

# *The Trials of Allegiance*

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*Treason, Juries, and the American  
Revolution*



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OXFORD  
UNIVERSITY PRESS

## *Introduction*

WHEN DAWN BROKE on the morning of October 4, 1779, in the fifth year of the American War for Independence, James Wilson of Philadelphia was not expecting to face combat. If he had stood on ceremony, he could have called himself Colonel Wilson (he was formally a colonel in the Cumberland County militia), but his countrymen would probably have rolled their eyes. A scholarly, bespectacled lawyer with no obvious martial abilities, Wilson had yet to draw his sword in battle (Figure I.1).

But he had contributed notably to the cause of American independence with an even more powerful weapon—his pen. After emigrating from his native Scotland in his twenties, Wilson had become a leader of the Pennsylvania bar and the author of an influential pamphlet advocating the cause of the American colonies.<sup>1</sup> Elected as a delegate to the Second Continental Congress, Wilson had proudly signed the Declaration of Independence at the Pennsylvania State House, the building that future generations would enshrine as Independence Hall.

Wilson's conduct had thus made him one of the most prominent American traitors to Great Britain and a rich prize for any British military unit that managed to capture him. When Wilson heard the beat of the drums on October 4, 1779, he suspected that the armed men marching through the streets of Philadelphia might be on his trail. Hunkered down in his elegant brick mansion at the corner of Third and Walnut Streets, just a few blocks from where he had signed the Declaration of Independence, Wilson and a group of wealthy friends were prepared to resist, to the death if necessary.

Soon the armed men reached Wilson's house, and the battle, one of the war's rare instances of urban combat, erupted in full. The attackers began shooting at the windows of the house and attempting to force open the front door. From the second floor, Wilson and his friends returned fire. The battle might have continued much longer, but a Pennsylvania cavalry force arrived and quickly ended



**FIGURE 1.1** Attorney James Wilson, one of only six men who signed both the Declaration of Independence and the United States Constitution.

*Credit:* Shutterstock.

the fighting. The battle of “Fort Wilson,” as it later came to be called, claimed at least six lives and injured many more. Wilson proved to be one of the lucky ones; he survived and later became a primary architect of the United States Constitution and one of President George Washington’s first appointees to the United States Supreme Court.

The armed and bitterly angry men attacking the house detested James Wilson for his political beliefs and for his actions at the Pennsylvania State House. But despite what one might expect, they were not British soldiers. Quite the opposite—the attackers were Wilson’s fellow Americans, Pennsylvania militiamen who were convinced that Wilson was insufficiently committed to the American cause. Wilson’s primary offense was the deployment of his legal talents in a cause that the militiamen found inexplicable—he had represented men accused of treason against the state of Pennsylvania for aiding the British army during the detested British occupation of Philadelphia. Just two days before the attack, in the grand courtroom at the State House, Wilson had won another acquittal for a man

accused of treason. But many of Wilson's fellow citizens were utterly perplexed. Why was a signer of the Declaration of Independence representing men accused of undermining the very Revolution to which he had pledged his life, his fortune, and his sacred honor? When the militiamen later sought to justify their conduct, they pointed to the "exceeding lenity which has been shown to persons notoriously disaffected to the Independence of the United States" as one of the reasons for the attack on Wilson's house.<sup>2</sup>

As the Fort Wilson incident vividly demonstrated, the American Revolution ripped the fabric of American society in half. Although sometimes portrayed as a genteel, intellectual rebellion, it was in fact a violent and bloody civil war, in which brothers fought against brothers and fathers fought against sons.<sup>3</sup> An astute Frenchman living in America noted the changes with disbelief: "The rage of civil discord hath advanced among us with astonishing rapidity. Every opinion is changed, every prejudice subverted, every ancient principle annihilated, every mode of organization which linked us before as men and citizens is now altered."<sup>4</sup> It was, in the words of a popular seventeenth-century song, a "world turned upside down."

The most serious—and frightening—implications of the new upside-down quality of American life related to the law of treason. When the troubles with England began, colonial Americans repeatedly denounced acts of Parliament, but stoutly insisted on their devotion to their English king. Betraying the king was not just a matter of political disloyalty—it was high treason, the most significant offense known to English law.

By the time the War for Independence erupted, the duty of allegiance had been fundamentally transformed. Loyalty to the king was no longer a duty, but a crime—high treason against the nascent American nation. As the British and American armies rampaged across the continent, the duty of allegiance imposed by law shifted with them. In Philadelphia, for example, this duty shifted from George III to the United States, then back to George III during the British occupation of Philadelphia, and finally back to the United States when the British army departed. As the late Robert Ferguson put it, "Nothing conveys the utter fluidity in Revolutionary American Culture more dramatically than the concept of treason."<sup>5</sup>

Although Benedict Arnold remains the Revolution's most famous traitor, the charge of treason could potentially be leveled against every American. Loyalty to the United States was treason against Great Britain, and loyalty to Great Britain was treason against the United States. Even those who tried to remain neutral were criticized on the ground that anyone who was not an active supporter was an enemy. The "Trials of Allegiance" referred to in this book's title are thus not

only court trials, but also the broader trials that the war and societal disruption posed to everyone living in British North America.

This book is an invitation to view the American Revolution from a new perspective—that of the law of treason. We have numerous accounts of the Revolution rooted in military, diplomatic, social, economic, political, and constitutional history. By contrast, the Revolution's interaction with the law of treason has remained largely unwritten. But in at least six key areas, treason played a fundamental role in the Revolution and in the lives of ordinary Americans.

First, in the years before the war broke out, American resistance leaders sought to justify the actions they were taking against British measures. These writers repeatedly distinguished legitimate resistance to tyranny, which was permissible, from outright treason, which was criminal. Although the arguments grew more and more distant from British law as the resistance activities increased, they provided much of the intellectual justification for the open defiance of British policies. Similarly, when British leaders threatened to try Americans for treason in England, American leaders responded with vigorous defenses of their right to a trial by a jury of their peers.

Second, although American resistance leaders insisted that they were innocent of treason, they did not hesitate to accuse others of the same offense. Prior to the Declaration of Independence, accusations of treason multiplied, generating rhetoric that was increasingly nationalistic in scope. Opponents of resistance activities were denounced as traitors against America and traitors against liberty. This rhetoric was soon converted into action and individuals accused of treason against America were tried before committees of safety and the military. These trials, scarcely noticed in much of the literature of the Revolution, demonstrated that American sovereignty was a functional reality well before independence was declared. As a practical matter, Americans no longer owed allegiance to the king of Great Britain, but to the individual colonies, to the nascent American state, or even to broad abstractions such as liberty itself.

Third, the Declaration of Independence was itself partially motivated by concerns over treason law. So long as the American colonies remained technically united with Great Britain, the adherents of the king could be indefinitely detained by extra-legal entities, but they could not formally be tried by a jury in a court of law or executed. The Declaration of Independence permitted the full force of the criminal law to be brought upon the Loyalists, and many proponents of the Declaration justified it for precisely that reason.

Fourth, the law of treason loomed large over the daily lives of ordinary people. Allegiances shifted with changes in military occupation, and that allegiance was now enforced through criminal penalties. Thousands of Americans played a role in the criminal justice system, whether as defendants, as witnesses, as bondsmen,

or as jurors. Through the jury system, ordinary Americans would be forced to confront the reality that other ordinary Americans may well have sided with the enemy. But the juries did something extraordinary—they consistently refused to send the defendants to the gallows. In case after case in Pennsylvania, the subject of this study, grand juries refused to indict and trial juries refused to convict. Even in the few cases in which they convicted, juries sought clemency for the defendant. The jury system would prove far more lenient to accused traitors than the two primary alternatives, military trials and trials by committees of safety.

Fifth, confiscation of Loyalists' property became a major issue during the Paris peace negotiations. Although the states contended that the confiscations were justified under state treason laws, British officials viewed them as illegal and sought compensation. Ultimately, the reintegration of former Loyalists into American society would produce heated denunciations, yet most Loyalists who returned found the path relatively smooth. Reconciliation, not vengeance, would be the order of the day.

Finally, the issue of treason became an early issue testing the strength of the new national government under the Constitution. Two rebellions in Pennsylvania, the Whiskey Rebellion and Fries's Rebellion, raised difficult questions about the application of English treason law in the new American republic. Should the law apply in the same manner, or had the Revolution limited its bounds, permitting even forceful resistance to particular laws, so long as the participants retained their underlying loyalty to the United States?

This book explores these issues in the course of answering a fundamental question: How did revolutionary Americans apply the law of treason, forged over many centuries in an island monarchy three thousand miles away, to instances of criminal disloyalty in their new republic? This question raises several subsidiary questions. How was the seeming tension between liberty and security resolved? To what extent did the law deviate from English patterns? To which legal entities was allegiance owed? How did patterns of prosecution change during the Revolution itself? And, perhaps most importantly, did institutions make a difference? What can one learn from the differing experiences of the military, committees of safety, and courts?

To be clear, my subject is not the general phenomenon of Loyalism or the motivations that drove people to one side or the other. It is not concerned with the details of treasonable plots or the frequency with which treasonable acts might have been committed. These topics, although fascinating, are beyond the scope of this work and have been well examined by other scholars.<sup>6</sup> My purpose is different—to understand how the law of treason was understood and applied in the context of a convulsive, divisive civil war in which few people were free of the imprecation of treason.<sup>7</sup> Many of the legal questions that American leaders

confronted during the war were not easy, and they continue to be debated even to this day—whether to suspend the writ of habeas corpus, whether to detain suspected traitors without trial, whether to exercise military jurisdiction over American civilians suspected of aiding the enemy, and whether to permit judicial review of executive detentions.

The book tells the story through the experience of Pennsylvania, as it was here that the issues raised by treason took on their greatest national significance. Pennsylvania was central to the Revolution from the very beginning. Its capital, Philadelphia, was the seat of the Continental Congress and the effective national capital, as well as America's largest city and busiest port.<sup>8</sup> Philadelphia was the "political, economic, and cultural center of the colonies and the new nation."<sup>9</sup> What happened there had nationwide implications. The cast of characters includes some of the most significant figures of the revolutionary era. A series of treason trials in Philadelphia, for example, were presided over by one signer of the Declaration of Independence, defended by two other signers, and involved participants who played a major role in the creation of the United States Constitution. In the early trials, both the presiding judge, Thomas McKean, and the principal prosecuting attorney, Joseph Reed, were simultaneously serving as members of the Continental Congress. Pennsylvania also generated the war's most intense controversy over treason trials, resulting in extensive newspaper discussions about the proper role of juries and, ultimately, in the violent confrontation and bloodshed of the Fort Mifflin incident.

One should not necessarily extrapolate the experience of Pennsylvania without qualification to the other American states. Although I have been researching this issue in Pennsylvania off and on for over twenty years, I have not devoted similar efforts to other jurisdictions, and therefore can offer only a limited comparative perspective.<sup>10</sup> Certain factors rendered the Pennsylvania experience distinctive. The patterns of war were different from those in any other state. Although the British occupied New York from 1776 to 1783, they occupied Philadelphia for only nine months in 1778 and 1779. Pennsylvania escaped the early years of the war, which focused on New England, as well as the later years, which focused on the South. Moreover, the large population of Quakers, religiously opposed to bearing arms, presented peculiar problems that were less salient in other states. Pennsylvania's unusual and controversial 1776 constitution, with its unicameral legislature and plural executive, further rendered Pennsylvania distinctive among the states. Nonetheless, certain broad themes were consistent across jurisdictions, including the pre-Revolution debate about the nature of treason, the role of committees of safety, and the general question of the harshness to be meted out to Loyalists, even though the details may have differed from state to state.



The subsidiary theme of this book is the role of juries. The colonists' insistence on their right to a jury of their peers was a primary grievance in the years prior to the outbreak of the war. Yet when the fighting started, and internal enemies needed to be detected and subdued, colonial Americans did not resort to juries. Instead, investigatory and detention powers rested in committees of safety or the military, both of which acted without juries, a pattern that continued after independence. When jury trial was finally operational for treason trials, Pennsylvania juries proved exceptionally lenient and this leniency persisted through the rebellions of the 1790s.

The subject of jury service in eighteenth-century America has not been well explored by scholars. In 1975, historians Harold Hyman and Catherine Tarrant lamented the "very thin body of American legal history concerning juries," and argued that "[f]ew areas of legal history need attention more."<sup>11</sup> In 1984, John Murrin observed that the history of the American jury "has almost completely eluded sustained scholarly attention."<sup>12</sup> Jury trials have received some attention in the intervening years, but it is safe to say that we still know very little about how criminal juries actually functioned in late eighteenth-century America.<sup>13</sup> It has been relatively straightforward to document what learned contemporaries *said* about juries, but it is much harder to determine what juries actually *did*. This lack of information is regrettable, because as historian J.R. Pole pointed out in 1993, trial by jury "is of the highest importance for understanding the character of American history in its colonial period and beyond."<sup>14</sup>

Chapters 6 and 7, the heart of this book, consider twenty-three jury trials prosecuted in Philadelphia in the fall of 1778 and the spring of 1779. These trials were aggressively prosecuted by the state in an atmosphere of widespread popular hostility to opponents of the American Revolution. The juries, however, convicted only four of these men, a low conviction rate even in an age of widespread jury lenity; moreover, in three of these four cases, the juries petitioned Pennsylvania's executive authority for clemency. What explains this lenity?

To answer this question we need to know more about the jurors themselves. Although the jury is often described as a black box, it can be illuminated, even after the passage of several hundred years. This book provides the most thorough analysis yet undertaken of a group of eighteenth-century American jurors. On the basis of extensive research in demographic records, I have reconstructed the Philadelphia jury box and identified not only the social status of the jurors, but also the intricate network of connections linking the grand jurors, the trial jurors, and the defendants. This study reveals, for the first time, how eighteenth-century American defense counsel creatively used peremptory challenges, deployed on the bases of religion, age, ethnicity, wealth, occupation, and political beliefs, to create juries more favorable to the defense. Jurors were also heavily influenced by

the death penalty, effectively nullifying Pennsylvania's treason laws rather than risk exposing accused persons to the hangman's noose.

But the jury verdicts did not go unchallenged. Significant popular opposition to the jurors' decisions led in 1779 to widespread condemnation in newspapers, to direct interference with a jury trial, and eventually to the armed attack on James Wilson's house. After Fort Wilson, attacks on juries diminished dramatically, and the jury recaptured its central role as a bulwark of popular liberty.

Recovering the world of treason and the American Revolution requires immersion in a much broader array of sources than the few accounts of American treason law have traditionally employed. Prior work has tended to emphasize statutes and the tiny handful of reported cases. Statutes are an important part of the story, but as legal historian Bruce Mann has emphasized, "The best evidence for the presence or absence of legal change lies not in what people said but in what they did. For that, one must consult court records in tedious, preferably quantitative, detail."<sup>15</sup> The court records of Pennsylvania are not located in one place, and I have had to piece together information on court proceedings from a variety of archival and other sources. This material is presented in quantitative, although I hope not especially tedious, detail.

Many years ago, James Willard Hurst argued that

even a brief canvass of the variety of historical sources of potential help in explaining the policy background of the Constitution's treason clause suggests the complex wealth of material which such an approach may add to the case-trained lawyer's familiar tools of decision and opinion. But, likewise, it suggests that since the historical approach seeks nothing less than to comprehend the whole pattern of causes which shape a given policy, it requires of the advocate an imaginative readiness to forego the abstract logic of doctrine for the living logic of events.<sup>16</sup>

To fulfill Hurst's vision, I have also examined what Steven Wilf calls "extraofficial legal actions—what might be called law out-of-doors, vernacular legal storytelling, the bric-a-brac of criminal trials, and, above all, the explosion of law talk with a volatile mix of law and politics."<sup>17</sup> These materials are supplemented with newspaper sources, pamphlets, and manuscript collections of letters and diaries, all of which provide a rich description of law on the ground, as it actually played out in the lives of ordinary and not-so-ordinary Pennsylvanians.

For the convenience of other researchers, I have cited published versions of eighteenth-century sources when possible, although in many cases I have examined the originals myself. Obviously, some editions are more reliable than others, and there are particular problems with the *Colonial Records* and

*Pennsylvania Archives* series, including the bowdlerization typical of nineteenth-century editors.<sup>18</sup>

In some cases, I have modernized punctuation and capitalization for the ease of the reader, although I have tried to do so with a light touch. I have tried to retain the terminology of the eighteenth-century sources as much as possible, although this task presents occasional difficulties. There is no perfect term for the opponents of the Revolution. They were described as “Tories” by the Revolution’s supporters, but this wasn’t a term they embraced themselves. The term “Loyalist” wasn’t coined until later in the conflict. Some historians have used the term “disaffected” to describe persons alienated from the revolutionary governments for a wide variety of reasons, many of which had nothing to do with loyalty to Great Britain, but this doesn’t always capture the spirit of the contemporary sources.<sup>19</sup> I have tried to use terms that are appropriate in context, but there is no perfect solution to this problem.

Another troublesome term is “prisoner.” In the late eighteenth century, before the introduction of the modern American prison, the term was used to describe any person held in captivity, including persons awaiting trial. Modern usage tends to define “prisoner” as a person sentenced to a term of imprisonment in prison after a trial. Using “prisoner” in its eighteenth-century sense is therefore more likely to be confusing than helpful to a modern reader. Accordingly, I use the admittedly anachronistic term “detainee” to describe persons who have been detained, but not formally sentenced in a court of law. Although the term was not used in the eighteenth century in this context, I can think of no other way of precisely describing the legal situation of these individuals to a modern reader.

A brief overview by way of orientation: Chapter 1 explores the background of treason in colonial Pennsylvania, including the adoption of British treason law and the legal complexities that led to a general failure of the state to prosecute individuals for treason. Chapter 2 turns to the bitter debates between 1765 and 1775, when Americans defended themselves against charges of treason, while simultaneously hurling the same charge at British officials, and even at the king himself. Chapter 3 addresses the period between the outbreak of the war and the adoption of the Declaration of Independence, focusing primarily on the treason trials conducted by committees of safety. The tumultuous period between formal independence and the reopening of the courts is the subject of Chapter 4, including the controversial suspension of habeas corpus in the wake of the British invasion. The difficulties of reopening the courts, the issuance of attainder proclamations, and the wave of cases generated by the British invasion are considered in Chapter 5. Chapters 6 and 7 provide an extensive analysis of the Philadelphia treason trials of 1778 and 1779, the most significant treason trials of the American Revolution. Chapter 8 evaluates the aftermath of the trials,



including the turbulent year of 1779, the repercussions of Benedict Arnold's treason in 1780, and disputes over the scope of executive detention powers. Chapter 9 deals with the aftermath of the war, the adoption of the Treason Clause of the United States Constitution, and the first federal treason trials, those arising out of the Whiskey Rebellion of 1794 and Fries's Rebellion of 1799.

## *Peace, the Constitution, and Rebellion, 1781–1800*

IN MAY 1795, the United States Attorney for the District of Pennsylvania, William Rawle, commenced the first trials for treason under the United States Constitution. The defendants were men from western Pennsylvania who had opposed the federal excise tax on whiskey, and Rawle prosecuted the cases vigorously, arguing that the men's conduct clearly amounted to high treason against the United States. Rawle was joined at the counsel table by William Bradford, the United States Attorney General. Bradford, who had prosecuted treason cases during the war as the Pennsylvania Attorney General, was a natural for this role. But Rawle was not. Indeed, his presence at the trials suggested that the world turned upside down by the Revolution had perhaps turned upside down once more. Unlike President Washington and other high-ranking federal officials, Rawle was not a hero of the Revolution. Quite the opposite—he was a committed Loyalist from a deeply Loyalist family. His stepfather, Samuel Shoemaker, a former mayor of Philadelphia, had served as Philadelphia's magistrate of police during the British occupation, earning him the title of one of the Revolution's most detested Loyalists. When the British departed, Shoemaker and Rawle realized that their lives were in danger and they fled to British-occupied New York. While in New York, Rawle wrote letters lamenting the Revolution, and in 1781 he moved to London to study at Middle Temple. In late 1782, amid worries that he would be attainted for treason by the state of Pennsylvania, he returned to America and eventually developed a thriving law practice.<sup>1</sup>

The startling fact that a former Loyalist was now prosecuting American tax protestors for high treason shows just how much Pennsylvania and the United States had changed in the fourteen years since the victory at Yorktown. With Cornwallis's defeat, military hostilities largely came to a halt, and the pervasive fears of internal enemies that had consumed Americans for over six years

diminished dramatically. Prosecutions for treason and misprision of treason did not immediately end in Pennsylvania, but it was clear that their days were numbered.

The issue of treason would now appear most prominently in the context of internal rebellions. Although the state prosecuted one man for levying war against the state, the primary actor would be the new federal government. When the Constitutional Convention met in Philadelphia in 1787, it authorized the federal government to try persons for treason, but adopted a restrictive definition in order to limit abuses. Within a few years, Pennsylvanians rising in arms to resist taxes and claiming to be the true heirs to the Revolution would fundamentally challenge the new government's ability to control internal dissent.

### *Treason Prosecutions after Yorktown*

After Yorktown, the proclamations of attainder remained the greatest threat to British adherents. The David Dawson precedent of execution without a trial, however, would not be repeated. In January 1783, for example, Christopher Wilson was brought before the Supreme Court, charged with being a person named in an attainder proclamation and failing to report within the allotted time. Wilson “denied all the facts averred in the said suggestion,” but a jury found for the government.<sup>2</sup> This was an unremarkable verdict, as Wilson’s own wife had filed a petition to the justices in 1779, lamenting her “disagreeable and unhappy circumstance of being married to Christopher Wilson who has left the state in company with the common enemy of America.”<sup>3</sup> A few days later, Wilson’s attorneys, William Lewis and Jared Ingersoll, filed an unsuccessful motion to bar the judgment of execution. Although sentenced to death, Wilson was not executed and was eventually discharged.<sup>4</sup> In his clemency petition to the Council, Wilson admitted joining the British, but argued that he had “never borne arms with them.” He had fled with the British to Long Island rather than “take the benefit of proclamation” because the “rage of war, and the injuries received from the British ran high in the passions of his countrymen,” giving him but “small chance for his life at that time.”<sup>5</sup> A similar procedure was used for Isaac Mitchenor and Samuel Burrowes in April 1783. The Supreme Court deferred their cases to the next session and admitted both men to bail, and it appears that they were never tried.<sup>6</sup>

In misdemeanor cases, defense attorneys began taking an increasingly dismissive tone. John Bulla, for example, was charged with misdemeanor at the Chester County Court of Oyer and Terminer in May 1783, for advising Thomas Woodward to steal a horse and supply it to the enemy during the British occupation. Jonathan Dickinson Sergeant, who had vigorously prosecuted traitors as

the state's attorney general, appeared as Bulla's counsel, and noted that this was "a stale business. . . . The time was when these things were important—less now." Dredging up old charges was an opportunity for the airing of grudges, and "tories may now be disposed to hunt tory."<sup>7</sup> At another trial, Jasper Yeates stated, "This is, I hope the last time for such trials."<sup>8</sup> In a misdemeanor case in York County in 1782, even the prosecutor noted that "time has subdued the resentment of the people respecting the defendant. The zeal for prosecution has subsided."<sup>9</sup>

There were only three trials for high treason in Pennsylvania after the victory at Yorktown. George Clift was convicted in Bucks County in December 1781, but was later pardoned. His petition for clemency was supported by Chief Justice McKean and by the members of the jury that had convicted him.<sup>10</sup> Peter Kerr was tried in April 1782 in Chester County on a charge of having joined the enemy and capturing an American prisoner on October 6, 1777.<sup>11</sup> The tardiness of the prosecution, although not legally an impediment, may have contributed to the jury's verdict of acquittal.

The final treason trial was that of Joshua Buffington in September 1782. Buffington was no stranger to the justices. In September 1781, he had been brought before the Supreme Court as an attainted traitor who failed to surrender himself in a timely fashion. Buffington was represented by William Lewis and Jared Ingersoll, a Yale graduate and future signer of the United States Constitution. Lewis and Ingersoll argued that the proclamation of attainder had named Buffington's township as East Bradford, but they produced numerous affidavits demonstrating that Buffington had lived in West Bradford.<sup>12</sup> Accordingly, the accused, Joshua Buffington of West Bradford, had not been attainted of treason. An exasperated Attorney General Bradford insisted that Buffington was obviously named in the proclamation as the "description cannot apply to any other person."<sup>13</sup>

The court ruled in Buffington's favor: "Although it may be allowed, that the legislature is not bound to the same strictness, that is required in the description of all indictments; yet, we are inclined to think that the Executive Council is so bound." Even a pardon, the court noted, would be "extremely doubtful" if it named the wrong township. Thus, although "Joshua Buffington of East Bradford was called upon to surrender himself. . . . Joshua Buffington of West Bradford certainly was not."<sup>14</sup>

A year later, Buffington was back, this time as the subject of an indictment by a grand jury in the court of oyer and terminer for serving as a soldier in the king's army.<sup>15</sup> The case was another debacle for the prosecution. Buffington was again represented by Jared Ingersoll, and he used nineteen of his peremptory challenges. Attorney General Bradford presented one witness, Elijah Wood, who testified that Buffington had come to him to buy molasses during the British



occupation of Philadelphia. After presenting five affidavits stating that Buffington had lived in Chester County until 1780, Bradford sought to have Wood testify that Buffington had confessed to him. Ingersoll immediately objected, triggering a lengthy argument about the admissibility of the confession. The court ruled that the confession to Elijah Wood could not be admitted unless the state first presented two witnesses to a treasonous act. With that, the state's case appears to have collapsed, as the state produced no more witnesses. Buffington produced no witnesses on his behalf, and the jury returned a verdict of not guilty.<sup>16</sup> With that ignominious conclusion at the State House, treason prosecutions for aiding the British came to an end.

### *Treason Cases: Summary Data*

Between September 1778 and September 1782, there were at least forty-five jury trials for treason in Pennsylvania's courts of oyer and terminer.<sup>17</sup> A full listing of these trials is provided in Appendix 2. As court records are incomplete, the possibility of additional trials cannot be completely eliminated.<sup>18</sup> The trials were heavily concentrated in the southeastern corner of the state. The vast majority of trials were in Philadelphia County. Of the remaining counties, Bucks County had seven trials, Chester and Bedford Counties had three, and Northampton had one.<sup>19</sup> Table 9.1 provides summary data from these trials.<sup>20</sup>

Overall, eighty-seven charges of high treason were presented to grand juries, which found indictments in 62% of the cases, a somewhat lower rate than the 86.5% indictment rate for misprision cases. Forty-five cases of high treason went to trial, but juries convicted in only 15.5% of them, a rate significantly lower than the 57% for misprision cases. Of the seven defendants who were convicted of high treason, four were pardoned and three were executed. Put another way, a person who was charged with treason before a grand jury in Pennsylvania between 1778 and 1782 had only a 3.4% chance of suffering execution.

On balance, it is hard to argue that Pennsylvania engaged in a reign of terror against opponents of the Revolution. Persons charged with treason were represented by skilled defense counsel, the courts did their best to ensure fairness at the trials, and conviction rates were surprisingly low. It seems far more likely that culpable people escaped than that innocent people were improperly convicted. The number of Pennsylvanians who actually provided some form of assistance to the British army in violation of the state's treason law almost certainly numbered in the thousands.<sup>21</sup> Yet only three were executed after a trial in a court of law. Admittedly, there is somewhat of a random quality to those three; Morden was a casualty of the fallout over Benedict Arnold, and Carlisle and Roberts probably suffered from being among the first of the Philadelphia



**Table 9.1 Treason Cases: Pennsylvania Court of Oyer and Terminer,  
1777–1782**

County	Ignoramus/ True Bill	NG/G	Judgment Entered	Pardoned	Executed
Bedford	9/5	3/0			
Berks	0/0				
Bucks	0/7	5/2	2	2	
Chester	2/5	3/0			
Cumberland	0/0				
Lancaster	0/0				
Northampton	7/4	0/1	1	0	1
Northumberland	0/0				
Philadelphia	15/33	27/4	4	2	2
Westmoreland	0/0				
York	0/0				
TOTAL	33/54	38/7	7	4	3

prosecutions. But absent the pardoning of all convicted defendants, some element of randomness was probably inevitable.

How typical was the Pennsylvania experience compared to other states? Although most states shared an aversion to capital punishment for treason, the mechanisms by which that aversion was expressed varied significantly, as the experience of neighboring states demonstrates. The sharpest contrast can be found at a court of oyer and terminer in Morristown, New Jersey in the fall of 1778, at the height of the Philadelphia treason trials. Thirty-five men, many of whom were from Pennsylvania, were tried for high treason for marching to join the enemy in New York.<sup>22</sup> All thirty-five were convicted. New Jersey governor William Livingston argued that “sound policy will require the execution of the ring-leaders; so humanity and mercy will interpose in behalf of the more ignorant and deluded.”<sup>23</sup> Most of the defendants were pardoned upon condition of serving in the Continental Army, and only two were executed.<sup>24</sup> A month later, at a court of oyer and terminer in Gloucester, New Jersey, seven men were convicted of high treason and sentenced to death, although most were later pardoned.<sup>25</sup>

In Delaware, eight men were convicted of high treason in 1780 alone, more than were convicted in Pennsylvania during the entire war. This figure is especially striking when one considers that Delaware’s population was approximately 37,000 people, compared to approximately 300,000 in Pennsylvania.

No executions ensued, however, as all eight men were pardoned.<sup>26</sup> Similarly, at a court of oyer and terminer in Frederick, Maryland, in July 1781, seven people were convicted of high treason and sentenced to death, a figure equal to Pennsylvania's wartime total.<sup>27</sup> Only three of the defendants were executed.<sup>28</sup> Likewise, in 1782, ten men were convicted of treason in Virginia, but all were pardoned.<sup>29</sup>

What made Pennsylvania different? The answer almost certainly rests in the controversial executions of John Roberts and Abraham Carlisle in early November 1778. These executions put jurors on notice that clemency could not be routinely expected from Pennsylvania's executive authority. Jurors who may have been persuaded of the defendant's guilt, but were unwilling to expose the defendant to the death penalty, had no choice but to acquit. By contrast, in other states, jurors could confidently convict defendants, knowing that the likelihood of eventual capital punishment was low.<sup>30</sup>

Of course, the oyer and terminer data do not represent the totality of persons ensnared by charges of disloyalty in Pennsylvania. It does not include most of the hundreds of people named in the attainder proclamations who either fled the state entirely or who were later discharged (or, in the unusual case of David Dawson, executed). It does not include people jailed on suspicion of treason, but against whom charges were never filed. Nor does it include people brought before the committees of safety or the military in the years prior to 1778.

Some of the cases that never made it to court could nonetheless be quite disturbing. In April 1780 in Northumberland County, for example, a large number of armed men descended upon two Quakers, Moses Roberts and Job Hughes, and thirteen of their neighbors. Despite Roberts's plea that his wife was "great with child and near the time of her delivery," the men seized him and the others and placed them in a boat that took them to Sunbury. On the way, someone struck one of the captured men "on the head with a tomahawk which entered his skull and he shed much blood."<sup>31</sup> At Sunbury, the men were interrogated before a "Court of Private Sessions," on suspicion of aiding the Indians.<sup>32</sup> The sheriff freed ten of the men on the condition that they pay £10,000 bail and promise not to appear in the county during the war. The remaining men were ordered to Philadelphia, and were placed in a canoe that took them down the Susquehanna toward Lancaster, where they were arrested on suspicion of high treason and were committed to jail by Justice Atlee.<sup>33</sup>

President Joseph Reed was displeased by the actions of the Northumberland officials, stating to George Bryan that these were "really distressing cases when suspicion is made to stand for proof, and necessity makes the law. I am fearful that an entire discharge will have very bad effects, and it seems a stretch of power to hold them in confinement when no cause is shown."<sup>34</sup> Chief Justice McKean was willing to release the men on bail, but Roberts and Hughes refused, insisting

that they were innocent and demanding an unconditional release, which angered McKean greatly.<sup>35</sup> The two men remained in jail, without indictment or trial, until they were released in late 1781.<sup>36</sup> Their case became a rallying cry for Quakers disillusioned with the state government.<sup>37</sup> John Pemberton felt that “judgment is turned backward, and equity cannot enter.”<sup>38</sup> A Quaker committee reported that the men “were detained in prison without being charged with any crime, but merely for refusing to give bail, being entirely innocent of the breach of any law; and are therefore suffering for the testimony of a good conscience, having undergone great oppression & injustice from the hands of cruel men.”<sup>39</sup> A case like this was not especially common, but it reminds us that not all significant legal proceedings were memorialized in the docket books of courts.

### *The Escaping-Prisoners Cases*

As cases of treason and misprision disappeared after Yorktown, prosecutions for a different form of disloyalty—helping British prisoners of war to escape—began to occupy the courts. The presence of large numbers of prisoners of war in the state had long posed problems for Pennsylvania’s government.<sup>40</sup> By 1781, over 800 prisoners were being held in Lancaster. As historian Ken Miller has noted, the prisoners “had access to an elaborate escape network consisting of loyalist guides and scattered safe houses stretching from Pennsylvania to New York.”<sup>41</sup> In May, a “daring plot” by the prisoners to escape was fortuitously uncovered. Colonel Adam Hubley wrote despondently to President Reed, “the number of disaffected people through this country is very considerable so that our situation is truly alarming when I consider the state in which I find the militia, should the prisoners once clear themselves of the barracks, the few men on guard . . . would not be able to stop them.”<sup>42</sup> By June, over 150 prisoners were sick with putrid fever, further increasing the desire of the healthier prisoners to escape from the crowded barracks where they were confined.<sup>43</sup>

Prisoners of war were not subject to the laws of Pennsylvania and, as the justices observed in a 1782 case, a “British prisoner may rightfully escape.”<sup>44</sup> If captured, a prisoner would not be subject to criminal prosecution, but simply returned to confinement. But what about those Pennsylvanians who helped the escaping prisoners along the way, by offering them directions, a meal, or a place to sleep? Even though active hostilities had ended after Yorktown, British soldiers remained enemies for purposes of the state’s treason law until a treaty of peace was concluded. Moreover, each British prisoner who successfully escaped was one fewer prisoner who could potentially be exchanged for an American prisoner. Accordingly, it would not be implausible to describe aid to escaping soldiers as a treasonous act of giving aid and comfort to the enemy.

Here, however, as elsewhere, the formal logic of the law yielded to realities. Prosecutors had found it almost impossible to win convictions from juries in cases involving far worse deeds. How likely was it that a jury in Lancaster County would convict someone of treason for giving food and a place in the barn to a young man trying to return to his family? Recognizing this problem, the Assembly passed an act in April 1782 providing for the punishment of “the base and treacherous practice of aiding, abetting, concealing or assisting” escaping prisoners of war. The act vested jurisdiction over the offense in the courts of quarter sessions, and imposed a punishment of a fifty-pound fine, half to be paid to the state, and the other half to the prosecutor, suggesting that private prosecutors would take the lead in these cases. Defendants unable to pay the fine would be publicly whipped with thirty-nine lashes.<sup>45</sup>

Curiously, however, no prosecutions were brought in the courts of quarter sessions. The statute did not create a new offense, but simply defined the parameters of an offense that was already subject to punishment as a common-law misdemeanor. The justices had been hearing similar cases prior to the statute’s enactment and had been imposing stiffer sentences than those required by the statute. On May 27, 1782, for example, Nathaniel Forsyth was convicted in the Court of Oyer and Terminer for York County and fined £100 and ordered imprisoned until July 4, 1783.<sup>46</sup> Chief Justice McKean and Justice Bryan endorsed Forsyth’s petition for clemency, noting that the statute, “which had passed before the trial of the prisoner, . . . was unknown to the Court, as they had been five weeks on the circuit.”<sup>47</sup> The Council accordingly remitted the fine and the sentence of imprisonment.<sup>48</sup> The practice of prosecuting the escape cases in the courts of oyer and terminer continued, primarily in Lancaster, Chester, Philadelphia, and York Counties, and the charges included a common-law count as well as a statutory count. Attorney General William Bradford, occasionally assisted by Joseph Reed, argued personally for the state. Bradford may have seen these cases as opportunities to target opponents of the Revolution. As he pointed out in one case, “He is no good Whig who harbors prisoners of war.”<sup>49</sup>

Justice George Bryan’s notes for many of these cases survive, so we have better evidence of witness testimony, arguments by the attorneys, and rulings of the court than we do for the cases of high treason. Whereas the treason defendants were all men, the defendants accused of aiding escaping prisoners included several women, including Ann Shirk, acquitted in Lancaster County in October 1782; Susannah Longacre, convicted in Chester County in October 1782; and Rachel Hammer, convicted in Philadelphia in January 1783.<sup>50</sup> The cases were vigorously argued, and the defendants had the assistance of able counsel, including James Wilson, William Lewis, Alexander Wilcocks, Jasper Yeates, and Stephen Chambers.<sup>51</sup> The lawyers cross-examined witnesses, advanced evidentiary

objections, and even attempted an insanity defense for one defendant.<sup>52</sup> At a Philadelphia trial in January 1783, the defense witnesses included former treason prosecutors Joseph Reed and Jonathan Dickinson Sergeant.<sup>53</sup>

Many of the cases stemmed from a clever sting operation, apparently initiated by General Moses Hazen, commander of the prison camp in Lancaster. Hazen arranged for Captain Noah Lee to pose as a British prisoner and provided three real British prisoners to assist him. The four men would then request help from various individuals to aid in their escape. When the assistance was provided, the trap was sprung. Misdemeanor charges followed, with Captain Lee and the British prisoners providing the sole testimony on behalf of the state. Each conviction yielded £25 for General Hazen (his half-share of the fine), and the fine could be assessed separately for each prisoner pretending to escape. Thus each person who fell for the plot could be fined up to £150, with General Hazen recovering £75. Although there is no direct evidence of Hazen's plans, it seems probable that he targeted persons suspected of active involvement in escape rings, rather than random individuals with no prior history of wrongdoing.

When these cases first reached the Court of Oyer and Terminer for Lancaster County in October 1782, defense counsel objected. In *Commonwealth v. Snyder et al.*, Stephen Chambers complained of a "plan laid to deceive these poor men and bring them to punishment."<sup>54</sup> Similarly, in *Commonwealth v. Meyers et al.*, defense counsel briefly argued that the "men were sent out by Lee for a particular purpose," and the defendants could therefore not be "guilty of harboring and aiding to escape." The point was buried in larger objections over evidentiary issues, however, and does not seem to have been squarely addressed by the court.<sup>55</sup>

When the court moved on to Chester County a few days later, however, defense counsel were ready to pounce. A modern attorney would consider some form of an entrapment defense, but this defense was not recognized until the nineteenth century.<sup>56</sup> The lawyers for Martin Usner and three other defendants instead argued that the alleged facts did not constitute a crime, as the men were not really British prisoners trying to escape. Alexander Wilcocks argued that "in the eye of law" the act did not apply "if these prisoners were permitted to go with intent to draw in these persons, and not to go off to New York." Similarly, William Lewis argued that the alleged offense lacked "the legal essentials," since these men could not "be considered as making an escape." It was analogous, Lewis suggested, to a "man shooting with malice at an object, supposed a man, yet proves a bear."<sup>57</sup>

An exasperated Attorney General Bradford complained that "this cause was advocated with as much zeal, as if the defendants were spotless." He asked, "Shall an offense bordering on treason go unchecked?" "Going to New York" is not necessary under the statute, he argued; "being at large is sufficient." Joseph Reed,

assisting Bradford, argued, “it would disgrace us to suppose [this offense] not punishable.” The court’s decision, preserved in Justice Bryan’s handwritten notes, is not entirely clear, but the court agreed with the state, noting that the statute must be construed “reasonably.” Helping prisoners to escape was an offense before the statute was enacted, and the statute reached “any aid, that may help prisoners to escape, though not escaping at the moment.”<sup>58</sup>

The court’s approval of Captain Lee’s entrapment plot would prove highly significant. At least twenty-seven people were convicted as a result of Lee’s efforts. Three of these were on counts at common law, which did not provide a share of the fine to the prosecutor, but the twenty-four convictions under the statute would have yielded £1700 to General Hazen.<sup>59</sup>

In contrast to the treason cases, the state obtained convictions in a significant majority of the escape cases. The evidence of guilt was probably more straightforward than in the treason cases, and the punishment was relatively mild, giving juries less hesitation about convicting. Nonetheless, the convictions may have had a significant deterrent effect. A clemency petition from November 1782 suggested that the fines were designed “to strike terror in the generality to prevent further mischief, in which they succeeded so far that a stranger can get no more lodging or directions for the road.”<sup>60</sup>

In many cases, however, the Council remitted the fine or a portion of the fines.<sup>61</sup> Christian Carpenter of Lancaster County, for example, petitioned the Council for clemency, arguing that he had thought “it proper, and consistent with the character of a Christian, to give what he could spare to those he thought in want. This principle, he is now convinced, was carried too far.”<sup>62</sup> The Council agreed to remit one-third of his fine.<sup>63</sup> Jacob Grove similarly persuaded the Council to remit a portion of his fine by arguing that he could “scarcely understand one word of the English language” and thus could not be chargeable with knowledge of the prisoner’s intended escape.<sup>64</sup> Frederick Buzzard successfully argued that he “was utterly ignorant of any law against lodging British prisoners” and pointed to the devastation of his farm by the British army, the loss of his wife, and the seven children he had to maintain.<sup>65</sup> John Evans persuaded the Council to remit the fine of his son, a minor convicted of giving prisoners directions to New York.<sup>66</sup>

### *The Returning Loyalists*

With military hostilities over, attention turned to the fate of those who had fled to the British during the war. The terms of the articles of peace being negotiated in Paris were of significant concern. In August 1782, the Pennsylvania Assembly unanimously resolved that the restoration of the property of attainted traitors

was “utterly incompatible with the future peace, interests, and safety” of the state and would “depreciate and weaken the independence gained at such a vast expense of blood and treasure.”<sup>67</sup> A Philadelphia almanac published in late 1782 opened with a picture of a hanged man entitled “Tory turned Rope-Dancer.” Doggerel verses stated that the Tory, who thought he was safe “from gallows and from rope,” had made an improvident decision to return to Pennsylvania.<sup>68</sup> In June 1783, a group of militiamen met at the State House and issued resolves arguing that it was “inconsistent with the interest and dignity of the good people of this State, that any person who hath voluntarily withdrawn himself from this, or any of the United States of America, since the 19th day of April, 1775” and who had aided the British in any capacity “should be suffered to return to, or reside within the State of Pennsylvania.” Such “unworthy men who would have rejoiced in the subjection of America” should not be allowed to “participate of the blessings of liberty and commerce.” To enforce these resolves, the militiamen formed a committee “to use all means in our power, to expel with infamy, such persons who . . . shall presume to come among us.”<sup>69</sup> Militiamen in Chester County resolved to do the same thing and vowed to “hereafter enquire into the character, and examine every suspicious person that comes within our knowledge.”<sup>70</sup> A committee in Bucks County resolved against the return of any person who had aided the British, noting that “the re-admission of such infamous deserters into the bosom of our country would greatly dishonor and endanger the state.”<sup>71</sup> Northampton County similarly instructed its representatives to support a law to prevent the return to Pennsylvania of anyone who had aided the British during the war.<sup>72</sup> An August 1783 circular letter by William Adcock (who had served on five treason juries, including that of John Roberts), warned that the “traitors, who joined the enemy, will also be creeping in amongst us.” Many “people who call themselves Americans,” Adcock warned, would “joyfully receive these men into our country, for the sake of strengthening their party, and promoting their own ambitious purposes.”<sup>73</sup>

The Treaty of Paris, concluded on September 3, 1783, required the American states to terminate all treason prosecutions and property confiscations stemming from the war. It further required the Confederation Congress to recommend to the state legislatures the restoration of property of British subjects confiscated during the war and the revision of the laws “consistent not only with justice and equity but with that spirit of conciliation which on the return of the blessings of peace should universally prevail.”<sup>74</sup> The British placed great emphasis on these provisions, but few Americans expected the states to comply. Not surprisingly, almost none did. New York, for example, enacted a law in 1784 that disenfranchised and barred from public office any person who had served in a British military unit or who had lived behind enemy lines after July 9, 1776.<sup>75</sup>



In Pennsylvania, resentment against the exiles nonetheless slowly dwindled and many of them eventually returned and were able to carry on their lives almost as if the Revolution had never happened. One of the most widely reviled exiles was Jacob Duché, the former minister of Christ Church in Philadelphia and chaplain to the Continental Congress, who had notoriously urged General Washington to negotiate for peace during the British occupation. Duché had been attainted in the original March 6, 1778 act of attainder, and his house was later occupied by Chief Justice McKean. Duché was desperate to return to Philadelphia, but feelers that he sent out in 1783 and 1789 discouraged him from doing so. In 1793, however, Duché finally received a pardon from Pennsylvania Governor Thomas Mifflin and was able to return. Memories of the war had faded, and Duché even had a cordial meeting with President Washington.<sup>76</sup>

In 1790, the Council considered a motion for a general pardon of all persons attainted for treason during the war. The motion was seconded by Zebulon Potts, who had served on the Philadelphia grand jury in 1778.<sup>77</sup> The Council had been regularly pardoning attainted traitors, but the motion was postponed and never received a vote.<sup>78</sup> When the new Pennsylvania constitution of 1790 took effect, the pardoning power was transferred to the governor, who continued to issue pardons regularly in treason cases. By 1792, Secretary of State Thomas Jefferson was able to assure the British ambassador that in Pennsylvania, “All persons were permitted to return . . . , and you see many of them living here to this day in quiet and esteem.”<sup>79</sup>

In 1792, the Pennsylvania Assembly passed a law restoring the portions of the estates of John Roberts and Abraham Carlisle that were still held by the commonwealth to their heirs.<sup>80</sup> An Assembly committee found that “the critical circumstances of the late contest afford[ed] an ample justification for those proceedings, which were calculated to secure the allegiance of the citizens,” but in the “present season of peace and prosperity,” the state might exercise “its dignity and its mercy” to restore these small pieces of property.<sup>81</sup>

Leniency would eventually be extended to even the most notorious traitors. In late 1778 or early 1779, a Philadelphia broadside had warned about leniency toward the exiles, claiming that even “Samuel Shoemaker, Andrew Allen, and Joseph Galloway will have a beaten path to come back upon.”<sup>82</sup> These three men were among the notorious adherents to the British and had been named in the state’s first legislative attainder proclamation. Yet the broadside proved prescient, as all three men were eventually pardoned. Shoemaker, a former mayor of Philadelphia, had served as a magistrate of police during the British occupation. Upon the evacuation, he had fled to New York and then to England, where he met with George III.<sup>83</sup> But by 1791, Shoemaker was back in Philadelphia and was described in a city directory as a “gentleman” living on High Street.<sup>84</sup>



In 1793, he received a pardon from Pennsylvania Governor Thomas Mifflin.<sup>85</sup> Andrew Allen had served as Pennsylvania Attorney General, in the Pennsylvania Assembly, on the Pennsylvania Committee of Safety, and as a delegate to the Second Continental Congress before fleeing to the British in December 1776. Allen received a pardon in 1792, and he returned to Philadelphia, where he lived for approximately five years before returning to England.<sup>86</sup> Even Joseph Galloway, perhaps second only to Benedict Arnold in popular hatred, received leniency. The former speaker of the Pennsylvania Assembly, Galloway had defected to the British in the fall of 1776 and served as superintendent of Philadelphia during the British occupation.<sup>87</sup> A poem in a Philadelphia newspaper had described him as a “traitor to his country” and a “Lucifer on earth.”<sup>88</sup> But by 1793, Thomas McKean had offered to help procure a pardon for Galloway.<sup>89</sup> In 1795 the pardon was issued, although Galloway chose not to return to Pennsylvania.<sup>90</sup> Only Benedict Arnold remained beyond possibility of redemption.

What made Arnold so distinctive? Unlike the other accused traitors, Arnold did not make his decision out of political principle at an early stage of the war. Instead, he sold out his country for money after five years of service in its army. This was no misguided neighbor, with simply a differing view of political issues. This was evil incarnate, the devil himself, as the Philadelphia street theater had so vividly demonstrated. Such a person was irredeemable, a foul villain who fully deserved to swing from the gallows.

### *The Continuing Threat of Internal Dismemberment*

During the war, the most significant threat of treason came from the densely populated southeastern counties of the state. After the war, the threat shifted, and the state’s greatest concerns over disloyalty arose in the sparsely settled frontier regions to the west and to the north, where loyalty to the government in Philadelphia was weakest. The controversies with Connecticut and Virginia that had consumed the colonial government prior to independence now threatened to erupt again. In November 1782, reports began circulating that the western settlers had “declared that the country within that space is independent of Pennsylvania.” Some members of the Confederation Congress were sympathetic, concluding that Pennsylvania would “be large enough if it was confined to the Alleghany Mountains, and it would be wisdom to acquiesce in the proposition of an independent state.”<sup>91</sup>

The Pennsylvania Assembly, however, had no desire to see the state dismembered. On December 3, 1782, it passed an act expanding the definition of high treason. It was now high treason to “erect or form, or . . . endeavor to erect or form any new and independent government within the boundaries of

this commonwealth as described in the charter and settled between this state and the state of Virginia.” Actions to accomplish this goal by force were probably already addressed by the 1777 statute’s prohibition on levying war against the state, but the new provision made explicit that even attempts constituted high treason. Two separate sections extended the offense to meetings and discussions. It was now treason to “set up any notice, written or printed, calling or requesting the people to meet together for the design or purpose of forming a new and independent government as aforesaid” or to “assemble . . . for that purpose in consequence of such notice.” It was also treason to “advisedly recommend or desire” the formation of a new government to the participants at such a meeting, or to “read to them any new form of a constitution with design to induce them to adopt the same as a new and independent constitution.” The new statute followed the 1777 statute in requiring two witnesses and trial in a court of oyer and terminer, but it permitted trial “in any county within this commonwealth” at the Council’s discretion, thus eliminating the advantages of a local jury. In a significant caveat, the Assembly stated that the act did not apply to the dispute between Pennsylvania and Connecticut.<sup>92</sup>

This statute, enacted as a panicked and hasty response to external events, is hardly a masterpiece of the legislative craft. It is easy to note just how many of the revolutionaries’ own activities prior to independence would have been unlawful under the statute, and permitting the Council to remove a trial from a local jury was eerily reminiscent of the statute of Henry VIII that the revolutionaries had so ardently denounced. Two years later, a draft report of the Council of Censors singled out this statute as an unconstitutional infringement of the right of trial by jury.<sup>93</sup> But the legislative bark proved to be far greater than any executive or judicial bite. No person appears to have been charged or tried under this provision.

The border controversies did trigger a treason indictment, but not until several years later in the seemingly never-ending dispute with Connecticut. In November 1782, a congressional commission issued the so-called Trenton Decree, upholding Pennsylvania’s jurisdiction over the Wyoming Valley, but many Connecticut settlers refused to accept this decision and the area again erupted in armed violence.<sup>94</sup> By 1786, Pennsylvania officials suspected that some of the Connecticut settlers intended to form an independent state.<sup>95</sup> In late August 1787, Chief Justice McKean issued an arrest warrant for John Franklin, the leader of the Connecticut settlers, who had been elected as Luzerne County’s first representative to the Pennsylvania Assembly in February 1787.<sup>96</sup> The warrant charged Franklin with denying the jurisdiction of Pennsylvania and encouraging “diverse inhabitants of the said county to disobey our laws and to resist our government.”<sup>97</sup> When Franklin was finally captured in early October 1787, he was brought to Philadelphia and placed under close confinement.<sup>98</sup> The *Pennsylvania*

*Gazette* approved of the arrest, describing Franklin as a “Western Shays, who . . . has uniformly labored to involve the county in civil war.”<sup>99</sup> At Franklin’s arraignment, Chief Justice McKean cited evidence that Franklin intended to erect an independent state and appointed a court to exercise its jurisdiction. Such facts, McKean stated, “would clearly constitute the crime of high treason, but that the laws of the government had prevailed upon them to institute a prosecution, for misprision of treason only.” Franklin pleaded not guilty, and referred his defense to his attorneys, Daniel Clymer and James Biddle. McKean denied bail on the ground that information showing that the insurgents “had proceeded to acts of open rebellion” had recently come to light. Attorney General Bradford then argued that the new facts required that Franklin be committed on a charge of high treason, and the justices agreed.<sup>100</sup> By April 1788, Franklin had still not been tried, but the justices agreed to release Franklin on a two-thousand-pound bail, a sum he was unable to pay.<sup>101</sup>

In response to Franklin’s continued detention, a group of Franklin’s supporters, disguised as Indians, kidnapped Timothy Pickering, the leading Pennsylvania official in Luzerne County. Pickering was the former quartermaster general of the army and had been sent by the Pennsylvania government to organize the recently created county. The kidnappers initially intended to hold Pickering as a hostage for Franklin’s release, but after a few weeks they concluded that the plan had failed and Pickering was released.<sup>102</sup>

The Council sought the advice of Chief Justice McKean and Justice Bryan on the best course of dealing with the kidnappers. The justices recommended charging them with riot, with the initial indictments brought in the court of quarter sessions, followed by removal by certiorari to the Supreme Court for trial. A charge of riot was preferable to high treason, as it was a noncapital offense, making convictions more likely.<sup>103</sup> Timothy Pickering felt that the kidnappers had clearly committed “high treason,” a view confirmed by “gentlemen learned in the law,” but the “great lenity and mercy” of the government led it to prosecute only for riot.<sup>104</sup> At the November sitting in Wilkes-Barre, three rioters were acquitted and the remainder received mild punishments. Chief Justice McKean, however, pointedly told them that “they were all guilty of high treason, and that in any country in Europe they would all be hanged, and it was to the mildness of the government of Pennsylvania that they were indebted for the light punishment now ordered.”<sup>105</sup>

At the same sitting, John Franklin was finally brought before a Luzerne County grand jury, where he was indicted, along with two other men, on a charge of high treason. The indictment alleged that Franklin had endeavoured “to erect and form a new & independent government within the boundaries of this Commonwealth,” had conspired to levy war against the state, and had

endeavoured to persuade over two hundred to assemble with arms against the Commonwealth.”<sup>106</sup> As a legal matter, the indictment was open to serious challenges. The 1782 act making it high treason to attempt to form a new government specifically excluded the Connecticut controversy from its scope, and the fact that the 1782 act was deemed necessary strongly suggested that the offense was not covered by the 1777 act. Moreover, conspiracy to levy war was not a form of high treason, and attempts to persuade had been seemingly excluded by the ruling in the Roberts case. These legal arguments were never raised, however, as Franklin successfully sought a postponement of the treason trial on the ground that three critical witnesses were missing.<sup>107</sup> He was returned to confinement, first in Easton, and then in Philadelphia.<sup>108</sup> In March 1789, an agreement was reached between members of the Assembly, the Council, and the justices that Franklin would be admitted to bail, and Franklin was released after seventeen months in confinement.<sup>109</sup> Upon his return to Luzerne County, he expressed an interest in election to the Assembly or the Council, a possibility that appalled Timothy Pickering. “Is it proper, is it consistent with common sense,” he asked, “for the people of this county to elect a man to be a member of the government of the state, who now stands indicted for High Treason against that very government?” Such an election would indicate that Franklin could “never have an impartial trial among such men— . . . he will be acquitted, however clear the evidence may be against him.”<sup>110</sup> Attorney General Bradford may well have agreed with this analysis, as Franklin was never tried and was discharged from his bail in May 1792.<sup>111</sup> Five months later Franklin was elected sheriff of Luzerne County.<sup>112</sup> In 1795, he was again elected to the Pennsylvania Assembly.<sup>113</sup> The failure of the Franklin prosecution marked the effective end of the offense of treason against the state of Pennsylvania.<sup>114</sup>

### *Treason and the United States Constitution*

Although all of the Revolution’s treason cases had been prosecuted at the state level, the rhetoric of treason was drenched in nationalism. The twin ideas of “treason against America” and of “treason against liberty” that had been enunciated prior to the Declaration persisted throughout the war. In indictments, in newspapers, in private correspondence, and in government records, the same phrase recurred over and over: “treason against the United States.” The phrase “treason against Pennsylvania” tended to occur only in the context of “treason against the United States, and the state of Pennsylvania.” In June 1782, David Ramsay, a South Carolina delegate to the Confederation Congress complained that “Treason in our governments may be committed by a state as well as an individual. That one which does not contribute its quota in men & money is guilty

of treason in the worst sense; for it does that which in consequences tends to the destruction of the body politic.”<sup>115</sup> In an item dated July 4, 1782, a writer in the *Pennsylvania Gazette* argued that “the man who grumbles at paying taxes” was “worse than a tory. He is an enemy to his own flesh and blood. He is a prophaner of the rites and worship of the sacred temple of liberty. He is a practical traitor against the independence and freedom of the United States.”<sup>116</sup> A few months later, Thomas Paine argued for the creation of national treason laws, so that the continental government could define “treason against the United States.”<sup>117</sup> In one of his final *American Crisis* papers, Paine wrote, “Our citizenship in the United States is our national character. Our citizenship in any particular state is only our local distinction . . . Our great title is Americans.”<sup>118</sup> Similar nationalist ideals pervaded the address of the President and the Supreme Executive Council of Pennsylvania upon the arrival of the news of the preliminary articles of peace. The Council felt “impelled by a commanding sense of duty to country” to recommend the strengthening and improvement of the Union through a federal supremacy. The members called on “every man who truly loves his country” to stand up for this union, denounced as “treasonable cowardice” the selfish motives of those who opposed them, and concluded with the following lines: “We fervently pray that Almighty God will be pleased to inspire the people of this land with wisdom to make such choice as shall establish their felicity upon a durable basis, and till time shall be no more, afford just cause for an American to rejoice that he is a citizen of the United States.”<sup>119</sup>

In 1787, the Constitutional Convention opened in the Assembly Room on the eastern side of the Pennsylvania State House, the same room where the Declaration of Independence had been signed eleven years earlier. Across the hall, on the State House’s western side, sat the Pennsylvania Supreme Court chamber, where at least nine men had been tried for high treason during the war. The Pennsylvania delegation included two men with intimate knowledge of both sides of the building. As a member of the Continental Congress, James Wilson had signed the Declaration of Independence in the Assembly Room. As a lawyer, he had defended men accused of treason across the hall in the Supreme Court. Jared Ingersoll had similarly served in the Continental Congress in the Assembly Room and had defended men accused of treason in the Supreme Court.

The new Constitution eventually proposed by the Convention contained a significant provision on treason. Article Three, Section Three stated,

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

This provision was innovative in three significant respects. First, none of the state constitutions contained any provisions addressing treason. By elevating the crime to constitutional significance, the framers prevented Congress, the President, and the judiciary from impulsively expanding the scope of treason. Second, under English law and Pennsylvania law, treason convictions required two witnesses and proof of an overt act. The Constitution significantly tightened this requirement by requiring two witnesses to the *same* overt act. Third, English law allowed convictions when two witnesses testified to an out-of-court confession.<sup>120</sup> The Constitution eliminated this possibility by requiring confession in open court.

Scholars have long speculated that James Wilson played a key role in the development of the Treason Clause. Although there is no direct evidence, the circumstantial evidence is suggestive. Wilson was the most distinguished lawyer at the convention, he was a member of the Committee of Detail that proposed the clause, and the clause addressed problems of particular professional interest to Wilson. In 1775, he had argued against broad readings of English treason law. In the Malin and Carlisle trials of 1778, Wilson had raised objections to the admissibility of certain overt acts, and in the Roberts trial, he had vigorously objected to the introduction of an out-of-court confession. In a careful study of Wilson's work at the Convention, William Ewald concludes, "Because treason had been a special concern of Wilson's since his unsuccessful defense of accused loyalists and Quakers during the war, this clause most likely represents his handiwork."<sup>121</sup> In subsequent speeches and writings, Wilson singled out the Treason Clause for special praise. As Willard Hurst argued, "Such continuing concentration on a clause which, whatever its merits, is certainly not one of the more conspicuously discussed parts of the Constitution, strongly suggests pride of authorship."<sup>122</sup>

One should be careful not to overstate the case, however. Wilson is likely responsible for the inclusion of a treason provision in the Constitution, but its precise contours bear the mark of other hands. The Committee of Detail's proposed treason provision emerged late in the drafting process, and did not include the requirement of two witnesses to the same overt act, nor did it define adhering to the enemy as "giving them aid and comfort."<sup>123</sup> These changes were introduced on August 20, 1787, when the Convention debated the specific language of the Treason Clause. In 1782, the Virginia General Court had ruled that no person could be convicted of treason without "two witnesses to one and the same overt act." Edmund Randolph complained about this requirement in a letter to James



Madison, arguing that “although it should be proved, that twenty or twenty hundred instances of adherence to the enemy be proved, each of them by a single witness, the punishment of treason cannot be executed upon their author.”<sup>124</sup> An unnamed delegate now moved to insert the two witness requirement into the federal constitution, a motion that received prompt support from Benjamin Franklin, who argued “prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.” Wilson, by contrast, was more equivocal, noting that “much may be said on both sides. Treason may sometimes be practised in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy.”<sup>125</sup> The motion was agreed to, eight states to three, with the Pennsylvania delegation voting in favor, and the Virginia delegation (which included Randolph and Madison), opposed. The “aid and comfort” language was proposed by Virginia delegate George Mason. Wilson felt the words were “explanatory, not operative; and that it was better to omit them,” but the motion was agreed to, ten states to two, with the Pennsylvania delegation again voting in favor.<sup>126</sup>

In late November 1787, Pennsylvania convened the first ratifying convention for the federal constitution in the Assembly Room at the State House.<sup>127</sup> Many of the delegates had direct experience with Pennsylvania’s treason trials. The strongest supporters of ratification were James Wilson, who had defended men accused of treason, and Thomas McKean, who had presided over the trials. Attorney Jasper Yeates, who defended cases of misprision of treason and assisting British soldiers to escape, spoke frequently in favor of ratification. Also supporting ratification, although less frequently, was attorney Stephen Chambers, who had been in James Wilson’s house during the Fort Mifflin incident and who later defended persons accused of assisting British soldiers to escape.<sup>128</sup> But the most surprising member of the convention was delegate Thomas Yardley of Bucks County, who had been acquitted of treason in October 1778 in a trial presided over by fellow delegate Thomas McKean. We do not know who defended Yardley, but James Wilson is certainly a possibility. There is no record of Yardley speaking during the convention, but he voted in favor of ratification.<sup>129</sup>

In the ratifying convention, Wilson praised the Treason Clause, stating that

[y]ou will find the current running strong in favor of humanity. For this is the first instance in which it has not been left to the legislature, to extend the crime and punishment of treason so far as they thought proper. This punishment, and the description of the crime, are the great sources of danger and persecution, on the part of the government against the citizen. Crimes against the state! and against the officers of the state! History informs us, that more wrong may be done on this subject than on any

other whatsoever. But under this constitution, there can be no treason against the United States, except such as is defined in this constitution. The manner of trial is clearly pointed out; the positive testimony of two witnesses to the same overt act, or a confession in open court, is required to convict any person of treason.<sup>130</sup>

In his handwritten notes of seventeen “Reasons for Adopting the Constitution” Wilson included “[t]he accurate description of treason—its consequences confined to the criminal.”<sup>131</sup> In a later speech, Wilson stated, “If we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason. . . . Sensible of this, the Convention has guarded the people against it, by a particular and accurate definition of treason.”<sup>132</sup>

### *The Status of State Treason Law*

It remained an open question, however, just what this “particular and accurate definition” had in fact defined. As the United States Supreme Court put it in 1945, the Treason Clause’s “superficial appearance of clarity and simplicity . . . proves illusory when it is put to practical application. There are few subjects on which the temptation to utter abstract interpretive generalizations is greater or on which they are more to be distrusted. The little clause is packed with controversy and difficulty.”<sup>133</sup>

One source of difficulty was whether the clause effectively eliminated the treason laws of the states. The issue was extensively debated at the convention itself. Connecticut delegate William Johnson took the most extreme position, arguing that states had no power over treason, even under the Articles of Confederation, “the Sovereignty being in the Union.” Virginia delegate George Mason disagreed, pointing out that “an act may be treason against a particular state which is not so against the United States,” such as Bacon’s Rebellion in Virginia. Massachusetts delegate Rufus King moved to give Congress the “sole” power to punish treason. James Wilson then pointed out that in “cases of a general nature, treason can only be against the United States, and in such they should have the sole right to declare the punishment—yet in many cases it may be otherwise.” He noted, however, that the subject was “intricate” and that he “distrusted his present judgment on it.” The motion was defeated, six states to five, and the final document defined “treason against the United States,” rather than treason generally.<sup>134</sup>

Questions began to arise almost immediately. Shortly before his nomination to the United States Supreme Court in 1789, Massachusetts Chief Justice William Cushing wrote to John Adams, asking “whether there be any kind of treason



which may be tried by a particular state, consistent with the Constitution, & if any what kind.”<sup>135</sup> Adams responded that “a more important question . . . never was proposed upon any part of the constitution: and upon the right decision of it will, in my opinion, depend the existence of government. Two sovereignties against which treason can be committed can never exist in one nation or in one system of laws.” In particular, Adams worried that state officials might punish federal officials for discharging their duties under federal law.<sup>136</sup> This concern was not entirely misplaced, as just a few years later Thomas Jefferson suggested that the state of Virginia convict and execute the employees of the Bank of the United States for treason against Virginia.<sup>137</sup>

The most plausible reading of state treason laws is that they are preempted by federal treason law with respect to the offense of adhering to enemies.<sup>138</sup> Only the nation, not states, can be said to have “enemies” in the way that treason law has traditionally contemplated. By contrast, an attempt to overthrow a state government by force, while otherwise maintaining allegiance to the United States, would constitute treason against the state by levying war against it. Subsequent state prosecutions for treason would prove extremely rare. There have been a handful of indictments, but only a few convictions: those of Thomas Wilson Dorr in 1844, convicted in Rhode Island in the wake of the Dorr Rebellion; John Brown and Edwin Coppoc, convicted in Virginia after the Harper’s Ferry raid of 1859; and Walter Allen, convicted in West Virginia during the Mine Wars of the 1920s.<sup>139</sup>

After the adoption of the Constitution, Pennsylvania maintained its laws against treason, but modified the punishment significantly in 1794. As part of a broader penal law reform, Pennsylvania eliminated the death penalty for a variety of offenses, including treason. In an influential 1793 pamphlet, former Attorney General William Bradford had argued that capital punishment should be eliminated in all cases other than the “higher degrees of treason and murder.”<sup>140</sup> The legislature went even further, eliminating capital punishment for treason, and replacing it with imprisonment at hard labor for six to twelve years.<sup>141</sup> This lenity went too far for Thomas McKean, who later sneeringly complained that “the crime of high treason is considered as less injurious to society than a rape, though committed on a courtesan.”<sup>142</sup> Justice Edward Shippen of the Pennsylvania Supreme Court (and Benedict Arnold’s father-in-law), however, argued that this modification would increase the number of convictions. Shippen noted that there is “a tenderness in jurymen where death is the consequence of their verdict, that inclines them to suffer trivial doubts to operate too much in favor of the accused” and that “the calls of mercy are frequently loud in the ears of the pardoning power.” By contrast, a sentence of lengthy imprisonment would stir no such sympathy from the jury or the governor.<sup>143</sup>

### *The Whiskey Rebellion*

A more pressing issue would prove to be the meaning of the phrase “levying war against the United States.”<sup>144</sup> In his 1778 grand-jury charges, Chief Justice McKean had interpreted “levying war” broadly, in accordance with English precedents, and he continued to do so through the late 1790s.<sup>145</sup> Similarly, in his Law Lectures in the early 1790s, James Wilson followed Michael Foster’s treatise almost word for word. Although Wilson noted that the “line of division” between levying war and “an aggravated riot is sometimes very fine and difficult to be distinguished,” he argued that “insurrections in order to throw down all inclosures, to open all prisons, to enhance the price of all labour, to expel foreigners in general, or those from any single nation living under the protection of government, to alter the established law, or to render it ineffectual—insurrections to accomplish these ends, by numbers and an open and armed force, are a levying of war against the United States.”<sup>146</sup> According to Foster, these acts were in “construction of law” high treason, for “though they are not levelled at the person of the king, they are against his royal majesty.”<sup>147</sup> Former Pennsylvania Attorney General William Bradford agreed, arguing in a 1793 essay that the phrase “levying war” originated with the treason statute of Edward III and had “been settled by the judicial construction of more than four centuries.”<sup>148</sup>

Internal rebellions in Pennsylvania, however, would quickly test these confident assertions. In 1794, the Whiskey Rebellion erupted in western Pennsylvania, triggered by opposition to the federal excise tax on whiskey. Although the tax had been deeply unpopular from the moment of its enactment, the opposition took a decidedly violent turn in July 1794, when a group of between 400 and 800 men attacked the opulent mountaintop mansion house of excise collector and staunch Federalist John Neville. The attack resulted in several deaths, and although Neville successfully escaped, the attackers burned Neville’s house and many of his outbuildings to the ground. On August 1, 1794, a group of approximately 7000 armed men met at Braddock’s Field, with the intent of marching on Pittsburgh. The next day, President Washington convened a high-level conference of advisors, including Pennsylvania Chief Justice Thomas McKean, who argued that the state’s judiciary was fully capable of dealing with the crisis and that “employment of a military force” would be “unconstitutional and illegal.”<sup>149</sup> But the military option proved irresistible. On August 4, 1794, James Wilson, now an Associate Justice of the United States Supreme Court, issued a declaration stating that the laws of the United States could not be executed by ordinary judicial proceedings in Washington and Allegheny Counties.<sup>150</sup> Wilson’s declaration allowed the Washington Administration to invoke the Militia Act of 1792, and Washington, aided by Alexander Hamilton, assembled a force of nearly

13,000 militiamen to crush the rebellion. By the time this force reached western Pennsylvania, however, organized opposition had collapsed, and Hamilton had to be content with bringing twenty men back to Philadelphia for trial.<sup>151</sup>

At no time did the administration consider a wholesale trial of the rebels. As their British predecessors had learned long before, such trials would serve no useful purpose and only inflame western sentiment against the federal government. Nonetheless, the administration hoped to prosecute the most prominent leaders of the rebellion. Unfortunately, the rebellion did not have an obvious leadership structure, and the most prominent men had fled in advance of Washington's army. The men brought back to Philadelphia were all fairly obscure.<sup>152</sup> More humiliating for the government, the prosecutions that were brought degenerated into a complete fiasco.

Before any indictments were formally issued, several of the prisoners, represented by William Lewis, filed petitions in the United States Supreme Court arguing that any trials should be held at a special session in western Pennsylvania, rather than in Philadelphia. Such a session would allow for more westerners to be represented on the jury and would facilitate the easier attendance of witnesses. The court's ruling was announced by Justice James Wilson, who had stood side by side with William Lewis during the Philadelphia treason trials. The court, Wilson stated, had "a wish, if possible, to grant" the petitions, but felt that insurmountable difficulties rendered it impractical.<sup>153</sup>

United States Attorney General William Bradford sought indictments against the twenty men brought from western Pennsylvania as well as against sixteen others. But the grand jury, as had its predecessor during the Philadelphia trials of 1778–1779, viewed the proposed indictments with some skepticism, rejecting one-third of the charges and issuing indictments in only twenty-four of the cases. The grand jury was chaired by Samuel Miles, a prominent Philadelphia businessman and politician, and included Davis Bevan, who had served on Samuel Rowland Fisher's jury and had stoutly defended the jury's independence in the newspaper wars of 1779. Eleven of the indicted defendants were never found. Several others successfully argued that they fell within President Washington's amnesty proclamation. Only ten defendants went to trial; in two cases, two defendants were tried together, so there were only eight jury trials in total.<sup>154</sup> All were held at Philadelphia's City Hall (Figure 9.1), where the restored courtroom can now be seen at Independence National Historic Park.

Jury selection played an important role in the Whiskey Rebellion trials, just as it had in the Philadelphia trials during the war. William Lewis, a seasoned advocate who had represented a number of the Philadelphia defendants, now appeared on behalf of many of the Whiskey Rebellion defendants. In addition to arguing that the return of the jurors did not comply with Pennsylvania law



**FIGURE 9.1** Philadelphia's Old City Hall, site of the Whiskey Rebellion and Fries's Rebellion treason trials.

*Credit:* Nikreates/Alamy Stock Photo.

(which would have limited the number of prospective jurors from the eastern counties), he also argued the defendants had not been provided the caption to the indictments, which would include the names of the grand jurors. Moreover, he argued that the lists of prospective jurors and witnesses that the prosecution had provided to the defense were inadequate, since they specified residence only by county and did not specify occupations. United States Supreme Court Justice William Paterson, presiding over the case with District Judge Richard Peters, concluded that Pennsylvania law did not control federal jury practice in all its particulars, thus ensuring a larger number of easterners in the jury pool. He agreed with Lewis, however, that the caption was required; the caption and the indictment “seem naturally to form but one instrument” and adopting such a rule would “avoid much difficulty and controversy.” Although he declined to require the prosecution to provide the occupation of the prospective jurors and witnesses, he did require the prosecution to provide the township of residence, to “enable the party accused to prepare for his defense.” The trials were accordingly suspended for three days to enable the prosecution to comply with this order.<sup>155</sup>

As in the Philadelphia trials of 1778–1779, the defendants' ample use of the thirty-five peremptory challenges shaped the jury in significant ways. In the first trial, that of Robert Porter, the whole panel was drawn "out of the balloting box without furnishing twelve names unchallenged."<sup>156</sup> In the six trials that were held in May and June 1795, a total of forty jurors filled seventy-two jury seats. Twenty-one jurors served only once, ten jurors served twice, six jurors served three times, two jurors served four times, and one juror, a hatter named Benjamin Scull, served five times. Defense attorneys learned from experience. Of the twelve jurors who convicted Philip Vigol, six did not serve again; of the twelve who convicted John Mitchell, seven did not serve again. A similar pattern occurred in the two trials that were delayed until October. After the first jury acquitted, eight of the jurors reappeared in the second jury (with one of them testifying as a defense witness).<sup>157</sup>

Future United States Secretary of the Treasury Albert Gallatin concluded that the shrewd use of challenges contributed heavily to the verdicts. Defendant John Mitchell, Gallatin noted, was defended by a "young, unexperienced, impudent and self conceited" lawyer, who made the baffling decision to challenge all the prospective jurors from the western counties and was left with a jury of "12 Quakers," apparently "on the supposition that Quakers would condemn no person to death." He was "utterly mistaken" and the jury found Mitchell guilty. By contrast, defendant John Barnet, who, Gallatin felt, was equally as guilty as Mitchell, was defended by the savvy William Lewis, who "got a jury of a different complexion." Though the trial lasted sixteen hours, Barnet's jury took only fifteen minutes to acquit.<sup>158</sup> Court records bear out Gallatin's observation. Although there was significant overlap between many of the juries, there were only two jurors who served on both Mitchell's and Barnet's juries, and Mitchell's jury included the highest number of jurors who were never chosen again.<sup>159</sup> As it had in 1778–1779, religion played a significant role, although this time with the polarities reversed. As Gallatin explained, he agreed with the opinion of Hugh Henry Brackenridge that defendants should "always choose a jury of Quakers or at least Episcopalians in all common cases such as murder, rape & so forth, but in every possible case of insurrection, rebellion & treason, give him Presbyterians in the jury, by all means."<sup>160</sup>

Although Justice Paterson and Judge Peters have often been criticized for excessively partisan rulings in the cases, their actual conduct was reasonably even-handed. They postponed the trial of two men, over the prosecution's objection, so that the defense would have a reasonable time to respond to the government's witness list as well as time to bring their own witnesses from the western counties.<sup>161</sup> In one case, they excluded two pieces of evidence that the prosecution sought to

present to the jury.<sup>162</sup> In another case, the jury requested a copy of Foster's *Crown Law* and the *Acts of Congress*, which the court willingly provided.<sup>163</sup>

The prosecution does not appear to have been expertly managed. In several cases, the prosecution struggled to satisfy the two witness requirement.<sup>164</sup> The most embarrassing debacle for the government came in the first trial, when "after a long examination of the witnesses, it was discovered, that the defendant . . . had taken no part in the insurrection, that, in fact, he was not the person, liable to the charge, but another person of the same name." The court accordingly directed a verdict of acquittal.<sup>165</sup> Prosecutor William Rawle later described it as a "circumstance not very pleasing" and blamed the incident on perjured testimony in an earlier affidavit.<sup>166</sup>

In the end, juries acquitted eight men and convicted only two, William Mitchell and Philip Vigol. One observer noted, "I do not think two more insignificant figures could be found in the western country."<sup>167</sup> Mitchell was described as a simpleton with no active role in leading the rebellion.<sup>168</sup> The jurors in Mitchell's case unanimously signed a petition to President Washington, stating that Mitchell was a "proper object of mercy," but providing no further explanation.<sup>169</sup> Mitchell's attorneys transmitted the petition, noting that it was "the unsolicited act of the jurors."<sup>170</sup>

Vigol, for his part, was described as a "rough ignorant German"<sup>171</sup> and as "a very ignorant man, said to be of an outrageous temper, and subject to occasional fits of insanity."<sup>172</sup> Six of the twelve jurors in Vigol's case signed a memorial to President Washington, stating only that Vigol was a "proper object of mercy."<sup>173</sup> The other six jurors, including the foreman, signed a more extensive memorial. These jurors had "felt themselves obliged by their oaths and affirmations to give a verdict" against Vigol, but they could not "help thinking his case, although within the letter of the law, to be a hard one, and his crime, although great, not be such as in their opinion should forfeit his life." They noted that Vigol did not play a prominent role in the rebellion, had been induced by others, had a wife and five children who depended on him, and was an "ignorant and harmless man whose existence can in no way be dangerous to security and government." Significantly, they also pointed to Pennsylvania's abolition of the death penalty for treason: "By what is generally conceived to be, and in the opinion of the jury is, a valuable improvement of the penal laws of Pennsylvania murder of the first degree alone is punished with death and high treason only with imprisonment and hard labour. The laws of the United States are not yet arrived to an equal degree of perfection and the Constitution has left to you alone the power to correct the hardships of the law."<sup>174</sup> William Lewis transmitted both memorials to the President, noting that the court had assigned him as Vigol's counsel. Lewis felt that the second memorial "fairly stated" the facts, but he strongly opposed the statement about



the abolition of the death penalty, claiming, “had it come to my hands before the jurors who have subscribed it left the city, I should have declined any interference unless that part had been omitted.”<sup>175</sup>

The jurors’ argument about the abolition of the death penalty, however, resonated with the larger community. Alexander Hamilton later recalled that the “sentiment that their punishment ought to be remitted was universal.”<sup>176</sup> Petitions flowed to the Washington Administration seeking mercy for both men. One petition argued, “The influence of Christian and Republican principles have lately rendered a belief almost universal throughout the United States, that the punishment of death is disproportionate to all crimes, except murder. Your petitioners therefore believe that the feelings of a majority of the Citizens of the United States will revolt at the execution of the prisoners now under sentence of death.”<sup>177</sup> One of the most notable petitions was from the grand jury for the City of Philadelphia, chaired by William Adcock. Adcock had served as a trial juror on five of 1778–1779 Philadelphia treason trials, including the jury that convicted John Roberts. The grand jury noted that it “was forcibly impelled by a reference in the Penal Code of Pennsylvania, and to the universal horror of their fellow-citizens, at the idea of inflicting the punishment of death. If high treason had been committed against this Commonwealth, the legal sentence would only have amounted to a long imprisonment at hard labour.” The grand jury urged President Washington to accommodate the “laudable sentiments” of his fellow citizens.<sup>178</sup>

Unsurprisingly, President Washington pardoned both men. The Whiskey Rebellion cases thus reflected a pattern similar to the cases from the 1770s. Pennsylvanians in the mid-1790s were no more willing to indict, convict, or execute people for treason than were their predecessors fifteen years earlier. With several trials still ahead of him, William Rawle explained that “a great unwillingness to say too much against their fellow citizens, a reluctance in the jury to convict the smaller engine on the testimony of their ringleaders, and a natural repugnance to capital convictions, occasioned some unexpected acquittals; and in some instances, bills were returned ignoramus, equally contrary to what appeared a grounded expectation.”<sup>179</sup>

The trials nonetheless offered federal judges the first opportunity to construe the phrase “levying war” in the Treason Clause of the United States Constitution. In August 1794, Attorney General William Bradford had provided a legal opinion to President Washington, arguing that the resistance activities to the excise tax constituted treason. “It has been settled by uniform judicial construction,” Bradford argued, “that all insurrections, risings, or armed combinations to withstand the authority or alter the lawful measures of government, to change the established law—to redress a real or pretended grievance of a public nature,

and to effect other innovations of a general concern by their own authority & with force—are in construction of law high treason within the clause of levying war.”<sup>180</sup> Treasury Secretary Alexander Hamilton agreed, more colorfully arguing in an anonymous newspaper contribution that the resistance to the excise tax was “treason against society, against liberty, against every thing that ought to be dear to a free, enlightened, and prudent people.”<sup>181</sup>

The federal judiciary readily agreed with the Washington Administration. In October 1794, Supreme Court Justice William Cushing argued in a grand-jury charge that the Whiskey Rebellion was an act of high treason “by rising in arms to control or oppose the laws.”<sup>182</sup> In his charge to the Philadelphia grand jury in May 1795, Justice William Paterson similarly embraced English law, arguing that “all persons, who rise in rebellion, and take up arms against the government, or who in a violent and forcible manner resist and prevent the regular administration of justice, and due execution of the laws, come within the description of levying war.” Moreover, persons who “make insurrections under the pretence of redressing national or public grievances . . . or who attempt, by intimidation and violence, to force the repeal of a law, or an alteration in governmental measures” were equally guilty of levying war. An “insurrection with an avowed design to pull down all inclosures, to open all prisons, and the like” was also treasonous. The line between treason and riot was drawn by the “universality of the intention.”<sup>183</sup>

This theme was forcefully articulated by United States Attorney William Rawle, assisting Attorney General Bradford in the prosecutions, who argued that “so frequently and fully has the offence of levying war against the government been defined, that a doubt can hardly be raised upon the subject.” English precedents were fully applicable, allowing the court “in the first stage of our own experience, to acquire precise and satisfactory ideas upon the subject, from the matured experience of another government, which has employed the same language to describe the offence, and is guided by the same rules of judicial exposition.” Those precedents confirmed that “raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent by force and terror, the execution of a law, is an act of levying war.”<sup>184</sup>

The few surviving reports of the trials indicate that the defendants took differing approaches with respect to this definition. At the trial of Philip Vigol, for example, William Lewis conceded that the offense charged in the indictment (attacking excise officers and burning their papers) amounted to levying war against the United States and based his defense instead on the sufficiency of the evidence and a duress claim.<sup>185</sup>

By contrast, the lawyers for John Mitchell accepted the English precedents but sought to narrow them as much as possible.<sup>186</sup> They conceded that “to compel Congress to repeal a law, by violence, or intimidation, is treason,” but argued that



merely “resisting the execution of a law, or attempting to coerce an officer into the resignation of his commission” was not. Even if an “insurrection for the avowed purpose of suppressing all the excise offices in the United States” was an act of levying war against the United States, it did not follow “that an attempt to oblige one officer to resign, or suppress all the offices in one district, will be a crime of the same denomination.” The federal government’s position was a “constructive, or interpretative, weapon, which is calculated to annul all distinctions heretofore widely established in the grades and punishments of crimes; and by whose magic power a mob may be easily converted into a conspiracy; and a riot aggravated into high treason.” Such “constructive or interpretative treasons must be the dread and scourge of any nation that allows them.”<sup>187</sup>

In reply, Attorney General Bradford argued, “If it is meant by this argument, that the insurgents of Pennsylvania must have contemplated a march from Georgia to New Hampshire, it is extravagant and absurd.” The requirement of universality was satisfied because “it was intended that, by their lawless career and example, Congress should be forced into a repeal of the obnoxious law, it necessarily followed, that, from the same cause, the offices of excise would be suppressed throughout the Union.” The “universality of object, which the books require, was inseparable from the nature of the opposition, for it was impossible to contemplate the repeal of the excise law in one survey, or one state, without effecting it in every survey, and in every state.”<sup>188</sup>

Justice Paterson’s charge to the jury sided with Bradford. Paterson concluded that an insurrection “to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation” was an act of “High Treason by levying of war.” The key distinction was that the rebels did not attack Neville’s house because of private motives or a personal hatred; they rose to address issues of a “general and public nature.”<sup>189</sup>

At least one member of the audience would have made an even more audacious claim for the defendants. Hugh Henry Brackenridge, a lawyer from western Pennsylvania, had been involved in various aspects of the Whiskey Rebellion, and thus was precluded from serving as a defense counsel. But he later published the arguments he would have made if he had appeared in court. Brackenridge accepted that under the English precedents the attack on Neville’s house and the gathering at Braddock’s field amounted to treason. But those precedents, Brackenridge argued, should be rejected. Only risings with the direct intent of overthrowing the government entirely should be considered treason by levying war against the United States: “I would therefore understand our law, as having in view only a fixed, formed, deliberate intention of subverting the government, as that offence which it will consider high treason, and punish with the loss of life itself. The accused had meditated death to the government, and the law in

this case, and this case only, will meditate death to him.”<sup>190</sup> In 1795, no lawyer had yet made that argument in court. But a few years later, after another rebellion in Pennsylvania, someone would.

### *Fries’s Rebellion*

The events that became known as “Fries’s Rebellion” originated with the enactment of a federal property tax in 1798, the first direct tax imposed by the federal government. Partisan conflict was at a boiling point, and the tax proved highly controversial; for many Americans it was as contemptible as the Alien and Sedition Acts of the same year. In several Pennsylvania counties, primarily Northampton and Bucks, federal tax assessors encountered significant threats and harassment.<sup>191</sup>

After a federal marshal arrested a number of the tax protestors, a group of nearly four hundred armed men confronted the marshal at a tavern and successfully demanded the release of the prisoners. The men were led by a German-American Revolutionary War veteran and Federalist named John Fries, who had marched with President Washington against the Whiskey Rebels in 1794.<sup>192</sup> Fries and his comrades believed that the federal property tax was unconstitutional and that rescuing the prisoners was a justifiable method of countering unconstitutional governmental actions.<sup>193</sup> President John Adams, however, took a very different view of the matter and ordered a federal military force to march to Bucks and Northampton Counties to arrest the leading figures on charges of treason by levying war against the United States.<sup>194</sup>

The cases came before the April 1799 sitting of the Circuit Court for the District Court of Pennsylvania, which was presided over by United States Supreme Court Justice James Iredell, and District Judge Richard Peters, who had previously presided over the Whiskey Rebellion cases. Justice Iredell opened the court with a charge to the grand jury, denouncing the French Revolution and offering a lengthy defense of the Alien and Sedition Acts. He touched on the issue of treason only briefly, noting that if “the intention was to prevent by force of arms the execution of any act of the congress of the United States altogether . . . any forcible opposition calculated to carry that intention into effect was a levying of war against the United States.” By contrast, if the intention was “merely to defeat its operation in a particular instance” because of “some private or personal motive,” the defendants’ actions would not amount to treason.<sup>195</sup>

Prosecutors submitted eleven charges of treason to the grand jury, which, curiously, included one member who had served on the jury that had convicted John Mitchell during the Whiskey Rebellion. This time, the grand jury was far

more receptive to prosecutors' pleas. The grand jurors issued indictments in ten of the cases, and rejected the charges in only one.<sup>196</sup>

Only John Fries's case went to trial during the court's spring 1799 sitting. Fries was represented by William Lewis, Alexander Dallas, and William Ewing.<sup>197</sup> In an opening motion, they argued that the trial should be held in Northampton County, where the alleged overt act of treason occurred, rather than in Philadelphia.<sup>198</sup> The right to a local jury, Lewis insisted, "was one of the grounds of complaint to the United States, which promoted their separation from the mother country, and this was one cause of her taking up arms."<sup>199</sup> The court rejected this argument, but the jury that was ultimately selected included six jurors from the city of Philadelphia, four from Bucks County, and two from Northampton County. The Northampton County jurors were Germans, with limited English proficiency, and were allowed to have an interpreter.<sup>200</sup>

Since the facts were largely undisputed, the primary issue in the case was whether the alleged acts constituted treason by levying war against the United States. In his opening statement, prosecutor Samuel Sitgreaves, assisting William Rawle, stated the government's theory that it was treason to raise "a military force from among the people for the purpose of attaining any object with a design of opposing the lawful authority of the government by dint of arms, in some matter of public concern in which the insurgents have no particular interest distinct from the rest of the community." Such an interpretation, Sitgreaves argued, was firmly rooted in English precedents.<sup>201</sup>

The defense sought to parry this argument in two ways. First, in an argument advanced by William Ewing, the defense argued that Fries's views were "not of a general nature" and that he had sought only to rescue particular prisoners. After the rescue was complete, he went home and caused no further disturbance. Even accepting the English precedents, such conduct could not amount to high treason.<sup>202</sup>

But the second argument, advanced by William Lewis, went much further. Lewis squarely rejected the idea that English interpretations of English treason law governed the interpretation of the United States Constitution. Most of the English precedents, Lewis argued, dated from before the reforms of the 1696 Treason Trials Act and before the period of functional judicial independence. Accordingly, "[a]s we have enacted laws of our own, and have not extended the laws of England to this country, we must put our own construction on them, and not the determination of an English court."<sup>203</sup> Lewis proposed a fundamentally different definition of levying of war, limited to three particular acts: (1) "where a body of men take up arms, and array themselves in a martial manner against the government, with a view to put an end to its existence"; (2) "if a part of the Union throw off all allegiance and authority of the United States"; and (3) if a

number of a people should “take possession of the legislative or executive authority, and by this force of arms or numbers should undertake to compel either of the departments of government to act as they dictate.” Expanding the definition of levying war beyond these narrow categories would “make the constitution anything or nothing—a mere nose of wax, to be molded into any form.”<sup>204</sup> Under this interpretation, forcible resistance to one particular law, even if animated by general, rather than private, concerns, could not amount to treason.

This argument, the narrowest interpretation of treason yet offered in an American courtroom, proved, not surprisingly, unpersuasive to the judges. In his charge to the jury, Judge Peters followed English precedents and concluded that “to oppose or prevent by force, numbers, or intimidation, a public and general law of the United States, with intent to prevent its operation, or compel its repeal” was treason by levying war.<sup>205</sup> Similarly, Justice Iredell advised the jury that it was treason to “oppos[e], by force of arms, an act of congress, with a view of defeating its efficacy, and thus defying the authority of the government.”<sup>206</sup>

The trial had lasted for nine days, most likely the longest criminal trial to that point in the history of the United States. When not in court, the jury had been sequestered “in the same room at a tavern,” and Justice Iredell observed that “we must be all very much fatigued.”<sup>207</sup> After three hours of deliberation, the jury returned with a guilty verdict.<sup>208</sup> Justice Iredell later wrote to his wife that “though Mr. Peters and myself were clear that such ought to be the verdict, we both felt a great deal when it was actually pronounced. I could not bear to look on the poor man, but I am told he fainted away. . . . I dread the task I have to perform in pronouncing sentence on him.”<sup>209</sup>

Five days later, however, William Lewis returned to court with a bombshell motion. He produced affidavits showing that John Rhoad, one of the German-American jurors from Northampton County, had declared before the trial that John Fries “ought to be hung.” The court held an evidentiary hearing, and numerous witnesses testified that the juror had uttered these prejudicial comments.<sup>210</sup> Rhoad denied making the statements, and insisted that he “went to the trial . . . with a mind perfectly open . . . as to his guilt or innocence and that before I assented to the verdict I deliberately weighed and considered all that had been adduced in his favor.”<sup>211</sup> But Justice Iredell concluded that the verdict had to be rejected. The juror may have had a “predisposed opinion of the guilt of the man”; accordingly, it was the justice’s duty to “vote for a new trial in the present case, as the fact appears too clear to be controverted.”<sup>212</sup> Judge Peters, by contrast, was not persuaded by the motion, noting that “the juror said no more than all friends to the laws and the government were warranted in thinking and saying as the facts appeared then to the public.” But to prevent “a division in the court,” he yielded “with some reluctance” to the opinion of Justice Iredell.<sup>213</sup>

Fries's retrial was delayed until the April 1800 sitting of the Pennsylvania Circuit Court. William Rawle again appeared for the government. Judge Peters was joined on the bench by Supreme Court Justice Samuel Chase. Before the jury was empaneled, Justice Chase announced that the court had issued an opinion on the meaning of levying of war. The opinion noted that although the jury had the ultimate power to decide all questions of law and fact, it was the duty of the court to offer its opinion on questions of law. And the law, Chase and Peters, declared, was clear: "[A]ny insurrection or rising of any body or people, within the United States, to attain or effect by force or violence, any object of a great public nature, or of public and general (or national) concern, is a levying war against the United States." Moreover, "any such insurrection or rising to resist or prevent by force or violence, the execution of any statute of the United States . . . is a levying of war against the United States."<sup>214</sup>

Pretrial rulings on contested points of law were highly unusual, and Chase's conduct in the Fries case would eventually be used against him in his 1805 impeachment trial.<sup>215</sup> As Stephen Presser has pointed out, "Chase's hair-trigger temper, his stubbornness, and his sense of his own judicial prerogative led him to rush precipitously into a confrontation on a sensitive jurisprudential point for which he had little support."<sup>216</sup> The ruling deprived the defense of its primary argument, and Fries's attorneys, William Lewis and Alexander Dallas, concluded that the best strategy was to protest the court's decision by withdrawing from the case. The withdrawal placed both Chase and Rawle in an awkward position, and after a meeting at Rawle's house, Chase offered to withdraw the opinion. But Lewis and Dallas concluded that the case had been irreparably damaged. They continued to refuse to serve as counsel and advised Fries to refuse the court's offer of appointing substitute counsel. According to Dallas, this unusual strategy was designed to maximize the likelihood of a presidential pardon in the likely event of a conviction.<sup>217</sup> Hanging a man who had been convicted without the assistance of counsel would be a public relations disaster for the Adams Administration, and Dallas and Lewis knew it.

The case proceeded with Chase stating that the court would act as counsel for the defense.<sup>218</sup> Although Fries used thirty-four of his thirty-five peremptory challenges, he asked only a few pointed questions of the witnesses and Chase did little to assist him.<sup>219</sup> In his charge to the jury, Chase echoed the points of his pretrial opinion, and after two hours of deliberation, the jury returned with a guilty verdict.<sup>220</sup>

Fries's trial was followed by several others. Rawle had brought nine treason cases to the 1800 grand jury, which issued indictments in all nine. Rawle later declined to prosecute two cases, and in two other cases, the defendant could not be found. The trials of the remaining four defendants produced mixed results.

Conrad Marks was acquitted on April 28, 1800. John Gettman and Frederic Heany were tried together, and were convicted on April 29. Finally, Anthony Stähler was acquitted on May 1. Jury challenges may have played some role in the verdicts. Of the twelve men who served on Fries's jury, ten were challenged in later cases. By contrast, none of the jurors who acquitted Conrad Marks were subsequently challenged.<sup>221</sup>

At the conclusion of Stähler's trial, the issue of juror misconduct arose again in Fries's case. The court was informed that juror Charles Deshler had become lost in the crowd outside of City Hall on the first night of the trial and was separated from his fellow jurors. Unsure what to do, Deshler went to the house of his brother-in-law Isaac Roush, who had served as a juror in two of the Philadelphia treason trials. Roush asked whether the jury had been discharged, and Deshler replied that it had, but that he was not supposed to speak with anyone on the subject of Fries's trial. Roush found this surprising and stated that "it did not use to be so; for the jury used to be kept together by a constable." Roush later said that "he supposed the evidence would go hard against Fries," to which Deshler replied, "Don't say anything about it for I am sworn." Deshler then returned to his house for the night, and rejoined the jury the following morning. The court concluded that the error was an innocent one and that it did not affect the validity of the verdict. The court then pronounced the death sentence on John Fries, as well as on Frederic Heany and John Gettman.<sup>222</sup>

As there were no criminal appeals in 1800, the defendants' only hope of escaping the gallows rested with President Adams. The president requested that Lewis and Dallas provide him with the points and authorities upon which they would have relied had they been allowed to present a full defense.<sup>223</sup> The two attorneys responded with a detailed letter setting out their principal arguments: (1) The trial was improper because it was held in Philadelphia County, rather than Northampton County, where the alleged events took place; (2) levying war under American law was limited to attempts to overthrow the government, and even under the English precedents, a riot to oppose a particular law had never been prosecuted as treason; and (3) Charles Deshler's separation from the jury on the first night of the trial and his conversation with Isaac Roush necessarily voided the proceedings.<sup>224</sup>

After receiving the defense attorneys' arguments, Adams posed fourteen pointed questions to several members of his Cabinet. Among other questions, Adams asked, "Is the execution of one or more so indispensably demanded by public justice and by the security of the public peace, that mercy cannot be extended to all three or any two or one?" "Was it any thing more than a riot, high handed, aggravated daring and dangerous indeed, for the purpose of a rescue? This is a high crime, but can it strictly amount to treason?" "Will not a career of



capital executions for treason, once opened, without actual bloodshed or hostility against any military force of government inflict a deep wound in the minds of the people, inflame their animosities, and make them more desperate in sudden heats and thoughtless riots, in elections and on other occasions where political disputes run high, and introduce a more sanguinary disposition among them?”<sup>225</sup>

The Cabinet members responded immediately. In a brief letter, Attorney General Charles Lee, Treasury Secretary Oliver Wolcott, and Navy Secretary Benjamin Stoddert all agreed that the crimes “amounted to treason, and that no danger can arise to the community from the precedents already established by the judges upon this subject.” Lee and Stoddert suggested that Fries alone should be hanged, but Wolcott favored the execution of all three defendants.<sup>226</sup>

Adams was unpersuaded, and the next day he directed his attorney general to issue pardons to all three convicted men, noting that he “must take on myself alone the responsibility of one more appeal to the humane and generous natures of the American people.”<sup>227</sup> In an 1815 letter, Adams explained, “What good, what example would have been exhibited to the nation by the execution of three or four obscure, miserable Germans, as ignorant of our language as they were of our laws, and the nature and definition of treason? . . . My judgment was clear, that their crime did not amount to treason. They had been guilty of a high-handed riot and rescue, attended with circumstances hot, rash, violent, and dangerous, but all these did not amount to treason. And I thought the officers of the law had been injudicious in indicting them for any crime higher than riot, aggravated by rescue.”<sup>228</sup>

Adams’s pardon, contrary to the advice of his Cabinet, exacerbated a growing divide between Adams and the Hamiltonian faction of the Federalist Party.<sup>229</sup> In his notorious 1800 pamphlet attacking John Adams, Hamilton singled out the Fries pardon for special criticism. Hamilton claimed that previous lenity to persons accused of treason had led too many Pennsylvanians to assume that “neither the general nor the state government dared to inflict capital punishment.”<sup>230</sup> Fries’s execution was required, Hamilton argued, to “repress this dangerous spirit” and to teach the people that “they were the dupes of a fatal illusion.”<sup>231</sup> “A striking demonstration” was required to prove that “condign punishment would be the lot of the violent opposers of the laws.”<sup>232</sup> Hamilton sneered at Adams’s interpretation of treason law, which he claimed was “disavowed by every page of our law books.”<sup>233</sup>

The debate between Adams and Hamilton over the scope of the levying war provision has never been conclusively resolved. No Supreme Court decision has explicitly rejected the idea that an armed rising with the intent of suppressing a particular law is an act of high treason. In his 1964 book *The American Law of Treason: Revolutionary and Early National Origins*, Bradley Chapin went so far



as to claim that the interpretation of the law by “Iredell, Peters, Patterson, and Chase . . . remains good law to this day.”<sup>234</sup> Formally, this claim may be true. On the other hand, as James Willard Hurst argued in 1971, “this branch of the crime has become obsolete by nonuse and by critical reaction against it at the bar and in the courts.”<sup>235</sup> Hurst probably has the better of the argument, given the tendency of early-nineteenth-century lower-court opinions to interpret the crime narrowly and the complete disappearance of such prosecutions in the twentieth century. The likelihood of a modern prosecutor seeking a treason indictment on facts similar to those of Fries’s Rebellion seems vanishingly small. To that extent, at least, Adams, rather than Hamilton, has been vindicated by history.

\* \* \*

The Fries cases marked the end of the trials of allegiance in Pennsylvania. The issue of treason did not disappear completely—there would later be indictments for treason in Pennsylvania arising from opposition to the Fugitive Slave Act, from the Homestead Strike, and from World War I.<sup>236</sup> But the issue of treason would not dominate political and legal events in the way that it had from 1765 to 1800. The imprecation of treason would no longer hang over the head of every American. The convulsive civil war had ended, and a new nation, formed by people from around the world, willingly shedding their old allegiances in favor of a new one, could finally emerge.



## Notes

### INTRODUCTION

1. James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (Philadelphia: William Bradford, 1774).
2. The Memorial and Representation of a Deputation from the Several Battalions of Militia of the City and Liberties of Philadelphia, Oct. 8, 1779, Stauffer Collection, 9:633, HSP.
3. See generally Holger Hoock, *Scars of Independence: America's Violent Birth* (New York: Crown, 2017).
4. Hector St. John de Crevecoeur, *Sketches of Eighteenth Century America*, ed. Henri Bourdin, Ralph Henry Gabriel & Stanley Thomas Williams (New Haven, CT: Yale Univ. Press, 1925), 178.
5. Robert Ferguson, *Reading the Early Republic* (Cambridge, MA: Harvard Univ. Press, 2004), 120.
6. The best twenty-first-century work on Loyalism is Maya Jasanoff, *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York: Knopf, 2011). For a military perspective see Thomas B. Allen, *Tories, Fighting for the King in America's First Civil War* (New York: Harper, 2010). Classic older works include William H. Nelson, *The American Tory* (Oxford: Oxford Univ. Press, 1961), and Robert Calhoun, *The Loyalists in Revolutionary America, 1760–1781* (New York: Harcourt, 1973). On spies and plots, see Carl Van Doren, *The Secret History of the American Revolution* (New York: Viking Press, 1941).
7. For a study of similar shifting loyalties and trials of treason in the Netherlands in the late 1500s, see Henk van Nierop, *Treason in the Northern Quarter: War, Terror, and the Rule of Law in the Dutch Revolt*, trans. J.C. Grayson (Princeton, NJ: Princeton Univ. Press, 2009).

8. Eric Foner, *Tom Paine and Revolutionary America* (New York: Oxford Univ. Press, 1976), 19, 21.
9. Billy G. Smith, "Philadelphia: The Athens of America," in *Life in Early Philadelphia*, ed. Billy G. Smith (College Station: Penn. St. Univ. Press, 1995), 3.
10. Eminent legal historian John Philip Reid has noted a similar problem in his study of the New Hampshire judiciary. Reid observes that we lack "the scholarly research to make comparative studies of the state judiciaries between the colonial period and the Civil War. . . . By necessity, the story that the three books tell has to be one with little comparisons." John Philip Reid, *Legitimizing the Law: The Struggle for Judicial Competency in Early National New Hampshire* (DeKalb, IL: NIU Press, 2012), 3–5. Reid notes, however, that the "the most interesting jurisdiction will be Pennsylvania." *Ibid.*, 4.
11. Harold M. Hyman & Catherine M. Tarrant, "Aspects of American Trial Jury History," in *The Jury System in America: A Critical Overview*, ed. Rita James Simon (Beverly Hills, CA: Sage Publications, 1975), 23; see also Albert W. Alschuler & Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States," *U. Chi. L. Rev.* 61 (1994): 867, 867–869 (noting general lack of historical scholarship on American juries).
12. John M. Murrin, "Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England," in *Saints & Revolutionaries: Essays on Early American History*, ed. David D. Hall, John M. Murrin & Thad W. Tate (New York: Norton, 1984), 152, 153.
13. Such works include Daniel D. Blinka, "Trial by Jury on the Eve of the Revolution: The Virginia Experience," *UMKC L. Rev.* 71 (2003): 529–581; Daniel D. Blinka, "Jefferson & Juries: The Problem of Law, Reason & Politics in the New Republic," *Am. J. Legal Hist.* 47 (2005): 35–103; James D. Rice, "The Criminal Trial before and after the Lawyers: Authority, Law and Culture in Maryland Jury Trials, 1681–1837," *Am. J. Legal Hist.* 40 (1996): 455–475. On civil juries in colonial Connecticut, see Bruce H. Mann, *Neighbors & Strangers: Law and Community in Early Connecticut* (Chapel Hill: UNC Press, 1987), 67–81.
14. J.R. Pole, "Further Reflections on Law in the American Revolution," *Wm. & Mary Q.* 50 (1993): 594, 597. On the importance of juries in late-eighteenth-century America, see also Akhil Reed Amar, *The Bill of Rights* (New Haven, CT: Yale Univ. Press, 1998), 81–118.
15. Bruce H. Mann, "The Evolutionary Revolution in American Law: A Comment on J.R. Pole's 'Reflections,'" *Wm. & Mary Q.* 50 (1993): 168, 169.
16. James Willard Hurst, *The Law of Treason in the United States: Collected Essays* (Westport, CT: Greenwood Publishing Corp., 1971), 11. Hurst's work, originally developed for briefs in a 1944 treason case in the United States Supreme Court, nonetheless relied almost entirely on published sources. Hurst argued that "records of trials for treason are scant and do not contribute as much as statutory material to

- outlining the attitudes taken towards the crime.” Ibid., 83. This book contends that far more attention to trials is warranted.
17. Steven Wilf, *Law’s Imagined Republic* (Cambridge: Cambridge Univ. Press, 2010), 196.
  18. On this problem, see James H. Merrell, “‘Exactly as They Appear’: Another Look at the Notes of a 1766 Treason Trial in Poughkeepsie, New York, with Some Musings on the Documentary Foundations of Early American History,” *Early American Studies* 12 (2014): 202–237.
  19. The case for “disaffected” is forcefully made in Anne Ousterhout, *A State Divided: Opposition in Pennsylvania to the American Revolution* (New York: Greenwood Press, 1987), 1–7. On the general problem, see also Robert Calhoun, *The Loyalists in Revolutionary America, 1760–1781* (New York: Harcourt Brace Jovanovich, 1973), xi–xii.

#### CHAPTER I

1. Hans Fantel, *William Penn: Apostle of Dissent* (New York: William Morrow, 1974), 1.
2. Bushel’s Case, 124 Eng. Rep. 1006 (C.P. 1670).
3. See generally Craig W. Horle, *The Quakers and the English Legal System 1660–1688* (Philadelphia: Univ. of Penn. Press, 1988), 101–120. On Pennsylvania’s early criminal-law and judicial system, see Jack D. Marietta & G.S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania, 1682–1800* (Philadelphia: Univ. of Penn. Press, 2006), ch. 1; G.S. Rowe, *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684–1809* (Newark: Univ. of Delaware Press, 1994), chs. 1–3; William H. Loyd, *The Early Courts of Pennsylvania* (Boston: Boston Book, 1910); John Smolenski, *Friends and Strangers: The Making of a Creole Culture in Colonial Pennsylvania* (Philadelphia: Univ. of Penn. Press, 2010), ch. 3; William E. Nelson, “Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania,” *SMU L. Rev.* 59 (2006): 3–53.
4. Act of 1690, ch. 197, *Pa. Stat.*, 1:138, 139; Act of May 31, 1693, ch. 88, *Pa. Stat.*, 1:192; Act of Nov. 27, 1700, ch. 100, *Pa. Stat.*, 2:134; Act of Oct. 28, 1701, ch. 106, *Pa. Stat.*, 2:148, 151; Act of Feb. 28, 1711, ch. 168, *Pa. Stat.*, 2:301, 310; Act of May 28, 1715, ch. 202, *Pa. Stat.*, 3:33; Act of May 28, 1715, ch. 203, *Pa. Stat.*, 3:65, 68–69.
5. Act of 1684, ch. 171, *Pa. Stat.*, 1:122.
6. Act of Nov. 27, 1700, ch. 47, *Pa. Stat.*, 2:52; Act of Nov. 27, 1700, ch. 14, *Pa. Stat.*, 2:14.
7. For a thorough overview of the problem, see Joseph H. Smith, “The English Criminal Law in Early America,” in *The English Legal System: Carryover to the Colonies* (Los Angeles: William Andrews Clark Memorial Library, Univ. of Cal., 1975), 3–60; see also Herbert A. Johnson, “English Statutes in Colonial New York,” in Herbert A. Johnson, *Essays on New York Colonial Legal History* (Westport, CT: Greenwood, 1981), 193–212.

226. Thomas McKean to Joseph Reed, Sept. 20, 1779, *Pa. Archives*, 7:703. The Council resolved to postpone consideration of the issue, but directed that William Bradford not exchange any of the named prisoners. Minutes of the SEC, Sept. 23, 1779, *Col. Records*, 12:112. A few months later, however, it rescinded this direction, and most of the prisoners, including those subject to Pennsylvania's treason law, were exchanged as prisoners of war. Minutes of the SEC, Jan. 31, 1780, *Col. Records*, 12:241. Joseph Paxton was later named in an attainder proclamation. Minutes of the SEC, March 20, 1781, *Col. Records*, 12:665.
227. *Chapman*, 1 Dallas, at 56–57.
228. *Ibid.* at 58–60; Fisher, "Journal," 424. Chapman's jury, like McCarty's, included previous Philadelphia jurors Andrew Burkhard and David Reese. Supreme Court Appearance and Continuance Docket, RG-33, PSA.
229. James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: UNC Press, 1978), 195–196.
230. G.S. Rowe's assertion that "thousands of Pennsylvanians were saved by the ruling of the McKean bench in the Chapman case" seems significantly overstated. Rowe, *Embattled Bench*, 151. Issues similar to those in *Chapman* were raised in *McIlwain v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209 (1808), in which the United States Supreme Court held that a man who left New Jersey in 1777 remained a citizen of New Jersey and owed allegiance to it. The court based its decision largely on contemporary New Jersey legislative pronouncements to that effect. Arguments of counsel in *McIlwain* are reported at 6 U.S. (2 Cranch) 280 (1804). For an analysis of *McIlwain*, see Kettner, *American Citizenship*, 199–202.
231. Thomas Fisher to Samuel Rowland Fisher, Oct. 24, 1781, J.F. Fisher Items, Cadwalader Collection, HSP; *Diary of Elizabeth Drinker*, 1:393; Representation of the Quakers, Nov. 22, 1781, *Pa. Archives*, 9:450; Marietta, *Reformation of American Quakerism*, 245.
232. Diary of Anna Rawle, Oct. 25, 1781, Rebecca Shoemaker Papers, HSP.
233. Marietta, *Reformation of American Quakerism*, 245.
234. Diary of Anna Rawle, Oct. 26, 1781, Rebecca Shoemaker Papers, HSP.
235. Joseph Reed to Nathaniel Greene, June 16, 1781, in *The Papers of Nathanael Greene*, ed. Dennis M. Conrad (Chapel Hill: UNC Press, 1995), 8:395, 399.

## CHAPTER 9

1. See generally Daniel J. Hulsebosch, "Exile, Choice, and Loyalism: Taking and Restoring Dignity in the American Revolution," *Law & Social Inquiry* 41 (2016): 841–865. Rawle's law firm, Rawle & Henderson, is still in existence and is the oldest continuously operating law firm in the United States. Rawle was also the first president of the Historical Society of Pennsylvania. Historical Society of Pennsylvania, "Rawle Family Papers," <http://www2.hsp.org/collections/manuscripts/r/rawle536.htm>.

2. Supreme Court Appearance and Continuance Dockets, RG-33, PSA, 194.
3. Claim Against Christopher Wilson Estate, Claims Papers Relating Primarily to Forfeited Estates, 1778–1791, RG-33, PSA.
4. Supreme Court Appearance and Continuance Dockets, RG-33, PSA, 194.
5. Petition of Christopher Wilson, Nov. 20, 1782, Clemency File, RG-27, PSA.
6. Supreme Court Appearance and Continuance Dockets, RG-33, PSA, 239. The Council also pardoned John Jeremiah Rice, an attainted traitor who had been captured while serving on a British vessel. Rice was recommended for a pardon by the President of the Continental Congress for revealing “the designs of the enemy at New York.” Minutes of the SEC, Oct. 31, 1781, *Col. Records*, 13:100. John Taylor, another attainted traitor, was pardoned on condition of taking the oath of allegiance and entering into a good-behavior bond. Minutes of the SEC, May 30, 1782, *Col. Records*, 13:294. For debate over the propriety of the Assembly rescinding an attainder, see *Minutes of the First Session, of the Seventh General Assembly of the Commonwealth of Pennsylvania* (Philadelphia: John Dunlap, n.d.), 760–769.
7. Notes of George Bryan in *Commonwealth v. John Bulla*, Chester Co. Ct. Oyer & Terminer, May 7, 1783, George Bryan Papers, HSP. Bulla was convicted, fined fifty pounds, and ordered imprisoned until the next July 4. The Council promptly remitted the sentence of the imprisonment, and several months later remitted the fine as well. Minutes of the SEC, May 16, 1783, July 5, 1783, *Col. Records*, 13:578, 619.
8. Notes of George Bryan in *Commonwealth v. Jacob Myers*, George Bough, and Nicholas Cline, Oct. 20, 1782, George Bryan Papers, HSP.
9. Notes on Motion for a New Trial, *Respublica v. John Brooks*, Aug. 1, 1782, Miscellaneous Legal Papers, Jasper Yeates Papers, HSP.
10. Minutes of the SEC, Dec. 31, 1781, *Col. Records*, 13:163.
11. Indictment of Peter Kerr, Chester Co. Ct. of Oyer and Terminer (Nov. 1781), Oyer and Terminer Papers—Chester County, RG-33, PSA; *Pa. Eve. Post*, June 21, 1782.
12. The affidavits are in the Papers of the Court of Oyer and Terminer, RG-33, PSA.
13. *Respublica v. Buffington*, 1 Dallas 60, 61 (Pa. 1781).
14. *Buffington*, 1 Dallas, at 61. A similar idea had been expressed even in the tumultuous atmosphere of 1778. A broadside, largely vituperative against Tories, nonetheless noted that a “misnomer in the Christian name of Mr. Walton, is alleged, sufficient perhaps to vacate all the proceedings against him. The spelling not only varies, but the words differ in sound. On being demanded to answer in the Court, why execution should not be awarded against him, he might have answered, that he was not the same person named in the proclamation. The plea would have merited attention; more attention, perhaps, from a Court of Law, than from the wisdom of the legislature.” A Whig Citizen, “To the Freemen of Pennsylvania,” Broadside, Evans 43709, Broadside Collection, HSP.
15. Indictment of Joshua Buffington, Ct. of Oyer and Terminer, Philadelphia, Co, Sept, 1782, Autograph Collection, RG-33, PSA.

16. Notes of George Bryan in *Commonwealth v. Buffington*, Sept. 30, 1782, George Bryan Papers, HSP.
17. The case of Abijah Wright complicates this data slightly. Wright was indicted for treason and burglary, and convicted on the burglary charge. There is no indication whether Wright's jury considered the treason charge. He is thus included in the indictment data previously discussed, but not in the trial data, although I have included his trial in Appendix 2.
18. The most likely additional trial is the possible case of James Hartnett, who is listed in several later compiled records as tried and acquitted of treason, although with no reference to the county where the trial took place. List of Persons who were ordered . . . to surrender themselves for trial. Papers in Attainder, Roll 836, RG-3, PSA. Such a trial is certainly possible. The context suggests Chester County in 1778, a sitting for which the court's docket book does not survive. I have found no other direct evidence, however, for this trial, and a separate record indicates that a grand jury declined to indict Harnett. List of Persons against whom no Indictments were preferred. Oyer and Terminer Papers-Chester County, roll 5, RG-33, PSA. In April 1779, Thomas McKean wrote to his wife that we have "five persons to try for treason" in Chester county. Thomas McKean to Sally McKean, April 28, 1779, Thomas McKean Papers, HSP, 6:20. However, only one person, Justin McCarty, appears to have been tried. McKean may be referring to cases in which the grand jury refused to indict, or perhaps Hartnett was one of the additional cases.

Additional indictments may also have been possible. Later compiled records state that Elisha Malin and George Davis were indicted for treason (also likely in Chester County in 1778) and that Malin was pardoned and that Davis escaped. I have found no further confirmation of these indictments or any subsequent pardon, and have not included them in the preceding data. List of Persons ordered . . . to surrender themselves, Papers in Attainder, Roll 836, RG-33, PSA; List of Persons Against Whom Proclamations Were Issued . . . , *Pa. Archives* (6th Ser.), 13:475.

I have been especially cautious with indictment papers. Unless the document explicitly states "true bill," I have treated it as a draft. As a cautionary tale, full indictments for high treason, with notations of witnesses being sworn, survive for James Meese and William West for the Philadelphia Court of Oyer and Terminer in April 1781. Indictments of James Meese & William West, Philadelphia Co. Ct. of Oyer and Terminer (April 1781), Oyer and Terminer Miscellaneous Papers, 1777-1781, RG-33, PSA. William West had been named in an attainder proclamation in Oct. 1780. *Pa. Gazette*, Oct. 4, 1780. But no grand jury approved these indictments and the men were instead prosecuted for abuse of office at the recommendation of the Continental Congress. Minutes of the SEC, Jan. 15, 1781, *Col. Records*, 12:599; Minutes of the SEC, Jan. 22, 1781, *Col. Records*, 12:604; Paul A.W. Wallace, "Historic Hope Lodge," *PMHB* 86 (1962): 115, 136-138.

In April 1779, Thomond Ball, deputy prothonotary of Northumberland County, informed the Council that there were six men in jail charged with either treason



- or misprision of treason. Ball sought the appointment of justices to try the cases. I have found no record of any response to this letter, or any record of trials that may have ensued. But the possibility cannot be ruled out. Thomond Ball to SEC, April 27, 1779, *Pa. Archives* (2d Ser.), 3:291–292.
19. These statistics differ from some previous statements on the subject. Henry J. Young did not report total indictment numbers, although he found 118 prosecutions “begun,” a rather ambiguous description. Young found forty-three trials, with thirty-six acquittals and seven convictions. These data are close to my finding of forty-five trials and thirty-eight acquittals. Henry J. Young, “Treason and Its Punishment in Revolutionary Pennsylvania,” *PMHB* 90 (1966): 287, 295. Because Young’s article reported cases of persons named in the attainder prosecutions separately from persons not named, his numbers have confused subsequent scholars. For example, in his 1994 book *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684–1809*, G.S. Rowe, relying on Young, wrote, “Of the one hundred and eighteen persons indicted for treason under the Pennsylvania law of treason, only four were convicted. Of those, three were pardoned and one, Ralph Morden, was executed.” Rowe, *Embattled Bench*, 162. Rowe converts Young’s ambiguous description of prosecutions “begun” into 118 indictments, a figure significantly inflated from the actual total of 54. Moreover, by missing the attainder prosecutions, Rowe understated the convictions and executions. Marietta and Rowe repeat Young’s 118 “indictment” figure in their 2006 book *Troubled Experiment: Crime and Justice in Pennsylvania, 1682–1800*. Marietta & Rowe, *Troubled Experiment*, 189. Anne Ousterhout found 53 indictments, 33 refusals to indict, 37 acquittals, and 8 convictions. Our numbers agree on refusals to indict and on number of convictions (she included Abijah Wright as a conviction). I find one more indictment and one more acquittal. Ousterhout, *State Divided*, 288, 319–320.
  20. The data in the table are drawn from the following: Court of Oyer and Terminer Docket Book, Supreme Court Appearance and Continuance Dockets, Papers in Attainder, Records of the Supreme Court of Oyer and Terminer, RG-33, PSA; Papers of the Shippen Family, Legal and Business, Vol. 16, HSP; Summary Extracts of the Proceedings of the Special Court of Oyer and Terminer held at Bedford 28th Sept. 1778 by Archibald McLean Esq., Executive Correspondence and Petitions, 1777–1790, Records of Pennsylvania’s Revolutionary Governments, RG-27, PSA; *Pa. Gazette*, Nov. 3, 1778, Oct. 6, 1779 & Dec. 22, 1779; *Col. Records*, Vols. 11–13.
  21. One source indicates over 4300 persons who took the oath of allegiance to the king in British-occupied Philadelphia; another shows 1488 American soldiers who deserted to the British cause during the first six months of the occupation. Ousterhout, *State Divided*, 306–307. Some of these individuals most likely came from other states.
  22. Robert Morris et al. to William Livingston, Nov. 12, 1777; William Livingston to George Washington, Nov. 5, 1777, in *The Papers of William Livingston*, ed. Carl

- E. Prince & Dennis P. Ryan (Trenton: New Jersey Hist. Comm., 1980), 2:111–118; 102. The 35 convictions were bloated to 105 in James Kirby Martin & Mark Edward Lender, *A Respectable Army: The Military Origins of the Republic 1763–1789* (Wheeling, IL: Harlan Davidson, 1982), 93, a number repeated in Ray Raphael, *A People's History of the American Revolution: How Common People Shaped the Fight for Independence* (New York: New Press, 2001), 169.
23. Livingston to Washington, Nov. 5, 1777.
24. William Livingston to George Washington, Dec. 1, 1777, *Papers of William Livingston*, 2:128–129.
25. *Pa. Packet*, Dec. 10, 1778; David J. Fowler, “‘Loyalty Is Now Bleeding in New Jersey’: Motivations and Mentalities of the Disaffected,” in *The Other Loyalists*, 45, 56. Fowler found that seventeen of the eighteen men convicted of high treason in Gloucester county during the war were pardoned.
26. Harold B. Hancock, *The Loyalists of Revolutionary Delaware* (Newark: Univ. of Del. Press, 1977), 6, 92. At a court of oyer and terminer in New Castle, Delaware, in April 1779, one man was convicted and one man was acquitted of high treason. *Pa. Gazette*, April 21, 1779.
27. Sentence of Death for High Treason, Evans 43990, Broadside Collection, HSP; *Pa. Gazette*, Aug. 15, 1781.
28. Dorothy Mackay Quynn, “The Loyalist Plot in Frederick,” *Maryland Historical Magazine* 40 (1945): 201–210.
29. Kettner, *Development of American Citizenship*, 182 n.22; Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782); Harry M. Ward, *The War for Independence and the Transformation of American Society* (London: UCL Press, 1999), 57.
30. A similar pattern prevailed after Shays’s Rebellion in Massachusetts. Most participants received pardons, and only the ringleaders were tried. Most of these men were convicted, and fourteen were sentenced to death, but all were eventually pardoned. Sean Condon, *Shays’s Rebellion: Authority and Distress in Post-Revolutionary America* (Baltimore: Johns Hopkins Univ. Press, 2015), 108–118.
31. Sufferings of Moses Roberts and Job Hughes, Prisoners in Lancaster Goal, 1780, Society of Friends items, Parrish Collection, HSP.
32. Questions proposed to Moses Roberts, Job Hughes, John Webb & Joseph Rossbury Prisoners in Lancaster Goal when separately examined at Sunbury, Meeting for Suffering—Miscellaneous Papers, Friends Historical Library, Swarthmore College, Swarthmore, PA.
33. Sufferings of Moses Roberts and Job Hughes, Prisoners in Lancaster Goal, 1780, Society of Friends Items, Parrish Collection, HSP.
34. Joseph Reed to George Bryan, May 18, 1780, in Reed, *Life and Correspondence of Joseph Reed*, 2:199.
35. Sufferings of Moses Roberts and Job Hughes, Prisoners in Lancaster Goal, 1780, Society of Friends items, Parrish Collection, HSP; Job Hughes to General Assembly of Pennsylvania, Nov. 8, 1780, Meeting for Sufferings—Miscellaneous

- Papers, Friends Historical Library, Swarthmore College, Swarthmore, PA; Fisher, "Journal," 428.
36. *Freeman's Journal*, Dec. 12, 1781.
  37. Prominent Philadelphia Quaker John Pemberton regularly visited the men in the Lancaster jail. Diary of John Pemberton, July 29, 1780; Oct. 29, 1780; Oct. 31, 1780; Nov. 1, 1780; March 16, 1781, Pemberton Papers, HSP.
  38. Pemberton Diary, June 16, 1780, Pemberton Papers, HSP, 166.
  39. Record of the Meeting for Sufferings, Sept. 21, 1780, Meeting for Sufferings—Miscellaneous Papers, Friends Historical Library, Swarthmore College, Swarthmore, PA. In some states, such as North Carolina, extrajudicial killings of Loyalists were not uncommon. Robert O. DeMond, *The Loyalists in North Carolina during the Revolution* (Durham, NC: Duke Univ. Press, 1940), 120–123. Such attacks were rare in Pennsylvania.
  40. On Pennsylvania's British prisoners generally, see Ken Miller, *Dangerous Guests: Enemy Captives and Revolutionary Communities during the War for Independence* (Ithaca, NY: Cornell Univ. Press, 2014).
  41. Miller, *Dangerous Guests*, 157.
  42. Adam Hubley to Joseph Reed, May 21, 1781, *Pa. Archives*, 9:156.
  43. William Atlee to Joseph Reed, June 13, 1781, *Pa. Archives*, 9:203–205.
  44. Notes of George Bryan in Commonwealth v. Martin Usner, et al., Chester Co. Ct. Oyer & Terminer, Oct. 22, 1782, George Bryan Papers, HSP.
  45. Act of April 13, 1782, ch. 932, *Pa. Stat.*, 10:464, 467.
  46. *Pa. Eve. Post*, June 21, 1782; Transcript of Conviction of Nathaniel Forsyth, Clemency File, RG-33, PSA.
  47. Petition of Nathaniel Forsyth, Jan. 13, 1783, Clemency File, RG-27, PSA.
  48. Minutes of the SEC, Jan. 13, 1783, *Col. Records*, 13:480.
  49. Notes of George Bryan in Commonwealth v. Myers et al., Lancaster Co. Ct. Oyer & Terminer, Oct. 20, 1782, George Bryan Papers, HSP.
  50. *Respublica v. Shirk & Myers*, Docket Book of the Court of Oyer & Terminer, Lancaster Co., Oct. 20, 1782, RG-33, PSA; *Respublica v. Usner et al.*, Docket Book of the Court of Oyer & Terminer, Chester Co., Oct. 23, 1782, RG-33, PSA; *Respublica v. Hammer & Tyson*, Docket Book of the Court of Oyer & Terminer, Philadelphia Co., Jan. 11, 1783, RG-33, PSA; Indictment of Rachel Hammer et al., Philadelphia Co. Ct. of Oyer & Terminer, Dec. 1782, Oyer and Terminer Papers, Records of the Supreme Court, RG-33, PSA.
  51. Notes of George Bryan in Commonwealth v. Martin Usner, et al., Chester Co. Ct. Oyer & Terminer, Oct. 22, 1782, George Bryan Papers, HSP (Lewis & Wilcocks); Notes of George Bryan in Commonwealth v. Myers et al., Lancaster Co. Ct. Oyer & Terminer, Oct. 20, 1782, George Bryan Papers, HSP (Yeates & Chambers); Notes of George Bryan in Commonwealth v. Snyder, Lancaster Co. Ct. Oyer & Terminer, Oct. 18, 1782, George Bryan Papers, HSP (Yeates & Chambers); Notes of George Bryan in Commonwealth v. Prince, Chester Co. Ct. Oyer & Terminer,

- Oct. 24, 1782, George Bryan Papers, HSP (Wilson). In the case of Nathaniel Forsyth, Justice Bryan's notes disclose no defense counsel, but state cryptically, "Mr. Yeates declines to speak." Notes of George Bryan in *Commonwealth v. Forsyth*, York Co. Ct. Oyer & Terminer, May 31, 1782, George Bryan Papers, HSP.
52. Notes of George Bryan in *Commonwealth v. Snyder*, Lancaster Co. Ct. Oyer & Terminer, Oct. 18, 1782, George Bryan Papers, HSP.
  53. *Respublica v. Prichardson et al.*, Docket Book of the Court of Oyer & Terminer, Philadelphia Co., Jan. 4, 1783, RG-33, PSA.
  54. Notes of George Bryan in *Commonwealth v. Snyder*, Lancaster Co. Ct. Oyer & Terminer, Oct. 18, 1782, George Bryan Papers, HSP.
  55. Notes of George Bryan in *Commonwealth v. Myers et al.*, Lancaster Co. Ct. Oyer & Terminer, Oct. 20, 1782, George Bryan Papers, HSP; Docket Book of the Court of Oyer & Terminer, Lancaster Co, Oct. 1782, RG-33, PSA.
  56. Rebecca Roiphe, "The Serpent Beguiled Me: A History of the Entrapment Defense," *Seton Hall L. Rev.* 33 (2003): 257–302; Paul Marcus, "The Development of Entrapment Law," *Wayne L. Rev.* 33 (1986): 5–37.
  57. Notes of George Bryan in *Commonwealth v. Martin Usner, et al.*, Chester Co. Ct. Oyer & Terminer, Oct. 22, 1782, George Bryan Papers, HSP.
  58. *Ibid.* Usner was convicted, and the Council initially rejected his petition for clemency. Minutes of the SEC, Feb. 10, 1783, *Col. Records*, 13:502. Several months later, the Council relented and reduced his fine by one-half. Minutes of the SEC, April 1, 1783, *Col. Records*, 13:546.
  59. A note from Attorney General Bradford indicates that the fines imposed under the common law did not have to be shared with the prosecutor, but would go entirely to the state. Note of William Bradford re: Rowland Evans, n.d., Clemency File, RG-27, PSA.
  60. Peter Miler to John Dickinson, Nov. 23, 1782, Dickinson Folder, R.R. Logan Collection, Box One, HSP.
  61. Minutes of the SEC, Dec. 24, 1782; Jan. 30, 1783; Feb. 20, 1783; March 2, 1783; March 17, 1783; March 18, 1783; March 28, 1783; April 8, 1783; May 18, 1783, *Col. Records*, 13:457, 495, 511–512, 520, 534, 535, 544, 550–551, 576–577.
  62. Petition of Christian Carpenter, n.d., Clemency File, RG-27, PSA. Carpenter also made the underwhelming argument that he "had at all times paid his taxes without giving unnecessary trouble to the collector."
  63. Minutes of the SEC, Feb. 20, 1783, *Col. Records*, 13:512.
  64. Petition of Jacob Grove, n.d. Clemency File, RG-27, PSA; Minutes of the SEC, Dec. 2, 1782, *Col. Records*, 13:442. Chief Justice McKean and Justice Bryan noted their support for this petition.
  65. Petition of Frederick Buzzard, Feb. 14, 1783, Clemency File, RG-27, PSA; Minutes of the SEC, March 1, 1783, *Col. Records*, 13:520.
  66. Petition of John Evans, March 6, 1783, Clemency File, RG-27, PSA. This petition was supported by Chief Justice McKean and grand juror Seth Quee, among others. Minutes of the SEC, March 7, 1783, *Col. Records*, 13:526.

67. *Freeman's Journal*, Aug. 28, 1782.
68. Anthony Sharp, *The Continental Almanac* (Philadelphia: Francis Bailey, 1782). On almanacs, see Patrick Spero, "The Americanization of the Pennsylvania Almanac," in *Pennsylvania's Revolution*, ed. William Pencak (Univ. Park: Penn. State. Univ. Press, 2010), 36–55.
69. *Pa. Gazette*, June 18, 1783.
70. *Pa. Gazette*, Aug. 6, 1783.
71. *Pa. Gazette*, Aug. 6, 1783.
72. Instructions to the Representatives of Northampton County, Aug. 20, 1783, Northampton County items, Society Collection, HSP.
73. William Adcock, "Philadelphia, August 1783," Broadside, Evans 18136, Broad-sides Collection, HSP.
74. Treaty of Paris, Sept. 3, 1783, arts. 5 & 6. See generally Roberta Tansman Jacobs, "The Treaty and the Tories: The Ideological Reaction to the Return of the Loyalists, 1783–1787" (Ph.D. diss., Cornell Univ., 1974); Hoock, *Scars of Independence*, 361–387.
75. Judith L. Van Buskirk, *Generous Enemies: Patriots and Loyalists in Revolutionary New York* (Philadelphia: Univ. of Penn. Press, 2002), 188.
76. Kevin J. Dellape, *America's First Chaplain: The Life and Times of the Reverend Jacob Duché* (Bethlehem, PA: Lehigh Univ. Press, 2013), 137–149, 171–176.
77. Minutes of the SEC, June 9, 1790, *Col. Records*, 16:378.
78. Minutes of the SEC, March 30, 1789; May 14, 1789; July 1, 1789; July 22, 1789; Aug. 21, 1789; Feb. 6, 1790; March 9, 1790; *Col. Records*, 16:43, 76, 107, 115, 179, 273, 297.
79. Thomas Jefferson to George Hammond, May 29, 1792, *The Papers of Thomas Jefferson*, ed. Charles T. Cullen (Princeton, NJ: Princeton Univ. Press, 1990), 23:551–613.
80. Act of March 8, 1792, ch. 88, *Pa. Stat.*, 14:204.
81. *Pa. Gazette*, Feb. 8, 1792.
82. "To the Freeman of Philadelphia . . .," Broadside, Evans 43709, Broad-sides Collection, HSP.
83. Memorial of Samuel Shoemaker, American Loyalist Claims, AO12.038.168, National Archives of the United Kingdom; "A Pennsylvania Loyalist's Interview with George III," *PMHB* 2 (1878): 35–39.
84. Clement Biddle, *The Philadelphia Directory* (Philadelphia: James & Johnson, 1791), 118.
85. Executive Minutes of Governor Thomas Mifflin, Dec. 27, 1793, *Pa. Archives* (9th Ser.), 1:699. For an overview of Shoemaker's life, see David Haugaard, "Samuel Shoemaker," in *Lawmaking and Legislators in Pennsylvania*, 3:1284–1300.
86. Executive Minutes of Governor Thomas Mifflin, Sept. 12, 1792, *Pa. Archives* (9th Ser.), 1:444; David Haugaard, "Andrew Allen," in *Lawmaking and Legislators in Pennsylvania*, 3:199–219.

87. See generally John M. Coleman, "Joseph Galloway and the British Occupation of Philadelphia," *Penn. Hist.* 30 (1963): 272–300.
88. *Pa. Journal and Weekly Advertiser*, n.d., quoted in Oliver C. Kuntzleman, *Joseph Galloway: Loyalist* (Philadelphia: Temple Univ. Press, 1941), 135.
89. Joseph Galloway to Thomas McKean, March 7, 1793, Thomas McKean Papers, HSP.
90. Executive Minutes of Governor Thomas Mifflin, Feb. 28, 1795, *Pa. Archives* (9th Ser.), 2:937; John E. Ferling, *The Loyalist Mind: Joseph Galloway and the American Revolution* (University Park: Penn. State Univ. Press, 1977), 64.
91. Samuel Wharton to George Read, Nov. 17, 1782, *LDC*, 19:394. On the Virginia dispute more generally, see Ousterhout, *State Divided*, 247–271.
92. Act of Dec. 3, 1782, ch. 1000, *Pa. Stat.*, 11:14.
93. *A Report of the Committee of the Council of Censors* (Philadelphia: Francis Bailey, 1784), 23.
94. Moyer, *Wild Yankees*, 33, 42.
95. Thomas Grant to Benjamin Franklin, May 20, 1786, *SCP*, 8:334–335; William Montgomery to Thomas McKean, May 20, 1786, *SCP*, 8:337.
96. Warrant for the Arrest of John Franklin, Aug. 31, 1787, *SCP*, 9:174–175; Votes Cast in Luzerne County Election, *SCP*, 9:18.
97. Franklin Arrest Warrant, *SCP*, 9:175.
98. Samuel Hodgdon to Timothy Pickering, Oct. 5, 1787, *SCP*, 9:222–223; Minutes of the SEC, Oct. 8, 1787, *Col. Records*, 15:291.
99. *Pa. Gazette*, Oct. 10, 1787.
100. *Conn. Courant*, Oct. 22, 1787, *SCP*, 9:249–250; see also John Franklin to SEC, Jan. 31, 1788, *SCP*, 9:321–323.
101. John Franklin to SEC, April 28, 1788, *SCP*, 9:370–371.
102. Timothy Pickering to Rebecca Pickering, July 3, 1788, *SCP*, 9:391–393; John Hyde et al. to SEC, July 15, 1788, *SCP*, 9:410–412; Moyer, *Wild Yankees*, 68–75. Pickering later served as United States Secretary of War and Secretary of State.
103. Thomas McKean & George Bryan to SEC, Aug. 7, 1788, *SCP*, 9:455–456; William Bradford, Jr., to Timothy Pickering, Aug. 23, 1788, *SCP*, 9:476.
104. Timothy Pickering to John S. Whitcomb & David Woodward, Sept. 5, 1788, *SCP*, 9:485–486.
105. Timothy Pickering to Samuel Hodgdon, Nov. 9, 1788, *SCP*, 9:516–517.
106. Indictment of John Franklin et al, *SCP*, 9:513–514. Franklin was also indicted on a separate misdemeanor charge. Docket Book of the Court of Oyer and Terminer, Luzerne Co., Nov. 1788, RG-33, PSA, 75.
107. Docket Book of the Court of Oyer and Terminer, Luzerne Co., Nov. 1788, RG-33, PSA, 75; *Pa. Gazette*, Nov. 26, 1788.
108. John Franklin to Thomas Mifflin, Feb. 17, 1789, *SCP*, 10:8.
109. Thomas McKean to Timothy Pickering, March 13, 1789, *SCP*, 10:9–10.
110. Timothy Pickering to Simon Spaulding, Sept. 26, 1789, *SCP*, 10:17–18.



111. Docket Book of the Court of Oyer and Terminer, Luzerne Co., May 1792, RG-33, PSA, 192.
112. Samuel Wallis to Samuel Meredith, Oct. 11, 1792, *SCP*, 10:161.
113. *Journal of the First Session of the Sixth House of Representatives of the Commonwealth of Pennsylvania* (Philadelphia: Francis & Robert Bailey, 1795), 39.
114. Although several indictments were issued for treason against Pennsylvania after the Homestead Strike in 1892, the cases did not go to trial, and the indictments were widely condemned for prosecutorial excess. Hurst, *Law of Treason*, 199–200.
115. David Ramsay to Nathanael Greene, June 9, 1782, *LDC*, 18:566.
116. *Pa. Gazette*, July 10, 1782.
117. Thomas Paine to Robert Morris, Nov. 28, 1782, Thomas Paine Papers, APS.
118. Paine, *Complete Writings*, 1:234.
119. Minutes of the SEC, Aug. 18, 1783, *Col. Records*, 13:648–649.
120. See, e.g., *Francia's Case* (1717), *Reports of Sir Peter King, Chief Justice of Common Pleas, 1714–1722*, ed. Lloyd Bonfield & L.R. Poos (London: Selden Society, 2017), 82–84.
121. William Ewald, “James Wilson and the Drafting of the Constitution,” *U. Pa. J. Const. Law* 10 (2008): 901–1009, 992.
122. Hurst, *Law of Treason*, 136.
123. Draft of the Committee of Detail, Aug. 6, 1787, in Max Farrand, *The Records of the Federal Convention of 1787*, rev. ed. (New Haven, CT: Yale Univ. Press, 1966), 182.
124. Edmund Randolph to James Madison, Oct. 5, 1782, in *Papers of James Madison*, ed. William T. Hutchinson & William M.E. Rachal (Chicago: U. of Chicago Press, 1967), 5:183.
125. Farrand, *Records*, 348.
126. *Ibid.*, 349, 346.
127. On the convention, see Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2010), 97–124.
128. *Pennsylvania and the Federal Constitution 1787–1788*, ed. John Bach McMaster & Frederick D. Stone (Philadelphia: HSP, 1888), 2:723–724; Minutes of the SEC, Oct. 19, 1779, *Col. Records*, 12:137. A year-and-a-half after the ratifying convention, Chambers was killed in a duel.
129. Juror John Steinmetz unsuccessfully ran for the ratifying convention. A newspaper observed that “Mr. Steinmetz, who is a federalist, was low in votes, only from being in antifederal company.” *Pa. Gazette*, Nov. 14, 1787. Andrew Burkhard, who was a juror in the John Roberts case, was the messenger for the Pennsylvania ratifying convention. *The Documentary History of the Ratification of the Constitution*, ed. Merrill Jensen (Madison: State Hist. Soc. of Wisconsin, 1976), 2:614.
130. *Documentary History of the Ratification*, 2:483.
131. *Ibid.*, 2:493.
132. *Ibid.*, 2:515–516.



133. Cramer v. United States, 325 U.S. 1, 46–47 (1945).
134. Farrand, *Records*, 347–349.
135. William Cushing to John Adams, Aug. 22, 1789, *Documentary History of the Supreme Court of the United States, 1789–1800*, ed. Maeva Marcus (New York: Columbia Univ. Press, 1992), 4:501.
136. John Adams to William Cushing, Sept. 14, 1789, available at <https://founders.archives.gov/documents/Adams/06-04-02-0109>.
137. Thomas Jefferson to James Madison, Oct. 1, 1792, *The Papers of Thomas Jefferson*, ed. John Catanzariti (Princeton, NJ: Princeton Univ. Press, 1990), 24:432–433.
138. The best modern analysis of state treason laws is J. Taylor McConkie, “State Treason: The History and Validity of Treason against Individual States,” *Kentucky L.J.* 101 (2012–2013): 281–336.
139. On the Dorr Rebellion, see generally Marvin E. Gettleman, *The Dorr Rebellion: A Study in American Radicalism* (New York: Random House, 1973; reprint, New York: Robert E. Krieger, 1980); on John Brown, see Brian McGinty, *John Brown’s Trial* (Cambridge, MA: Harvard Univ. Press, 2009); and on the Mine Wars, see James Green, *The Devil Is Here in These Hills: West Virginia’s Coal Miners and Their Battle for Freedom* (New York: Atlantic Monthly Press, 2015).
140. William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* (Philadelphia: T. Dobson, 1793), 12.
141. An Act for the Better Preventing of Crimes, and for Abolishing the Punishment of Death in Certain Cases (1794), ch. 1777, *Pa. Stat.*, 15:174. See generally Bradley Chapin, “Felony Law Reform in the Early Republic,” *PMHB* 113 (1989): 163–183.
142. Thomas McKean to Paul Hamilton, Sept. 1, 1806, Society Collection, HSP.
143. Edward Shippen, Undated Charge Number 2, Written ca. 1794, in *Gentlemen of the Grand Jury*, 2:1092, 1093.
144. As James Willard Hurst has pointed out, “The evidence . . . poses a most difficult problem, which it does not resolve.” Hurst, *Law of Treason*, 140.
145. Thomas McKean’s Charge, City & County of Philadelphia, Nov. 17, 1797, in *Gentlemen of the Grand Jury*, 1: 966, 968.
146. Wilson, *Works*, 2:668.
147. Foster, *Report*, 211.
148. Bradford, *Enquiry*, 43.
149. Conference Concerning the Insurrection in Western Pennsylvania, Aug. 2, 1794, *The Papers of Alexander Hamilton*, ed. Harold C. Syrett (New York: Columbia Univ. Press, 1972), 17:9–14.
150. James Wilson to George Washington, Aug. 4, 1794, *Documentary History of the Supreme Court of the United States*, 2:438–439.
151. For the basic facts of the Whiskey Rebellion, see Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York: Oxford Univ. Press, 1986).
152. *Ibid.*, 218–219.

153. *Documentary History of the Supreme Court of the United States*, 6:514–518; *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795).
154. These data are drawn from the Criminal Case Files of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1791–1840 (National Archives Microfilm Publication M986), and the Minutes of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1790–1844 (National Archives Microfilm Publication M932).
155. *United States v. The Insurgents of Pennsylvania*, 2 U.S. (2 Dall.) 335, 342 (C.C. Pa. 1795).
156. *United States v. Porter*, 2 U.S. (2. Dall.) 345 (C.C. Pa. 1795).
157. These data are drawn from the Minutes of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1790–1844 (National Archives Microfilm Publication M932).
158. Albert Gallatin to Hannah Gallatin, June 1, 1795, *Documentary History of the United States Supreme Court*, 3:52, 53.
159. Minutes of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1790–1844 (National Archives Microfilm Publication M932).
160. Albert Gallatin to Hannah Gallatin, June 1, 1795, *Documentary History of the United States Supreme Court*, 3:52, 53.
161. *United States v. Stewart*; *United States v. Wright*, 2 U.S. (2 Dall.) 343 (C.C. Pa. 1795).
162. *United States v. Mitchell*, 2 U.S. (2 Dall.) 357 (C.C. Pa. 1795).
163. *United States v. Vigol*, 2 U.S. (2 Dall.) 346, 347 n.\* (C.C. Pa. 1795).
164. William Findley, *History of the Insurrection, in the Four Western Counties of Pennsylvania* (Philadelphia: Samuel Harrison Smith, 1796), 210.
165. *United States v. Porter*, 2 U.S. (2 Dall.) 345 (C.C. Pa. 1795).
166. William Rawle to Alexander Addison, Aug. 15, 1795, *Pa. Archives* (2d Ser.), 4:535, 536.
167. Hugh Henry Brackenridge, *Incidents of the Insurrection in the Western Part of Pennsylvania, In the Year 1794* (Philadelphia: John M'Culloch, 1795), 66.
168. Findley, *History of the Insurrection*, 211.
169. Memorial of the Jurors, *United States v. Mitchell*, n.d., Pennsylvania Whiskey Rebellion Collection, Manuscript Division, Library of Congress.
170. Edward Tilghman and Joseph Thomas to George Washington, June 13, 1795, Pennsylvania Whiskey Rebellion Collection, Manuscript Division, Library of Congress.
171. Albert Gallatin to Hannah Gallatin, May 25, 1795, Albert Gallatin Papers, New-York Historical Society, quoted in Richard A. Ifft, "Treason in the Early Republic: The Federal Courts, Popular Protest, and Federalism during the Whiskey Insurrection," in *The Whiskey Rebellion: Past and Present Perspectives*, ed. Steven R. Boyd (Westport, CT: Greenwood Press, 1985), 165, 175.
172. Findley, *History of the Insurrection*, 211.
173. Memorial of the Jurors, *United States v. Vigol*, n.d., Pennsylvania Whiskey Rebellion Collection, Manuscript Division, Library of Congress.

174. Jurors to George Washington, n.d., Pennsylvania Whiskey Rebellion Collection, Manuscript Division, Library of Congress.
175. William Lewis to Edmund Randolph, June 12, 1795, Pennsylvania Whiskey Rebellion Collection, Manuscript Division, Library of Congress.
176. Alexander Hamilton, *Letter from Alexander Hamilton, concerning the public conduct and character of John Adams, Esq. president of the United States* (New York: John Lang, 1800), 42.
177. Citizens of Philadelphia to George Washington, June 13, 1795, Pennsylvania Whiskey Rebellion Collection, Manuscript Division, Library of Congress.
178. Grand Inquest for the City of Philadelphia to George Washington, June 15, 1795, Pennsylvania Whiskey Rebellion Collection, Manuscript Division, Library of Congress.
179. William Rawle to Alexander Addison, Aug. 15, 1795, *Pa. Archives* (2d Ser.), 4:535.
180. William Bradford to George Washington, Aug. 1794, *The Papers of George Washington: Presidential Series*, ed. David R. Hoth & Carol S. Ebel (Charlottesville: UVA Press, 2011), 472–478.
181. [Alexander Hamilton], “To the People of the United States,” Aug. 28, 1794, *The Papers of Alexander Hamilton*, 17:159–161.
182. William Cushing, Charge to the Grand Jury of the Circuit Court for the District of Rhode Island, Nov. 7, 1794, *Documentary History of the Supreme Court*, 2:491, 493.
183. William Paterson, Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania, May 4, 1795, *Documentary History of the Supreme Court*, 3:40–42. On Paterson’s role in the Whiskey Rebellion cases, see Linda Myrsiades, “A Tale of a Whiskey Rebellion Judge: William Paterson, Grand Jury Charges, and the Trials of the Whiskey Rebels,” *PMHB* 140 (2016): 129–165.
184. *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 348–349 (C.C. Pa. 1795).
185. *United States v. Vigol*, 2 U.S. (2 Dall.) 346 (C.C. Pa. 1795).
186. Alexander Dallas stated that these attorneys were Edward Tilghman, the Middle Temple-trained son-in-law of Benjamin Chew, and Joseph Thomas. *Mitchell*, 2 U.S. (2 Dall.) at 350. Albert Gallatin, however, noted only Thomas as representing as Mitchell. Albert Gallatin to Hannah Gallatin, June 1, 1795, *Documentary History of the Supreme Court*, 3:52, 53.
187. *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 350–351 (C.C. Pa. 1795). The defense also raised challenges to the applicability of the two witness requirement to the overt acts alleged in the indictment and argued that certain allegations amounted only to conspiracy to levy war, which was not in itself treason.
188. *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 354 (C.C. Pa. 1795).
189. *Mitchell*, 2 U.S. (2. Dall), at 355–356.
190. Brackenridge, *Incidents of the Insurrection*, 59–60.
191. The leading modern account is Paul Douglas Newman, *Fries’s Rebellion: The Enduring Struggle for the American Revolution* (Philadelphia: Univ. of Penn. Press, 2004). See also Terry Bouton, “No Wonder the Times Were Troublesome’;

- The Origins of Fries Rebellion, 1783–1799,” *Penn. Hist.* 67 (Winter 2000): 21–42; Whitman H. Ridgway, “Fries in the Republican Imagination: A Crisis of Republican Society, *Penn. Hist.* 67 (Winter 2000): 141–160.
192. Newman, *Fries's Rebellion*, 56.
  193. *Ibid.*, 140–141.
  194. *Ibid.*, 142–164.
  195. *Case of Fries*, 9 F. Cas. 826, 840 (C.C.D. Pa. 1799) (No. 5126).
  196. Minutes of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1790–1844 (National Archives Microfilm Publication M932). A number of other defendants were charged with lesser offenses. On the defendants charged under the Sedition Act, see Wendell Bird, *Press and Speech under Assault: The Early Supreme Court Justices, the Sedition Act of 1798, and the Campaign against Dissent* (New York: Oxford Univ. Press, 2016), 356–367.
  197. The selection of counsel was controversial, and at one point Dallas challenged Lewis to a duel over his role in the case. Newman, *Fries's Rebellion*, 166.
  198. *United States v. Insurgents of Pennsylvania*, 3 U.S. (3 Dall.) 513 (C.C.D. Pa. 1799).
  199. *Case of Fries*, 842.
  200. *Ibid.*, 847.
  201. *Ibid.*, 848. Rawle made similar points later in the trial. *Ibid.*, 875–877.
  202. *Ibid.*, 887.
  203. *Ibid.*, 897–898.
  204. *Ibid.*, 899.
  205. *Ibid.*, 908.
  206. *Ibid.*, 912–913.
  207. *United States v. Fries*, 3 U.S. (3 Dall.) 515 (C.C.D. Pa. 1799); *Case of Fries*, 916.
  208. *Case of Fries*, 916.
  209. James Iredell to Hannah Iredell, May 11, 1799, *Documentary History of the Supreme Court*, 3:361.
  210. *Case of Fries*, 916–917.
  211. Declaration of John Rhoad, May 15, 1799, Criminal Case Files of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1791–1840 (National Archives Microfilm Publication M986).
  212. *Case of Fries*, 922.
  213. *Ibid.*, 923; *United States v. Fries*, 3 U.S. (3 Dall.) 515 (C.C.D. Pa. 1799).
  214. *Case of Fries*, 9 F. Cas. 924, 943–944 (C.C.D. Pa. 1800) (No. 5127).
  215. See generally William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justices Samuel Chase and President Andrew Johnson* (1992). Chase was defended by Joseph Hopkinson, who had defended several of the defendants in the Fries's Rebellion cases.
  216. Stephen B. Presser, “A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence,” *Northwestern Law Review* 73 (1978): 26–111, 92.

217. *Case of Fries*, 941.
218. *Ibid.*, 939.
219. *Ibid.*, 926; Presser, “A Tale of Two Judges,” 91.
220. *Case of Fries*, 930–932.
221. Minutes of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1790–1844 (National Archives Microfilm Publication M932); Criminal Case Files of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1791–1840 (National Archives Microfilm Publication M986). John Fries used thirty-four challenges, Conrad Marks used thirty-one, Gettman and Heaney used thirty-five, and Stähler used twenty-eight.
222. Depositions of Charles Deshler & Isaac Roush, Minutes of the U.S. Circuit Court for the Eastern District of Pennsylvania, 1790–1844 (National Archives Microfilm Publication M932).
223. *Case of Fries*, 946.
224. William Lewis & Alexander Dallas to John Adams, *Case of Fries*, 947–948.
225. John Adams to the Heads of Department, May 20, 1800, *The Works of John Adams*, ed. Charles Francis Adams (Boston: Little Brown, 1854), 9:57–59.
226. Charles Lee, Oliver Wolcott & Benjamin Stoddert to John Adams, May 20, 1800, *Works of John Adams*, 9:59–60.
227. John Adams to Charles Lee, May 21, 1800, *Works of John Adams*, 9:60.
228. John Adams to James Lloyd, March 31, 1815, *Works of John Adams*, 10:152–155.
229. Newman, *Fries’s Rebellion*, 180–188.
230. Alexander Hamilton, *Letter from Alexander Hamilton, concerning the public conduct and character of John Adams, Esq. president of the United States* (New York: John Lang, 1800), 43.
231. *Ibid.*, 43.
232. *Ibid.*, 44.
233. *Ibid.*, 44. During Shays’s Rebellion, Samuel Adams similarly argued for executions, claiming that republics should punish treason more harshly than monarchies. As Adams put it, “In monarchies, the crime of treason and rebellion may admit of being pardoned or lightly punished; but the man who dares to rebel against the laws of a republic ought to suffer death.” Quoted in Condon, *Shays’s Rebellion*, 97.
234. Chapin, *American Law of Treason*, 97.
235. Hurst, *Law of Treason*, ix.
236. *Ibid.*, 260–265.

## CONCLUSION

1. *Mass. Spy*, Feb. 16, 1775.
2. Chapin, *American Law of Treason*, 71.
3. Similar attitudes prevailed during the American Civil War. There were approximately one hundred treason prosecutions of questionable legal validity