefs appropriated official readings for their own use, with transformative effects on American legal culture.[16]

Both eyewitness accounts of the Whiskey Rebellion and trial depositions confirm widespread belief in mob activity as a form of legal action linked to the precedent of the American Revolution. Rebel assemblies affirmed constitutional action, formed committees to petition, reserved the right to take positive action against "illegal" abuse, and defended the necessity for action where there was no legal recourse or where a system for redress had failed.[17] They made distinctions between tax collectors (who were resisted) and state officials (who were respected); between *all* laws and one specific, oppressive law (the whiskey excise law); and between local and state law (which rebels considered to be laws of the Union) and federal laws (which, rebels argued, were not those of the state). Local institutions and authorities, including judges, juries, sheriffs, and justices of the peace, refused to pursue, charge, indict, or convict the rebels.[18] In the early republic transition to a written federal Constitution, and to statutes legislated in conformity with it, the Whiskey Rebellion and its trials reflected

Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic," *George Washington Law Review* 72 (2003): 131–32.

[16] Wilmarth, "Elusive Foundation," 132, 144, 146; Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1798* (Columbia, MO, 1997), 101–2, 134, 136–37; Wilf, *Law's Imagined Republic*, 4. See Pierre Bourdieu, *Outline of a Theory of Practice*, trans. Richard Nice (New York, 1977); Linda Myrsiades, *Medical Culture in Revolutionary America: Feuds, Duels, and a Court-Martial* (Madison, NJ, 2009), 27; Bouton, *Taming Democracy,* 32; Kramer, *The People Themselves*, 33–34, 207–8; and Fritz, *American Sovereigns*, 14–15, 155–57.

[17] See Brackenridge, *Incidents of the Insurrection*; Findley, *History of the Insurrection*; William Paterson, bench notes for *U.S. v. Barnet*, GLC01114, Gilder Lehrman Institute of American History; Paterson, bench notes for *U.S. v. Miller*, folder 119, William Paterson Papers, Sarah Byrd Askew Library, William Paterson College; Paterson, bench notes for *U.S. v. Philson and Husbands* [*sic*], folder 120, William Paterson Papers, Sarah Byrd Askew Library, William Paterson College; Paterson, bench notes for *U.S. v. Porter*, MFF2739, Senator John Heinz History Center in association with the Smithsonian Institution.

[18] See Bouton, *Taming Democracy*, 28–29, 145–67, 204, 208, 218, 226, 244, and 216–43 on the Whiskey Rebellion. Bouton provides the concept of "rings of protection": collaboration by jurors, local militias, sheriffs, tax collectors, and the "rough music" of intimidation. Holt expands the idea of popular sovereignty to class warfare to argue that the Whiskey Rebellion was a story of precapitalist oppression by the rich over the poor and the well landed over the unlanded or the poorly landed; a root cause of the rebellion, in this view, was "the loss of what remained of the feudal way of life . . . and the dislocations which that caused for many people" (Holt, "Whiskey Rebellion of 1794," 81–82). See also Slaughter, *Whiskey Rebellion*, 39–60; Fennell, "From Rebelliousness to Insurrection," 1–4, 176, 264–67; and Fritz, *American Sovereigns*, 280–85 (see esp. 280–81, where Fritz distinguishes his view from Kramer's).

aspects of both popular and formal law. The trials thereby represent a transitional moment in political thought. The revolutionary-era belief in popular actions had transitioned to a new consensus in which opposition to burdensome or oppressive laws created under a Constitution that the people had created threatened the survival of the republic. In this new view, the democratic populism of the Whiskey Rebellion dishonored the legacy of the revolution. Treason law would be the true test for balancing popular sovereignty and individual rights against state stability.

In line with this perspective, federal courts would have to prove themselves as new institutions in a new federal government, and they would have to do so in the presence of a residual belief in collective sovereignty. Transitioning to meaningful constitutional review, the courts faced resistance from the people, who held that it was their sovereignty from which the Constitution took its legitimacy. With "political pressure and institutional ambiguity" among their greatest threats, judges acted in a world of flux, navigating politics and law to create precedents for criminal law—particularly for treason law.[19] Given these complex conditions, emphasizing simple partisanship on the part of Federalist judges provides an inadequate explanation for their actions. Scholars would do well to regard the Whiskey Rebellion trials as a regenerative episode in changing political and legal thought.

In guiding grand jurors to indictments and trial juries to verdicts, judges faced critical political complexities: the problematic precedent of the American Revolution, the development of a new popular consensus, the challenge of a new form of government, and the threat that democratic populism posed. One source that illuminates how they addressed such complexities—grand jury charges from 1792 to 1800—has been little studied and has much to offer students of the period.

These grand jury charges challenge assumptions of judicial partisanship and lack of restraint on the part of judges; rather, they demonstrate the legal and political sophistication and the principled underpinning of judges' practices. They offer material on political issues that go unaddressed in law reports and that reflect considerations of governance and legal authority with which both judges and grand jurors, as citizens, were preoccupied. Considering the transition that legal culture was undergoing, grand jury charges shed fresh light on the dilemma judges faced in the tri-

[19] Barbara J. Shapiro, *Beyond "Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley, CA, 1991), 112.

als. They fill in much that is missing about the meaning of legal and political narratives of the insurrection (narratives of popular sovereignty and the needs of state security, the establishment of an independent judiciary and preservation of the Union) and illuminate the ways in which the judiciary negotiated with the people in balancing liberty and power.

Like other federal judges, Paterson took the opportunity of his grand jury charges to serve the new government and its courts by educating grand jurors on their role in the new nation. The way in which he framed the rebellion is clearer here than in any of the published trial records or manuscript notes. Beyond adding to our understanding of his conduct of the trials, Paterson's charges provide a window into a legal mind struggling to define treason within a long tradition of treason law and to provide a reading appropriate to the new nation.

The Grand Jury

This study comprises fourteen grand jury charges by six judges over the period from 1792 to 1800, tracing events from the early days of rebellion through the trials to the residual effects of the rebellion.[20] Historically, the grand jury represented a force for citizen participation in government, "a jury of neighbors," whom English legal scholar William Blackstone regarded as a "barrier . . . between the liberties of the people, and the prerogatives of the crown."[21]

[20] A total of sixteen grand jury charges were examined, fourteen of which are discussed in the paper. Three were delivered in state courts, one in county court, two in federal district courts, and ten in federal circuit courts. Ten were delivered in Pennsylvania at various levels: one in Philadelphia criminal court, three in the western courts, two in district court, and four in circuit court. Of the remaining circuit court charges, two were delivered in Virginia and one each in New Jersey, Delaware, Georgia, and New Hampshire. The judges represented the Pennsylvania Supreme Court (Thomas McKean), the western courts of Pennsylvania (Alexander Addison), the US Supreme Court (William Paterson, John Blair, James Iredell, William Cushing, and Samuel Chase), the US Circuit Court, and the US District Court (Richard Peters).

[21] Linda S. Myrsiades, "Grand Juries, Legal Machines, and the Common Man Jury," *College Literature* 35 (2008): 158–78; Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York, 2005), 102; William Blackstone, *Commentaries on the Laws of England*, vol. 4, 13th ed. (London, 1800), 343, 349; Helene E. Schwartz, "Demythologizing the Historic Role of the Grand Jury," *American Criminal Law Review* 10 (1971–72): 701–3; Suja A. Thomas, "Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States," *William and Mary Law Review* 55 (2014): 1211. The right to a grand jury was granted in two state constitutions during the revolution: Georgia and North Carolina (Richard D. Younger, "Grand Juries and the American Revolution," *Virginia Magazine of History and Biography* 63 [1955]: 265). The grand jury was preserved in the Fifth Amendment to the federal Constitution as a right in felony cases and in the Bill of Rights as a check on federal and legislative power (Kevin K. Washburn, "Restoring the Grand Jury," *Fordham Law Review* 76 [2008]: 2346).

Relatively independent in the colonial period, it had a history of opposing authority.[22] Jurors, profiting from their "inscrutability," could not be interrogated on their refusal to indict and so could not be predictably relied upon to enforce unpopular laws or indict political defendants.[23] Grand jury powers extended in practice from finding facts and determining the law to mitigating sentences by deciding the crime for which a defendant could be tried.[24] They impeded the government's ability to enforce the law by refusing to indict; discouraged authorities from seeking indictments in matters that met with local disfavor, taxation in particular; and checked the legislature by disregarding existing law.[25]

At the same time, the grand jury maintained the stability of local government by investigating corruption, official abuse or negligence, lack of law enforcement, and public disorder. It acted as a shield against "promiscuous prosecution" in periods of political disorder.[26] In 1783, for example, Pennsylvania Supreme Court Chief Justice Thomas McKean, as prosecutor, brought Eleazer Oswald before a grand jury without recusing himself as its judge. The grand jury received witnesses not admitted by the court and refused to indict. Directed to reconvene and reconsider its decision, it refused to do so, emboldening Oswald to pursue McKean's impeachment.[27] Nullification of a judge's directions created a problem for the American judiciary, particularly in times of riot, sedition, or presumed treason.[28] Rioters might themselves serve as jurors, and jurors might refuse to indict neighbors or to indict in favor of a federal authority hundreds of miles away.[29] Between 1783 and 1792, admiralty judge Francis Hopkinson engaged in a well-publicized debate with Pennsylvania Supreme Court

[22] Washburn, "Restoring the Grand Jury," 2343; Younger, "Grand Juries," 265, 268.

[23] Established in *Bushell's Case* (1670). See John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003), 323–24, 326; Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago, 1994); Sanjeez Anand, "The Origins, Early History, and Evolution of the English Criminal Trial Jury," *Alberta Law Review* 43 (2005): 407–32; Myrsiades, "Grand Juries," 159–60; and Shapiro, *Beyond "Reasonable Doubt*," 87.

[24] Thomas, "Blackstone's Curse," 1203–4; Washburn, "Restoring the Grand Jury," 2344.

[25] For the history of the grand jury, see Langbein, *Origins of Adversary Criminal Law*, 45; Thomas, "Blackstone's Curse," 1214; and Shapiro, *Beyond "Reasonable Doubt*," 86–92, 111–12.

[26] Younger, "Grand Juries," 257–58, 265–68; Richard D. Younger, "The Grand Jury under Attack," *Journal of Criminal Law, Criminology, and Police Science* 466 (1955): 26–49; Schwartz, "Demythologizing," 701–3.

[27] Myrsiades, "Grand Juries," 165–72; Shapiro, *Beyond "Reasonable Doubt*," 87–90; and G. S. Rowe, *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684–1809* (Cranbury, NJ, 1994), 170–72.

[28] Younger, "Grand Jury under Attack," 26. See Alexander Addison, *Reports of Cases in the County Courts of the Fifth Circuit, and in the High Court of Errors and Appeals of the State of Pennsylvania, and Charges to Grand Juries of Those Courts* (Washington, DC, 1800), 35–53.

[29] Schwartz, "Demythologizing," 701–3, 721, 723–26.

justices McKean and George Bryan over whether the grand jury ought not to act as a mere tool of government prosecution. Justices refused to call up a grand jury when it benefitted them, and they reprimanded those that disregarded a directed charge.[30] Members of an elite group who profited from government support, judges influenced grand jury selection and threatened those who refused to serve.

The judge's ability to manipulate a grand jury depended to a large extent on its composition. In England it was common to privilege members of the elite by packing a grand jury on behalf of royalists or the upper classes.[31] In the Philadelphia treason trials of 1778–79, grand juries consisted of men who both possessed considerable wealth and had played "a significant role in Pennsylvania revolutionary politics."[32] For the Whiskey Rebellion trials, the jury was chosen by lot from a pool of qualified jurors called up by a marshal.[33] Unless the marshal summoned only those of a certain class, a mixed grand jury was possible. No distinction was made between jurors for a grand and a petite jury, and there were no landholding or voter requirements for either kind of jury.[34] Still, as jurors were paid five shillings a day and fined six pounds if they failed to appear, poor jurors from a distance would have been greatly inconvenienced if called to serve.[35] It was not clear whether some grand jurors were summoned from the western counties, where the offenses occurred.[36] Only trial juries were required to include representation from the county in which the crime

[30] Myrsiades, "Grand Juries," 165–72; Shapiro, *Beyond "Reasonable Doubt,"* 87–90; Younger, "Grand Juries," 259; G. S. Rowe, *Thomas McKean: The Shaping of an American Republicanism* (Boulder, CO, 1978), 187; Washburn, "Restoring the Grand Jury," 2341–42; Thomas, "Blackstone's Curse," 1213. On the independence of judges and the development of the grand jury, see Shapiro, *Beyond "Reasonable Doubt,"* 87–93, 111–13.

[31] Schwartz, "Demythologizing," 759–60; Younger, "Grand Jury under Attack," 28.

[32] See Carlton Larson, "The Revolutionary American Jury: A Case Study of the 1778–1779 Philadelphia Treason Trials," *Southern Methodist University Law Review* 61 (2008): 1457–62, 1511–12.

[33] The 1789 Judicial Act of Congress, section 29, relied upon state law for jury composition; the Pennsylvania Act For the Better Regulation of Juries (1785) controlled jury selection. See United States v. Insurgents of Pennsylvania, 2 U.S. (2 Dall.) 335, 341 (1795).

[34] For jury packing in sedition cases, see Schwartz, "Demythologizing," 723–24, 726, and 732.

[35] *The Statutes at Large of Pennsylvania from 1682–1801,* ed. James Tyndale Mitchell and Henry Flanders (Harrisburg, 1887), 487, 492–94.

[36] A great deal was made by defense counsel of representation from the western counties; they made liberal use of jury challenges in the trials, giving them considerable leeway in the composition of juries (Holt, "Whiskey Rebellion of 1794," 74–81). See Albert Gallatin letters for the most thorough eyewitness account on the constitution of trial juries, challenges, indictments, and convictions: to Hannah Gallatin, May 12, 15, and 18–19, 1795; to John Badollet, May 20, 1795; and to Thomas Clare, May 30, 1795, Albert Gallatin Papers, 1794–1952, New-York Historical Society (NYHS). Western juries were not packed by members of the upper classes to the exclusion of common citizens, as often happened in urban grand juries in the East.

occurred, and only for death penalty cases.[37] The different rates of grand jury indictments (73 percent) and trial convictions (20 percent) for treason suggest that jurors from the western counties did not serve on the grand jury, for they would not have indicted with such frequency as eastern jurors, particularly in the many weak cases where convictions were unlikely.[38]

Beyond the composition of the grand jury, the judge's most potent instrument in influencing its members was his charge. It was used to advise a grand jury on the law and "to inculcate in . . . listeners an understanding of the intricacies of self-government and a respect for the Constitution." A similar charge was commonly delivered in any number of different court terms.[39] Federalist judges took the opportunity to generate public support for the national government. They harangued juries with their party views and political biases, urging support for the government's position. This pattern was especially true in cases concerning sedition and treason.[40] A judge's words carried weight with jurors, as judges represented the government and the law and had control over the proceedings of the grand

[37] From the western counties only twelve out of seventy-two—thirty-six from Philadelphia County, fifteen from Delaware County, and nine from Chester County—were called to form a pool for each of the ten cases tried, from which trial jurors would be chosen; United States v. Insurgents of Pennsylvania, 2 U.S. (2 Dall.) 335, 339, 342 (1795).

[38] According to Holt, the grand jury indicted twenty-four out of the thirty-four bills for treason presented (73 percent), of which ten stood trial since of those indicted thirteen had fled and one fell under the amnesty. Of these ten, two (20 percent) were convicted. The grand jury refused to indict four rebels for misprision of treason and five rebels for misdemeanor. Two rebels were indicted for felony, twenty-six for misdemeanor, and two for misprision of treason. Only two of these were tried and convicted (Holt, "Whiskey Rebellion of 1794," 75–76). Holt argues, further, that Federalist judges would have refused to allow grand jurors from the western counties to weigh the guilt of the rebels, which would have explained the total number of fifty-two indictments (for treason, misprision of treason—a misdemeanor—felony, and other misdemeanors). Where the western counties were represented, on the petite juries, the fact that jurors would not convict was noted by the Whiskey Rebellion prosecutor, William Rawle (District Attorney Rawle to Judge Addison, Philadelphia, Oct. 29, 1795, in *Pennsylvania Archives*, 2nd ser., 4:453). Rawle appeared resigned to "a reluctance in the jury to convict the smaller engine on the testimony of their ringleaders, and a natural repugnance to capital convictions" (District Attorney Rawle to Judge Addison, Philadelphia, Aug. 15, 1795, in *Pennsylvania Archives*, 2nd ser., 4:450). Holt argues that the "nonpoor grand and petite jurors," while not rebels themselves, would have identified with them enough to reject the prosecution's elitism. Indeed, all the grand and petite jurors added their names to a petition of hundreds asking for clemency for the two rebels, Mitchell and Vigol, who were convicted of treason (Holt, "Whiskey Rebellion of 1794," 78n164, 79–81).

[39] Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York, 1971), 12; "William Paterson Grand Jury Charge—Number 1," Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789–1800*, 7 vols. to date (New York, 1986–), 5:457.

[40] O'Connor, *William Paterson*, 230, 258, 275; Schwartz, "Demythologizing," 727–32, 750–51; G. Edward White, *Law in American History: From the Colonial Years through the Civil War* (New York, 2012), 206; Henry L. Snyder, "Charges to Grand Juries: The Evidence of the Eighteenth-Century Short-Title Catalogue," *Historical Research* 67 (1994): 291.

jury.[41] In the end the combination of political charges and packed juries could make indictments easier to arrange and insufficient evidence less of a problem. Even if an indictment were denied, the very fact of calling a grand jury was meant to silence public opposition.[42]

Despite such manipulation, grand juries expressed remarkably consistent support for the judicial system. Jury statements tended to recommend the publication of grand jury charges for the edification of fellow citizens, for education in the Constitution and laws, and for the dissemination of "moral and patriotic lessons."[43] Grand jurors charged by Justice McKean in a rebellion case, for example, expressed a characteristically deep pride in jury service.[44] In language that often seemed to have been lifted wholesale from a judge's charge, jurors stated their concern for assaults on the "public happiness," insisting that the taint of rebellion did not extend to their districts and that such rebellion would "remain a solitary instance in the annals of our country."[45] They defended the reputation of their state and their own "enlightened attachment to liberty and law." Voicing their disapproval of riots, anarchy, and subversion, jurors defended the government against attack by calling on friends to oppose enemies of order and encouraging political minorities to respect the general will.[46] Jury statements thus reflected both the judge's influence and the desire to claim

[41] Schwartz, "Demythologizing," 755–56; Younger, "Grand Juries," 263.

[42] Schwartz, "Demythologizing," 764–65.

[43] The sample here represents eight jury statements responding to grand jury charges by six judges who addressed rebellion against the government, the Whiskey Rebellion in particular, from 1792 to 1799: "Reply of the Grand Jury of Circuit Court for the District of Delaware," June 9, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:61, in response to William Paterson, Circuit Court of Delaware; Address to James Iredell, Circuit Court of Pennsylvania, May 15, 1799, in Thomas Carpenter, ed., *The Two Trials of John Fries, on an Indictment for Treason; Together with a Brief Report of the Trials of Several Other Persons, for Treason and Insurrection, in the Counties of Bucks, Northampton, and Montgomery, in the Circuit Court of the United States* (Philadelphia, 1800), 15–16, in response to James Iredell, Circuit Court of Pennsylvania; "Presentment of the Grand Jury of the Circuit Court for the District of Georgia," Apr. 29, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:39, in response to John Blair, Circuit Court of Georgia.

[44] "Charge of Chief Justice McKean and Reply of the Grand Jury, Philadelphia, Nov. 8, 1792," in *Pennsylvania Archives*, 2nd ser., 4:37.

[45] "Reply of the Grand Jury of the Circuit Court for the District of New Jersey," Apr. 2, 1796, in Marcus, *Documentary History of the Supreme Court*, 3:102, in response to James Iredell, Circuit Court of New Jersey.

[46] "Reply of the Grand Jury of the Circuit Court for the District of New Hampshire," Oct. 24, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:71, in response to William Cushing, Circuit Court of New Hampshire; "Presentment of the Grand Jury for the Circuit Court for the District of Georgia," Apr. 29, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:39, in response to John Blair, Circuit Court of Georgia; "Reply of the Grand Jury of the Circuit Court for the District of Pennsylvania," Apr. 12, 1796, in Marcus, *Documentary History of the Supreme Court*, 3:113–14, in response to James Iredell, Circuit Court of Pennsylvania.

"true" republicanism, to counter the spread of "false philosophy and . . . wicked principles," and to warn of the folly of "ruinous attempts" against the government.[47] If judges were Federalist in spirit, so too were many of the grand juries over which they presided.

William Paterson

The most significant judicial narrative of the Whiskey Rebellion came from the presiding judge of those trials, William Paterson. Paterson served as attorney general of New Jersey during the years of the American Revolution and became governor in 1791, at which time he gave up his legal practice. A representative to the Constitutional Convention of 1787, he defended equal representation of small states and affirmed state over private interests in western lands, easing the ratification process and gaining wide respect. Paterson's lifelong devotion to the Constitution dated from his participation in this convention.[48]

George Washington appointed Paterson to the US Supreme Court in 1793, reflecting the president's regard for the court as a central support for the new national government. Intent on selecting only the fittest men to serve, Washington discounted his preference for geographical balance on the court.[49] Nominees must have supported both the revolution and the Constitution. Men with judicial knowledge and legal experience were preferred, as were those who had served politically or in the military.[50] Paterson was not strongly Federalist in his views, but he supported a strong national government and adherence to its laws. At the Constitutional Convention, he even proposed a failed plan to authorize drastic measures against popular rebellions.[51] His appointment was thus a function of both his political bearings and his legal views. Well respected as a jurist on the

[47] Address to James Iredell, Circuit Court of Pennsylvania, May 15, 1799, in Thomas Carpenter, ed., *Two Trials of John Fries*, 15–16, in response to James Iredell, Circuit Court of Pennsylvania; "Reply of the Grand Jury of the Circuit Court for the District of Pennsylvania," Apr. 12, 1796, in Marcus, *Documentary History of the Supreme Court*, 3:113–14, in response to James Iredell, Circuit Court of Pennsylvania.

[48] O'Connor, *William Paterson*, 133–34, 181, 183, 140–43, 147, 162.

[49] Washington to John Jay, Oct. 5, 1789, and Washington to John Rutledge, Sept. 29 and 30, 1789, in Marcus, *Documentary History of the Supreme Court*, 1:1, 11, and 20–21; Brooks D. Simpson, "President Washington's Appointments to the Supreme Court," *Journal of Supreme Court History* 17 (1992): 64; Hickox and Liviano, "William Paterson," 57–58.

[50] Simpson, "Washington's Appointments," 65–66.

[51] O'Connor, *William Paterson*, 224–25, 249, 252–53, 255. Shays's Rebellion (1786) exemplified the need to authorize drastic measures to suppress popular rebellions (ibid., 147–48).

US Supreme and US Circuit Courts, Paterson was known for his "basic moderation and open-mindedness," as well as his concern for political stability in the new nation.[52]

Nevertheless, Paterson's role in the Whiskey Rebellion trials was controversial. Paterson himself wrote to his wife that he found the trials "a disagreeable necessity."[53] His biographer, John E. O'Connor, argues that Paterson's political opinions encroached on his judicial impartiality. This reading of Paterson's performance in the trials became common in later years, as adherents cast the trials in terms of "political theater," assailed Paterson for making "the verdicts inescapable," and complained about heavy-handed instructions to the jury. They accused justices of acting from pressure to convict and out of fear the rebels would go free, of choosing the cases most likely to secure convictions, and of pursuing convictions only so they could mercifully pardon the rebels later.[54] Although Paterson carefully weighed the interests of the state against those of individuals, observers considered his performance in the trials volatile, excessive, and biased.[55] The textual evidence, however, challenges this underexamined view.

The Grand Jury Charges

Paterson's grand jury charges in the year of the Whiskey Rebellion trials provide three opportunities to assess his state of mind in close proximity with the trials themselves. These charges can first be juxtaposed with his trial jury charges in *U.S. v. Mitchell* and *U.S. v. Vigol*, delivered in May. They can then be supplemented by his Supreme Court opinion in *Vanhorne's Lessees v. Dorrance*, delivered in April, and by a report he sent to the president in June. Grand jury and trial jury charges cannot, of course, be considered in the same light. The two juries had different purposes—grand juries indicted, whereas trial juries tried a case—and

[52] O'Connor, *William Paterson*, 284; see Hickox and Liviano, "William Paterson."

[53] Paterson to Euphemia Paterson, Feb. 20, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:6 and 1n5.

[54] See Slaughter, "King of Crimes," 90–91; Slaughter, *Whiskey Rebellion*, 220; Ifft, "Treason in the Early Republic," 173–74; Blinka, "Germ of Rottenness," 169n200; O'Connor, *William Paterson*, 234–36, 249, 258, 270, 284; and Brackenridge, *Incidents of the Insurrection*, 2:63.

[55] Unlike Justice Iredell in the *Fries* case, Paterson failed to advise the jury in *Vigol* that its task was to consider only whether the defendant was guilty of the crime charged and not to consider if the safety of the nation required the prisoner be punished (O'Connor, *William Paterson*, 328n35). Iredell also applied in *Fries* the two-witness rule to one overt act to corroborate a confession, a rule that Paterson interpreted very loosely in *Mitchell* (Blinka, "Germ of Rottenness," 174n221).

operated according to different legal standards. Grand juries used a lower standard of probability and allowed only prosecution evidence; criminal trials used a higher standard of proof and allowed both prosecution and defense arguments and evidence.[56] The two were related, however. In his grand jury charges, Paterson justified politically the legal position he later took in the trial charges and provided an explanatory framework that made sense of his performance in the trials.

To appreciate fully Paterson's grand jury charges, they should also be considered alongside two by Pennsylvania judge Alexander Addison and two by federal judge Richard Peters in the previous year of full-blown insurrection. One of Addison's charges came immediately before the federal militia's October invasion of western Pennsylvania; the other came after it, when important trials were about to be moved to the federal circuit court in Philadelphia. State courts continued to try related riot cases throughout 1795.[57] A third charge by Addison in the early days of whiskey tax resistance offers an opportunity to gauge the development of his views over time. Peters's charges both occurred before he joined the federal militia as its judicial arm, alongside US District Attorney for Pennsylvania William Rawle. By presidential order Peters had unrestricted judicial powers in his role with the militia; Rawle later went on to prosecute the rebels in Philadelphia in trials where Peters presided as a judge.[58]

In 1792 Addison charged a grand jury to preserve the peace in the wake of an August 24 attack against Washington County army captain William Faulkner, who had rented space to excise inspector John Neville.[59] Addison contrasted the private interest (natural liberty) of the rebels to the public good (civil liberty). De-emphasizing the threat to public order, he spoke of the excise tax as a private, particular inconvenience, which "there are no legal means ready to remove." He characterized the events not as treason but as riots that dangerously combined private citizens "under specious pretences of justice" and "patriotic labours."[60] The principles Addison laid out were simple: the grand jury need not take into account the rebels' inten-

[56] See Langbein, *Origins of Adversary Criminal Law*, 33, 262, 265–66; Shapiro, *Beyond "Reasonable Doubt,"* 22, 24–25, 140; and Anthony A. Morano, "A Reexamination of the Development of the Reasonable Doubt Rule," *Boston University Law Review* 55 (1975): 516–19.

[57] Ifft, "Treason in the Early Republic," 175–76.

[58] Alexander Hamilton to Henry Lee, Oct. 20, 1794, in Syrett, *Papers of Alexander Hamilton*, 17:331–36; Francis Wharton, *State Trials of the United States during the Administrations of Washington and Adams, with References Historical and Professional* (New York, 1849), 159–61.

[59] Slaughter, *Whiskey Rebellion*, 114–15.

[60] Addison, *Reports of Cases*, 47–49, 53.

tion (blackening their faces and carrying arms "proved their designs unlawful"); whether force was necessary ("every use of force implies, that the cause is bad") or done for a good purpose ("the thing itself is criminal, whatever be the object"); or whether a rebel was guilty of an overt act ("its authors, their advisers, and abettors . . . were all guilty").[61]

By eliminating these critical legal distinctions, Addison simplified the jury's task. He minimized the illegality of the popular assault as local grievances that appeared to lack a means of redress, allowing state courts to charge riot for offenses for which a federal court would later charge treason.[62] As president judge, Addison on the one hand urged fellow judges who felt "it was not our duty to hunt after prosecutions" to do their duty and hold trials.[63] On the other hand, Addison refused to assist the federal collector in taking depositions, complaining that he was farming out his duties to "an inhabitant of this corner, everyday exposed to the passions of the people in it." Although he agreed to "take all measures as appear[ed] to [him] proper to bring justice in the proper courts of Pennsylvania," he would do no more, he declared, "until I am convinced that it is my duty to do more."[64] Addison had clearly chosen to straddle the fence by both pleasing the people and preserving his ambitions.

By September 1794, after two fitful years of unrest and stung by accusations that state courts under his authority were incompetent, Addison reached a watershed moment. He became convinced that the West faced a national crisis so awful that it risked any forgiveness by the federal government.[65] Resistance to the excise law had escalated in his mind to resistance to all laws. The Washington administration had already procured authorization from Associate Supreme Court Justice James Wilson—who later served as one of the judges in the Philadelphia trials—to launch a federal militia against the rebels.[66] "[I]f one law is repealed at the call of armed men," Addison charged a Pittsburgh grand jury, "government is destroyed: no law will have any

[61] Addison, *Reports of Cases*, 50–52.

[62] Ifft, "Treason in the Early Republic," 175.

[63] Addison to Thomas Mifflin, Nov. 4, 1792; Mifflin to George Washington, Oct. 5, 1792; Mifflin to Judges of the Pennsylvania Supreme Court, Oct. 5, 1792; *Pennsylvania Archives,* 2nd ser., 4:28–29, 32.

[64] George Clymer to Alexander Hamilton, Oct. 4, 1792, and Addison to Clymer, Sept. 29, 1792, in Syrett, *Papers of Alexander Hamilton*, 12:517–22, 519n5; Slaughter, *Whiskey Rebellion*, 125–27. George Clymer, federal supervisor of collection, had appealed to Addison to assist him in collecting taxes.

[65] Addison, "Necessity of Submission to Excise Law," in *Reports of Cases*, 100–12; *New Jersey Journal*, Sept. 24, 1794.

[66] An August 4, 1794, letter from Supreme Court Associate Justice James Wilson to President Washington provided the legal authorization from an associate justice or district judge to operationalize section 2 of the Militia Act of 1792 so that a federal militia could be sent to the western country (Wilson to Washington, Aug. 4, 1794, in *Pennsylvania Archives*, 2nd ser., 4:70).

force."[67] The nation must either exert the "whole force" of its authority or it "must cease to exist." As "guardians of the public peace," jurors were to consider whether they could survive as an independent people, for the government "must either subdue us, or cast us off."[68] Addison's words resonated with the early demands of the rebels. How would the Indians on the western frontier be repelled? How would the frontier withstand the British and the Spanish? How would the Mississippi River be opened to commerce?[69]

Following the arrival of the federal militia, Addison's condemnation of the rebels became even more explicit. In his December 1794 grand jury charge, he argued that the rebellion, the most alarming event in America for many years, demonstrated the "inefficiency of a free representative democracy."[70] Individual neighborhoods, he complained, mistakenly used the word "people" and spoke in the name of the people, each assuming a right to do as one pleased. To allow any individual to prevail in a group, any combination in a state, or any state in the Union, would be no more than to allow a part to dictate to the whole. The rebels exemplified the dangers of republican government that the Federalists most feared: a crisis in which people turned to force rather than the Constitution to redress grievances. "Forcible resistance to law," Addison held, was never acceptable, so long as "the law be consistent with the constitution."[71] Only the Constitution itself could silence a law that was "repugnant" to it. Even words and such symbolic speech as liberty poles were criminal acts and "standards of rebellion"; thus, it followed that "impunity [for such acts] begets offences, as corruption begets maggots."[72] Rebels taught "an awful lesson" of anarchy "under the semblance of zeal for the public good."[73] He reminded jurors that they had no discretion under oath "answerable to God"; they had to indict.[74]

Addison had, in sum, indicted the rebellion for demonstrating the violence and weakness some believed was inherent in representative democracy. In converting to Federalism, Addison evolved from a jurist who found space for local institutions and popular resistance to one who stood with

[67] Addison, *Reports of Cases*, 101. The fear that in rendering "one law ineffectual, the whole system of laws may be destroyed," so that "All laws will at last yield," was a common Federalist theme. Judge Richard Peters repeated this theme as late as 1799 in *Fries*. Carpenter, *Two Trials of John Fries*, 908.

[68] Addison, *Reports of Cases*, 111.

[69] Ibid., 104–5.

[70] Ibid., 113.

[71] Ibid., 115.

[72] Ibid., 126–27, 124–25.

[73] Ibid., 118, 120.

[74] Ibid., 125.

the Constitution and the federal government.[75] In the process he identified the central themes that defined the federal judiciary's response to the Whiskey Rebellion.

Indeed, Addison was caught on the horns of a dilemma, trusted neither by staunch Federalists nor by the rebels.[76] The rebels found Addison "obnoxious" for encouraging a marshal to serve writs against them; "They talked of not suffering [him] to return to the country."[77] His grand jury charges in Allegheny and Westmoreland Counties went unendorsed for publication by jurors, "who were under such apprehensions from the country as not to think it safe to manifest an approbation of the sentiments contained in the charge."[78] The rebel assembly at Parkinson's Ferry preferred a reading of a fiery pamphlet by a charismatic utopian preacher, Herman Husband, to that of an Addison grand jury charge.[79]

As a federal judge for the District of Pennsylvania, Peters's grand jury charge in August did not merely anticipate Addison's increasing concern

[75] *Albany Register* report, *Aurora*, July 25, 1799, quoted in Marcus, *Documentary History of the Supreme Court*, 3:375; see Norman L. Rosenberg, "Alexander Addison and the Pennsylvania Origins of Federalist First-Amendment Thought," *Pennsylvania Magazine of History and Biography* 108 (1984): 399–417. A signed letter published in 1795 in the *Aurora* by a pseudonymous figure, "A Militia Man," presumed two causes for Addison's change of heart from "democrat" to Federalist. First, whereas the first seeds of sedition saw him "hidden in obscurity whilst it was in his powers to bring the offenders to justice," once the offenders had been contained by the government and taken for trial, he could "unnecessarily recapitulate the enormities they have been guilty of" to undermine their popular esteem. Second, Addison was accused of publishing his September 1794 grand jury charge to "inflame and irritate the public mind" and "to depress the characters of individuals in the eyes of their fellow citizens." Addison's intent, according to the letter, was to deny the people elected representatives of their choice in the Pennsylvania state legislature elections of October 14, 1794. "A Militia Man," letter to editor, *Aurora*, Jan. 14, 1795. On the elections, see Albert Gallatin, *The Speech of Albert Gallatin, a Representative from the County of Fayette, in the House of Representatives of the General Assembly of Pennsylvania on the Important Question Touching the Validity of the Elections Held in the Four Western Counties of the State, on the 14th Day of October, 1794* (Philadelphia, 1795).

[76] Addison was, for instance, much maligned by Alexander Hamilton for being guilty of "arts of misrepresentation . . . carried to a considerable height" and for his fear of "losing the [people's] confidence by a compliance with what was desired of him." Using the judge's own words ("that constitutional resistance, which alone is justifiable in a free people") to accuse him of catering to the people, Hamilton claimed "proof by his own confession." From Hamilton's standpoint the judge had promoted noncompliance with the law, for there was no such thing as constitutional resistance "short of actual violence or breach of the peace." Addison to Thomas Mifflin, Mar. 31, 1794, *Pennsylvania Archives*, 2nd ser., 4:51; Hamilton to George Washington, Sept. 2, 1794, *Pennsylvania Archives*, 2nd ser., 4:246; see Findley, *History of the Insurrection*, 291–93.

[77] Brackenridge, *Incidents of the Insurrection*, 1:75–76.

[78] Brackenridge, *Incidents of the Insurrection,* 2:10, 14, 30. The rejection refers to Addison's September 6 and September 22 grand jury charges. Subsequent charges in Washington and Fayette counties were endorsed.

[79] Sometimes reported as "Husbands," see Ifft, "Treason in the Early Republic," 182n54; Husband was at the Redstone and Parkinson's Ferry assemblies in August 1794. See William Paterson, bench notes, *U.S. v. Philson and Husbands* [*sic*]. In one iteration, the structures of local institutions were repli-

for constitutional democracy; it went well beyond it. Peters effused on the unequivocal responsibilities citizens owed to the government, the laws, and the Constitution. Even though "treason [was] a crime of too high a nature and of too deep a dye to fall within the jurisdiction" of the district court, Peters found that the district jury was mandated, at the very least, to address the recent "unjustifiable, disgraceful and much to be lamented disturbances." In a dramatic shift away from the ethos of the recent American Revolution, Peters exhorted the grand jury to defend the newly established government rather than the right to resist oppressive laws.[80] Local interests were superseded by those of the whole nation, which fully compensated that sacrifice by its protection of the whole. Peters weighed power more heavily than liberty and saw his court as a form of public police, an essentially prosecutorial role that reinterpreted the idea of a grand jury. No longer a barrier between the government and the people, the grand jury, he offered, ought to "bring forward the offending citizen to make atonement for his transgression."[81] Invoking American exceptionalism, he called upon the jury in the names of God, nature, "our common country, and . . . the majesty of the law" to ensure heaven's blessings bestowed on the nation and to reject what he had prejudged as nothing "but rebellion, but treason."[82]

Peters's charges were delivered in a trial court for minor civil and criminal matters—one that had no authority over appeals from state courts or federal questions.[83] He subsequently found himself perfectly placed to apply his views on the insurrection when he went westward with the militia to round up and interrogate prisoners, investigate crimes, and assign charges. His prosecutorial zeal did not deter him from taking a place on the bench beside Paterson in Philadelphia; he never considered recusing

cated in popular courts that adjudicated cases in the rebel assemblies; see Brackenridge, *Incidents of the Insurrection*, 1:59–63, 65, 71–72, 79, 82–83, 108–9.

[80] It was a legacy that Pennsylvania Supreme Court Chief Justice Thomas McKean shared in a grand jury charge on January 4, 1792, where he wondered at a people "just rescued" from the bondage of a foreign power and that possessed a government "framed by themselves," who would yet "trample on laws of their own making." Having escaped "a despotic government," he added, they would "not submit to one free and equal." "Charge of Chief Justice McKean and Reply of the Grand Jury, Philadelphia, Nov. 8, 1792," in *Pennsylvania Archives*, 2nd ser., 4:36.

[81] Richard Peters, grand jury charge, District Court of Pennsylvania, *Gazette of the United States*, Sept. 30, 1794. On exceptionalism, see also Richard Peters, "Charge of Judge Peters of the U. S. Courts," [Aug. 19, 1794], District Court of Pennsylvania, in *Pennsylvania Archives*, 2nd ser., 4:152.

[82] Richard Peters, grand jury charge, District Court of Pennsylvania, *Gazette of the United States*, Sept. 30, 1794.

[83] Eduardo C. Robreno, "Learning to Do Justice: An Essay on the Development of the Lower Federal Courts in the Early Years of the Republic," *Rutgers Law Journal* 29 (1998): 560–61.

himself from the court that would try the rebels.[84] Judge Peters's high-handed management of his task in the West thus undermined subsequent prosecution in the Philadelphia Circuit Court. His preoccupation with public order left him open to accusations of unfair favoritism, biased testimony, and corrupted evidence. Trial watcher Albert Gallatin compared Peters's unjudicial temperament on the bench unfavorably to the excellent example of Justice Paterson, and scholars have since described Peters's jurisprudence as "arbitrary and tyrannical."[85]

Peters's attitude is perhaps best illustrated by his insistence in *U.S. v. Insurgents* that "all the inconveniences to the defendant . . . weigh lightly when set against the delays and obstructions [thrown] in the way of the execution of the laws of the nation."[86] Indeed, four years after the trials in another Pennsylvania case, the anti-tax Fries's Rebellion, he clarified his discretionary Federalism.[87] There, Peters relied on the precedent of the Whiskey Rebellion trials to claim that while he had rejected constructions of treason that ran afoul of "justice, reason and law . . . It is not fair and sound reasoning to argue against the necessary and indispensable *use* of constructions, from the *abuses* it has produced." He authorized juries not to be "so much alarmed about *abuses*" or to refrain from using interpretations that they found "proper and necessary."[88]

Justice Paterson did not share Peters's preference for the procedural rights of the state over the individual's right to a fair trial. His views on the insurrection appear in a lead-up to the trials in an April 1795 charge to a grand jury in the Circuit Court of New Jersey. Unlike Peters, Paterson took on the paternal role of an educator in good citizenship. Paterson called for "preventative justice," that is, education, the proper means of frustrating "hostile but colourable schemes and views" and for offsetting the designs of rabble factions and party interests or those who "work the ruin of the state."[89] Education worked hand in glove with reverence for—indeed, veneration of—the law in producing citizens who "act well our

[84] The format from 1793 consisted of one US Supreme Court justice and one district court judge presiding over a circuit court.

[85] Stephen B. Presser, "A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence," *Northwestern University Law Review* 73 (1978): 38, 40, 104–6, 109.

[86] United States v. Insurgents of Pennsylvania, 2 U.S. (2 Dall.) 335, 341 (1795).

[87] Presser, "Tale of Two Judges," 38, 40, 104–6, 109.

[88] Carpenter, *Two Trials of John Fries*, 206–7.

[89] William Paterson, grand jury charge, Circuit Court of New Jersey, Apr. 2, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:11–12.

parts in society."[90] Together with republican virtue, the Constitution, and the law, education could maintain the balance of liberty and order.[91]

Paterson's May 4, 1795, charge to open the Whiskey Rebellion trials just a month later was another matter entirely. It presented law as a weapon to curb disorder and castigate the rebellious. In a nation of republican character where only law, and not men, was sovereign, jurors had the duty to reprove abettors of violence. To do otherwise threatened political existence, peace, and "the majesty of the people themselves." Licentious and more dreaded "than hosts of external foes" (the destabilizing pressures from France and England), the ill-informed were contrasted to citizens on the grand jury, who should compel rioters to submit to the supreme law.[92]

This charge was not an isolated incident. In an October newspaper piece, Paterson attacked public men who were "ever busy in raising and spreading false rumours, in alarming the public mind and working up the people into sedition and rebellion."[93] In an undated, contemporaneous grand jury charge, Paterson argued that the law, "the first political maxim in a republican government," required an obedience "mistaken for slavery" by the unthinking.[94] In another undated charge, he warned that insurrection resulted from forgetting that "Order is Heaven's first law," and that such rebellion led unavoidably to "political slavery and death."[95] Despite its heavy-handed rhetoric, however, Paterson's May charge was a complex statement of political theory. It had, in effect, proposed a framework for dealing with the rebellion in the context of an existing debate on treason.

The Treason Debate

Present in both English common law and colonial statutes, treason was a familiar yet debated term in early American legal culture.[96] The term

[90] Ibid.

[91] Paterson, grand jury charge, Apr. 2, 1795, in ibid., 3:13.

[92] William Paterson, grand jury charge, Circuit Court of Pennsylvania, May 4, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:41–42.

[93] Ibid. Paterson continued to be obsessed with this theme throughout the trials, addressing it as the sole theme of a piece he published in October 1795. "Horatius—N. IV," *Genius of Liberty & New-Jersey Advertiser*, Oct. 26, 1795.

[94] William Paterson, undated grand jury charge, in Marcus, *Documentary History of the Supreme Court*, 3:459.

[95] William Paterson, undated grand jury charge, in ibid., 3:463–64.

[96] Whereas Willard Hurst (the baseline authority on American treason law) examined the law of specific colonies in detail, he drew broad conclusions that allow the present paper to speak more generally where possible and appropriate. See Willard Hurst, "Treason in the United States I: Treason, Down to the Constitution," *Harvard Law Review* 58 (1944): 226, 238, 240, 243, 258.

treason was used in a restricted sense, with emphasis on the safety of the government, to which individual rights were subordinated, but with proofs and procedures designed to protect the accused.[97] While these twin poles were to provide the parameters for future insurrections, both the rights of the accused and the security of the state required that such imprecise concepts as conspiracy, subversion, and usurpation of power be clarified.[98] To do so, jurists had to differentiate between riot and treason, qualify what counted as "war," and sharpen uncertain, doubtful, or general grounds in determining what treason was.

English common law had defined treason as acts against the king, but the phrase was "expressly excluded" from revolutionary-era statutes and the Constitution.[99] Laws that punished conspiring against a king were troublesome for the new republic. Such statutes were clearly violated during the revolution and would have been difficult to apply.[100] In the new nation, acts against a government replaced acts against a king. The question, then, was what aspect of and the extent to which government had to be breached in order for an offense to constitute treason. For example, preventing execution of the law was one form of resistance against the government. However, this category could include actions as benign as legislative attempts to repeal a law. Additionally, rebellion could take the form of actions against government officials executing the law. In a republic, in what sense was an official representing government authority like an agent representing the king? In answering these questions, much of English common law depended on doctrines the framers intended to bar from American law.[101]

The only convictions for treason to precede the Whiskey Rebellion trials were those of Abraham Carlisle and John Roberts. Based on a 1777

[97] Hurst, "Treason in the United States I," 229, 237, 240–41, 248–49, 258, 263, 235–36, 243.

[98] Willard Hurst, "Treason in the United States II: The Constitution," *Harvard Law Review* 58 (1945): 396. Hamilton was careful to cite rebellion as a threat to both individual rights and state authority in his rhetoric; in practice (particularly in his investigation of treasonous acts), he reverted to the prerevolutionary position privileging the authority of the state.

[99] Matthew Hale, "Concerning Levying of War against the King," chap. 14 in *The History of the Pleas of the Crown*, vol. 1 (London, 1736), 130–58; Michael Foster, "Of Levying War and Adhering to the King's Enemies," discourse 1, chap. 2 in *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry* [*sic*]*, and of Other Crown Cases* (London, 1792); Blackstone, *Commentaries*, chap. 6, under the third species of treason ("If a man do levy war against the king"); and Hurst, "Treason in the United States I," 240–42, 251–52, 258.

[100] The *Burr* trials in 1807 demonstrated the issues with the precedent of the American Revolution. See R. Kent Newmyer, *The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation* (New York, 2012); and Peter Charles Hoffer, *The Treason Trials of Aaron Burr* (Lawrence, KS, 2008).

[101] Hurst, "Treason in the United States III," 816.

Pennsylvania state law initially designed to prosecute loyalists, prosecutors charged them with aiding the enemy.[102] The 1778 verdicts cut two ways: while the law was restricted in its application, the trials also broadened "the types of conduct which may be relied on as the overt act necessary to make out the crime."[103] In the *Carlisle* case, the court found it sufficient "to lay in the indictment, that the Defendant sent intelligence to the enemy, without setting forth the particular letter, or its contents." While the court found that the charge of levying war was "not, of itself, sufficient," it also held that "assembling, joining and arraying himself with the forces of the enemy, is a sufficient *overt act,* of levying war."[104]

Revolutionary courts thus initiated an American application of English treason law with which the Constitution had to contend. Protecting the state required that opposition to government laws or authority by force and outside established procedures be defined as treason. Broadly defined in the Constitution, treason was not intended to apply to political opponents or domestic disturbance.[105] Rather, the Constitution ensured that "treason against the United States shall consist only in levying war against them or in adhering to their enemies" (Article III, section 3), phrases borrowed from an English statute enacted by Edward III.[106] James Wilson, the architect of Article III, saw the statute as "the governing rule" replacing creative common law while still drawing on its legacy.[107] The US Constitution thus safeguarded treason from expansion by codifying treason as a constitu-

[102] The Philadelphia trials of British sympathizers (Carlisle and Roberts among them) during the American Revolution occurred before the ratification of the Constitution; the trials were held in the Oyer and Terminer Courts, Philadelphia, September sessions, 1778: Respublica v. Carlisle, 1 U.S. (1 Dall.) 35 (1778); Respublica v. Roberts, 1 U.S. (1 Dall.) 39 (1778). See Larson, "Revolutionary American Jury," 1449–55; Hurst, "Treason in the United States I," 254–56; Henry J. Young, "Treason and Punishment in Revolutionary Pennsylvania," *Pennsylvania Magazine of History and Biography* 90 (1966): 293–94, 300, 302, 306; and Peter C. Messer, "'A Species of Treason & Not the Least Dangerous Kind': The Treason Trials of Abraham Carlisle and John Roberts," *Pennsylvania Magazine of History and Biography* 123 (1999): 303–32.

[103] Young, "Treason and Punishment," 296, 298; Hurst, "Treason in the United States I," 254, 256.

[104] *Carlisle*, 1 U.S. at 38.

[105] Hurst, "Treason in the United States I," 237–38, 245, 258.

[106] Treason Act, 1351, 25 Edw. 3, Stat. 5, c. 2; Young, "Treason and Punishment," 295.

[107] Robert Green McCloskey, ed., *The Works of James Wilson*, 2 vols. (Cambridge, MA, 1967), 2:664–65. James Wilson, the architect of the constitutional language on treason and defense counsel with William Lewis in a significant number of Pennsylvania treason cases from the revolution until the end of the century—including the trials of Carlisle and Roberts—was a US Supreme Court appointee in 1789 and author of seminal lectures on the law in 1790–91. He presided over the Whiskey Rebellion trial *U.S. v. Hamilton*. See Young, "Treason and Punishment," 294, 302; Hall, *Philosophy of James Wilson*, 27–28; Geoffrey Seed, *James Wilson* (Millwood, NY, 1978), 150; and Hurst, "Treason in the United States II," 405.

tional concern restricted to levying war or aiding the enemy. By using the term "only" to limit what qualified as an act of treason, by requiring two witnesses to a single overt act or a confession in open court as evidence of an offense, and by limiting the legislature to "the power to declare the punishment of treason," the Constitution restricted treason and protected against legislative and judicial interference.[108] It was intended, in sum, to ensure that crimes could not be charged as treason, rather than felony, unless they constitutionally qualified as treason. Article III was, moreover, to act as a bulwark against "other cases of like treason [that] may happen in time to come."[109]

In his May charge to the Whiskey Rebellion grand jury, Paterson laid out the options for applying Article III, creating a framework that informed his trial jury charge in *U.S. v. Mitchell*. *Mitchell* was the most critical of the Whiskey Rebellion trials, not only because it resulted in a rare conviction, but also because Paterson's jury charge provided the trials' fullest analysis of treason. Offering an argument compatible with the English common law commentaries of Foster, Hale, and Blackstone, and one that anticipated the prosecution's case in the upcoming trials, he identified two approaches to defining treason. Both approaches expanded the definition to include acts that might have been misdemeanors or felonies, such as riot or misprision (concealment or nondisclosure) of treason, but that did not qualify outright as war against the government. The first approach relied upon a litany of acts that qualified as "levying war" under English common law: taking up arms, gathering in great numbers, marching in combination, engaging in intimidation by force and violence, and assembling in the posture of war (with leaders, by a party's array in a military manner, with physical attacks against persons and property, or by insurrection). This definition fit Wilson's discussion of levying war in his 1790–91 law lectures, the only subsequent analysis of substance that survived from a member of the Constitutional Convention.[110] The second approach focused on resisting the administration of justice or the execution of laws, rising in rebellion under pretense of redressing public grievances, forcing the repeal of a law, or altering government measures. This definition leached into the realm of constructive treason, a more arbitrary common-law denomination of uncertain and ambiguous offenses and not

[108] Hurst, "Treason in the United States III," 811.
[109] McCloskey, *Works of James Wilson*, 2:664–65; Hurst, "Treason in the United States II," 404.
[110] McCloskey, *Works of James Wilson*, 2:663, 668; Hurst, "Treason in the United States II," 404.

of actual insurrection.[111] Paterson's dual approach primed the grand jurors in two ways: it allowed jurors to choose one version over the other, giving the judge a safety net for an indictment; and it allowed toggling between the two definitions, capitalizing on the benefits of each without choosing one over the other, to double the persuasive possibilities of a directed charge.

Paterson confirmed this framework twice more. The first confirmation occurred in unpublished bench notes for three other trials (*U.S. v. Barnet*, *U.S. v. Miller*, and *U.S. v. Philson and Husband*) that did not result in convictions.[112] In all three trials, Paterson not only itemized rebellious actions but also underlined, sidelined, and made marginal notes in the manuscripts to focus attention on them. This accrual of acts substituted for a clear indication of intent. In *Barnet*, for example, Paterson noted that "intention goes hand in hand with the facts." He did not privilege, as Wilson did, that "the fact of levying war" could more clearly be evinced "from the purpose for which, rather than from the manner in which, the parties assemble."[113] Wilson said what Paterson did not: that intent led to the determination of treason. Consistent with the cases that resulted in convictions, *U.S. v. Vigol* and *U.S. v. Mitchell*, Paterson's legal standard relied on creating a fact pattern by accumulating acts until they reached a critical mass. Rather than applying a legal rule, he used the facts to infer a rule.

Following English authority, *Barnet* also noted that "the mind of the prisoner must be manifested by some overt act."[114] Paterson's position thereby appears to have evolved, shifted, or contradicted itself. On the one hand, an act without intent was not treason, and purpose (or conspiracy, often conflated with purpose) alone did not suffice without a treasonous act. In either case, neither intent nor an overt act stood alone, nor did one precede or preempt the other; they acted synchronously. On the other hand, Paterson did not require that a given thought lead to or cause an act, rather that the act and the thought should occur hand in hand, or that an act should occur that demonstrated an intent.[115]

[111] McCloskey, *Works of James Wilson*, 2:663, 667.

[112] Paterson, bench notes for *U.S. v. Barnet*; Paterson, bench notes for *U.S. v. Miller*; Paterson, bench notes for *U.S. v. Philson and Husbands* [*sic*].

[113] McCloskey, *Works of James Wilson*, 2:667.

[114] Hale, *Pleas of the Crown*, 144–46; an act without intent was not treason, and purpose alone did not suffice without a treasonous act.

[115] Hurst, "Treason in the United States III," 829–30, 839. The question here is whether there has been movement from one proposition (the realm of thought) to another (conduct that acted on what was in one's mind).

Without the manuscript notes from the three trials, Paterson's position would remain unclear. But his own words in his own hand provide a process of thought that is quite clear.[116] Whereas Paterson accepted that an act without intent was not treason, that did not prevent him from aggregating instances of conduct from which intent could be inferred. Once inferred, that intent could be said to work hand in hand with the acts, a tautology of treason that would serve his purpose in *Mitchell* and *Vigol*.[117] When he claimed in his May charge that "the universality of the intention marks the line of discrimination between acts of treason and acts of riot," he implied that acts could rise from riot to treason by virtue of some vague generality of intent inferred from the acts themselves.[118]

The second confirmation of Paterson's framework appeared in a June 1795 report solicited by Secretary of State Randolph to inform the president's consideration of pardons in the two treason convictions. Paterson called the report "a short narrative of the cases made out in the trials of Mitchell and Vigol" and begged off going "into more detail." He was dashing off to the circuit court in Delaware. Here again, Paterson recited a litany of acts, leaving them to speak for themselves: the rebels "assembled in the appointed place"; they "found themselves in a line"; they "commenced their attack."[119] While his language was more temperate than in *Vigol* and *Mitchell*, he relied on a similar method of demonstrating guilt.

As before, Paterson weighted the posture of war more heavily than clear intent. He did not address whether the threat to the United States rose from riot (which has no purpose against the state) to treason (which must intend to subvert the state). He did not consider the difference between acts of riot and of levying war or the importance of intent in distinguishing lesser and greater acts.[120] Paterson simply used lower-level offenses

[116] Paterson's words must not be confused with the reconstruction by Dallas in the law reports or Marshall's interpretation in *Burr*. Chief Justice John Marshall's opinion in *Burr* (1807) took Paterson's statement in *Vigol* ("combining these facts and the design," 347) to mean that treason required "actual force with a treasonable design" (United States v. Burr, 25 F. Cas. 187 [C.C.D. Va, 1807] [No. 14,694], 11), noting that elsewhere in the trial charge Paterson had made the crime "dependent on the intention"; that is, whether an act was criminal depended upon its intent, not whether an act of treason required actual force without a treasonous intent.

[117] Hurst, "Treason in the United States III," 834–35, 845. The question here is whether planning to subvert or conspiring to levy war could stand for the act of levying war or if an overt act without intent could be taken as evidence of intent.

[118] Paterson, grand jury charge, May 4, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:42.

[119] Paterson to Edmund Randolph, June 6, 1795, ser. 4, George Washington Papers, Library of Congress.

[120] Hurst, "Treason in the United States III," 824. The colonial period gave "levying war" a broad interpretation, expanded it by including conspiracy, and did not require specific intent (Hurst, "Treason in the United States I," 238, 241, 243, 262). The Constitution, however, restricted treason by including

(misdemeanors, felonies, riot, and force) to add up to treason. It was the same "grossly deficient" construction that, Wilson had argued in his law lectures, infected the common law of treason.[121]

With his May grand jury charge as a precursor, Paterson's trial jury charge in *Mitchell* embraced an expansive common-law definition of treason. He conflated undermining a single law with an "usurpation of the authority of government . . . of a general nature," so that one law thereby assumed the role of law in general.[122] If obedience to the law were the overriding standard against which to measure treasonous acts, interfering with an act of Congress and suppressing excise offices surely counted as treason.[123] Article III, the defense, and even English commentaries warned against such doubtful constructions.[124]

In a separate construction of constitutional language—where two witnesses were required to a single overt act—Paterson joined witnesses from different acts, included conspiracy as an act, and held that those acts were not different but coterminous. In this way he could both admit that "a bare conspiracy is not treason" and hold "that intention and the act, the will and the deed, must concur."[125] Thus, forming the intention at one time and place, marching from that place to carry "the traitorous intention into effect," and committing a violent act at yet another time and place were regarded as a single act requiring a total of two witnesses.[126]

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an overt act as a separate element of the offense (combined with a fixed proof by two witnesses to prevent perjury); inferring intent from an overt act not truly connected to intent did not honor the Constitution's restrictive construction of the term (Hurst, "Treason in the United States II," 403, 406, 412, 429).

[121] McCloskey, *Works of James Wilson*, 2:663.

[122] Slaughter, "King of Crimes," 93–95; United States v. Mitchell, 2 U.S. (2 Dall.) 348, 355 (1795).

[123] Paterson, grand jury charge, May 4, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:41–42.

[124] "Doubtful constructions" referred to what Blackstone called the "abundance of constructive treasons" that resulted from the "great latitude left in the breast of judges" (Blackstone, *Commentaries*, 75). Blackstone found these "forced and arbitrary constructions" were never intended to be treason and differed greatly from that which was treason. Conspiracy constituted one such construction, unless directed "at the person of the king or his government" (ibid., 82). Like conspiracy, according to Hale, encroaching royal power was difficult to discern as well as to prove and thereby was too general and "very uncertain" a charge (Hale, *Pleas of the Crown*, 80). It was a charge that could not be easily defended against: "Subverting the realm . . . bred a great insecurity" in the people. Determining whether it made for treason rather than that "which must be only a riot," he contended, "should be well considered." As an overt act constituting treason, assembling a force without arms, albeit in great numbers, was, for Hale, a matter that seemed to him a case of "constructive levying of war" (ibid., 84, 151).

[125] *Mitchell*, 2 U.S. at 356.

[126] The lack of two witnesses to the overt act and the presence of four witnesses for the conspiracy were reconciled by finding that the treason and the conspiracy were to be considered "as one act." In a statement made after the presentation of the prosecution case, Paterson directed defense counsel to address whether the conspiracy at Couche's Fort "was not in legal contemplation, an actual levying of war" and to consider whether the acts at the house "were not a continuation of the act, which originated at Couche's Fort" (ibid., 350).

Surprisingly, in neither the *Vigol* nor the *Mitchell* trial did Paterson substantively address "levying war," the very charge of which the defendants were found guilty. He merely presumed that preventing the execution of a law by force constituted treason by levying war and that usurping government authority was present once levying war occurred. Paterson, in sum, breached the restricted or limited definition of treason intended by the framers of the Constitution; he extended one law to all law, entertained "doubtful" constructions, eliminated boundaries between riot and treason, and manipulated the two-witness requirement. Rather than limiting the application of levying war, as the US Constitution intended, he expanded it by way of English common law.

Paterson's analysis of treason law in the *Mitchell* and *Vigol* charges seemed determined to direct the jury to reach a guilty verdict. In *Vigol* Paterson expressed such confidence that he appeared to leave the jury virtually no choice.[127] Not only, he noted, had the evidence harmonized "in all its parts" to prove the prisoner was involved, but "there is not, unhappily, the slightest possibility of doubt" about the accused's intention. The judge concluded that "combining these facts, and the design, the crime of High Treason is consummate."[128] In *Mitchell* Paterson was open to balancing certainty against doubt but not to asserting doubt as a superseding standard. He considered only that the jury might weigh "circumstances, which carry irresistible conviction to the mind" against the most positive testimony, but such conviction had both to be undeniable and to overcome strong evidence, thus giving doubt little weight. The jury might "consider how far this aids the doubtful language" of a witness, a weak standard at best given Paterson's correlative that "the prisoner must be declared guilty."[129] The possibility of reasonable doubt—then understood as moral certainty, informed conscience, or fully satisfied belief—was thereby minimized rather than embraced.[130] At the same time, Paterson neglected to direct the jury to consider the guilt of the individual rather than the security of the state. In this regard he behaved like a political judge.

However heavy-handed Paterson might appear, the *Mitchell* and *Vigol* law reports do not give a full picture of where Paterson stood in spring 1795. Law reports were still in their infancy, and they were often

[127] See Marcus, *Documentary History of the Supreme Court*, 3:2; O'Connor, *William Paterson*, 234.

[128] United States v. Vigol, 2 U.S. (2 Dall.) 346, 346–47 (1795).

[129] *Mitchell*, 2 U.S. at 356.

[130] Shapiro, *Beyond "Reasonable Doubt,"* 18–25; Langbein, *Origins of Adversary Criminal Law*, 33, 261–66; Morano, "Reasonable Doubt Rule," 516–19.

imperfect, unofficial, partial, and "not particularly detailed," creating the impression in later years that the Whiskey Rebellion trials were "of limited importance."[131] Indeed, the author of the rebellion trial reports, Alexander Dallas, "found such miserable encouragement" for his law reports in general that he wished in the end "to call them all in and devote them to the rats in the State House."[132] Fortunately, in the April term of the US Supreme Court, Paterson expressed his jurisprudence in *Vanhorne's Lessee v. Dorrance,* an opinion meant to draw a bright line between what was constitutional and what was not.[133]

In the *Vanhorne* opinion, Paterson addressed two areas of consequence for the Whiskey Rebellion trials. First, he was mindful that "no opinion of a single judge can be final and decisive . . . if erroneous, it will be rectified."[134] Admittedly, Paterson's role in *Vanhorne* was to write the Supreme Court's appellate opinion, rather than—as in the Whiskey Rebellion trials—to deliver a grand jury or a trial jury charge. Nevertheless, his Supreme Court opinion signaled the limitation of a justice's charge in a case at the circuit court. Further, he accepted that a jury needed at times to take a broader role, one that might impinge on a judge's responsibility to decide the law. He allowed "that when this is done in a proper manner, it gives stability to judicial decisions, and security to civil rights."[135]

Paterson's *Vanhorne* opinion suggests that the judge may have been more open to jury self-direction and less insistent on directed verdicts than Dallas's law reports led people to believe. Whether *Vanhorne* anticipated or confirmed Paterson's jurisprudence in *Mitchell* and *Vigol*, the judge appeared prepared to accept greater freedom for juries. As a result, the accusation that he directed verdicts in the circuit court trials might not, in fact, accurately reflect how he saw his role, or even his actual performance

[131] Presser, "Tale of Two Judges," 181; see Morris L. Cohen and Sharon H. O'Connor, *A Guide to the Early Reports of the Supreme Court of the United States* (Littleton, CO, 1995).

[132] Alexander Dallas to Jonathan Dayton, Oct. 18, 1802, as quoted in Craig Joyce, "The Rise of the Supreme Court: An Institutional Perspective on Marshall Court Ascendancy," *Michigan Law Review* 59 (1985): 1306. Joyce cites the George Dallas Papers, Historical Society of Pennsylvania, and credits James R. Perry, coeditor of the Documentary History Project, for locating the letter. On law reports, see Erwin C. Surrency, "Law Reports in the United States," *American Journal of Legal History* 25 (1981):48–66; and Gerald T. Dunn, "Proprietors—Sometimes Predators: Early Court Reporters," *Yearbook, Supreme Court Historical Society* (1976): 61–70.

[133] Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1798). Paterson's support for the Constitution in the *Vanhorne* opinion is reinforced by his previous roles in two venues: representative from New Jersey to the Constitutional Convention of 1787 and, as a US Senator, coauthor of the 1789 Judiciary Act, which created the federal court system.

[134] Ibid., 304.

[135] *Vanhorne*, 2 U.S. at 307.

in the trials, as much as the way in which Dallas constructed the law reports.[136] Where the *Mitchell* and *Vigol* reports expressed a determined and directive attitude on the part of the judge, contemporaneous accounts by trial watchers did not cite Paterson for intemperance, unfairness, or manipulation of the jury.[137] Moreover, the trial jury charges showed a jurist struggling to frame treason law in a reasonable way, with sound and balanced analysis, albeit in the context of an unsettled body of American law that was still deeply indebted to English authority.

The second area of consequence in *Vanhorne* revealed Paterson's understanding of the Constitution's function. A written constitution, he believed, must precede in importance a legislated law. While "the one [the Constitution]" was "the work of the Creator [the people] . . . the other [the law]" was the work "of the Creature [the legislature]."[138] For Paterson, law inconsistent with "principles of reason, justice, and moral rectitude," by which he meant the principles of the Constitution, were void: "Thus far ye shall go and no further. Not a particle of it should be shaken, not a pebble of it should be removed." Unlike in *Vanhorne*, Paterson was not testing legislative law against the Constitution in the Whiskey Rebellion trials. Rather, he was determining the application of Article III, section 3, of the Constitution in relation to common law. Still, he freely interpreted the Constitution in the trials (the two-witness rule, "levying war"). Several possibilities exist to explain Paterson's simultaneous fealty to the Constitution and willingness to expand its terms: he believed his analysis in the trials was consistent with the Constitution; he did not think the Constitution spoke to the issue; or he so desired a given verdict that he either allowed himself more discretion than was justified or deceived himself.

[136] Even if Dallas had access to Paterson's notes, which is very likely, or combined them with his own observations, which is even more likely, Paterson's unpublished notes from Whiskey Rebellion trials (*Barnet, Miller, Philson and Husbands* [*sic*]*, Porter*) suggest that Dallas's renovations would have been substantial. Paterson, bench notes for *U.S. v. Barnet*; Paterson, bench notes for *U.S. v. Miller*; Paterson, bench notes for *U.S. v. Philson and Husbands* [*sic*]; Paterson, bench notes for *U.S. v. Porter*.

[137] No claims have come forward that Paterson mistreated the defense or denied it an opportunity to argue its case. Nor was he at any point in his career brought up for impeachment for his judicial work, as in fact Addison and Peters subsequently were; Addison was convicted. Hugh Henry Brackenridge, who testified in three Whiskey Rebellion trials where Paterson presided, concluded that the trials provided an exactness and abundance of evidence that would have allowed him as potential counsel the ability to fashion a true defense for the rebels (he later withdrew from the defense as an interested party). See Brackenridge, *Incidents of the Insurrection*, 3:151.

[138] *Vanhorne*, 2 U.S. at 308.

There was much to admire in Paterson's conduct in the trials. Full evidence was presented, and weak charges and cases were dismissed.[139] That grand juries sent up for trial only eleven out of thirty-five cases brought before them, and trial juries convicted only two defendants of treason, undermines the argument that the judge directed jury verdicts. The trial process dismissed inadequate evidence, addressed technicalities, and respected jury verdicts. Rather than a failure of the judicial system, the government's decision to discontinue the Whiskey Rebellion prosecutions after its October losses in two trials could equally be regarded as a success for the court and a failure for the prosecution. US District Attorney General Rawle prosecuted too many cases, leading to haste, poor preparation, and flawed performances.[140]

As the dismissive, almost ungracious tone of his report to President Washington revealed in the aftermath of the trials, Paterson became defensive about Republican objections to his performance.[141] Paterson was clear in his own mind about his common-law, constructivist approach to the trials, and he believed that he had delivered justice, even if the two men he sentenced were subsequently pardoned by the very administration whose goal of enforcing order he felt he had well served.[142] Paterson likely felt that the pardons followed the model of the revolution in making examples of the rebels and then responding to jury petitions for clemency.[143] A legal authority of some repute, he apparently never looked back to reexamine his jurisprudence or his politics.

On balance, Paterson was a moderating presence on the Whiskey Rebellion bench. If Paterson were to be faulted for his constructivist approach or his reliance on English precedents and common law doctrines already in use in American courts, such criticism only reflects that he was

[139] Paterson's opinion in *United States v. Insurgents* was not only in favor of the defendants but also demonstrated a fair-handed set of procedures and findings. The decision demonstrated that he had in fact recognized and was prepared to accommodate what was necessary to prepare a proper defense. See United States v. Insurgents of Pennsylvania, 2 U.S. (2 Dall.) 335, 342 (1795). For charges that were dropped or reduced to misdemeanors, see Albert Gallatin to Hannah Gallatin, May 12, 15, and 18–19, 1795; to John Badollet, May 20, 1795; and to Thomas Clare, May 30, 1795. See also Holt, "Whiskey Rebellion of 1794," 75–76.

[140] See here, Holt, "Whiskey Rebellion of 1794," 75–79; and District Attorney Rawle to Judge Addison, Aug. 15, 1795, in *Pennsylvania Archives*, 2nd ser., 4:450.

[141] O'Connor, *William Paterson*, 275, 329n39; Paterson to Edmund Randolph, in Marcus, *Documentary History of the Supreme Court*, 3:56; Paterson to Edmund Randolph, June 6, 1795.

[142] O'Connor, *William Paterson*, 270, 275, 329n39.

[143] Blinka, "Germ of Rottenness," 170n200; Slaughter, "King of Crimes," 91.

a product of his time. He shared that fault with most of his contemporary judges, Federalist and otherwise, all of whom faced an undeveloped body of American statutory law.[144] Paterson did what was common at the time: apply the law as it existed. He would have been surprised and disappointed to find himself criticized for undermining the Constitution or bending too far in the direction of English authority.

Appearing in the Circuit Court of Delaware shortly after he completed his report to the president, Paterson echoed the concerns of his April and May charges. Reprising his cry to the rebels in May that "Ye disorganizing spirits from henceforth obey," he hoped that the nation's citizenry had learned the lesson of rebellion: "May no factions . . . arise within thy peaceful vales to generate and foment internal discord and strife; may insurrection never more rear her crest; may neither foes at home nor foes abroad disturb this our rare and high felicity. But may we all, as becomes good citizens, lead quiet lives under the guidance and government of the laws." The judge had come out of the worst of the trials much maligned and yet clear in his own conscience.[145] The safety and welfare of fifteen states diversely constituted and loosely linked depended upon "co-operation and confederacy" to ensure "the prosperity and happiness of the Union at large."[146] Paterson moderated the tone that had characterized his grand jury charge at the opening of the rebellion trials, but he was clear that the happiness of the nation depended upon the grand jury pursuing transgressions against the nation. "The justice of the nation," he noted, "[wa]s committed to their care."[147]

Paterson felt deeply threatened by the rebellion, which affected his performance and led to serious criticism. This criticism is not, however, entirely warranted. Paterson and most of his peers were unnerved by the

[144] Federalist judges like Richard Peters—and Alexander Addison, in his later years—were open to the possibility of an expansive federal common law, that is, punishing offenses not proscribed by laws passed by Congress (Presser, "Tale of Two Judges," 46–47). This represented an attempt to expand the limits of federal government. Republicans feared that federal common law would undermine legislated law and become a weapon for Federalists to punish their political opponents (Robreno, "Learning to Do Justice," 572–73).

[145] See Holt, "Whiskey Rebellion of 1794," 77, 77n162; William Rawle seemed ready to terminate the trials after he lost two more in the October term. Just before the Circuit Court met in April 1796, he did in fact drop the remaining charges. Paterson, grand jury charge, Circuit Court of Delaware, June 8, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:57. William Paterson, grand jury charge, Circuit Court of Pennsylvania, May 4, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:42.

[146] Paterson, grand jury charge, June 8, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:59.

[147] Ibid., 3:59, 60.

prospect that a combination of internal and external enemies was poised to destroy the Union. The democratic-republican societies, the Indian wars, Shays's Rebellion, the Whiskey Rebellion, and the unresolvable conflict between England and France had combined to besiege the new nation. In March 1795, just as the trials were about to begin, news of Secretary of State John Jay's treaty with England led to a public furor. Expressions of discontent similar to those exhibited in the Whiskey Rebellion—public assemblies, protests, and libelous attacks—were aimed at the Jay Treaty. In June Paterson tried and acquitted the millennial prophet Herman Husband for preaching inflammatory visions of a New Jerusalem to rebel gatherings. Federalists Alexander Hamilton and William Rawle found Husband's words both "extremely inspirational" and clearly troublesome.[148] For Paterson, the political ogre he had struggled with in the rebellion trials continued to threaten the republic.[149]

Wholesale criticism of Paterson's performance seems unjustified. He cannot be seen simply as an ill-tempered partisan who held the line on Federalism or a jurist gone bad who betrayed his characteristically thoughtful and temperate self. Rather, Paterson navigated with what he believed was a reasonable jurisprudence, course-correcting against a backdrop of conflicting national and international forces.

Collateral and Aftermath Narratives

Paterson was not alone in his concern for the state of the Union or his devotion to the Constitution. His fellow justices drew similar conclusions in their grand jury charges, suggesting a common judicial perspective—considerably Federalist, as they were administration appointees. Nonetheless, Paterson was more restrained in his approach to the Whiskey Rebellion trials than were other judges, actually tamping down the heated rhetoric of the times. By contrast, US Supreme Court

[148] Paterson tried Herman Husband for a misdemeanor; see Fennell, *"From Rebelliousness to Insurrection,"* 192–221; Holt, "Whiskey Rebellion of 1794," 54–57, 78–79, 79n165, 81–82; Fritz, *American Sovereigns*, 154–55; Slaughter, *Whiskey Rebellion*, 276n27; Bouton, *Taming Democracy,* 42–43; Findley, *History of the Insurrection,* 212; and Sacvan Bercovitch, *The American Jeremiad* (Madison: University of Wisconsin Press, 1978).

[149] Bouton has made a case that unwittingly reinforces Federalist fears of popular uprisings as a threat to the stability of the republic and, in the process, justifies Paterson's sense that the nation was under siege by popular uprisings; a continuing revolution from 1754 to 1799 makes Paterson's fears of a systemic threat appear less like paranoia and more like a realistic assessment. Bouton, *Taming Democracy,* 28–29, 145–67, 204, 208, 218, 226, 244.

Justice John Blair harangued his grand jury on the events of the western rebellion.

In a charge to a grand jury in the Circuit Court of Georgia in the same April term as the rebellion trials, Blair warned that "the governing principle of the late commotion [was] an overstrained conception of liberty, deriving to certain combinations of men, and almost to individual characters, all the sacred rights of the people, and dignifying with *their* name and authority their own pernicious systems."[150] Embodying the nascent Federalist narrative of the Whiskey Rebellion trials, Blair essentially reinvented the social contract: whoever opposed authority "with pertinacious petulance private to public opinion" undermined the public good and thereby threatened "the eversion of our happy government."[151] However evil the law, the evil of rebellion decidedly outweighed it. However untenable the principle of law, forcible resistance belonged to a state of nature, not a civil society, and was "repugnant to the common sense of mankind, to the principle of every consociation."[152] Force against tyranny was entitled to legal protection—surely his answer to the precedent of the American Revolution—but the present use of power with a "cruelty and distraction inseparable from civil war" derogated the authority of the Constitution. Blair regarded the Constitution as "fundamentally one of the finest fabrics the world had yet seen" and one that the people had themselves deliberately enacted. Appropriating the message of popular constitutionalism, Blair claimed that to defy the Constitution invaded the rights of the people and usurped their sovereignty.[153]

Justice Blair anticipated the sentiments of grand jury charges that followed the trials, chief among which were the charges of US Supreme Court Justice James Iredell. Slated to sit on the circuit court that tried the Whiskey rebels, only to be reassigned at the last moment, Iredell in the year after the rebellion took a temperate tone.[154] Treason, he argued, was an offense that caused "the greatest accumulation of public and pri-

[150] John Blair, grand jury charge, Circuit Court of Georgia, Apr. 27, 1795, in Marcus, *Documentary History of the Supreme Court*, 3:32.

[151] Ibid.

[152] Ibid., 3:33.

[153] Ibid., 3:34–35.

[154] Iredell was originally scheduled to sit as a second Supreme Court justice with Paterson at the Philadelphia trials, but Justice Cushing's illness required Iredell's continued presence on the Eastern Circuit. Marcus, *Documentary History of the Supreme Court*, 3:1; James Iredell, grand jury charge, Circuit Court of Virginia, Nov. 23, 1795, in ibid., 3:74–79; Circuit Court of Pennsylvania, Apr. 12, 1796, in ibid., 3:106–14; Circuit Court of Pennsylvania, Apr. 11, 1799, in ibid., 3:332–45.

vate misery any crime can possibly occasion." Yet, he reasoned, the "great engine of Judicial tyranny" allowed so loose a definition of treason that judges could "charge that as an act of Treason which was never intended to be deemed such" by the Constitution.[155] Mindful of the abuses of English courts and the French Revolution, Iredell maintained that a beneficent government must extend "every indulgence which humanity as well as justice could declare" in offering the convicted "the scepter of Mercy."[156]

Iredell was less forgiving four years later. Seeking indictments in Fries's Rebellion, the crux of his charge was the importance of preserving the government from the specter of anarchy and chaos.[157] It was a theme that would resonate with members of a jury in the same circuit court that tried the rebels and for whom the events of 1794 were still fresh. Restating threats expressed in grand jury charges from Addison to Blair, Iredell warned of dire results should the jury fail in its duty. "If you suffer this government to be destroyed," he demanded, "what chance have you for any other?" Iredell's closing sentiments on the rebellion, like those of Peters and Paterson, played on a theme that had become prevalent in this period of religious awakening—that a jeremiad had been called down upon a nation that risked its blessed state by rebelling against authority. "May that God whose peculiar providence seems often to have interposed to save these United States from destruction," he exhorted, "preserve us from this worst of all evils. And may the inhabitants of this happy country deserve his care and protection by a conduct best calculated to obtain them."[158]

The specter of the Whiskey Rebellion had clearly not subsided in the imagination of the republic.[159] The continuing activities of the democratic-republican societies, protests against the Jay Treaty, and the uproar over the 1798 Sedition Act exacerbated the sense of threat the rebellion seemed to pose to the Union. US Supreme Court

[155] Iredell, grand jury charges, Apr. 12, 1796, and Nov. 23, 1795, in ibid., 3:107, 75–76.

[156] Ibid., 3:76–77.

[157] Iredell, charge to the grand jury of the Circuit Court for the District of Pennsylvania, Apr. 11, 1799, in Carpenter, *Two Trials of John Fries*, 1–16.

[158] Iredell, charge to grand jury, Circuit Court of Pennsylvania, Apr. 11, 1799, in Carpenter, *Two Trials of John Fries*, 15.

[159] District Judge Peters, in an ominous postscript to an April 24, 1799, letter to Justice Paterson, begged for Paterson's presence in Philadelphia for the Fries trial: "On Monday the first Treason Trial begins & in the Fate of that the whole may be involved." Peters's concern extended to the prospect that a wrong turn ("ridiculous or weak") could energize "the Party, forever on the Watch for such Events" and thereby spread "to all the combustible Matter too generally dispersed in other Quarters." The "State," he opined, had been "twice disgraced by infamous Insurrection," recalling the precedent set by the Whiskey Rebellion. All quotes in Marcus, *Documentary History of the Supreme Court*, 3:353.

Justice William Cushing directly tied the Sedition Act to the Whiskey Rebellion. Resistance to the 1798 legislation recalled the "Pittsburgh insurrection," "raised under the groundless pretext of opposing an arbitrary law about a small matter *of excise*" but actually assaulting a fundamental power in the Constitution—the necessary means "for the support of government, for the common defence and for the general welfare."[160] Speaking in the same court in which both the Whiskey and Fries's Rebellion trials had been held, US Supreme Court Justice Samuel Chase, a devoted Federalist, offered a final iteration of this message in 1800.[161] In a federal Union, he offered, one section of the country may not object to the execution of a law that it finds objectionable without encouraging other sections to do the same. Repealing acts on such a basis could only dissolve the government; it would "be the height of folly to expect afterwards to see any law executed."[162] Chase's "political truth" was a basic Federalist principle shared by many of his fellow judges: only the law could provide for the security of the Union, the impartial administration of justice, and the protection of lives, liberty, and property.

Conclusion

Several factors have led historians to question whether William Paterson's role in the Whiskey Rebellion trials was a function of principle or Federalist partisanship. Treason law was in a state of flux at this time, and US law on treason was just beginning to develop its own constitutional identity separate from that of English common law and statutory law. Law talk and legal decisions in the Whiskey Rebellion infused new life into that debate, which was not resolved until *U.S. v. Burr* (1807).[163] Vestiges of popular sovereignty, moreover, exerted the coercive force of democratic populism and its unwritten constitution to complicate the jurisprudence of a judge like Alexander Addison at the state level and displace the authority of state courts. But popular sovereignty had also authorized the Constitution, with which future law must be consistent. This was the dilemma in which the rebellion was caught: by turning against a government created by the people, the rebellion risked dishonoring the legacy of the American Revolution.

[160] William Cushing, grand jury charge, Circuit Court of Virginia, Nov. 23, 1798, in Marcus, *Documentary History of the Supreme Court*, 3:313.

[161] Ellis, *Jeffersonian Crisis*, 79.

[162] Samuel Chase, grand jury charge, Circuit Court of Pennsylvania, Apr. 12, 1800, in Marcus, *Documentary History of the Supreme Court*, 3:413–14.

[163] *Burr*; see Newmyer, *Treason Trial of Aaron Burr*; and Hoffer, *Treason Trials of Aaron Burr*.

As a voice of the federal judiciary, Peters was much less conflicted than Addison. He unequivocally declared the people's responsibility to their own Constitution and the laws that flowed from it. In this view the judicial authority of the courts and the Constitution superseded the people. Noting his respect for "the majesty of the people themselves," Paterson walked back Peters's promotion of state power, an indication that the movement away from popular sovereignty and toward the authority of the courts and the written federal Constitution was incremental and in conflict throughout the 1790s. It was a conflict that continued to inform judicial thought for some time.

Paterson's Whiskey Rebellion grand jury and trial charges ultimately reflected his judicial philosophy and its underlying principles. His grand jury charges fleshed out the jurist's political mindset, while his conduct in the trials operated within the constraints of traditional law and judicial principle.[164] In *U.S. v. Insurgents*, for instance, Paterson rejected the irascible analysis of his district court partner on the bench, Judge Peters, in favor of a resolution that respected the procedural rights of the defendants. Like Justice Wilson in *U.S. v. Hamilton*, he exhibited judicial restraint and reasonableness in his treatment of the rebels. If his inclination was, like that of most Federalist judges, to privilege common law and constructivist reasoning based in English rules, doctrines, and precedents, it is difficult to fault him considering that the alternative relied upon the unpredictable vagaries of common sense and local institutions.[165] Accepting the law as it was understood at the time provided for Paterson a basis for judicial reasoning within a history and tradition rooted in custom and precedents. Thus, his trial charge analyses were tied to jurisprudential reasoning, not common logic or party politics. His reasoning was closely aligned with a theory of government and a reading of the Constitution that responded to the vicissitudes of existing and emerging law. Paterson had to deal with legal concepts of treason that postconstitutional American courts had not yet addressed and for which the 1778 trials of British sympathizers were the closest precedent. Whether or not one agreed with the trial court charges in *Mitchell* or *Vigol,* they were principled rather than partisan. Paterson's contemporaneous Supreme Court opinion in *Vanhorne* supports this conclusion. Here, Paterson signaled his acceptance of the shifting roles of judges and juries, acknowledged the importance of appellate review, and

[164] Ifft, "Treason in the Early Republic," 173–74.
[165] See Kramer, *The People Themselves*, 162, referring to Reid, "Defensive Rage."

embraced the central role of the Constitution. The principles and precedent apparent in this opinion informed Paterson's future jurisprudence at both the circuit court and Supreme Court levels.

Paterson's work derived more from political theory than from party loyalty. A conscientious judge concerned with the relationship of governance and law, Paterson was caught in the transition from popular to constitutional sovereignty. The revolution's legacy was best protected, he believed, by curbing democratic populism when it turned against the government created by the people and threatened the welfare of the nation. The sacrifices of the revolution to create the Union would be honored best by preserving that Union. If Paterson was partisan, it was to a theory of government, not a party. A revised appreciation of the part William Paterson played in the story of the Whiskey Rebellion is vital to our understanding of judges in the early republic as well as to the larger questions of the relationships between the individual and the state and between popular democracy and constitutional government.

West Chester University of Pennsylvania,
Emerita LINDA MYRSIADES