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**The Apparent Political Selection of  
Federal Grand Juries in Virginia,  
1789-1809**

Brent Tarter and Wythe Holt

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## The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1809

By Brent Tarter and Wythe Holt

The political situation in the United States in the quarter century following independence from Britain was highly charged, and there was deep suspicion and enmity between the Federalists and the Republicans, or Jeffersonians, the two political parties which emerged in the mid-1790s. One of the institutions that served to focus the suspicion was the federal judiciary. Presidents George Washington and John Adams selected a corps of federal judges almost entirely from the Federalist Party, so that some of their decisions came under critique from the Republicans as partisan.

“Marshals ranked second only to federal judges on the Jeffersonians’ list of political scoundrels,”<sup>1</sup> because of alleged jury packing. The marshals of the federal courts were judicial officers, whose jobs were much like those of county sheriffs. The courts did not, however, select marshals. They were presidential appointees, and among their other duties in the federal courts of several of the states, marshals (like sheriffs in those states) unilaterally selected the men who served on grand juries.

Three actions by the grand jury of the federal Circuit Court in Virginia during the period between 1789 and 1809, the first twenty years of the federal court system, raised the question whether the marshals acted in a partisan way in selecting the grand jury. In May 1797, that grand jury returned a presentment (not an indictment) against Samuel Jordan Cabell, a Republican member of the House of Representatives who represented Thomas Jefferson’s district. The

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<sup>1</sup>“Juror Reform Bills of 1800,” in Maeva Marcus *et al.*, eds., *The Documentary History of the Supreme Court of the United States, 1789-1800* (New York: Columbia University Press, 1985—) [hereafter *DHSC*], 4:271.

previous January, Cabell had written a letter to his constituents complaining of unwise and partisan conduct alleged to have been committed by President Washington which, Cabell said, might have led to war with France.<sup>2</sup> In May 1800, the grand jury returned an indictment under the recently-passed Federalist national Sedition Act against the Republican journalist and essayist James Thomson Callender, who was among the most assiduous political supporters of presidential candidate Thomas Jefferson, for passages in his book *The Prospect Before Us*, which historian Kathryn Preyer has called “a savage attack on President Adams.”<sup>3</sup> And in June 1807 the grand jury indicted former Vice President Aaron Burr for treason for allegedly having made plans to seize New Orleans in 1806 in an attempt to separate the southwest portion of the United States from the remainder of the nation. Burr, who was a skilled attorney, challenged two individual grand jurors, both notorious Jeffersonian lieutenants, for “favor” or bias, a novel claim then and now.<sup>4</sup> In each situation it was strongly suspected that the federal marshals had selected grand jurors who were Federalists in the first two instances and Republicans in the third, in order to accomplish overtly political results.

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<sup>2</sup>Presentment of the Grand Jury of the Circuit Court for the District of Virginia, May 22, 1797, *DHSC* 3:181. For the episode, see, e.g., Dumas Malone, *Jefferson and the Defense of Liberty* (Boston: Little Brown, 1962), 334-37; Noble E. Cunningham, Jr., *The Pursuit of Reason: The Life of Thomas Jefferson* (Baton Rouge: Louisiana State University Press, 1987), 210-11.

<sup>3</sup>Kathryn Preyer, “*United States v. Callender: Judge and Jury in a Republican Society*,” in Maeva Marcus, ed., *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* (New York: Oxford University Press, 1992), 179-80. For the episode, see James M. Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, N.Y.: Cornell University Press, 1956), 334-58.

<sup>4</sup>*United States v. Burr*, 25 Fed. Cas. 25, 55-57 & n.3, 59 (C.C.D. Va. 1807) (No. 14,693); see Jeffrey Abramson, *We The Jury: The Jury System and the Ideal of Democracy* 38-40 (New York: Basic Books, 1994).

## The Ideological and Practical Importance of Juries

Juries were understood to be the most intimate and useful way in which citizens took part in their own governance, in the adjudication of civil and criminal controversies. A contemporary commentator on the Cabell case, for example, stated a popular commonplace when he wrote that juries “have ever been considered the great palladium of American, as well as British liberty.”<sup>5</sup> Virginians regarded them as indispensable agents for the protection of liberty. It is doubtful that any leading public man of the time in Virginia would have questioned that citizen juries were just as essential a barrier against abuse of power as were curbs on unchecked executive power.

Two clauses protecting the right to jury trials in civil and criminal cases have a prominent place in the influential Virginia Declaration of Rights that the Virginia Revolutionary Convention unanimously adopted on June 12, 1776.<sup>6</sup> Eleven years later, the Virginia Ratification Convention recommended a set of amendments to the Constitution of the United States (that it had ratified by a small majority), prominent among which were demands for the protection of jury trials in civil and criminal proceedings.<sup>7</sup> Some of the strongest criticisms hurled at the new Constitution during that Ratification Convention were aimed at what appeared to be a potentially too-powerful new federal judiciary. Proponents of ratification were unable to assuage the fears of critics who believed the judiciary provisions of Article III did not afford the kinds of

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<sup>5</sup>“Timothy Tickle” to Samuel Jordan Cabell, July 5, 1797, Richmond *Virginia Gazette, and General Advertiser*, July 5, 1797, *DHSC* 3:216.

<sup>6</sup>Brent Tarter, “The Virginia Declaration of Rights,” in Josephine F. Pacheco, ed., *To Secure the Blessings of Liberty: Rights in American History* (Fairfax, Va.: George Mason University Press, 1993), 37-54, esp. 44-45.

<sup>7</sup>Merrill Jensen *et al.*, eds., *The Documentary History of the Ratification of the Constitution* (Madison, Wi.: University of Wisconsin Press, 1975 —), 10:1545-58.

protections that many Virginians believed that they were entitled to. Suspicious from their experiences during the latter part of the colonial period of the potential for abuse of power that lay in the judicial branch, Virginians – whether they favored or opposed the Constitution – insisted that juries of citizens were essential ingredients of the judicial process. Throughout the period, when Virginians conjured up fears of engines of persecution, they nearly always included tyrannical courts and judges. It appears to have been an unquestioned assumption that juries could and would ascertain the truth, regardless of what corrupt judges, kings, or governors might attempt.<sup>8</sup>

Virginians also had eminently practical political reasons for demanding jury trials. Millions of dollars were owed by Americans to British creditors for private debts accrued before the Revolution. Perhaps 45% of the total debt was owed by residents of Virginia, which, along with other states, created many legal impediments to British creditors, including closing its courts to British debt suits. Through eight long years of bloody warfare the debts remained unpaid. Despite Article IV of the peace treaty of 1783, which required payment of all such debts in hard money, Virginia and most other southern states continued to place obstacles in the way of British merchants attempting to collect the debts; and requests that the Continental Congress made to the states to enforce that clause of the treaty proved largely unavailing. The authors of the new Constitution wanted foreign investment for the new nation, but until the pre-war debts were paid

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<sup>8</sup>Brent Tarter, “Virginians and the Bill of Rights,” and John M. Murrin and A.G. Roeber, “Trial by Jury: The Virginia Paradox,” both in Jon Kukla, ed., *The Bill of Rights: A Lively Heritage* (Richmond, Va.: Virginia State Library, 1987), 3-18, 109-30.

it would not be forthcoming.<sup>9</sup> However, legal impediments were only a part of creditors' fears. Jurors sympathetic to their neighbors' debt plight were another possible obstacle to collection because they would decide how much was owed in any contract suit. The chief reason for the institution of national courts (the Confederation had none) was the provision of an alternative, national judicial venue wherein the British creditors might obtain relief.<sup>10</sup> Because jury trials were not guaranteed in the Constitution as submitted to the states for ratification, Article III appeared to allow the new national courts to sit without juries. Moreover, subtle language in the Article seemed to allow an appellate Supreme Court to disregard jurors' decisions at trial. Suspicious and angry Americans demanded during the ratification process that juries be required in the federal courts and that their verdicts be honored. Supporters of the Constitution, fearful of its rejection, retreated hastily,<sup>11</sup> and promised that federal juries would receive constitutional protection and that their verdicts would not be overturnable. By and large, these promises were kept through the adoption of the Bill of Rights and in technical provisions of the Judiciary Act of

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<sup>9</sup>For treatment of this issue in the context of the necessity of repayment of the huge *public* debts incurred by the United States and the individual states to prosecute the Revolutionary War, see Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007), esp. 94-99, 182, 230-31, 270; Terry Bouton, *Taming Democracy: "The People," the Founders, and the Troubled Ending of the American Revolution* (New York: Oxford University Press, 2007), 172-76.

<sup>10</sup>Wythe Holt, "The Origins of Alienage Jurisdiction," *Oklahoma City L. Rev.* (1989), 14:547-64. An important secondary reason for the courts was to provide a mechanism for overturning state debtor relief legislation. See Holton, *Unruly Americans*, 186-87.

<sup>11</sup>These supporters also resorted to strongarm tactics, lies, misrepresentations, and equivocation to obtain the acceptance they so strongly desired, see Holton, *Unruly Americans*, 249-53; Bouton, *Taming Democracy*, 180-82, as well as making positive material arguments, see Holton, *Unruly Americans*, 227-32, 234-35, 239-49.

1789.<sup>12</sup>

### The Politics and the Law of Grand Juries

Grand juries were of equal importance with trial juries. Anglo-American traditions of popular liberty required not only citizen participation in the adjudication of the guilt or liability of their fellows, but also that citizens participate in the process of charging fellow citizens with crimes. Grand juries comprised of a large but indeterminate number of citizens (usually about twenty-four), which were empaneled by and sat with courts of general jurisdiction, fulfilled this function. Grand juries had become to be thought of as the inquest of the citizenry, the “body of the people,” an official and serious opportunity for citizens to voice grievances to the public through the process of “presentment,” a statement that the grand jury presented to the court specifying a grievance or complaint of governmental mismanagement.<sup>13</sup>

During the first decades of government under the Constitution, as the role of the federal courts evolved, the third branch of the national government drew intense public scrutiny. The composition and makeup of juries, especially of grand juries, during the early national period have received surprisingly little scholarly attention, especially in the light of the politically motivated prosecutions under the Alien and Sedition Acts of 1798,<sup>14</sup> but contemporary attention was another matter. The three Virginia episodes furnished opportunities for zealous friends of

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<sup>12</sup>Wythe Holt, “‘To Establish Justice’: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts,” *Duke Law Journal*, 1989:1421-1531.

<sup>13</sup>The grand juries serving the federal circuit courts in Georgia repeatedly made such presentments during the 1790s. See *DHSC* 3:224 (Oct. 18, 1791); 3:272 (Apr. 27, 1792); 3:332 (Nov. 13, 1792); 3:366 (Apr. 29, 1793); 4:39 (Apr. 29, 1795); 4:120 (Apr. 27, 1796). See also *DHSC* 3:433 (presentment of grand jury of circuit court of North Carolina, ca. Dec. 3, 1793).

<sup>14</sup>See, e.g., Smith, *Freedom’s Fetters*.



liberty, as well as for party partisans, to test whether the dangers of political overreaching by the judicial branch voiced during the ratification period had become manifest in grand jury selection. Grand juries were one of the lynchpins of the new federal court system. Most of the business of the new federal courts was civil, but it was in the realm of criminal law and in the capacity of a grand jury to serve as the agent of inquest for the local public that it had greatest potential for good – and for harm.

The First Congress acted to flesh out the broad and vague language of Article III. In apportioning the major tasks of that Congress, to get the new government going and to satisfy the host of doubters and dissenters according to the promises supporters of the Constitution had made, reform of the Constitution fell to the House of Representatives, which drafted a Bill of Rights, while the Senate undertook the judiciary issues. Future Chief Justice Oliver Ellsworth, in 1789 a senator from Connecticut, gave able and assiduous leadership to the task of fashioning the court system.<sup>15</sup> Ellsworth and his committee rejected a proposal that Congress require uniform national procedures, such as directing the mode of grand jury selection, and deferred to the “states-rights” feelings of the huge number of United States citizens who had opposed the new government. It would be ahistorical to imagine that the kinds of states-rights arguments that became common in the nineteenth century emerged full-blown in the 1790s, but it is clear that the Anti-Federalists and other, Jeffersonian, critics of the new national government of the United States were deeply afraid of centralization and wished to preserve the states as autonomous, sovereign civic entities. Such fears nearly led to the rejection of the Constitution. In order to gain acceptance of the Constitution and of the new government instituted under it, supporters of

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<sup>15</sup>Holt, ““To Establish Justice,”” 1481-1513.

ratification in state after state promised that Congress would act to correct many potential centralizing abuses that seemed apparent in the new Constitution's often vague language. The greatest achievements of the First Congress, the Bill of Rights and the Judiciary Act, were designed to damp those states' rights fears. Section 29 of the Judiciary Act of 1789 required that each federal trial court follow the qualifications for service and employ the mode of selection of grand juries in the state in which it sat.<sup>16</sup>

Jury selection varied tremendously from state to state in 1789. In five states – New Hampshire, South Carolina, Georgia, Massachusetts, and Connecticut – jurors were drawn by lot from a panel previously selected by “some impartial means,” in North Carolina the local justices of the peace picked the panel from which the sheriff drew the jurors, and in all the other states the common law method was still used, in which the sheriff had full discretion to pick both the petit jury panel or “venire” from which each trial jury would be chosen in a given case, and the grand jury venire.<sup>17</sup> The entire grand jury venire would serve, if each summoned grand juror appeared at court. Virginia had most recently codified its basic procedures in 1788 in section

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<sup>16</sup>“An Act to establish the Judicial Courts of the United States,” *Statutes at Large* (Boston: Little & Brown, 1848), chap. 20, sec. 29, 1:88; Holt, ““To Establish Justice,””1516. Ellsworth's original draft of what became section 29 required recourse to each state's personal jury qualifications, but with regard to the venires, somewhat vaguely required that the lists of grand and petit jurors be composed “as the Court shall direct ... out of such list as given them by the Marshal.” This language passed the Senate and went to the House. During debates over the bill in the House, it was struck in favor of a broad “all juries ... shall be formed according to laws of each State respectively.” The Senate concurred, and language in the handwriting of Ellsworth clearly requiring choice of jurors either by lot or by the procedures in place in each state became a part of Section 29. See 4 *DHSC* 91-94.

<sup>17</sup>Kathryn Turner [Preyer], “The Judiciary Act of 1801” (PhD dissertation, University of Wisconsin, 1959), 105 n.233. According to “Editorial Note,” in Julian P. Boyd *et al.*, eds., *The Papers of Thomas Jefferson* (Princeton, N.J.: Princeton University Press, 1951—) (hereafter *Jefferson Papers*), 30:575, jurors were essentially elected in Massachusetts and Connecticut.

106 of "An Act Establishing District Courts, and for Regulating the General Court," as amended by the 1792 "Act Concerning Grand Juries, Petit Juries, and Veniremen." These laws required the sheriff of the county in which a trial court was to sit to summon twenty-four freeholders (male owners of real property) to serve as a grand jury. A quorum of sixteen was required for the grand jury to act. If fewer than sixteen appeared, the sheriff could take a requisite number of qualified "bystanders" who happened to be present on the day when the session of court convened<sup>18</sup> (courts were important social occasions, with widespread public attendance). No other requirement or limitation was placed on the discretion of the sheriff (or, thus, on the federal marshal), thereby allowing great leeway in judgment and for possible political motivations to operate.

#### The Composition of Virginia's Federal Grand Juries, 1789-1809

The federal circuit court (then a trial court) met twice a year in Virginia, usually in May and November, except in the autumn of 1796, when Justice James Wilson was unable to reach Virginia, and each time the court met the marshal summoned and the court seated a grand jury, except in the spring of 1801 when there was a vacancy in the office of marshal. During the first twenty years, from May 1790 through November 1809, more than 400 men served on the thirty-seven grand juries that the federal Circuit Court empanelled in Virginia. Because of imprecise identifications in the grand jury lists and the common habit in prominent Virginia families of having more than one person with the same name, the exact number is impossible to ascertain; it

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<sup>18</sup>*Acts Passed at a General Assembly of the Commonwealth of Virginia, ..., in the Year of Our Lord, One Thousand Seven Hundred and Eighty Eight* (Richmond, Va.: Dixon, Davis and Nicholson, [1789]), 37; *Certain Acts of the General Assembly of the Commonwealth of Virginia, Passed ... in the Year of Our Lord, One Thousand Seven Hundred and Ninety-Two, The Operation Whereof Was Suspended ...* (Richmond, Va: Augustine Davis, 1794), 11.

may have been as low as 407 or as high as 436.<sup>19</sup> At least three-quarters of the grand jurors served only once, but fifty-four men served on two grand juries, twenty-four others on three, and ten more on four. Six men served on five grand juries, and four men served six times. Three men served on eight of the grand juries.

Full biographical details are not available for all of the grand jurors, but it is evident that the grand jury members were on the whole more respectable than representative. Every grand jury included several men who were or recently had been members of Virginia's General Assembly or of Congress, and more than a few served prominently in one or the other legislative body or as governor after they were on the grand jury. William Branch Giles, for example, served as foreman of the grand jury in three successive years, in 1803, 1804, and 1805, and was summoned for service in the Burr case in 1807. Giles had been a member of the House of Representatives from 1790 to 1798 and again from 1801 to 1803 (interrupting that service to represent Amelia County in the House of Delegates from 1798 to 1800), and was a member of the United States Senate from 1804 to 1815. He was later governor of Virginia from 1827 to 1830.<sup>20</sup> Burwell Bassett was another nationally prominent political leader who served on the grand jury three times (November 1791, May 1793, and April 1802). He had been a member of the General Assembly off and on since 1785, and served in the House of Representatives for

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<sup>19</sup>The names of the members of the grand juries are recorded in the United States Circuit Court for the District of Virginia Order Books 1-8, deposited in the Library of Virginia.

<sup>20</sup>John A. Garraty and Mark C. Carnes, gen. eds., *American National Biography* (New York: Oxford University Press, 1999) [hereafter *ANB*], 9:28-29.

eight terms in four separate stretches during the period 1805-1829.<sup>21</sup> John Page was yet another. His grand jury service, in November 1799, came near the end of a remarkable public career that had begun as a member of the royal governor's Council from 1773 to 1775. He was a member of the Council of State and often acting governor in 1776 and 1777 when Patrick Henry was ill or absent from the capital, a member of the House of Delegates off and on from 1781 to 1801, a member of the House of Representatives (often presiding over its sessions in Committee of the Whole) during the first four Congresses, and finally governor of Virginia from 1802 to 1805.<sup>22</sup>

The names of prominent families, and of men who were themselves prominent, were present on Virginia federal grand juries from the beginning. The first such grand jury, which was summoned for the court's first meeting in Charlottesville in May 1790, consisted of nineteen men. Its foreman was Nicholas Lewis, a wealthy planter of Albemarle County who had served in the House of Delegates.<sup>23</sup> Both Nicholas and Lewis were surnames of weight in Virginia, and the fact that Nicholas was Lewis's given name was but one of the evidences of his well-connected family tree. Two Nicholases actually served on the grand jury with him. Wilson Cary Nicholas bore three famous Virginia family names and soon overshadowed his relative, the foreman. He represented Albemarle in the General Assembly from 1784 to 1800, and was a member of the United States Senate from 1799 to 1804, a member of the House of Representatives from 1807 to

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<sup>21</sup>John T. Kneebone *et al.*, eds., *Dictionary of Virginia Biography* (Richmond, Va.: Library of Virginia, 1998—) (hereafter *DVB*), 1:384-85.

<sup>22</sup>*ANB*, 16:902-03.

<sup>23</sup>Places of residence and public service of grand jurors mentioned in this paragraph and later, unless otherwise noted, derive from Cynthia Miller Leonard, *The General Assembly of Virginia: A Bicentennial Register of Members* (Richmond, Va.: Virginia State Library, 1977), and the editors' research files for the *Dictionary of Virginia Biography*, Library of Virginia.

1809, and governor of Virginia 1814-1816.<sup>24</sup>

Other notable men served on that grand jury too. John Coles was another wealthy Albemarle County planter of a family which furnished Jefferson and James Madison with private secretaries and Illinois with its first governor. John Nicholas, Jr., was one of two or three men of that name who resided in the vicinity of Albemarle County, one of whom was no friend of Jefferson. Dr. George Gilmer was a neighbor and friend of Jefferson and a member of the General Assembly during the Revolution. William Clarke was related to former Continental Army General Jonathan Clark and also of the conqueror of the Northwest, George Rogers Clark; but it is unclear whether he was a near relative to the William Clark who accompanied Meriwether Lewis (another kinsman of the foreman) on the epic journey of western exploration, or was that future explorer himself. Isaac Davis was a member of the House of Delegates from Orange County. Roger Thompson was a member of the Assembly from Fluvanna County off and on from 1784 to 1791, as was his neighbor, Samuel Richardson, from 1784 to 1789. And Thomas Lewis was probably the member of the numerous and well-connected Lewis family who moved to western Virginia, represented Kanawha County in the House of Delegates from 1795 to 1800, and was a Federalist member of the House of Representatives in 1803-04.

Each successive grand jury included men of similar consequence. Among the members of the second grand jury, which met in Williamsburg in November 1790, were the foreman, Champion Travis, a wealthy inhabitant of Jamestown Island and a member of the General Assembly off and on from 1769 till 1806; Robert Greenhow, one of the last of the important Williamsburg merchants; Corbin Griffin, kinsman of federal District Judge Cyrus Griffin, a

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<sup>24</sup>*ANB*, 16:378-80.

member of the House of Delegates from Williamsburg from 1786 to 1788, and a member of the House of Representatives from 1789 through 1795; William Harwood, whose wealthy family owned large tracts of land along the James River in Warwick County and in Williamsburg; and Dr. William Pasteur, former Mayor of Williamsburg and one of its most venerable residents.

At the third meeting of the court in Richmond in May 1791, where it always thereafter convened, the foreman was Richard Adams, one of the wealthiest landowners and merchants in Virginia who had served in the General Assembly with only one brief interruption from 1752 to 1782.<sup>25</sup> Other families of similar distinction represented on that grand jury were Ambler, Lewis, Lyell, Massey, Mayo, Patteson, Randolph, Truehart, and Wickham; and there was Charles Yates who, while not quite a rival to Adams in terms of simple property owning, did not have to yield the palm to many Virginians in terms of his reputation for profitably managing large-scale commercial and manufacturing enterprises. Richard Adams also presided over the grand jury at the court's fourth meeting, in November 1791, and was succeeded at the next court by Beverley Randolph, who had just completed his third consecutive one-year term as governor. Three other Randolphs, two Walkers, the same Ambler, and members of the Burwell, Eppes, Harrison, Nelson, and Page families were also members. Charles Carter, possibly the proprietor of stately Shirley Plantation, was foreman of the November 1792 grand jury,<sup>26</sup> and his future son-in-law, general and former governor Henry "Light Horse Harry" Lee, presided over the grand juries of May 1795 and May 1796.<sup>27</sup>

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<sup>25</sup>*DVB* 1:32-33.

<sup>26</sup>*DVB* 3:57-59.

<sup>27</sup>*ANB* 13:372-74.

Inasmuch as nearly every grand jury consisted of a majority of ordinary respectable gentlemen who had little or no previous experience of federal grand jury service, it might be surmised that the persuasive powers of more experienced and (usually) more prominent gentlemen would have had magnified impact. Many of these men, however, had experience in the General Assembly, and most had sat on the county courts, where they gained familiarity with court procedures, and were respected men in their communities. They may have had as strong opinions and as much self-confidence as the more distinguished or better known members of the grand juries. There is almost no anecdotal evidence of how the members of a grand jury conducted their business.

It is clear that whatever their party affiliations, the marshals saw their duty as bringing prominent and powerful men to represent the community of Virginia in the new federal courts, but it is entirely possible that they compiled their lists, or at least selected several members, based on knowledge of what cases might come before the grand jury or what political issues the public might desire the grand jurors to address. That may have been the case in the spring of 1794.

The grand jury that met in Richmond on May 23, 1794, was the first to hand down a criminal indictment, of Joseph Mundall “for resisting an Officer of the United States in the Execution of Process,” and was also the first to take cognizance of a matter of national politics. “Conceiving it our essential duty to take notice of every Obstacle to the happiness, liberty and prosperity of the good People of the United States,” the grand jury began, it recited a list of grievances against Great Britain relating to nonperformance of some of its obligations under the peace treaty of 1783. Then: “We therefore present as a national Grievanc[e] the recovery of such Debts by British subjects until that Government shall fully comply with the treaty of peace on



their part & also make reparation for the spoliations they have committed on American Vessels.”<sup>28</sup>

The presentment repeated the common justification that many Virginians gave for their failure to open their state courts to suits by British creditors as required by the treaty’s Article IV, namely that Britain had failed to undertake duties specified in other parts of the treaty, especially including failure to return slaves who had escaped to the British during the Revolution, or to provide adequate compensation for their loss.<sup>29</sup>

The members of that grand jury included several men from Norfolk and its vicinity, the area most vulnerable to British naval obstructions of commerce and a region from which the British had taken a significant number of slaves for which no compensation had been paid to the former owners. Norfolk was more than a hundred miles from Richmond, therefore not a place where Norfolk residents might happen to be by accident on the very day that the federal court met. The foreman of the jury was Edward Hack Moseley, member of a prominent lower Tidewater family with long-standing family and commercial ties to the great shipping families of Norfolk. Moseley served on only one other grand jury, the one that issued a presentment against Samuel Jordan Cabell in May 1797.

Two other members of the 1794 grand jury were William Aitcheson and Patrick Parker, young sons of the principals in the firm of Aitcheson and Parker, which had been chief provisioning agents for the British Navy at Norfolk before the Revolution and whose successful merchant fathers had both become prominent loyalists. The younger Parker had recently returned

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<sup>28</sup>*DHSC 2:472.*

<sup>29</sup>Wythe Holt, “George Wythe: Early Modern Judge,” *Alabama L. Rev.* (2007), 58:1009, 1017-24.

to Norfolk to try to reestablish the business after a decade abroad with his father. A fourth member was Roger Atkinson, Jr., son of a leading Petersburg merchant who had sided with Virginia during the Revolution. Parker served only on that grand jury, and Atkinson served only one other time, in May 1792. Other members of the May 1794 grand jury were representatives of the great Virginia families of Carr, Fitzhugh, Harrison, Lewis, Moore, Nelson, Page, Randolph – there were two Randolphs – and Woodson. That Moseley, Aitcheson, Atkinson, and Parker were all summoned for grand jury service that month suggests the possibility of preconcerted action. For each of the three most controversial grand juries, there are explicit charges or similarly significant circumstantial evidence of political packing of the grand jury.

#### The 1797 Presentment of Cabell

During Washington's second term, from March 1793 to March 1797, the factions dominating Congress and national political activity had coalesced into two rival, bitterly antagonistic political parties, and Thomas Jefferson had taken the leadership of one of them. On May 22, 1797, a seventeen-member grand jury met in Richmond and, immediately upon being sworn in, listened to a long charge given by the presiding judge, Supreme Court Justice James Iredell.

Supreme Court judges had been assigned to populate the benches of federal circuit courts held biennially in each state under provisions of the Judiciary Act of 1789, presumably to save money but also to allow nationally important characters to render authoritative answers to the difficult questions Congress expected to come before those courts. At first, two justices sat at each circuit court along with the district judge of the federal district court located in the state. There were three circuits and six justices, so each of the justices both sat twice a year as a

Supreme Court in Washington and rode circuit twice a year either in the northeast, the central states, or the south. Circuit-riding, especially in the south, was difficult, time-consuming, and perilous for the justices, and they immediately and ceaselessly set about attempting to get Congress to halt the practice. All they received during the first decade, however, was the 1792 reduction of the required number of justices per circuit court to one, thereby lowering the usual number of circuits ridden per year to one.<sup>30</sup>

Iredell's grand jury charges, commencing with the Whiskey Rebellion of 1794 and his consequent fear of domestic unrest and the possible dissolution of the nation, had become more strident, hortatory, and anxious.<sup>31</sup> Such charges were supposed to aid the grand jury by defining

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<sup>30</sup>See Wythe Holt, "The federal courts have Enemies in all who fear their Influence on State Objects': The Failure to Abolish Supreme Court Circuit Riding in the Judiciary Acts of 1792 and 1793," *Buffalo L. Rev.* (1987), 36:301-40.

<sup>31</sup>Compare Iredell's extant grand jury charges before the fall of 1794, *DHSC* 2:216-24 (charge to Circuit Court of Georgia, Oct. 17, 1791); *DHSC* 2:263-71 (charge to Circuit Courts of Georgia, South Carolina, and North Carolina, Apr. 26, May 14, June 1, 1792); *DHSC* 2:308-15 (charge to Circuit Court of Massachusetts, Oct. 12, 1792); *DHSC* 2:348-57 (charge to Circuit Courts of New Jersey, Pennsylvania, and Maryland, Apr. 2, Apr. 11, May 7, 1793); *DHSC* 2:454-70 (charge to Circuit Courts of South Carolina and North Carolina, May 12, June 2, 1794), with those made in the springs of 1795 and 1796, *DHSC* 3:14-23 (charge to Circuit Court of New York, Apr. 6, 1795), *DHSC* 3:28-30 (charge to Circuit Courts of Connecticut and Vermont, Apr. 25, May 12, 1795); *DHSC* 3:106-13 (charge to Circuit Court of Pennsylvania, Apr. 12, 1796), *DHSC* 3:124-28 (charge to Circuit Court of Virginia, May 25, 1796). See also the heated and anxious responses to Iredell's charges given by grand juries in the spring of 1796, *DHSC* 3:102-104 (reply of grand jury of New Jersey, Apr. 2, 1796, to a charge of Iredell now lost), *DHSC* 3:113-14 (reply of grand jury of Pennsylvania, Apr. 12, 1796), *DHSC* 3:129-30 (reply of "majority" of grand jury of Virginia, May 26, 1796). Kathryn Preyer finds "more specifically political ... exhortations, ... [a] markedly quickened tempo of concern" in [all] the justices' charges only *after* 1798." Preyer, "*Callender*," 178 (emphasis in original). However, we think the dividing-line, when the justices' charges "became ... more emphatic in their warnings of dangers to the new republic from abroad and from enemies within," *id.*, was the Whiskey Rebellion of 1794. See also, for example, the fiery grand jury charge given in Georgia in April 1795 by the usually mild and imperturbable John Blair, *DHSC* 3:31-37.

crimes, especially statutory ones whose particular requirements might be difficult for members of the general public to understand. But from the inception of the new, more centralized government, the circuit-riding justices had taken it upon themselves to use grand jury charges to encourage allegiance to the new Constitution and the new federal courts,<sup>32</sup> in awareness that the new regime had not been the choice of a very large number of its citizens.<sup>33</sup>

In Pennsylvania in 1796, Iredell called attention to the victory over the western-Pennsylvania-based Whiskey Rebels and to suspicions that seamen in Philadelphia might aid the cause of the French in their war at sea with the British, in violation of the United States's policy of neutrality.<sup>34</sup> He did not give the same grand jury charge in Virginia, as perhaps these topics seemed suitable mostly for Pennsylvanians. In 1797 Iredell also prepared separate charges to be delivered to the grand juries of Pennsylvania and Virginia,<sup>35</sup> but different motives seemed to be in play. Both of Iredell's charges of that year dealt in general with the benefits of having a government derived from the people, and the dangers of upsetting delicate relations with foreign

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<sup>32</sup>Ralph Lerner, "The Supreme Court as Republican Schoolmaster," *Supreme Court Rev.*, 1967:127-80.

<sup>33</sup>See Holton, *Unruly Americans*, 249 (evenly divided popular sentiment on the Constitution); Holt, "To Establish Justice," 1475-77 (close votes in many state ratification conventions; ratification "only by the slimmest of margins").

<sup>34</sup>For previous instances, see *United States v. Guinet*, 2 U.S. 321 (C.C.D. Pa. 1795) (indictment under the Neutrality Act of 1794 for fitting out and arming a privateer in Philadelphia to be used by the French); *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360) (indictment under the common law for enlisting on a French privateer in Philadelphia).

<sup>35</sup>Both of these large, politically important states were included in the federal Middle Circuit, along with New Jersey, Maryland, and Delaware. Iredell had ridden this circuit only once before 1796, in 1793, when he had given the same charge to the grand juries of Pennsylvania, Maryland, and New Jersey; Chief Justice Jay had joined him for the 1793 Virginia circuit court session and had delivered the charge to that grand jury.

governments. The Pennsylvania charge went on to underscore the recent (March 1797) re-enactment of the Neutrality Act.

Nothing seemed to prevent the Neutrality Act from also being a suitable topic for Virginians, but instead Iredell devoted most of his charge to the Virginia grand jury to inveighing against the danger of poorly chosen legislators who, as he stated it, were unmindful of “the delusive and dangerous passions by which many are guided” and which might produce “a struggle which may endanger the government at the moment when its utmost energies are necessary.” Iredell condemned dissident opinions of legislators, “which unavoidably give a full scope to the passions of weak, arrogant, or unprincipled men.” Such opinions, Iredell warned, could “produce great agitation, but must operate with increased and dangerous vigour in one, like ours, composed of many powerful states, to a great degree independent of each other, having either real or imaginary differences of local interests, and with little other effectual cement to bind them together, but a sense of foreign external danger.”

Without specificity, Iredell plunged into purple language with regard to what seemed to be a specific incident.

If after all, any individual disapproved of the voice of his country, what does duty and common modesty require of him? ... Is he rashly to determine that the measure has been adopted from some dishonest motive? ... If he ... will indulge in atrocious calumny, he must stand in the view of his fellow-citizens as a slanderer .... The part surely for every man who loves his country, but who disapproves of any public authoritative decision, is to submit to it with diffidence and respect, considering the many chances there are that his own opinion may be really wrong, ... and that the very basis of all republican governments

... is, the submission of a minority to a majority.

Iredell then seemed to invite a presentment: “every individual shall perform his share of the common trust, or answer for his neglect of it. Many instances of neglect or indifference towards it, which may have great effects on the happiness of his country, are of a nature not punishable by human laws, and the punishment of them, therefore, must be left to the consciousness of the individual, and the reproach which a violation of the rules of morality, though unaccompanied by any human sanction, seldom fails to draw upon it.” Other acts, Iredell concluded, were so serious that society provided by law for their punishment.<sup>36</sup>

Iredell did not mention the name of Samuel Jordan Cabell, Jeffersonian Congressman from Virginia,<sup>37</sup> who had written a public letter to his constituents – dated Jan. 12, 1797, from Philadelphia, and published in Richmond’s *Virginia Argus* on Mar. 28, 1797 – complaining that President George Washington had not furnished Congress with documents concerning the relations between the United States and France. He feared that a breach between the United States and the world’s only other “free *republic*” might bring on an expensive, unnecessary, and disastrous war. He charged that the Washington administration had exhibited an impolitic “partiality” toward Great Britain since before the negotiation of the Jay Treaty in 1794. In strong language that lost only some of its punch for its convoluted sentence structure, Cabell fairly thundered at the Federalist opposition:

As it must be obvious to the meanest capacity that in proportion as we act offensively and injuriously to France, so in proportion do we contribute aid to the combined despots,

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<sup>36</sup>Iredell, Grand Jury Charge to Virginia Circuit Court, *DHSC* 3:174-76.

<sup>37</sup>*DVB* 2:494-95.

and thereby endanger the triumph of liberty over that of tyranny, and also are undermining the existence of our own government and sapping the foundation of that illumined pyramid of liberty, for the establishment of which the American patriotic vein has bled so profusely, and are thereby hastening with a precipitancy and frantic rage only to be equalled by its depravity and madness, the attainment of the *darling wish* of the aristocracy in this country, the establishment of monarchy, and consequently are furiously hurling ourselves into the vortex of tyranny.<sup>38</sup>

A Federalist-leaning grand jury could easily see Cabell as precisely that loose-cannon legislator Iredell had pointed to, that very man whose “atrocious calumny” of the great Washington Iredell had spent so many minutes anonymously condemning.

At least some of the members of the grand jury had evidently come prepared to act in the spirit that the judge recommended. They ordered that Iredell’s charge be printed, and soon after his charge was complete returned to the courtroom unanimously to “present as a real evil the circular Letters of several members of the late [*i.e.*, recent] Congress, and particularly Letters with the Signature of Samuel J. Cabell, endeavoring at a time of real public danger, to disseminate unfounded calumnies against the happy Government of the United States, and thereby to separate the people therefrom, and to encrease or produce a foreign influence ruinous to the peace, happiness and independence of these United States.”<sup>39</sup> The presentment was also printed two days

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<sup>38</sup>Noble E. Cunningham, Jr., ed., *Circular Letters of Congressmen to Their Constituents, 1789-1829* (Chapel Hill, N.C.: University of North Carolina Press, 1975), 1:67-114 (emphasis in original).

<sup>39</sup>Presentment of the Grand Jury of the Circuit Court for the District of Virginia, May 22, 1797, *DHSC* 3:181.

later on May 24, in the next issue of Richmond's principal newspaper, *The Virginia Gazette, and General Advertiser*.

A furor erupted. Cabell immediately charged that Iredell had made "a political charge from the bench," consistent with the "regular practice of the federal judges, to make political discourses to the grand jurors throughout the United States." The justices, he insisted, had "become a band of political preachers" who "complain of opinions which they seem to think tend to defeat their system of politics, ... making use of their power and influence both personally and officially to control the freedom of individual opinion." Cabell predicted that under the sway of such judges "men of different political and religious sentiments from the judges, will not find that easy access to justice which those of different opinions may expect." He also detected a major breach of the principle of separation of powers, that "these kind of charges ... shew a political influence over the judges by the executive."<sup>40</sup>

Other men were even more direct than Cabell. Jefferson stated that Iredell and other federal judges "have for a considerable time been inviting the Grand juries to become inquisitors on the freedom of speech, or writing and of principles of their fellow citizens." A public letter to Iredell signed "Scaevola" and published in the Richmond *Daily Advertiser* on June 11 stated that the judge had delivered an "inflammatory" charge and "endeavoured to incite the jury to make a presentment responsive to the address," making them accessories in "proscribing political opinions to which you are hostile."<sup>41</sup>

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<sup>40</sup>Letter of Samuel Jordan Cabell, May 31, in Philadelphia *Aurora, and General Advertiser*, June 6, 1797, *DHSC* 3:183-85.

<sup>41</sup>Thomas Jefferson to Peregrine Fitzhugh, June 4, 1797, *Jefferson Papers* 29:417 and *DHSC* 3:190; "Scaevola" to James Iredell, June 4, 1797, in Richmond *Daily Advertiser*, June 11,



Jefferson, “Scaevola,” and other Republican writers were beginning to enunciate a novel, modern approach to the separation of powers: judges were not supposed to be connected with the executive, nor were they to have political opinions or be a part of the political process.

“Scaevola” put it succinctly:

A judge should confine himself in his charge, to offences against the existing laws of the country. He should neither descant on the general politics of, nor indulge in the political vagaries which his own heated imagination may suggest. He should neither approve the tenets of one party, nor inveigh against the principles of another. He should neither commend the wisdom of an administration, nor mark the virulence of its opponents.

Above all, he should be very vigilant, lest he impresses on the public mind that he fosters in his own bosom all the acrimony of a partizan.<sup>42</sup>

Such a view of the position of the judiciary was not generally held at the time. Members of the federal judiciary regularly worked with members of the other two branches of the national government and delivered some opinions in litigated cases that were evidently designed to uphold political positions of the executive.

For example, President Washington thought of Chief Justice John Jay as one of his principal political advisers, and in 1793 appointed him special envoy to England to negotiate a treaty with Great Britain. President Adams later appointed Chief Justice Oliver Ellsworth a similar special envoy to France, and during the short interval between his appointment of John Marshall to the Supreme Court and the conclusion of his single term as president, Adams counted

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1797, *DHSC* 3:192-94.

<sup>42</sup>*Id.* at 192.

on Marshall as his principal political adviser. The justices rendered advisory opinions to members of the legislative and executive branches, and consulted with members of both branches on political matters. The Federalist Supreme Court justices thought nothing of acting as an adjunct of the executive, and of Federalist Party political positions, in their charges to grand juries.<sup>43</sup> In *Glass v. The Sloop Betsy*,<sup>44</sup> the Supreme Court unanimously reversed a lower federal court, deciding contrary to a well-accepted principle of international law (adhered to by six of the seven federal district courts which had entertained the issue) that American courts had jurisdiction over the question of the legality of maritime prizes adjudicated on U.S. soil by French consuls sitting as French prize courts. William Casto, the leading historian of the Supreme Court in the 1790s, concludes that the decision was designed to uphold the political position of the United States government “in an important case that directly implicated the nation’s ability to avoid being drawn into the European war.”<sup>45</sup> In *Hylton v. United States*,<sup>46</sup> the Court “winked at” many difficult legal issues and “gave the government the functional equivalent of an advisory opinion” in a headlong rush to uphold the government’s power to levy direct taxes without regard to

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<sup>43</sup>Wythe Holt, “Separation of Powers? Relations between the Judiciary and the Other Branches of the Federal Government before 1803,” in Kenneth R. Bowling and Donald R. Kennon, eds., *Neither Separate nor Equal: Congress in the 1790s* (Athens, Ohio: Ohio University Press, 2000), 183-210.

<sup>44</sup>3 U.S. (3 Dall.) 6 (1794).

<sup>45</sup>William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia, S.C.: University of South Carolina Press, 1995), 82-84 & n.31, 86 (quote). “The major recurring theme of the decade was the Justices’ ongoing efforts to assist the Washington and Adams administrations in evolving a stable relationship with the European powers – especially France and Great Britain.” *Id.* at 71.

<sup>46</sup>3 U.S. (3 Dall.) 171 (1796).

population.”<sup>47</sup>

It is not surprising that members of a political opposition, disliking the policies of the Federalists, would take a different view of the nature of federal judicial power. The Cabell episode gave them the opportunity to advance the view that judges should be apolitical and not act with or under the executive branch. “Timothy Tickle” voiced the usual contemporary and more realistic view, in a public letter to Cabell:

In the name of common sense, what is the judiciary, who are the judges in this country? Are they not a branch of the American government, bound to support that government, as well as every other branch of it, both by the nature of their relationship with the government and their oath? What is the government they are thus bound to support, what the laws of that government, which your adopted address seems to admit is their duty to expound to do justice between individuals, if they are not a part of the political arrangements of this country? How then are the judges possibly to avoid political discussions, and giving their political opinions between the government and individuals, and yet do their duty?<sup>48</sup>

Judges, like all other members of a government, will act politically, according to their own views, which are often like those of the administration that appointed them, and the writing of each judicial opinion is a part of that political activity.

Iredell took the unusual step of defending his actions in a letter to the press. He

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<sup>47</sup>Holt, “Separation of Powers?,” 190, quoting Casto, *Supreme Court*, 103.

<sup>48</sup>“Timothy Tickle” to Samuel Jordan Cabell, July 5, 1797, in Richmond *Virginia Gazette, and General Advertiser*, July 5, 1797, *DHSC* 3:215.

disclaimed prior knowledge of Cabell's letter, denied any collusion between judge and grand jury, and noted that he had "deliberately" written the charge in Philadelphia and had previously given it to the Maryland federal grand jury. He stated that the charge had been substantially the same in both states, and "without a view to any particular person." He admitted that he had seen "printed letters of one or two other members of Congress from the same state" before he wrote the charge, "but had them not in my thoughts when I prepared that charge."<sup>49</sup> Iredell seems to protest too much, and seems disingenuous in his own defense. His having given the same charge in Maryland could have been calculated, and certainly means nothing.

One of the members of the grand jury, Calohill Minnis, also wrote a letter to the press, stating that he had decided to procure a condemnation of Cabell's circular letter before he went into court, and that the members of the grand jury adopted his thoughts, and the presentment, unanimously. He asserted vigorously that Iredell's charge to the jury had not prompted the jury to action.<sup>50</sup> And "Timothy Tickle" noted that not even Cabell had dared to assert "that the jury was packed."<sup>51</sup>

Nevertheless, the composition of the grand jury suggests at least some connivance aimed at procuring a body of men whose political beliefs were congenial to those of Minnis and Iredell. The foreman was none other than recently retired Supreme Court Justice John Blair, whose health had failed causing him to resign in 1796, and who, after leaving the bench, seldom left his home

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<sup>49</sup>Letter of James Iredell, June 21, 1797, in *Richmond Virginia Gazette, and General Advertiser*, July 5, 1797, *DHSC* 3:201-03.

<sup>50</sup>Calohill Mennis to Samuel Jordan Cabell, June 15, 1797, in *Richmond Virginia Gazette, and General Advertiser*, July 5, 1797, *DHSC* 3:197-98.

<sup>51</sup>"Timothy Tickle," *DHSC* 3:215.

in Williamsburg, much less took part in public life. Blair was a firm Federalist throughout the 1790s, the exertion involved in his traveling to and from Richmond would have been extreme, and he never served on any other grand jury.<sup>52</sup> Ten other men served on this and no other grand jury. We know nothing about the political opinions of most of them, but one, Thomas Griffin Peachy, was a relative of the Federalist District Court Judge Cyrus Griffin, and another, Thomas Newton, actively supported Thomas Jefferson in the General Assembly session of 1798-99. Jeffersonian Henry Tazewell, of Virginia, wrote that he was surprised at the activity of Blair on the grand jury, but “Some others of the Jury I am not astonished at.”<sup>53</sup> Other members of the grand jury included Robert Pollard, who was a well-known Federalist in the 1790s and went on to serve on the grand jury seven more times; Corbin Griffin, who was another relative of Judge Griffin; and Edward Hack Moseley, who had been foreman in May 1794, was (as noted) from a commercially oriented family that might be expected to have Federalist leanings. The grand jury also included Joseph Selden, who sat again in April 1802 and May 1804 and was to have a ten-year career as a Republican in the House of Delegates. It cannot be determined whether Newton and Selden had not by then taken the Jeffersonian political side, were persuaded by the other members or by Iredell’s charge or by Blair’s eminence, or were genuinely displeased by Cabell’s circular letter which in effect identified President Washington as a monarchist. Despite them, the

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<sup>52</sup>Wythe Holt, “John Blair: ‘A Safe and Conscientious Judge’,” in Scott Douglas Gerber, ed., *Seriatim: The Supreme Court Before John Marshall* (New York: New York University Press, 1998), 155-97. Several Virginians were surprised and saddened by Blair’s action concerning Cabell. See Henry Tazewell to [John Page?], June 3, 1797; Peregrine Fitzhugh to Thomas Jefferson, June 20, 1797; “A Virginian,” in Philadelphia *Aurora, and General Advertiser*, June 21, 1797, all in *DHSC*, 3:189, 201, 190 n.1. Others castigated illicit conduct “by a judge on the bench, and a judge in the jury room.” “Scaevola,” *DHSC* 3:193.

<sup>53</sup>Tazewell to [Page?], *DHSC* 3:189.

grand jury had a decidedly Federalist hue.

James Thomson Callender, at that time a strenuous supporter of Jefferson, later wrote of the grand jury,

four fifths of the whole band consisted of pardoned tories, and of republicans imported from Scotland. These are the common materials of a federal Virginia jury. Nothing else can be expected. The president appoints the marshal, the latter appoints the jury; and if they stumble upon a democratical verdict, the marshal must quit his office.<sup>54</sup>

Callender was wrong about immigrants being impressed to serve (all of the jurors were established residents of Virginia), but he was not alone in his belief that the grand jury was politically stacked.

Jefferson was irate at the conduct of the grand jury, accepting without question that its action was a preconcerted attack on one of his political allies, his own representative in Congress. First he attacked the judges for acting politically, and then he drafted a long petition to the General Assembly, consulting with James Madison and James Monroe, and afterwards (having made major meliorating alterations) circulating it through Cabell's congressional district. Employing the same line of argument that he and Madison embodied the following year in the Virginia and Kentucky Resolutions of 1798, Jefferson asserted that the states, as protectors of the rights of their citizens, had both the responsibility and the right to step in and put a stop to unconstitutional and improper actions of the federal government and its officers. Viewing the courts' marshals as tools of the executive, because appointed by the president, and the judges as unelected political tyrants,

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<sup>54</sup>James Thomson Callender, *The Prospect Before Us* (Richmond, Va.: S. Pleasants, 1800-1801), 1:20.

Jefferson argued that the Virginia legislature could and should protect the citizens of Virginia from a combination of national executive and judicial power. The House of Delegates passed resolutions on December 27, 1797, condemning the action of the grand jury and accusing the marshal and the judges of encroaching on the rights of the national legislative branch and on the rights of Virginia's citizens. Instead, however, of demanding changes in the manner of appointment of federal grand juries, the assembly members requested that Congress pass a law restricting federal grand juries to the presentment of actual federal crimes.<sup>55</sup>

No such bill passed in Congress, and in 1798, with the Alien and Sedition Acts, Jefferson became even more alarmed. He petitioned the General Assembly to change state law to require that Virginia's grand jurors be chosen by popular election, removing the power of a presidential appointee to select federal grand jurors in Virginia. The proposal did not receive serious attention, perhaps because of its extreme democracy, perhaps because the General Assembly that session was engrossed in the contentious and important debates revolving around the Virginia Resolutions and the Virginia Report.<sup>56</sup>

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<sup>55</sup>Thomas Jefferson to Peregrine Fitzhugh, June 4, 1797, to James Madison, Aug. 3, 1797, *Jefferson Papers*, 29:417, 490-91; James Madison to Thomas Jefferson, Aug. 5, 1797, *Jefferson Papers*, 29:505-06; Thomas Jefferson to James Monroe, Sept. 7, 1797, "Editorial Note," "Petitions," *Jefferson Papers*, 29:491-93, 493-504; Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," *William and Mary Quarterly*, 3d ser., 5 (1948):152-54; *Journal of the House of Delegates of the Commonwealth of Virginia ... 1797* (Richmond, Va.: Augustine Davis, 1797 [i.e., 1798]), 40-41, 61-64.

<sup>56</sup>Thomas Jefferson to James Madison, Oct. 26, 1798, *Jefferson Papers*, 30:567-68; General Assembly, Legislative Petitions, Albemarle County, Dec. 24, 1798, Record Group 79, Library of Virginia; *Journal of the House of Delegates of the Commonwealth of Virginia ... 1798* (Richmond, Va.: Meriwether Jones and John Dixon, 1798 [i.e., 1799]), 37, 51, 56, 72, 104; *Jefferson Papers*, 30:571-75; John Taylor to Thomas Jefferson, Feb. 15, 1799, *Jefferson Papers*, 31:41-42.

## The 1800 Indictment of Callender

A second episode of apparent tampering with grand jury selection occurred in May of 1800, when the Virginia federal grand jury indicted Callender under the Sedition Act of 1798. Supreme Court Justice Samuel Chase had taken it upon himself to help reelect President John Adams against the challenge of Jefferson. Chase waged a one-man crusade under the Sedition Act against those men (all Jeffersonians, not surprisingly) who dared to criticize Adams's record and policies. In the spring of 1800 Chase appeared at the circuit courts of the five states in the Middle Circuit – New Jersey, Pennsylvania, Maryland, Virginia, and Delaware – loaded for bear. As his biographers put it, “he roamed the Middle Circuit stamping out sedition wherever he could.” Chase had said that he believed a free press was “the Support of Liberty,” but in typical rhetoric of the time, which may be confusing to moderns, he also found “a licentious press ... the bane of freedom, and the Peril of Society.”<sup>57</sup> In 1800, Chase understood all criticism of John Adams to be licentious.

Nothing happened in New Jersey early in April, but the circuit court session in Philadelphia, which lasted from April 11 through May 2, was a different matter. In a fiery charge to the grand jury, which Chase probably gave at all the other courts on his circuit,<sup>58</sup> he made it clear that neither lawyers' claims that the Sedition Act was unconstitutional nor any democratic-leaning jury inclined to acquit would stand in his way. He would run the show. He instructed the grand jury (and the audience of lawyers and citizens) that only federal judges, not juries, could

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<sup>57</sup>James Haw *et al.*, *Stormy Patriot: The Life of Samuel Chase* (Baltimore, Md.: Maryland Historical Society, 1980), 197; Samuel Chase to James McHenry, Dec. 4, 1796, *DHSC* 3:403.

<sup>58</sup>Preyer, “*Callender*,” 192 n.38.



decide whether a federal statute was unconstitutional, and that, in a criminal case, a jury's refusal to follow the judge's directions as to the law would be grounds for a new trial, despite a fairly clear understanding at the time that juries in criminal cases were appropriate judges of the law.<sup>59</sup> Chase railed against political minorities who refused to subordinate themselves to the government or to accept laws passed by a majority, even unconstitutional laws, because only the judiciary had the right to make such determinations. "Patriotism, like religion," he ranted, "is often the cloak for the most wicked actions. ... The false patriot is the man, who professes himself a friend to Liberty, and yet wilfully misrepresents his Government, and the conduct of its Officers; or, without Just cause, creates distrust and suspicion of the Legislature, or of the Executive, or of the principal Officers of Government; and openly opposes or secretly foments and encourages opposition to the execution of the Laws."<sup>60</sup>

Chase proceeded to try Jeffersonian Thomas Cooper under the Sedition Act for writing and distributing a handbill severely critical of Adams. Thanks to partisan and unfair rulings and a prejudiced charge to the petit jury by Chase, Cooper was convicted. Then Chase supervised the treason trial of John Fries in such a one-sided manner that Fries's volunteer lawyers withdrew from the case. Fries was convicted and sentenced to die.<sup>61</sup> A Jeffersonian bystander wrote that he had "witnessed the most arbitrary, high handed, and tyrannical proceedings and decisions that I

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<sup>59</sup>See the discussion in *id.* at 177.

<sup>60</sup>Circuit Court Charge, Apr. 12, 1800, *DHSC* 3:408-17.

<sup>61</sup>For the Cooper trial, see Smith, *Freedom's Fetters*, 307-33. Jefferson later pardoned Cooper. Adams was not convinced that Fries had been treated fairly or that his activities really amounted to rebellion and pardoned him later that month. See Paul Douglas Newman, *Fries's Rebellion: The Enduring Struggle for the American Revolution* (Philadelphia: University of Pennsylvania Press, 2004); Bouton, *Taming Democracy*, 244-56.

believe ever disgraced the judiciary of any country having the least pretensions to freedom.”<sup>62</sup> At the next federal court, in Maryland, just before the Virginia court, and then afterwards at the federal court in Delaware, Chase attempted to coerce the grand juries to indict local Republican newspaper editors under the Sedition Act. Both, however, refused to do so.<sup>63</sup>

Before Chase left Annapolis, his old friend Luther Martin gave him a copy of Callender’s *The Prospect Before Us*, an incendiary criticism of Adams’s policies (as noted). Chase was heard to declare that when he arrived in Richmond he would submit the book to the grand jury, adding that if Virginia was “too depraved to furnish a jury of good and respectable men, he would certainly punish Callender.”<sup>64</sup> In Richmond, after Chase repeated his Pennsylvania charge, the Virginia grand jury dutifully returned an indictment. During the trial Chase once again dominated the proceedings with his rulings and high-handed conduct, and Callender was convicted.<sup>65</sup>

The Jeffersonian Philadelphia newspaper *Aurora* voiced the general Republican understanding that the grand jury that indicted Callender was “conveniently *packed* by a federal *Marshal*.”<sup>66</sup> By then, Jeffersonians throughout the country charged that juries were politically

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<sup>62</sup>Letter from an Anonymous Correspondent [Stevens Thomson Mason?] to Meriwether Jones, May 7, 1800, in Philadelphia *Aurora, and General Advertiser*, June 10, 1800, *DHSC* 3:424-33.

<sup>63</sup>See untitled report dated June 4, 1800, Baltimore, Maryland, in *Charleston City Gazette*, June 20, 1800; Letter from an Anonymous Correspondent, June 28, 1800, New Castle, Delaware, in Philadelphia *Aurora, and General Advertiser*, July 1, 1800; *Wilmington Mirror of the Times*, July 4, 1800, all in *DHSC* 3:439, 442, 445-46.

<sup>64</sup>“Spring and Fall Circuits 1800,” *DHSC* 3:405, quoting Haw, *Stormy Patriot*, 202-03.

<sup>65</sup>*DHSC* 3:405, 435-36. Jefferson later pardoned him.

<sup>66</sup>[Untitled,] June 2, 1800, Philadelphia, Pennsylvania, in Philadelphia *Aurora, and General Advertiser*, June 2, 1800, *DHSC* 3:438 (emphasis in original). For other Jeffersonian

picked. One man wrote that during the sedition trials of Republican Congressman Matthew Lyon and of Thomas Cooper and James Callender, “marshals were consistently pilloried for rigging juries. ... It was a foregone conclusion that marshals would ‘pack a jury of tories to try a republican.’”<sup>67</sup>

Was the grand jury that indicted Callender packed? It is difficult to tell. It is not possible to attach partisan political labels to most Virginians during much of the 1790s because, as the leading scholarship on the period demonstrates, many men did not identify themselves by partisan labels, and state or regional issues that arose in the General Assembly sometimes caused temporary coalitions that differed radically from other coalitions that formed on national issues.<sup>68</sup> With the exceptions of a few men whose political prominence was very great and whose political leanings are therefore fairly easily known, it is virtually impossible to ascertain whether most of the men who served on Virginia’s federal grand juries during the 1790s identified themselves or were regularly identified as Federalists or Republicans. Three existing lists help, though they identify supporters of Jefferson much more than they identify Federalists. Two voting lists,

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suspicious about packing juries, see Letter from an Anonymous Correspondent to Meriwether Jones, May 7, 1800, in *Philadelphia Aurora, and General Advertiser*, June 10, 1800; “A Card to Judge Chase,” June 20, 1800, in *Philadelphia Aurora, and General Advertiser*, June 27, 1800, both in *DHSC* 3:427, 440.

<sup>67</sup>“Juror Reform Bills of 1800,” *DHSC* 4:271, quoting “Montezumazin No. III,” *Philadelphia Aurora, and General Advertiser*, Mar. 18, 1800, *DHSC* 4:640. One historian of the events, speaking of the petit jury, says bluntly that Marshal David Meade Randolph “certainly cooperated with the presiding judges in the Callender trial in empanelling a wholly Federalist jury.” Smith, *Freedom’s Fetters*, 348n.

<sup>68</sup>See Richard R. Beeman, *The Old Dominion and the New Nation, 1788-1801* (Lexington, Ky.: University of Kentucky Press, 1972); Norman K. Risjord, *Chesapeake Politics, 1781-1800* (New York: Columbia University Press, 1978).

recording which members of the House of Delegates on January 4, 1799, supported or opposed the Virginia Resolutions and on January 22, 1799, supported or opposed the Virginia Report, identify the positions of some former and/or future grand jurors on those strong and transparently Republican denunciations of Federalist policies adopted at the very height of partisan feeling in Virginia.<sup>69</sup> A third list contains the names of men who were appointed to one of the state or local campaign committees of correspondence that supporters of the presidential candidacy of Jefferson formed in Richmond during meetings held January 21-23, 1800.<sup>70</sup> Unfortunately, there are no comparable lists of public men who supported Federalist political positions.

Whether federal marshal David Meade Randolph had, indeed, stacked the May 1800 grand jury is not clear. Of its nineteen members, not one of the names appears on any list of known Federalists. The foreman was James McClurg, several times Mayor of Richmond between 1797 and 1805, a member of the Constitutional Convention in 1787, and probably a Federalist.<sup>71</sup> It was the second of four times he served on the federal grand jury. Identifiable Republicans include only Randolph Harrison of Cumberland County (serving on the third of eight grand juries) and Isaac Coles of Pittsylvania County.<sup>72</sup> Richard Kennon of Mecklenburg County, serving for the

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<sup>69</sup>*Journal of the House of Delegates ... 1798* (Richmond, Va.: Meriwether Jones and John Dixon, 1798 [*i.e.*, 1799]), 59, 96.

<sup>70</sup>William P. Palmer and Henry W. Flournoy, eds., *Calendar of Virginia State Papers and Other Manuscripts* (Richmond, Va.: Superintendent of Public Printing, 1875-1893), 9:74-87.

<sup>71</sup>Significantly, in his letter reporting to Jefferson the outrages and high-handedness of Chase, Virginia Governor James Monroe specifically mentioned that McClurg was the foreman of the grand jury which indicted Callender. Monroe to Jefferson, May [25], 1800, in *DHSC* 3: 436-37.

<sup>72</sup>*DVB* 3:368-70.

second time, was to be elected Speaker of the Virginia Senate in December 1800, and to receive from President Jefferson the governorship of the Louisiana Territory in 1804, marking him clearly as a Republican by then. Coles and seven others served only on this grand jury, while Kennon and three others served only one other time. The political affiliations, if any, of the other members of the grand jury are not known. Indeed, in spite of Jefferson's partisan dislike of his distant kinsman, David Meade Randolph, who began a decade of service under Washington's appointment as marshal in 1791,<sup>73</sup> evidence to prove or disprove Jefferson's charges about political manipulation of grand jury membership is scarce. Nevertheless, Thomas Jefferson and his political friends thought that federal grand juries were being packed.

In spite of their criticisms and suggestions for reform, legislation to reduce or eliminate the great discretion of marshals still did not pass. In the spring of 1800, Federalist Senators in Congress blocked an attempt to change the method of selecting federal grand juries and impose a uniform national procedure, requiring choice by lot.<sup>74</sup> Not only did Federalists oppose abandonment of the old system, some Republicans disapproved of Congress imposing any uniform requirements on the states. The Judiciary Act of 1801, passed by the Federalists in February during the waning days of Federalism's national power (after Jefferson had been awarded the Presidency but before his March inauguration), similarly made no changes in the procedures for empaneling grand juries<sup>75</sup>. Neither Jefferson as president nor his new Republican

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<sup>73</sup>Preyer, "Callender," 181.

<sup>74</sup>The language of the jury reform statute as passed on May 13, 1800, had the same selection requirements as Section 29 of the Judiciary Act of 1789. See *Statutes at Large*, ch. 61, 2:82.

<sup>75</sup>See "Juror Reform Bills of 1800," *DHSC* 4:270-74.

majority in Congress (which was eager to accommodate him, repealed the Judiciary Act of 1801, and passed a new Judiciary Act of 1802) developed an alternative to the old grand jury selection process.<sup>76</sup> In Virginia, the marshal still selected grand jurors as he saw fit. So Jefferson adopted a political solution to a political problem.

In 1801, Jefferson chose to leave many Federalist appointees in place, resisting strong Republican pressures to cleanse the stables. He decided, however, not to honor any of Adams's appointments made after it became known that he had obtained more electoral votes than the sitting president, and he determined (since the Federalists retained life tenure in almost every federal judgeship) to dismiss most of the marshals and district attorneys. As he told a fellow Virginia Republican when soliciting advice about appointing a district attorney and a marshal for the court of the new western district of Virginia, "let them be the most respectable & unexceptionable possible; and especially let them be republican. the only shield for our Republican citizens against the federalism of the courts is to have the Attornies & Marshals republicans."<sup>77</sup> Jefferson dismissed David Meade Randolph from office and replaced him with a reliable Republican, Joseph Scott, a process that took several months but brought the selection of federal grand jury members in Virginia under Republican control. And, after Scott became

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<sup>76</sup>The existing literature does not treat of these proposed changes in 1800-01. See generally Kathryn Turner [Preyer], "Federalist Policy and the Judiciary Act of 1801," *William and Mary Quarterly*, 3d ser., (1965) 22:3-32. But see Wythe Holt, "The Judiciary Acts of 1801 and 1802" (forthcoming).

<sup>77</sup>Thomas Jefferson to Archibald Stuart, Apr. 8, 1801, *Jefferson Papers*, 33:555; see Leonard D. White, *The Jeffersonians: A Study in Administrative History, 1801-1829* (New York: Macmillan, 1951), 353-54; Noble E. Cunningham, *The Jeffersonian Republicans in Power: Party Operations, 1801-1809* (Chapel Hill, N.C.: University of North Carolina Press, 1963), 12-29; Noble E. Cunningham, *The Process of Government Under Jefferson* (Princeton, N.J.: Princeton University Press, 1978), 165-75.

marshal, politically active Republicans immediately became conspicuous and numerous on grand juries. The first grand jury that Scott summoned, for December 5, 1801, contained at least eight Republican politicians and no known Federalists; the grand jury of April 26, 1802, contained at least seven Republicans and no known Federalists; and the November 22, 1802, grand jury had at least five active Republicans, but Federalist Robert Pollard returned for the fourth of his eight sessions. (Scott summoned Pollard five times but almost never included any other active Federalists.) Between 1803 and 1805, thirty-three known Republicans and only three known Federalists served on six grand juries. In addition, the political prominence of the Republican grand jury members Scott selected was greater than the political prominence of many of the grand jury members selected during the Randolph regime. This pattern continued through 1809.

#### The 1807 Indictment of Burr

The most conspicuously partisan of all the grand juries during the first two decades was the one Joseph Scott summoned to Richmond in May 1807 which indicted Aaron Burr and his alleged collaborators for treason. Burr's was one of the most notorious and thoroughly inspected of all American political trials. Burr and Jefferson had made a political marriage of convenience, as the New Yorker became the Virginian's ticket-balancing vice presidential candidate in the hotly contested and crucial election of 1800. Both received seventy-three electoral votes, and the tie threw the election into the lame-duck Federalist-controlled House of Representatives. Jefferson became incensed when Burr not only refused to concede the Presidency to him but also apparently was willing to make deals with several Federalists wanting anybody but the hated Jefferson. After the House relented and Jefferson became president, he refused to trust Burr and dumped him from the ticket in 1804. Burr then apparently engaged in some shady transactions

which concerned detaching the trans-Appalachian west from the United States. Jefferson had him arrested (he was seized from a subterranean hideout in what is now rural Alabama) and brought to Virginia for trial.

Because of the celebrity of the occasion, with the political attention of the United States riveted upon the meeting of the federal circuit court in Richmond in May 1807, it is also the only empanelling of an early Virginia federal grand jury reported fully in a newspaper.<sup>78</sup> The spare entry in the court's Order Book contains none of the details, obscuring as much as it reveals. The record of the day's proceedings opens with the names of the two judges present and a list of sixteen members of the grand jury (the foreman being identified by name), and there is an additional notation on the next page that two named men "who were summoned to attend here this day as Grand Jurymen appeared and for reasons appearing to the Court were discharged."<sup>79</sup> But what really happened, according to the newspaper report, was much more complicated and interesting and revealing than that.

Chief Justice John Marshall and the aging District Judge Cyrus Griffin were on the bench. Also present were United States Attorney George Hay and two able lawyers assisting him in the prosecution, William Wirt (a future attorney general of the United States) and Alexander McRea. Aaron Burr took an active part in his own defense, and with him in representation were Edmund Randolph (former governor, former secretary of state, former attorney general both of Virginia and of the United States), John Baker, John Wickham, and Benjamin Botts. The latter were two

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<sup>78</sup>The *Richmond Enquirer* of May 27, 1807, printed a full report of the proceedings of the federal court's opening day on May 22.

<sup>79</sup>United States Circuit Court Order Book No. 6 (1806-1807), 124-25, Library of Virginia.



of the brightest young legal talents in Richmond. The redoubtable Luther Martin of Maryland would later join this team.

Burr himself first called attention to the composition of the grand jury and started the chain of events in court that provide us with our only detailed account of the summoning and empaneling of federal grand juries in Virginia during the twenty-year period. Burr charged that two of the men Scott had originally summoned had advised him of their inability to attend, whereupon Scott had issued summonses to two additional men in order to have the legal maximum of twenty-four. Scott acknowledged without reluctance that Burr's statement was correct. He had asked James Barbour to replace the brilliant, vehement Jeffersonian John Taylor of Caroline – Barbour's great friend and neighbor – and had summoned Dr. William Foushee of Richmond to replace John McRae. The chief justice accepted Burr's argument that the Virginia law did not allow Scott to summon more than twenty-four men, even if some of those men then asked to be excused for ill health or some other good and sufficient reason. Consequently Foushee and Barbour were not properly members of the panel and were stricken from the list.<sup>80</sup>

Such is an impractical and unduly restrictive interpretation. It could easily be implied from Virginia's law that the marshal had to present to the court twenty-four grand juror names, but was not limited to twenty-four choices if some men originally selected could not attend. Marshall's possibly partisan ruling set the stage for another legal maneuver that revealed even more about how the grand jury selection process operated.

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<sup>80</sup>*Richmond Enquirer*, May 27, 1807; Herbert A. Johnson *et al.*, eds, *The Papers of John Marshall* (Chapel Hill, N.C.: University of North Carolina Press for the Institute of Early American History and Culture, 1974-2006), 7:21-22; Albert Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin Co., 1918), 3:409.

Burr and his attorneys made a second motion. “With regret,” Burr claimed the right to challenge other grand jurors “for favour,” that is, for possible bias. “This is a right that American law does not often recognize even to this day,” a recent historian of American juries wrote, “and it was certainly unheard of at common law.”<sup>81</sup> Hay declined to contest this motion either, and Marshall mildly acquiesced by inviting those whom Burr challenged to withdraw voluntarily. Burr challenged two of the most prominent Jeffersonians of the time, William Branch Giles and Wilson Cary Nicholas. Giles – who had been foreman of the grand jury in November 1803, May 1804, and November 1805 – was then serving in the Senate, having been Jefferson’s acknowledged floor leader in the House of Representatives, while Nicholas – foreman in May 1805 – had held a similar position in the United States Senate. Burr treated the possible bias of the two Republicans quite differently. He went out of his way to disclaim any actual bias on the part of Giles. Burr allowed that Giles’s mind was “as pure and unbiased” as it could be, but try as he liked, “it would be an effort above human nature for this gentlemen to divest himself of all prepossessions” because of the knowledge Giles possessed, and his intimacy with the President; his words and actions in the Congress had already demonstrated that he had made up his mind that Burr should be indicted. On the other hand, Burr stated bluntly that Nicholas “entertained a bitterly personal animosity” against him. Giles and Nicholas certainly felt insulted, but both agreed to withdraw.<sup>82</sup> Theirs were the names that the court’s Order Book indicates “were discharged.” Another grand juror, Joseph Eggleston, a former Republican congressman, asked to

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<sup>81</sup>Abrahamson, *We, the Jury*, 39, 263-64 n.106.

<sup>82</sup>*Id.* at 39, quoting *United States v. Burr*, 25 Fed. Cas. 25, 56 n.3, 57 (C.C.D. Va. 1807) (No. 14,693); Beveridge, *Life of Marshall*, 3:409-11.

be excused, admitting that he had declared his belief in Burr's guilt. However, in reply to Marshall's question whether he could act in an unbiased fashion as a grand juror, Eegleston stated that he could, and Marshall refused his request.<sup>83</sup>

Four men had fallen off Scott's venire and several others, whose names are not recorded, were not in attendance. The marshal then asked that two men be added to the grand jury, meaning that after the dismissals only fourteen remained, two short of the legal minimum of sixteen. Marshall immediately agreed to add those Scott named, John Randolph of Roanoke and the previously-dismissed Dr. William Foushee. But in a very unusual step, Marshall named as foreman the hotheaded former Jeffersonian House floor leader Randolph, lately estranged from Jefferson and claiming personal hatred for the president.<sup>84</sup> Surely this was not an unbiased appointment, but it was evidently not challenged.

Jefferson kept himself well informed on the progress of the Burr proceedings, corresponding frequently with District Attorney Hay and in May sending down a packet of signed blank pardons for him to use to produce testimony against Burr.<sup>85</sup> So often did Jefferson and Hay correspond and so frequently did Jefferson offer advice to Hay that the president could rightly be charged with executive interference in a judicial proceeding, as he had previously charged against Federalist officials. Soon after the grand jury was selected, Jefferson, upset with the exit of Giles

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<sup>83</sup>*Id.* at 412.

<sup>84</sup>*Id.* at 413 & n.1. Foremen were usually selected by the other grand jurors.

<sup>85</sup>Thomas Jefferson to George Hay, May 20, 26, 28, 1807, and George Hay to Thomas Jefferson, May 25, 28, 1807, all in Thomas Jefferson Papers, Library of Congress.

and Nicholas, calculated that it was composed of “2 feds, 4 Quids & 10 republicans.”<sup>86</sup> The so-called Tertium Quids, of which John Randolph of Roanoke was a leader, were a small, third faction of former Jeffersonians.

Very distinguished persons were on the panel. Randolph had previously been foreman of the federal grand jury in May 1806. He was in the midst of twenty-seven years of service in the House of Representatives (not continuous); he would also be Senator from 1825 to 1827. Other celebrated Republicans, so far as can be discerned, had not departed from allegiance to Jefferson. They included John Ambler, member of the House of Delegates from 1793 to 1795 and a member of Jefferson’s 1800 campaign committee; Joseph C. Cabell, Samuel Jordan Cabell’s nephew and Jefferson’s ally in the founding of the University of Virginia, and a member of the House of Delegates off and on between 1808 and 1835; Joseph Eggleston, a thirteen-year member of the House of Delegates before becoming a Jeffersonian member of Congress from 1798 to 1801; James Mercer Garnett, a Jeffersonian Republican in the House of Representatives from 1805 to 1809, before and afterwards serving in the House of Delegates from Essex County; and Foushee, a conspicuous Republican in the General Assembly off and on from 1791 to 1808. Other prominent Republican members included John Mercer and James Pleasants, both of whom had voted for the Virginia Resolutions and the Virginia Report during the 1798-1799 session of the General Assembly. Pleasants served in the General Assembly off and on for more than thirty years, was a member of the 1800 campaign committee, was a Jeffersonian member of the House of Representatives (1811-1819) and the U.S. Senate (1819-1822), and later was governor of Virginia

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<sup>86</sup>Thomas Jefferson to George Hay, May 26, 1807; Thomas Jefferson to J.W. Eppes, May 28, 1807, both in Thomas Jefferson Papers, Library of Congress.

(1822-1825). Littleton Waller Tazewell was the son of one of Jefferson's close friends in the colonial House of Burgesses, had also voted for the Virginia Resolutions and the Virginia Report, also served on the campaign committee of 1800, was a Republican in the House in 1800 and 1801, a Jacksonian in the Senate from 1824 to 1832, and governor of Virginia from 1834 to 1836. William Daniel had been a member of the 1800 campaign committee and was a member of the House of Delegates from Cumberland County from 1798 to 1813. Edward Pegram and Robert Taylor also served on the 1800 campaign committee, while Taylor was Speaker of the Virginia Senate from 1805 to 1815. John Brockenbrough was once a Jeffersonian and later a member of the Richmond Junto (Jeffersonians who became Quids who became Jacksonians) which supposedly controlled much of Virginia politics after the 1810s. This leaves Beverly Munford, Thomas Harrison, and Alexander Shephard to be possibly "feds," but it is not clear who, other than Randolph and possibly Brockenbrough, Jefferson might have counted as "quids."

### Conclusion

Just as Marshal David Meade Randolph had probably stacked the deck against Cabell in 1797 and possibly against Callender in 1800, so Marshal Joseph Scott used his vast discretion to pick notable Jeffersonians to pack the grand jury against Burr in 1807. Even fair-minded observers, granting the benefit of any doubts they may have had about the integrity of the members of the grand jury, would scarcely have anticipated that a man for whom Thomas Jefferson had been sharpening his political knife would leave the courtroom unindicted. Federal grand juries in Virginia could be, and almost certainly were, stacked to suit contemporary political purposes between 1789 and 1809. The problem was the extraordinary discretion in jury selection extended to a presidential appointee, the federal marshal for each state. Jefferson and others

clearly understood the problem and posed solutions, but Jefferson's appointee also employed the opportunity that his discretionary power gave him to use it to advance Jefferson's purposes (without, of course, any protest from Jefferson). At the time, neither the General Assembly of Virginia nor the United States Congress moved toward a less discretionary or more democratic method of grand jury selection or to a method that could not be easily exploited for partisan purposes.