

The Aaron Burr Treason Trial

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The Aaron Burr Treason Trial: A Short Narrative

The trial of Aaron Burr for treason in 1807 has few rivals in American history for dramatic appeal and for its colorful cast of characters. The accused traitor had been Vice President during the first administration of Thomas Jefferson. In the summer of 1804, Burr killed his rival Alexander Hamilton in a duel, an event that effectively ended Burr's career in national politics. Three years later, he was on trial, charged with the capital crime of treason by the government headed by Jefferson, his former partner in political office. Presiding over the trial was John Marshall, Chief Justice of the United States, the President's distant cousin and political foe. Finally, there was James Wilkinson, general of the army, once Burr's associate and at trial his chief accuser. With these principal players, the trial in the U.S. Circuit Court at Richmond was as much high political and personal drama as it was a judicial proceeding.

The law of treason

From the standpoint of constitutional law, the Burr trial is notable for Chief Justice Marshall's landmark decision narrowly construing the Constitution's definition of treason and thereby making conviction for this crime exceedingly difficult. Article III, section 3, of the Constitution provides that "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 government charged Burr with the first of these two crimes of treason, levying war against the United States.

In limiting treason "only" to levying war and giving aid and comfort to enemies, the framers established a more restrictive definition than had prevailed in Great Britain. Some of the language used in the Constitution was identical to an English statute of 1352 that listed seven treasonable actions, including levying war against the king and adhering to his enemies and giving them aid and comfort. Of the other treasonable actions in the English law, the most important was "compassing" (bringing about) or imagining the death of the king. English judges had extended this category of treason by "construction" (interpretation) to embrace spoken or written words critical of government policy and actions taken to prevent the execution of a law. The framers' omission of this definition of treason was intended to restrict the concept of "constructive treason"—in other words, speaking or acting to encourage treason—that in England had been exploited to suppress dissent and political opposition.

At some level, however, a federal law of treason could not entirely dispense with the concept of constructive treason. The Constitution might define treason as “levying war,” but the precise meaning of that term could only emerge by judicial construction in a series of cases. Before the Burr trial, the few United States cases of treason were limited to the federal government’s prosecution of persons involved in resisting a tax on distilled spirits and a direct tax in the 1790s. These cases were not important precedents for the Burr trial, though they provided examples of what some federal judges regarded as the conditions and circumstances necessary to constitute levying war. To discover the meaning of levying war, the Burr trial lawyers combed through many volumes of reports of English state trials. These cases shed much light, but American lawyers had to choose carefully which parts of English law they wanted judges to say were applicable to the United States.

The Burr conspiracy

The government prosecutors alleged that Burr levied war against the United States as part of a conspiracy to establish a separate confederacy composed of the Western states and territories. Separation of the West from the union was a real possibility in the early nineteenth century, when many doubted whether a republican form of government centered on the Atlantic coast could effectively extend its jurisdiction to the vast region between the Alleghenies and the Mississippi River. Independent-minded Westerners were eager to expand settlement into territories still belonging to Spain, causing endless friction that threatened to embroil the United States in a war with that nation. The West remained a highly unstable region, where a man of talents and enterprise might find opportunity.

Aaron Burr clearly believed the West offered him a second chance after his fall from grace. Nearing 50 after his fatal encounter with Hamilton, Burr was full of restless ambition, determined to play the grand role he believed was his destiny. In 1805, he floated down the Ohio and Mississippi to New Orleans, greeted enthusiastically at various stopping points. This triumphal tour buoyed his hopes, and he set about making plans, seeking funds, obtaining supplies, and recruiting followers for a second expedition to take place in the fall of 1806. Burr found recruits among young men living in the interior section of the country, susceptible to his persuasive charm and motivated by dreams of winning glory and fortune. He found willing financial backers as well, including one Harman Blennerhassett, an immigrant Irish lawyer who built an idyllic estate on an island in the middle of the Ohio River. Blennerhassett not only provided funds, but his island was nicely situated to serve as an assembly point for men, boats, and supplies. What were Burr’s intentions? Clearly, he planned some kind of expedition that was military in character. Did he envision a war with Spain, in which he would lead an attack upon Spanish possessions in North America, invade Mexico, and liberate South America? If this was his aim, he was not a traitor,

though he might be in violation of the Neutrality Act of 1794, which made it a “high misdemeanor” to engage in military operations against a foreign power with whom the United States was at peace. If such an operation succeeded, however, Burr most likely would not be prosecuted but hailed as a patriot whose military exploits fulfilled the expansionist aspirations of his countrymen. Or, did Burr’s proposed expedition against Spain mask a traitorous design to foment revolution in the West and establish a separate grand empire extending from the Mississippi Valley to Mexico City and beyond?

Burr’s enterprise collapsed before it had hardly begun, thanks to information provided by General Wilkinson, who was also governor of the Louisiana Territory. Burr had drawn Wilkinson so far into his plans that the two communicated in “cipher,” a code in which numerals are substituted for letters. In October 1806, Wilkinson got cold feet and decided to turn informer. He sent President Jefferson a translated copy of a cipher letter said to be from Burr. This letter, dated July 1806, spoke of plans to move down the Ohio in mid-November and proceed to New Orleans. Wilkinson subsequently furnished additional information that Burr was raising an army of 7,000 men, that a certain unspecified territory was to be “revolutionized,” and that seizures were to be made at New Orleans.

Ex parte Bollman and Swartwout

Jefferson responded by issuing a proclamation of conspiracy. In short order, Burr’s “army” melted away to a few hundred recruits. Wilkinson himself took action in New Orleans, declaring martial law and rounding up suspects and potential witnesses. Among these were Burr’s associates, Erick Bollman and Samuel Swartwout, who had carried messages, including the cipher letter, from Burr. Wilkinson sent them under military guard to Washington, where they were held in custody. In February 1807, the Supreme Court granted their motion for a writ of habeas corpus, by which the prisoners were brought into court for an inquiry into the legality of their imprisonment.

Marshall’s opinion in *Ex parte Bollman and Swartwout* ordered the prisoners’ release on the grounds that there was no probable cause to commit them on charges of treason. The opinion offered general observations about the nature of treason that were to have an important bearing in the trial of Aaron Burr. To be traitor, said Marshall, an individual did not have to appear “in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force, a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.” By the time this opinion was published in the newspapers, the Jefferson administration had already decided to prosecute Burr for treason. The government was fully aware of the

difficulty of securing a conviction for treason. Indeed, its quick and effective action in suppressing the conspiracy before it ripened into open warfare compounded the problem of proving overt acts as required by the Constitution. The *Bollman* opinion, however, might have encouraged the President and his legal advisers that they could make a case against Burr. They chose as the overt act required for conviction the events that took place on Blennerhassett's Island in the Ohio River on the night of December 10, 1806. A body of men had assembled there and was preparing to embark down river, apparently to join up with other detachments and proceed to New Orleans. There was a brief confrontation of sorts when a Virginia militia unit attempted to dissuade Blennerhassett and the others from leaving the island. The militia backed off in the face of drawn muskets, and Blennerhassett's party proceeded on its way. Burr himself was not on the island at the time, having gone ahead weeks earlier, but the Chief Justice himself had said that a person could be a traitor, although "remote from the scene of action."

U.S. Circuit Court, Virginia: Preliminary examination

While the Supreme Court was considering the case of *Bollman* and Swartwout, an army lieutenant holding a copy of the President's proclamation arrested Burr in the Mississippi Territory. By late March 1807, the prisoner was in Richmond for a hearing before Chief Justice Marshall, who conducted a preliminary examination in the U.S. Circuit Court for Virginia. Because Blennerhassett's Island lay inside Wood County, Virginia (now West Virginia), Burr's case fell within the jurisdiction of that court, on which Marshall and U.S. District Judge Cyrus Griffin sat. The court was not then in regular session, but a judge could conduct a criminal hearing at any time.

At Burr's preliminary hearing on March 31, 1807, U.S. Attorney George Hay and U.S. Attorney General Caesar Rodney asked Judge Marshall to commit Burr to jail on charges of treason and the misdemeanor of waging war against Spain, though the government's real interest was in convicting Burr of treason. John Wickham and Edmund Randolph represented Burr, who also argued on his own behalf.

On April 1, Chief Justice Marshall read the first of many opinions he was to give in this case. As in the *Bollman* case, he concluded that the evidence was not sufficient to show that Burr's alleged treasonable designs had "ripened into the crime itself by levying war against the United States." He did, however, order Burr to be committed for the misdemeanor of carrying on a military expedition against Spanish territory. He set bail at \$10,000, and the prisoner entered into a bond in that amount for his appearance at the next session of the circuit court in May. Like any other accused person, Burr did not have to put money up front. Rather, he and some friends acting as "securities" bound themselves to pay in case he did not show up in court.

U.S. Circuit Court, Virginia: Grand jury

Burr's case by now had become deeply embroiled in politics, with Republicans supporting President Jefferson's measures to bring the accused traitor to justice and Federalists rallying to defend Burr against the charges. Many in heavily Republican Virginia were inclined to believe Burr had acted traitorously, and this popular belief made jury selection more difficult and time consuming. After the opening of the spring term of the U.S. circuit court on May 22, 1807, a grand jury of sixteen was sworn in, and Chief Justice Marshall delivered a charge that was not published but reportedly focused on "the definition and nature of treason, and the testimony requisite to prove it."

Burr's counsel seized the offense by attacking the prosecution and its motives. Luther Martin, who joined Burr's defense in time for the grand jury proceedings, assumed the role of principal attack dog. In one notably vitriolic rant, he denounced a President who had "let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend." Earlier, Jefferson had unwittingly and unwisely made himself vulnerable to such censure by publicly declaring that Burr's guilt was "beyond question." Martin's outburst came in the midst of the most important argument at this stage of the proceedings, prompted by Burr's motion for a subpoena *duces tecum* to President Jefferson.

A subpoena *duces tecum* orders a person to appear in court and "bring with you" certain specified documents. Burr wanted the President to turn over a letter and papers received from Wilkinson, together with copies of the President's reply and certain directives issued by the departments of war and navy. The motion raised the fundamental question of whether the federal judiciary could issue such a subpoena to the President without violating the constitutional principle of separation of powers. The subpoena followed an earlier contest between the Jefferson administration and the Supreme Court concerning the delivery of a commission to a justice of the peace. In that earlier case, *Marbury v. Madison* (1803), the Supreme Court declined for lack of jurisdiction to order the delivery of the commission but rebuked the executive branch for not doing its legal duty.

In Burr's case, too, the threatened confrontation did not occur. Chief Justice Marshall granted the motion for a subpoena, maintaining that the President was not exempt from court orders designed to protect the constitutional rights of criminal defendants. By the terms of the subpoena, the President was to provide the documents but did not have to appear personally. Jefferson did not acknowledge the court's order but informed U.S. Attorney Hay that he had substantially complied with the subpoena's terms by previously delivering the requested documents to the prosecutor. In so doing, Jefferson claimed to act voluntarily and did not acknowledge the judiciary's right to compel him to release executive papers. He also maintained that in the interests of national security the President must be the sole judge of which

papers could be safely disclosed. Jefferson here asserted the doctrine known as “executive privilege,” a claim invoked by President Richard Nixon in 1974 in response to a subpoena *duces tecum* ordering him to produce tapes of White House conversations relating to the “Watergate” case. Whether or not the papers sought by Burr were material to his defense, the motion for a subpoena did provide an opportunity for his lawyers to score points against the administration. Another integral part of their legal strategy was to discredit Wilkinson, the prosecution’s star witness, whom they accused of criminal misconduct in ordering arrests, forcibly seizing and imprisoning potential witnesses, and then having them transported under military guard to Richmond. Wilkinson, indeed, proved to be a disappointment to the prosecution, his credibility tarnished by suspicion that in revealing Burr’s plot he was merely trying to save his own neck. His testimony before the grand jury was undermined by indications that he had altered the famous cipher letter in ways to conceal his own relationship with Burr. Despite its questions about Wilkinson, the grand jury on June 24 returned indictments against Burr and Blennerhassett for treason and the misdemeanor charge of carrying on war against Spain. Chief Justice Marshall scheduled a trial for Burr at a special session of the court beginning August 3.

U.S. Circuit Court, Virginia: Trial for treason

After several postponements because of absent witnesses and a week of selecting twelve jury members, the court on August 17, 1807, directed the jury to be sworn in, the indictment read, and the case opened by the government. Assisting Hay in the prosecution were Alexander MacRae, then lieutenant governor of Virginia, and William Wirt, a future U.S. attorney general. Burr’s legal team now numbered five, with Benjamin Botts and Charles Lee joining the previously retained Wickham, Randolph, and Martin.

The government’s case hinged on proving that Burr’s military enterprise had a treasonable design; that the gathering of men on Blennerhassett’s Island was a partial execution of that design and constituted an overt act of levying war; and that Burr, though not then on the island, could be considered in law as “constructively” present. To make this case, the prosecution intended to offer the testimony of 140 witnesses. The defense, believing that a Virginia jury would be unsympathetic with the accused, settled on a strategy of taking the case from the jury and placing the question of Burr’s guilt in what it hoped would be the safer hands of the court. After only a few witnesses had testified, Burr’s counsel moved to exclude the further admission of evidence as “collateral,” not directly pertinent to the indictment’s specific charge. At best, they argued, such testimony could show Burr’s treasonable intentions, his connection with the gathering of men on the island, or his participation in actions elsewhere and at other times, but it could not prove that Burr levied war on Blennerhassett’s Island.

In an exhaustive hearing on this motion, the lawyers rummaged through the whole course of English and American precedents on the law of treason. All the argumentation boiled down to the meaning of “levying war” in the treason clause of the Constitution. The prosecution pressed for a broad definition by which the gathering of armed men on the island constituted an overt act of levying war. Citing Marshall’s statements in *Ex parte Bollman and Swartwout*, Hay and his team argued that Burr was, in the language of English common law, legally present on the island as the “procurer,” that is, the instigator and organizer of the armed force plotting to overthrow United States authority in New Orleans. Wickham and the other defense lawyers insisted upon a strict definition of treason that required an overt act of force and the direct involvement of the accused in that act of force.

On August 31, Chief Justice Marshall delivered the major opinion of the Burr trial, upholding the defense’s motion to exclude the further admission of testimony. The opinion was dense and complicated, full of qualifications and intricate legal distinctions. Speaking only as a circuit court judge, Marshall appeared to shy away from making definitive pronouncements on such a difficult and sensitive constitutional issue as the law of treason. The opinion was nonetheless clear and forthright in its essential holding that the Constitution required a strict definition of treason—that is, that the accused had to be shown to have levied war according to the precise terms set out in the indictment.

Rather than repudiate his earlier decision in *Ex parte Bollman and Swartwout*, Marshall explained and qualified it. That opinion, he said, despite its apparent relevance to Burr’s case, did not extend to one who counseled or advised treason but performed no act in carrying on the war. He also denied that the earlier opinion dispensed with the idea of force as an essential element in levying war. Ultimately, Marshall ruled that the indictment was flawed in alleging that Burr levied war on Blennerhassett’s Island. Instead, it should have stated the truth that the accused was absent and that his treason consisted in procuring the assemblage. Such procurement was the overt act that would have to be proved by two witnesses. None of the testimony could establish this overt act. With no further testimony to consider, the jury had virtually no choice but to acquit. In an unusual twist, however, the verdict, instead of a simple “not guilty,” declared Burr “not guilty by the evidence presented.”

The decision of August 31 effectively ended the trial of Aaron Burr and spared him the penalty of death by hanging. His ordeal in court lasted another month and a half, however. After failing to convict Burr of treason, the government halfheartedly tried him on the misdemeanor charge of waging war on Spain. This trial, too, ended in acquittal, on grounds similar to the earlier acquittal. The federal attorney Hay then had one more legal weapon at his disposal: a motion to “commit,” or send, Burr for trial in the federal court of Kentucky or Ohio on treason and misdemeanor charges.

In this commitment hearing, the court was again acting as an examining tribunal, as it had been the preceding spring when Burr was first brought before Marshall. Because the rules of evidence were less strict in such a proceeding, the court allowed the testimony of the many witnesses whose evidence had been excluded in the preceding trials. Over the next month Marshall and Judge Griffin (silent throughout the Burr case) listened patiently to the mass of testimony and long-winded arguments of the lawyers. Finally, on October 20, Marshall ruled on the motion. Once again, he refused to commit Burr for treason but ordered him to stand trial in Ohio on the misdemeanor of waging war against Spain. Although Burr was subsequently indicted on the misdemeanor charge in the U.S. Circuit Court for the District of Ohio, the government chose not to prosecute him. For all practical purposes, he was a free man.

The Federal Court and Its Jurisdiction in the Burr Case

U.S. Circuit Court for the District of Virginia

The U.S. Circuit Court for Virginia had jurisdiction in Burr's case because the offense with which he was charged was stated to have occurred in Wood County in the district of Virginia. That county's boundaries included Blennerhassett's Island in the Ohio River.

The U.S. circuit courts established in the Judiciary Act of 1789 were primarily courts of original jurisdiction. They tried civil suits between citizens of different states and crimes defined by federal law. They were distinct from the U.S. district courts, which were principally original courts for trying admiralty and maritime causes and suits for penalties and forfeitures incurred under federal laws. The circuit courts also had limited appellate jurisdiction over the district courts. Except for a brief interval in 1801 and 1802, until 1869 there were no separate circuit court judges. The circuit courts were composed of a Supreme Court justice, assigned to a particular circuit, and the local U.S. district judge.

By 1807 there were seven circuits. Chief Justice Marshall was assigned to the fifth circuit, comprising the districts of Virginia and North Carolina. The Virginia circuit court met twice each year, beginning on May 22 and November 22. Marshall's colleague on the bench in Virginia was District Judge Cyrus Griffin, who made no recorded comments during the Burr trial.

The Judicial Process: A Chronology

March 30, 1807

U.S. Circuit Court for the District of Virginia

At a special session at the Eagle Tavern in Richmond, Aaron Burr was brought before Chief Justice Marshall to hear charges of treason and misdemeanor. U.S. Attorney George Hay moved that Burr be committed to jail on these charges.

March 31, 1807

U.S. Circuit Court for the District of Virginia

Argument of the motion to commit Burr took place in the hall of the House of Delegates at the Virginia state capitol. Hay, assisted by U.S. Attorney General Caesar Rodney, was opposed by John Wickham and Edmund Randolph, counsel for Burr, as well as by Burr himself.

April 1, 1807

U.S. Circuit Court for the District of Virginia

Marshall held that there was probable cause for committing the accused on the misdemeanor charge—that is, for carrying on a military expedition against the territories of Spain—but not on the charge of treason. Burr entered into a bail bond for \$10,000 to appear for trial at the U.S. Circuit Court on May 22.

May 22, 1807

U.S. Circuit Court for the District of Virginia

The court's regular spring term commenced. A grand jury of sixteen was sworn in. Marshall delivered a charge to the grand jury.

June 13, 1807

U.S. Circuit Court for the District of Virginia

Marshall delivered an opinion in favor of Burr's motion for a subpoena *duces tecum* to be issued to President Jefferson.

June 24, 1807

U.S. Circuit Court for the District of Virginia

The grand jury returned indictments against Burr for treason and for carrying on war with Spain. Burr pleaded not guilty on June 26. The court ordered the trial for treason to begin on August 3.

June 30, 1807

U.S. Circuit Court for the District of Virginia

Marshall ordered Burr to be confined to the state penitentiary until the trial.

August 17, 1807

U.S. Circuit Court for the District of Virginia

Marshall directed the jury of twelve to be sworn in and the indictment for treason to be read. Hay opened the case for the prosecution and proceeded to examine the first of 140 proposed witnesses.

August 20, 1807

U.S. Circuit Court for the District of Virginia

After only a dozen witnesses had been examined, the defense moved to exclude the admission of evidence that did not go to prove the charge as defined by the indictment, that Burr had committed treason by levying war on Blennerhassett's Island on December 10, 1806. This motion provoked an elaborate argument over the meaning of treason that continued through August 29.

August 31, 1807

U.S. Circuit Court for the District of Virginia

Marshall delivered the principal opinion in the trial, granting the defense's motion to exclude collateral testimony.

September 1, 1807

Hay informed the court that he had no further evidence or arguments to present to the jury. The jury retired briefly and returned a verdict that Burr was "not proved to

be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty.”

September 9, 1807

U.S. Circuit Court for the District of Virginia

The trial on the misdemeanor began. Burr was charged with levying war against Spain in violation of the Neutrality Act.

September 15, 1807

U.S. Circuit Court for the District of Virginia

Marshall issued a ruling excluding evidence that did not directly prove the charges set out in the indictment. After retiring for twenty minutes, a jury returned a verdict of not guilty.

September 18, 1807

U.S. Circuit Court for the District of Virginia

Hay moved to send Burr for trial in another federal court on charges of treason committed outside Virginia.

October 20, 1807

U.S. Circuit Court for the District of Virginia

Marshall refused to commit Burr for treason, but ordered him to stand trial in Ohio on a charge of preparing and providing the means for a military expedition against Spain.

Legal Questions Before the Federal Court

What constitutes “levying war” under the Constitution’s definition of treason?

A warlike gathering or assemblage of men having an appearance of force and in a situation to practice hostility, said Chief Justice Marshall in his opinion of August 31, 1807.

This meaning of levying war, said Marshall, was based on a multitude of English cases and authorities and was confirmed by the few American cases of treason. In *Ex parte Bollman and Swartwout*, the Chief Justice had said that it was not the court’s intention “to say that no individual can be guilty” of treason “who has not appeared in arms against his country.” Marshall explained that the *Bollman* opinion, properly understood, did not overthrow the authority of earlier settled cases and declared that any assemblage with a treasonable design was a levying of war. The *Bollman* opinion, he explained, did not reject the idea of force as an essential element in levying war. If actual fighting was not required, however, then there had to be a warlike appearance, an assemblage in military array in such manner as to indicate a clear plan to use force.

After elaborately defining the term “levying war,” Marshall cautiously refrained from deciding whether the assemblage on Blennerhassett’s Island amounted to an overt act of treason, though he strongly implied that it did not.

Could a subpoena duces tecum issue to the President of the United States?

Yes, said Chief Justice Marshall, in his opinion of June 13, 1807.

U.S. Attorney Hay acknowledged that a general subpoena ordering a witness to testify might issue to the President, but he insisted that the executive was exempt from a subpoena *duces tecum* ordering him to produce certain specified documents. Marshall responded by first considering why the President was not exempt from a general subpoena. A President, he said, was not a king, but a citizen like everyone else and therefore subject to the law and the Constitution. In terms of this constitutional obligation, Marshall saw no material distinction between a general subpoena and a subpoena *duces tecum*.

The President could not claim exemption on the basis of the pressing demands of his office, since these did not require all of his time. Nor could the President cite national security as grounds to withhold documents that might be material to the accused. If documents contained information too sensitive for public disclosure, the

court would take care to keep them confidential. In reply to the argument that the motion for a subpoena implied “disrespect” to the President, Marshall declared that the court felt “many, perhaps peculiar motives, for manifesting as guarded a respect for the chief magistrate of the union as is compatible with its official duties.” Jefferson, citing the principle of separation of powers, did not concede that the federal judiciary could compel the federal executive to answer legal process. If his testimony were needed to aid a defendant, he would give it voluntarily. Jefferson also claimed “executive privilege” in deciding what documents, and which part of them, might satisfy the demands of justice.

Did a person accused of a crime have a right before, as well as after, indictment to request the court to compel the attendance of his witnesses?

Yes, said Chief Justice Marshall, in his opinion of June 13, 1807.

While the grand jury was meeting, Burr requested the court to issue a subpoena to President Jefferson. The prosecution objected that until an indictment was found against Burr, he was not entitled to have the court issue subpoenas. Marshall replied that the “genius and character of our laws and usages” supported a “fair and impartial trial” and consequently favored an expansive view of the rights of the accused. He gave particular emphasis to the Sixth Amendment, which gave to a person accused of a crime “a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor.” Courts, said Marshall, should regard this right as “sacred” and therefore read the amendment to allow a party to request witnesses before as well as after indictment.

Can a person who organized or instigated the gathering of an armed force be considered as legally or constructively present at the commission of the treasonable act if that person did not participate in the armed assembly?

No, said Marshall. Even in English law, which extended the doctrine of constructive treason to many cases, only persons close enough to the scene to provide direct and immediate assistance in levying war could be considered as constructively present.

Burr’s situation, the Chief Justice explained, was like that of an “accessory,” or subordinate accomplice, in a common crime. In such a crime, an accessory was one who was not present at the commission of the offense but was nevertheless guilty as a participant by organizing or instigating it. In the high crime of treason, however, there was a stricter standard that recognized no distinction between a “principal” (the

chief actor or perpetrator) and accessory. To be implicated in treason, Burr had to be considered as a principal, charged with committing a specific overt act. In his case, the overt act cited in the indictment was not levying war on the island but “procuring”—organizing, advising, or instigating—the armed assemblage. This meant that Burr could not be considered as being legally present on Blennerhassett’s Island, like an accessory in a common crime.

Whether procuring the armed force could be considered under the Constitution as treason in levying war was a matter of great doubt. In any event, the act of procuring would have to be proved by two witnesses.

Who is a competent juror?

A person of open mind who has not previously formed an opinion of guilt or innocence, said Chief Justice Marshall in his opinion of August 11, 1807.

During jury selection, Burr’s lawyers challenged a number of prospective jurors for “cause,” that is for holding opinions hostile to the defendant. U.S. Attorney Hay complained that the questions posed by Burr’s lawyers were too general and might prevent the selection of a jury.

Marshall stated that the common law required and the Constitution secured the right to an impartial jury, composed of persons who would fairly hear the evidence and decide according to that evidence. Those who had already formed an opinion of the accused’s guilt were disqualified, as were those who had formed an opinion not on the whole case but on a point so essential that it would have an unfair influence upon the verdict.

What had the federal courts decided in earlier cases of treason?

Although the lawyers and judges had plenty of English cases to consult about the law of treason, U.S. federal courts had decided only a few treason cases before *United States v. Burr*. Two of these grew out of the Whiskey Rebellion of 1794. Another case arose from resistance to the direct tax enacted by Congress in 1798. The Supreme Court’s only consideration of treason had come in the habeas corpus hearing on behalf of Burr’s confederates, Bollman and Swartwout. Lawyers cited all these cases, as did Marshall in his principal opinion of August 31.

The Whiskey Rebellion Cases—A tax on whiskey distilleries provoked armed resistance in western Pennsylvania, which the Washington administration suppressed with federal troops. The government entered treason prosecutions against a number of the so-called whiskey rebels in the U.S. Circuit Court for the District of Pennsylvania, sitting at Philadelphia in the spring of 1795. Two of the trials ended in the convic-

tions of Philip Vigol and John Mitchell, both of whom were later pardoned. In both cases Justice William Paterson delivered jury charges that expounded the meaning of “levying war.” Marshall quoted Paterson’s charges to support his argument that United States judges went beyond English judges in requiring “the actual exercise of force, the actual employment of some degree of violence,” to constitute a levying of war.

United States v. Fries—In 1798, Congress passed a law levying a direct tax on houses, a tax that was forcibly resisted by German farmers in northeastern Pennsylvania. In 1799, the federal government prosecuted John Fries, a leader of the resistance, in the U.S. Circuit Court at Philadelphia. In the first trial of Fries, Justice James Iredell delivered a grand jury charge and Judge Richard Peters delivered a jury charge stating that an intention to prevent the execution of a federal law and any forcible opposition designed to carry that intention into effect amounted to a levying of war against the United States.

Fries was convicted, but his lawyer successfully moved for a new trial. In the second trial Justice Samuel Chase stated in his jury charge that a conspiracy to oppose the execution of a law was a misdemeanor, but a forcible carrying into effect of that intention was levying war. He further stated that any force connected with that intention constituted the crime of levying war. Fries was convicted but was later pardoned by President Adams. Chief Justice Marshall quoted these charges, most extensively that of Justice Chase, to support his contention that United States law required force as an essential element of levying war.

Ex parte Bollman and Swartwout—The Supreme Court heard this case in the winter of 1807, just before the proceedings against Burr commenced. Chief Justice Marshall ordered the release of Bollman and Swartwout, two of Burr’s associates, on the ground that there was no probable cause to charge them with treason. In his opinion Marshall remarked:

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force, a treasonable purpose all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.

This passage proved troublesome to Marshall in Burr’s case, the more so because these were his own words. The prosecution frequently quoted this passage in support of its arguments that Burr should be considered as constructively present on Blennerhassett’s Island and that force was not an essential ingredient in the act

of levying war. The defense, on the other hand, tended to ignore this statement or dismiss it as “obiter dictum,” that is, something not essential to or directly related to the substance of the decision.

In his Burr case opinion of August 31, Marshall took great pains to explain and clarify his earlier opinion regarding Bollman and Swartwout. That opinion, he said, did not embrace the case of one who counseled or advised treason but performed no act in carrying out the war. Nor did it overturn previously settled federal law that required some degree of force to constitute an act of levying war.

Lawyers' Arguments and Strategies—The U.S. Government

United States Attorney George Hay and his associates William Wirt and Alexander MacRae had to prove the case laid out in the indictment: that Aaron Burr committed treason by levying war against the United States on Blennerhassett's Island on December 10–11, 1806.

1. Burr, though not actually present on the island on the date specified in the indictment, was legally or “constructively” present

Prosecution lawyers offered testimony to show that Burr had the treasonable intentions of seizing New Orleans, “revolutionizing” the west, and separating it from the union. The “assemblage” (gathering or collection of persons) on the island was part of the grand design, they contended. As the mastermind of the plot, responsible for the gathering of armed men on the island, Burr could be considered in law as present at the commission of the overt act of treason. They relied on the Supreme Court's opinion in *Ex parte Bollman and Swartwout*, which stated that “if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force, a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.”

2. Arms and the use of force were not necessary ingredients to constitute an act of levying war

The prosecution argued for a broad definition of “levying war.” Hay urged common sense and considerations of national security in contending that an overt act of treason did not require the actual commission of hostilities or even that a body of men should appear in military “array” (referring to attire and orderly arrangement). The crime of treason, he said, was complete before open warfare commenced. Again, prosecution lawyers cited the Supreme Court's opinion in *Bollman and Swartwout*, which implied that someone who had not appeared in arms could be guilty of treason and defined a levying of war as “a body of men . . . actually assembled for the purpose of effecting by force a treasonable purpose.” Under this definition, the prosecution contended, the armed group of thirty men on Blennerhassett's Island constituted a levying of war.

Lawyers' Arguments and Strategies—The Defense

The defense asserted that Burr's actions as described in the indictment did not represent a levying of war.

1. The indictment was fundamentally flawed because Burr was not present on Blennerhassett's Island at the time the alleged treasonable act occurred

Burr's lawyers insisted that the Constitution narrowly defined treason as levying war against the United States, and that under this definition, no person could be guilty of treason unless actually present when the overt act of war occurred. Plotting, planning, or procuring treason did not constitute a levying of war that met the criteria for the crime of treason. The government's testimony purporting to show Burr's responsibility for the occurrences on the island was therefore irrelevant to the indictment's specific charge that Burr had levied war as if he were one of the assembled troops on the island. The defense lawyers denied that *Ex parte Bollman and Swartwout* established the proposition that a person not present at the scene of the overt act could nevertheless be considered a traitor. That part of the opinion, they argued, was "obiter dictum," unnecessary to the decision of the case in which it was given. In any event, there had never been an attempt in the United States to convict a person of treason who had not been on the spot where the crime took place.

2. Force and military array were essential elements of an act of levying war

The defense argued for a restrictive definition of levying war. A mere enlisting of men or raising and embodying troops was not itself sufficient to constitute an overt act of levying war. Arms were not necessarily military weapons, as rifles and shotguns were commonly used for hunting in the frontier region. The requirement, Burr's lawyers conceded, did not necessarily entail actual force but clearly included an imposing potential force, "a sufficient display of men and means to effect the object by intimidation." Levying war had to be an act of public notoriety, such as the marching of troops through the country. The assembled men had to be in military array and have an unmistakable warlike appearance. According to defense attorneys, the opinion in *Bollman and Swartwout*, properly understood, supported this meaning of levying war. The defense attorneys therefore contended that the government's testimony could not prove that the assemblage on Blennerhassett's Island amounted to a levying of war. The court, accordingly, should not permit such evidence to be submitted to the jury.

Biographies

John Marshall (1755–1835)

Chief Justice of the United States and presiding circuit judge at Aaron Burr's trial

“It has been my fate,” wrote Chief Justice Marshall in June 1807, “to be engaged in the trial of a person whose case presents many real intrinsic difficulties which are infinitely multiplied by extrinsic circumstances.” At the time of the Burr trial, Marshall had been Chief Justice of the United States for six years, having been nominated by President John Adams and confirmed by the Senate in January 1801, just six weeks before Thomas Jefferson began his first term as President. Marshall presided at the Burr trial as part of his duties as the Supreme Court justice assigned to sit on the U.S. circuit courts of the circuit comprising Virginia and North Carolina.

Burr's case, troublesome in itself for raising perplexing questions concerning the law of treason, was the more vexatious to Marshall for reopening the quarrel between the Jefferson administration and the federal judiciary, as played out earlier in the controversy over *Marbury v. Madison* in 1803 and the impeachment of Justice Samuel Chase in 1805. No one was more fully attuned to the awkward dilemma he faced in conducting this high-profile case. To maintain a posture of strict judicial impartiality was a duty that was at once imperative and exceedingly difficult to fulfill in the highly charged political atmosphere of the time. Things got off to a bad start a few days after the preliminary hearing in April 1807, when Marshall attended a dinner given by his friend and neighbor John Wickham, who had also invited his client Aaron Burr. Although the Chief Justice may not have suspected that the man he had just ordered to be bound over for trial at the next court would be a fellow guest, his decision to stay through the dinner was a lapse in judgment for which the Republican press roundly denounced him.

Over the course of the proceedings against Burr, Marshall delivered seventeen written opinions and several briefer opinions delivered orally. These opinions were



John Marshall

Print by J.H.E. Whitney after Charles Balthazar Julien Fevret de Saint-Mémin, c. 1889. Library of Congress, Prints and Photographs Division [reproduction number LC-USZ62-8499].

given in response to motions, mostly by the defense, and after counsel had argued both sides of the question. Two of the opinions occupy a prominent place in American constitutional law. One, given on June 13, accompanied his ruling on Burr's motion for a subpoena *duces tecum* to issue to President Jefferson. In granting the motion, the Chief Justice endeavored to balance the rights of the accused with the executive's duty to govern. The other prominent opinion was given on August 31 in deciding on the motion to exclude further testimony from going to the jury. Marshall upheld this motion as well, defining the crime of treason under the Constitution in such narrow terms as to make conviction difficult—which he believed faithfully reflected the intention of the framers.

Marshall delivered this opinion on the exclusion of testimony only two days after close of arguments. He must have written at a furious pace or else begun his draft while the lawyers were still orating. The finished opinion weighed in at nearly 22,000 words and consumed two-and-a-half hours in delivery. Anticipating the controversy his opinion would provoke, Marshall portrayed himself as an embattled judge resisting the popular tide, adhering to duty in the face of great pressure to do otherwise. After delivering the last of his rulings in Burr's case in late October, Marshall "galloped to the mountains" for a much-needed vacation. He was relieved to be done "with the most unpleasant case which has ever been brought before a Judge in this or perhaps in any other country which affected to be governed by laws." He continued to serve as Chief Justice until his death in July 1835.

Thomas Jefferson (1743–1826)

President of the United States and head of the executive branch prosecuting Burr

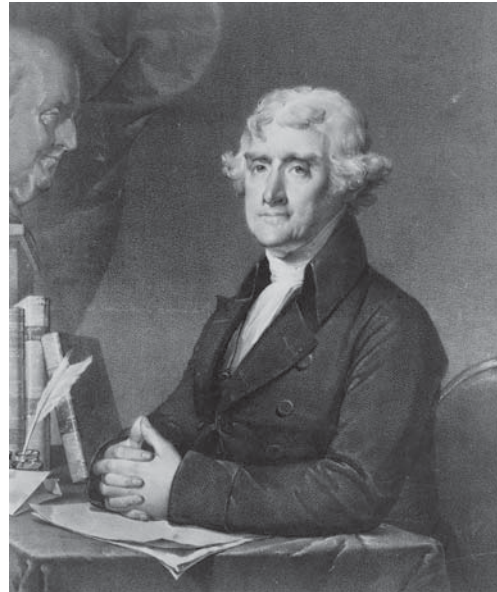
As the nation's chief executive, Jefferson had an official duty to suppress what he believed to be Burr's conspiracy and to prosecute its ringleader. He believed Burr was guilty of treason and that overt acts could be proved, even though the government had put down the enterprise before open warfare broke out. However, his determination to put Burr on trial for the high crime of treason, and not just for the lesser offense of conducting war against Spain, has led critics to attribute personal and partisan animus to the prosecution of Burr. Jefferson's nearly obsessive interest in the case, reflected in numerous and lengthy letters to U.S. Attorney Hay, lends credence to the charge. Although offstage, Jefferson was directly involved in managing the government's case against Burr.

That the President disliked Burr as an unprincipled intriguer, a man who would attach himself to whatever party or cause that would advance his unbounded personal ambition, was undoubtedly true. Jefferson was by no means alone in holding that opinion, sharing it with many others, including Jefferson's hated rival, the late Alexander Hamilton, whom Burr shot and killed in their celebrated duel of 1804.

Jefferson, so he later stated, had distrusted Burr ever since Burr had entered national politics in the early 1790s. Burr proved his utter untrustworthiness in Jefferson's eyes by his refusal to acknowledge Jefferson's claim to the presidency after both received the same number of electoral votes in the election of 1800.

Whatever the interplay of motives that induced him to pursue the treason charge, President Jefferson seriously compromised the case before it began by declaring in a message to Congress in January 1807 that Burr's "guilt is placed beyond question." This blunder allowed Burr and his lawyers to construct a plausible case that Jefferson was engaged in a personal vendetta to destroy a hated political rival. The President unwittingly made it possible for the Burr prosecution to become an indictment and trial of his own administration.

Even without this misstep, formidable obstacles stood in the way of a treason conviction. Jefferson could not have been pleased that Burr's case was to be tried by Chief Justice John Marshall, the judge who in *Marbury v. Madison* had stated that the executive acted illegally in withholding a justice of the peace's commission. Jefferson and Marshall, both Virginians and distantly related to each other, shared a mutual dislike that seemed to manifest itself in the recent institutional clashes between the executive and judicial branches. Jefferson complained that the judiciary was a Federalist bastion, intent upon assaulting the works of Republicanism. The Burr trial soon gave him more reason for complaint. At the outset Marshall found no probable cause to commit Burr for treason, a ruling that provoked Jefferson to wonder if the Constitution should be amended to make the judiciary more accountable to the public, impeachment being "a farce." While the grand jury met in June, Chief Justice Marshall granted the defense's motion for a subpoena *duces tecum* to issue to President Jefferson, ordering him to produce certain letters from Wilkinson and other documents. Jefferson regarded this judicial order as unnecessary, since he was willing voluntarily to provide whatever papers were required and in fact had already sent them before the subpoena was served. Privately irritated with the Chief Justice for playing along with Burr's obvious attempt to embarrass the administration and provoke a contest between the executive



Thomas Jefferson

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branch and judiciary, Jefferson substantially complied with the subpoena. He did so on his own terms, however, defending the executive's prerogative to refuse personal attendance and to decide which papers could be made public.

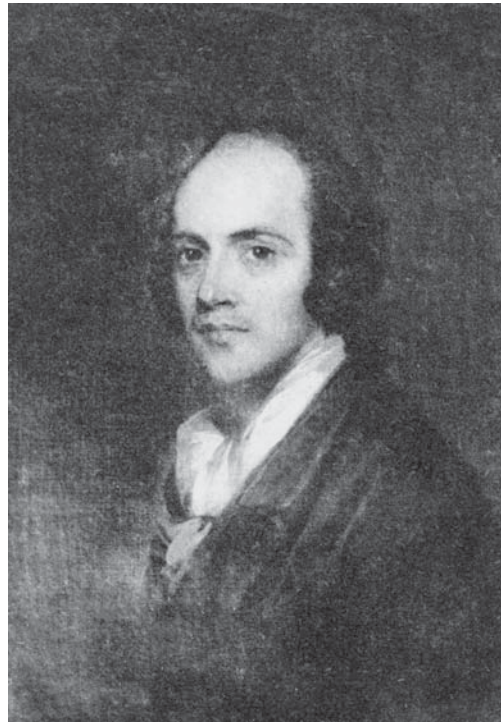
Upon learning of Marshall's decision of August 31 upholding the defense's motion to exclude further testimony, Jefferson wrote: "The event has been what was evidently intended from the beginning of the trial, that is to say, not only to clear Burr but to prevent the evidence from ever going before the world." Jefferson then instructed Hay to get all the evidence reduced to writing so he could lay it before Congress, which could decide whether "the defect was in the testimony, in the law, or in the administration of the law" and provide an appropriate remedy. The President took this step in a message to Congress in October 1807. As for the remedy he had in mind, Jefferson made no public recommendations, though he privately hoped for a constitutional amendment which, "keeping the judges independent of the Executive, will not leave them so, of the nation."

Aaron Burr (1756–1836)

Indicted for treason against the United States and tried in the U.S. Circuit Court, district of Virginia

As one of the nation's foremost attorneys, Aaron Burr played an active role in his own defense, by no means content to place himself fully in the hands of the formidable lawyers he hired to defend him. In a sense, the accused prisoner was lead counsel, advising and instructing his team about legal strategy and tactics.

A New Jersey native, Burr was the son of the second president of the College of New Jersey (later Princeton) and grandson of the noted theologian Jonathan Edwards. After graduating from the College of New Jersey, he took up the study of law, but put this aside with the onset of the War of Independence. As a Continental army officer, Burr performed with great valor, eventually obtaining a commission as lieutenant colonel with a regimental command. After the war, he resumed law



Aaron Burr

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study, obtained his license, and moved to New York, where he began competing with Alexander Hamilton in the legal and political arenas. Burr's career in politics began in 1784 with election to the New York state legislature. In 1791, the legislature elected Burr to the U.S. Senate, choosing him over Hamilton's father-in-law. Burr served one term, moving politically from the middle ground toward the Republicans. He ran with Jefferson on the Republican presidential ticket in the election of 1796, which was won by John Adams. Burr then entered the New York Senate, where he built up a strong political organization that won the state for the Republicans and secured Burr a place on the ticket again with Jefferson in 1800.

Along with success in politics, Burr had acquired a reputation as a man lacking in principle, motivated only by expediency and desire to satisfy his large personal ambitions. He managed to incur the hostility of both Hamilton and Jefferson. The latter became bitterly suspicious of Burr for not stepping aside when the two received the same number of electoral votes in the election of 1800, throwing the election into the House of Representatives. Burr was virtually excluded from a role in the Jefferson administration and a prospect of succeeding to the presidency. At the same time his rivalry with Hamilton intensified to the point that Burr issued a challenge that eventuated in a fatal duel in the summer of 1804. With his political career in ruins, Burr began forming plans he hoped would bring him glory and fortune in the American Southwest, but instead resulted in his trial for treason in the federal court at Richmond.

At his preliminary examination on March 31, 1807, Burr signaled his intention to serve as his own lawyer by addressing the court on the motion to commit him for treason. When the court session opened on May 22, he aggressively challenged prospective grand jurors, succeeding in obtaining the removal of two prominent Jeffersonian politicians he claimed were personally hostile to him. Burr and his team of lawyers adhered to a strategy of attacking the motives and good faith of the government prosecuting him and particularly those of the government's chief witness, General James Wilkinson. It was Burr's idea to move for a subpoena *duces tecum* commanding President Jefferson to produce a letter from Wilkinson and other documents that the accused claimed were material to his defense.

Chief Justice Marshall's opinion of August 31 upholding the motion and the jury's acquittal the next day allowed Burr to escape the gallows. But the misdemeanor trial and the motion to commit for treason or misdemeanor charges in another jurisdiction kept him in Marshall's court for an additional month and a half. Although he was disappointed with Marshall's decision of October 20 ordering him to stand trial in Ohio on the misdemeanor charge of waging war on Spain, Burr knew the government would not pursue the charge.

In the aftermath of the trial, Burr found himself deeply in debt and hounded by creditors who pursued him for the many unpaid bills from his western enterprise and subsequent legal proceedings. In June 1808, he embarked for England, remaining

there and in Europe for four years. Shortly after his return in 1812, he suffered the deaths of his grandson and daughter within months of each other. He resumed the practice of law in New York, but despite professional success he remained chronically in debt from borrowing money for various schemes. In 1833, Burr married a wealthy widow, who sued for divorce after he quickly squandered her fortune. The divorce was granted on the day he died in 1836.

Harman Blennerhassett (1765–1831)

Burr's associate, indicted for treason by a grand jury of the U.S. Circuit Court, district of Virginia

Blennerhassett has been called the most “conspicuous casualty” of Burr’s western enterprise, a sad, even tragic, victim of a grand scheme that went awry. Honest, generous, and trusting to a fault, Blennerhassett was not the altogether guileless innocent memorably portrayed in Wirt’s famous speech (“Who is Blennerhassett?”) at the trial. He was an enthusiastic backer of Burr’s plans, a willing recruit to the New Yorker’s army.

Born into an aristocratic Irish family, Blennerhassett received a good education and acquired a reputation for learning and culture. During the 1790s he joined an Irish revolutionary association agitating for independence from Britain. This endeavor got him into trouble with the authorities, which led to his decision to emigrate to America in 1796.

Bringing with him a bride and a substantial family fortune, Blennerhassett eventually settled in the nation’s interior, establishing mercantile partnerships in Marietta, Ohio, and purchasing an island in the Ohio River, just below present Parkersburg, West Virginia. With his wife, a striking beauty, he set about creating a sylvan paradise on his island. He erected an imposing mansion, decorated it with expensive furnishings, and constructed bounteous gardens on the surrounding grounds.

Burr and Blennerhassett first met in early May 1805, when Burr stopped at the island during his western trip of that year. Burr saw in the Irishman a potential financial backer, but he was probably more interested in the island as a staging point



Harman Blennerhassett

Miniature portrait, artist unknown, 1796.
Blennerhassett Island Historical State Park,
Parkersburg, West Virginia.

or redoubt for his contemplated expedition. For his part, Blennerhassett was flattered by the attentions of a man who had been so prominent in American affairs. He was also attracted by the prospect of glory and riches, which he needed to replenish after sinking a large portion of his inherited wealth in building such a lavish estate.

By early 1806, Blennerhassett had become an eager adherent, apparently regarding Burr's vague plans involving a military expedition against Spain. Blennerhassett advanced money, extended credit, and wrote newspaper essays that spoke of marching on Mexico and hinted at the breakaway of the west. In late summer of that year, Burr made another visit to the island, which by then had become a center of recruiting activities and was to be an embarkation point for men, boats, and supplies. Burr left the island on September 1, Blennerhassett remaining behind to supervise preparations for an eventual departure to join the expedition's leader downriver. These activities excited the attention of the local authorities, but Blennerhassett and a band of about thirty men and four boats slipped away on the night of December 10. The next day the Wood County militia looted Blennerhassett's mansion and outbuildings.

Blennerhassett succeeded in joining Burr, and the two were subsequently arrested in the Mississippi Territory. While Burr was taken to Richmond, Blennerhassett was released and remained in the Mississippi Territory. In July 1807, on his way back upriver to check on the condition of his island home, he was again arrested and brought to Richmond. The grand jury in the U.S. circuit court in Richmond had returned an indictment of Blennerhassett on a charge of treason and a misdemeanor charge of waging war on Spain. During Burr's trial, Blennerhassett was confined to the state prison, where he wrote letters to his wife and kept a journal that throws much light on the proceedings. After Burr's acquittal for treason, the U.S. attorney chose not to proceed with Blennerhassett's trial. Chief Justice Marshall later ordered Blennerhassett, along with Burr, to stand trial in Ohio on misdemeanor charges of waging war on Spain, but the government did not prosecute the case.

Spared the hangman's noose, Blennerhassett was nevertheless a broken man, his fortune depleted, his estate sold for debts, and with scant likelihood of being repaid the funds he had advanced to his erstwhile friend and chieftain. He subsequently moved to Natchez, Mississippi, where he bought a cotton plantation that never proved profitable. After ten years, he sold the plantation and moved first to New York and then to Montreal, where he practiced law for three years. Following further disappointment, Blennerhassett in 1822 went back across the Atlantic to England. The former master of an enchanted isle in the Ohio River spent his remaining years in the home of a kindly sister.

James Wilkinson (1757–1827)

General of the army and governor of Louisiana, who was the government's chief witness against Burr

An inveterate adventurer, intriguer, and seeker of glory and fortune, James Wilkinson found himself as much on trial at Richmond as did the man he accused of being a traitor to the United States. Wilkinson rose from middling circumstances as the son of a Maryland farmer to prominence as a Continental army officer during the War of Independence. His rise in status was accompanied by a reputation for self-promotion. After the war he moved to Kentucky, set himself up in mercantile business, and began pressing for Kentucky's separation from Virginia while promising Spain to protect and extend its American empire. As a Spanish agent, he received an annual pension and unlimited trading rights on the Mississippi River. In the 1790s, he reentered the army, eventually becoming commanding general, all the while continuing in Spanish service. (Wilkinson's activities as a Spanish agent, frequently rumored during his lifetime, were confirmed after the opening of the Spanish archives a century later.)

By 1805, Wilkinson was governor of the new territory of Louisiana and in communication with Burr, whom he had first encountered as a fellow officer during the Revolutionary War. He imparted his great knowledge of the Southwest to Burr, doubtless appealing to Burr's hopes for glory and fortune to be made in this politically unstable region. How deeply Wilkinson was involved in Burr's schemes may never be known, but their relationship was close and secretive enough that they communicated in cipher. In October 1806, Wilkinson informed President Jefferson of a coded letter evidently from Burr detailing his intentions to lead an army down the Mississippi. In thus exposing a plot with the apparent design to dismember the union, Wilkinson hoped to protect himself while winning glory as a national hero. Instead, he emerged from the Burr trial with his dubious reputation badly if not irretrievably damaged.



James Wilkinson

Chalk drawing by Charles Balthazar Julien Fevret de Saint-Mémin. National Portrait Gallery, Smithsonian Institution.

As the government's chief witness against Burr, Wilkinson arrived in Richmond in mid-June to testify before the grand jury. Following a dramatic courtroom confrontation between the accused and his accuser, Burr and his defense team embarked on a relentless and effective campaign to undermine Wilkinson's credibility, focusing particularly on the general's arbitrary and overbearing conduct in arresting suspects and potential witnesses in New Orleans during the weeks following public disclosure of Burr's conspiracy. In the end, the grand jury indicted Burr, but nearly half the jurors wanted to indict Wilkinson as well for "misprision" (concealment) of treason. One of these jurors was John Randolph, the grand jury foreman, who spoke of Wilkinson as a "mammoth of iniquity" and as "the most finished scoundrel that ever lived." After his grand jury appearance, Wilkinson was not called again to testify until October, after Burr's acquittal on the treason and misdemeanor charges and during the motion to have Burr prosecuted for treason in another federal court. Again, Burr's lawyers put Wilkinson on the defensive, forcing him to make damaging admissions that revealed his attempt to conceal his relationship with Burr. By then the exasperated U.S. attorney had lost all confidence in Wilkinson. After the trial, Wilkinson was subjected to investigations and courts martial relating to his Spanish dealings and conduct in the army. He survived these, and during the War of 1812 he was put in charge of a plan to invade Canada. This proved to be a disaster, resulting in the loss of his military command and a further court martial. Although he was acquitted, the army no longer had any use for his services. He settled in New Orleans, wrote his memoirs, and spent the last three years of his life in Mexico City in pursuit of Texas land claims.

Luther Martin (1748–1826)

Maryland lawyer who was Burr's lead counsel

Renowned as among the nation's foremost trial lawyers, Luther Martin defended his close friend Aaron Burr with an intensity animated by strong personal dislike of Thomas Jefferson. Like Burr, Martin attended the College of New Jersey (later Princeton) and entered the legal profession. In 1778, he was appointed Maryland's first attorney general, a post he held intermittently during the next forty years. He was a delegate to the Federal Convention of 1787, but, unhappy with the Constitution, became an outspoken opponent. During the 1790s his enmity toward Jefferson inclined his politics to the Federalists. Just two years before Burr's trial, Martin had performed brilliantly in obtaining an acquittal for impeached Supreme Court Justice Samuel Chase. Burr, presiding at the impeachment trial as Vice President, had watched in admiration. Martin managed to stay in top form professionally over many years despite habitual drunkenness—"Lawyer Brandy Bottle," as he was known—and careless personal appearance.

Martin arrived in Richmond in late May 1807, nearly a week after the grand jury convened. He rented a house near the Capitol, where Burr (after a stint in the state penitentiary) was kept under guard during the treason trial. While the grand jury met, Martin unveiled his defense strategy of attacking the Jefferson administration, accusing the government and the President in particular of conducting a partisan and personal vendetta against his client. He amply displayed his gift for invective during the argument of the motion for a subpoena to be issued to the President. Jefferson, said Martin, had proclaimed Burr “a traitor in the face of that country, which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend.” For his part, Jefferson privately wondered if Martin should be committed “as *particeps criminis* with Burr” for having known in advance of the latter’s treasonable enterprise. Such a move would “put down this unprincipled & impudent federal bull-dog.”

At the treason trial, Martin gave the closing argument on the motion to exclude the evidence. Speaking for fourteen hours on August 28 and 29, he gave the second most famous speech of the Burr trial after Wirt’s, while indisputably earning the top prize for lawyerly long-windedness. Repetitious and haphazardly organized as he was, Martin displayed immense learning, effectively drawing a contrast between the strict definition of American treason embodied in the Constitution and the old English doctrine of constructive treason and the rule that in treason all are principals. These, he said, had “originated in the worst of times, in the most tyrannical reigns, and when the most corrupt and wicked judges sat in the English courts.” With respect to Burr’s expedition, Martin contended that the government had offered no proof of an overt act of levying war—this was “will o’ the wisp treason . . . said to be here and there and everywhere, yet it is nowhere.” Revisiting a favorite theme, he implicitly censured an administration that had excited “public prejudices” against Burr to the point that a jury, even “if satisfied of his innocence, must have considerable firmness of mind to pronounce him *not guilty*.”

After the Burr trial, Martin continued to be a highly sought after counselor, arguing a number of cases in the Supreme Court. His last appearance in a major case



Luther Martin

Photoprint of painting by David Edwin. Library of Congress, Prints and Photographs Division [reproduction number LC-USZ62-83712].

occurred in 1819, when as Maryland's attorney general he represented the state in the great bank case *McCulloch v. Maryland*. Shortly afterward, Martin suffered an incapacitating stroke that rendered him a helpless derelict for his remaining years. In 1823, he was taken in by Burr, with whom he lived during the remaining three years of his life.

John Wickham (1763–1839)

Virginia lawyer representing Aaron Burr

On a defense team of six eminent lawyers, John Wickham was second only to Luther Martin as principal counsel for the accused traitor. Wickham was the acknowledged leader of the glittering Virginia bar and had a reputation for a quick legal mind, polished manners, and a cultivated wit. A New York native, Wickham was imprisoned during the War of Independence because of his family's Tory sympathies. He was released to the care of an uncle, a Virginia clergyman, with whom he went to live and study law. He was admitted to the bar in 1786 and soon thereafter moved to Richmond, where he practiced in the superior courts. After his first wife died, Wickham married the daughter of a prominent Richmond physician. Their home near Capitol Square was the center of an elegant social circle. Nearby was the home of John Marshall, a good friend and (before his elevation to the bench) rival at the bar. As the host of a celebrated dinner that took place a few days after the preliminary hearing in April 1807, Wickham committed an impropriety in extending an invitation to both Marshall and Burr.

Wickham was engaged on Burr's behalf throughout the proceedings from the initial hearing in the early spring through the commitment hearing in the fall of 1807. From the beginning he aggressively insisted that overt acts had to be established and denied the relevance of evidence that did prove such acts. At the treason trial Wickham led off for the defense in speaking to the motion to exclude further testimony. In a speech that commenced on August 20 and concluded the next day, Wickham



John Wickham

Painting, unidentified artist. National Portrait Gallery, Smithsonian Institution.

argued that under the Constitution no person could be guilty of levying war unless personally present at the commission of the overt act. He also contended that the indictment against Burr was faulty insofar as it charged him with personally levying war on Blennerhassett's Island. Under this indictment, said Wickham, evidence that Burr was the procurer of treason was irrelevant. Chief Justice Marshall adopted much of Wickham's argument and reasoning in his seminal opinion of August 31.

The Burr trial was the high point of a distinguished legal career. Wickham never held public office, content with the private practice of law and life as an affluent Virginia gentleman. He entertained prominent visitors to Richmond, including noted American statesmen and English literary figures.

George Hay (1765–1830)

U.S. attorney for the District of Virginia, who represented the government in prosecuting Burr

Hay had a reputation as a competent if not brilliant lawyer. Born in Williamsburg, Virginia, son of a cabinetmaker, Hay later moved to Albemarle County, where he read law. During the 1790s he established a successful practice in Petersburg and participated in Jeffersonian politics. In 1799, he attracted attention with a pamphlet defending freedom of the press and attacking the sedition law. The next year he defended James T. Callender in his sedition trial before Judge Chase in the U.S. Circuit Court at Richmond. For this and other services on behalf of the Republican cause, President Jefferson nominated Hay as U.S. attorney in 1803. On the eve of the Burr prosecution, Hay suffered the loss of his first wife.

From the outset, Hay faced a formidable task convicting Burr of treason, ironically because the administration's prompt suppression of the enterprise before it matured into open warfare significantly increased the difficulty of proving overt acts. Aware of this obstacle, the U.S. attorney dutifully conducted a prosecution that President Jefferson regarded as top priority. Jefferson, indeed, took an unusually active role behind the scenes, dispensing instructions and recommendations to Hay in a barrage of letters written from Washington and Monticello. Far from regarding the President's missives as a distracting intrusion, Hay probably welcomed all the advice he could get. For the preliminary hearing, the President sent Attorney General Caesar A. Rodney to assist Hay. After Rodney returned to Washington, William Wirt and Alexander Macrae had joined the prosecution. Hay and his two co-counsel had to contend against a defense team of five lawyers of exceptional talent, not counting Burr himself.

At the preliminary hearing, Hay failed to persuade Chief Justice Marshall to commit Burr for treason. This was the first of a series of prosecution defeats and a portent of the eventual outcome. Although the grand jury's treason indictment

against Burr in June was a significant victory, the defense by then had managed to seize the initiative by attacking the government and particularly its chief witness, General James Wilkinson. At the trial in August, Hay opened the government's case by arguing that conviction for an overt act of treason did not require the actual commission of hostilities or even that a body of men should appear in military array. Common sense and considerations of national safety, he said, "certainly required that the crime of treason should be completed before the actual commission of hostilities against the Government." Hay reiterated this point in his speech of August 26 and 27 on the motion to exclude further testimony, which he introduced by acknowledging to the court that he could not "instruct you by my learning, amuse you by my wit, make you laugh by my drollery, nor delight you with my eloquence." He also placed great emphasis on the preservation of the principle of trial by jury, observing that it was "a most dangerous proposition" for a judge to encroach on the jury's proper province of weighing all the evidence. Referring to an impeachment article against Justice Chase concerning his conduct in an earlier treason trial, Hay appeared to be warning Chief Justice Marshall of what might happen if he granted the motion to exclude evidence. After the Burr trial, Hay married a daughter of James Monroe, with whom he had formed a close association. He continued to serve as U.S. attorney until 1816, when he resigned to enter the Virginia legislature. After a term in the House of Delegates and several terms in the state senate, he moved his family to Monroe's northern Virginia estate. He spent much time in Washington, D.C., practicing law and advising President Monroe. In 1825, President John Quincy Adams nominated Hay as U.S. district judge for the Eastern District of Virginia, an office he held until his death. In this capacity, he also sat with Chief Justice Marshall on the U.S. Circuit Court.

William Wirt (1772–1834)

Assisted U.S. Attorney George Hay in prosecuting Burr

A Maryland native, Wirt was orphaned at a young age and raised by an aunt. He moved to Culpeper County, Virginia, in 1792, and commenced the practice of law. Ambition, talent, and a congenial personality brought him early success, despite a disposition to prefer the pleasures of social life to professional toil. His practice spread to neighboring Albemarle County, where he formed valuable connections through his marriage to the daughter of a friend of Thomas Jefferson. Widowed within a few years (he later remarried), Wirt moved to Richmond, where in May 1800 he served with Hay in representing James T. Callender in his trial for sedition under Judge Samuel Chase. His argument against the constitutionality of the sedition law enhanced his legal reputation. Having won distinction as a lawyer, Wirt exhibited a literary flair in a series of pen portraits published in 1803 as *The Letters of a British Spy*. Among

the subjects of these anonymous sketches were John Marshall, Edmund Randolph, and John Wickham, with whom Wirt was later associated at the Burr trial. When he joined the prosecution team in 1807, Wirt had recently returned to private law practice after serving several years as judge of Virginia's court of chancery for the eastern district.

At the trial Wirt distinguished himself in a losing cause, proving himself more effective than the plodding Hay. His captivating eloquence and wit provided entertaining interludes to the often-dry legal disquisitions of his fellow lawyers. His most important speech occurred at the climax of the trial on August 25. He presented a well-reasoned argument portraying Burr as the mastermind who set in motion the great treasonable enterprise, of which the assemblage on Blennerhassett's Island formed a part. Citing the Supreme Court's opinion in *Ex parte Bollman and Swartwout*, Wirt insisted that Burr was a principal in treason even though he was not physically present on the island. To suggest that only those on the island could be principals, while the absent master plotter was a mere accessory, was absurd. "Who is Blennerhassett?" asked Wirt, introducing a passage that became a classic of American oratory. With his ample literary gifts, the lawyer spun a riveting tale of corrupted innocence, of Blennerhassett's peaceful, tranquil life on his Eden in the Ohio River until the "serpent entered its bowers." Burr escaped conviction as a traitor, but Wirt forever linked him with the Biblical story of fallen humanity.

Wirt won enduring fame for his performance at the Burr trial, but in later years he achieved even greater prominence in law and literature. In 1817, President Monroe appointed him U.S. attorney general, a post he held for twelve years. The same year he published his celebrated *Sketches of the Life and Character of Patrick Henry*. As attorney general and as private counsel, Wirt made frequent appearances in the Supreme Court. He argued some of the most important cases of the Marshall Court, including *McCulloch v. Maryland* (1819), *Gibbons v. Ogden* (1824), and the Cherokee cases of 1831 and 1832. Chief Justice Marshall praised Wirt's "judgment and genius," adding: "In the brilliant play of imagination, in fertility of invention, I should hesitate were I required to name his equal." His opposition to the Jackson administration led to his nomination as president by the Anti-Masonic party in 1831.



William Wirt

Engraving, St. Mémin Collection of Portraits, published by E. Dexter, New York, 1862. Library of Congress, Prints and Photographs Division [reproduction number LC-USZ62-119242].

Media Coverage and Public Debates

In ordinary circumstances, newspaper coverage of the early federal courts, even the Supreme Court, was infrequent. Although they paid much attention to the operations of the federal government, newspapers focused almost exclusively on proceedings in Congress and communications from the executive departments. Whole terms might pass without so much as a mention of a federal court case. This is understandable, for most legal cases are private civil suits of no interest to anyone but the parties themselves. Not surprisingly, the cases that did attract popular interest were usually criminal, such as robbing the mail and counterfeiting notes of the Bank of the United States. These were the most common federal crimes.

Aaron Burr's case was of a different order of magnitude, even for a criminal case. Treason was the highest crime of all. The revelations of the conspiracy captivated the American public's attention from late 1806 through 1807. Newspaper publishers immediately recognized an opportunity to boost circulation. They eagerly tried to gratify the public's interest by filling their columns with every known fact or rumor relating to Burr's enterprise and with detailed accounts of the ensuing legal proceedings.

Because the trial took place in the summer, when Congress and the state legislatures were not in session, newspapers had ample space to print not only the formal court proceedings but also editorials, letters to the editor, and other commentaries reflecting the paper's political point of view. Three Richmond newspapers fully reported the case, beginning with the preliminary examination in the spring and continuing through its final disposition six months later: the *Enquirer*, edited by Thomas Ritchie; the *Virginia Argus*, edited by Samuel Pleasants; and the *Virginia Gazette*, edited by Augustine Davis. The *Enquirer* and *Virginia Argus* were supporters of the Jefferson administration, while the *Virginia Gazette* was Federalist in its politics. The papers hired reporters to take stenographic notes of the lawyers' arguments and judge's opinions in an attempt to reproduce them verbatim. After initial publication in the newspapers, the trial proceedings were published separately in book form.

Newspaper articles

“Communication”—*Virginia Argus*, April 7, 1807

The writer of this “communication” was most likely Samuel Pleasants, editor of the Virginia Argus. This piece was the first public reaction to the celebrated dinner hosted by John Wickham.

It is reported, and we are sorry to say, that the fact appears indisputable, that Col. Aaron Burr and the Chief Justice of the U. States, dined together at Mr. Wickham's, since his examination, and since his honor had himself solemnly decided that there were probable ground to believe him guilty of a high misdemeanor against the U. S. We acknowledge that the rites of hospitality ought not to be refused to this *unfortunate gentleman* by those who believe him innocent; but confess our astonishment that men, whose intellects are so penetrating as those of Mr. Wickham and Mr. Marshall, did not perceive the extreme indelicacy and impropriety of such respect being paid him by the Judge, who is to sit hereafter on his trial, and who, by his own opinion officially pronounced, had affixed a stigma on his character, which can only be wiped off by his future acquittal.

Editorial—*United States Gazette* (Philadelphia), reprinted in the *Virginia Gazette*, April 29, 1807

Like his fellow journalists, Virginia Gazette editor Augustine Davis filled his columns with stories and articles clipped from other newspapers throughout the country and abroad. To counter Republican criticism of Marshall's attendance at Wickham's dinner, Davis inserted this piece from a Federalist newspaper in Philadelphia.

The democratic papers of Richmond have commenced a most furious attack upon the character of Chief Justice Marshall. They say that his conduct has been "*grossly indecent*," that it is "*a disgrace to the country*" . . . that it has "*excited sentiments of lively indignation*," &c. &c. It will immediately be asked what has the Chief Justice done to merit their accusations? Why, forsooth, he dined with a gentleman in Richmond, and col. Burr was at the table!!! and the Chief Justice neither kicked Col. Burr out of doors, nor ran away himself; but sat and ate his dinner as deliberately, and to all appearance with as little concern as though perfectly unconscious that the presence of Col. Burr could either contaminate his principles, or blast his reputation! This is the head and front of his offending.

“Communication”—*Virginia Argus*, June 17, 1807

This satirical piece nicely captures the comic opera aspect of the Burr trial embodied in two of its most colorful characters: General James Wilkinson, the prosecution’s chief witness, and Luther Martin, Burr’s lead lawyer.

DRAMATIC INTELLIGENCE

The Drama under rehearsal at the Richmond Theatre, first reported to be a *Farce*, is now said to be of the new species of *Melo Drama*.

The arrival of Mr. *Wilkinson*, a performer of long standing, has excited much curiosity—the managers are sure of full houses from some time to come.

The engagement of Mr. Martin, from the Theatre at Baltimore, appears to have been made upon a supposition that the taste of the Richmond audience was for *Low Comedy*—from the reception of this actor, it appears that there was some mistake in this affair.

Letter from John Brockenbrough, July 11, 1807—*Virginia Gazette*, July 15, 1807

Brockenbrough, one of the grand jurors, wrote in response to a published piece by Munford Beverley, also a member of the grand jury. Beverley had stated that seven jurors, including himself and Brockenbrough, had voted to present James Wilkinson on three charges: high treason, misprision (concealment) of treason, and violating the Constitution.

In a controversy between General Wilkinson or his friends and Mr. Beverley, I can certainly feel no disposition to interfere. But as Mr. Beverley has chosen, in his statement of the enquiry into General Wilkinson’s conduct by the Grand Jury, to introduce *my* name into the newspapers, I deem it a duty to *myself* to relate briefly the *facts* of the case as far as they concern *me*. The very strange misconception involved in this affair I cannot comprehend, and I must therefore leave it to be explained by others.

Whatever may be my impressions respecting General Wilkinson, I did not vote for presenting him on a charge of High Treason, for *no vote on that question was taken by the Grand Jury, to my knowledge.*

On the motion to present him for misprision of treason, I was of opinion, after

the discussion of the subject, that the evidence did not warrant the presentment, and consequently I voted against it.

For his infraction of the Constitution I voted to present him, because I thought the offence came completely within the jurisdiction of the Court of this District.

Editorial—*United States Gazette* (Philadelphia), reprinted in the *Virginia Gazette*, September 30, 1807

This editorial from a Federalist newspaper responds to attacks on Marshall and the judiciary by censuring the Jefferson administration for disregarding the rights of the people in putting down the Burr conspiracy.

The prevailing fashion in this country is now to run down the Judicial authority and attempt to merge it in that of the executive. If the executive declares that a man is guilty of treason, and afterwards puts him upon his trial before a court and jury, the democrats will not allow that court and jury to do any thing more or less than to confirm the sentence of the executive and execute the offender. This they consider as maintaining the rights of the people.

While the democratic faction are thus feelingly alive to what they affect to consider as usurpation on the part of the Judiciary, they are perfectly unconcerned at the most enormous and unexampled usurpations on the part of the executive. History will hardly furnish an example of such oppressive tyranny as has been practised under the administration of Mr. Jefferson towards a number of men who were supposed to be concerned in the schemes of Col. Burr. In England damages have been given to the amount of ten thousand pounds for arresting and detaining a man for a few hours, under a general warrant, issuing from the cabinet of the king. In the United States, and under the administration of Mr. Jefferson, several men have been arrested without any warrant at all; hurried away from their friends under circumstances of the aggravated cruelty and barbarity; forced on board of crazy vessels, and in the winter season transported to the distance of several thousand miles; and after being landed, sent under military escort from one post to another to avoid the process of the laws of the country; all this in a time of profound tranquillity—and for what? Why, for nothing at all, except for not having the good fortune to be agreeable to Mr. Jefferson and his officers; for upon examination it was found that against some of them the government had not even an accusation to bring, and against none of them were they able to substantiate any charge whatever.

Yet such monstrous usurpation, so destructive of every principle of civil liberty, is not thought worthy of even a comment by those who profess to be the exclusive champions of the rights and liberties of the people.

Editorial—*Virginia Argus*, December 4, 1807

In the aftermath of Burr's acquittal, Republican newspapers bitterly denounced Chief Justice Marshall, accusing him of manipulating and twisting the law to allow Burr to escape on a technicality. Their displeasure prompted proposals, such as that advocated here, to amend the Constitution by providing for the removal of federal judges at the request of a majority of both houses of Congress. The editorial echoes Jefferson's remark, following the failure to convict Justice Samuel Chase in 1805, that impeachment as a means of removing bad judges was a "farce." Despite the furor over the Burr trial, Congress did not act upon proposals to make easier the removal of federal judges.

As the General Assembly of Virginia will commence their session on Monday next, we take the liberty of recommending to their particular attention the important subject of the Judiciary of the United States.

The extraordinary proceedings in the case of AARON BURR . . . clearly shew that an *independent* Judiciary (that is to say, a Judiciary not controlled by the laws, and above the fear of violating them) is a very pernicious thing. That the federal Judiciary is, in this sense of the word, *independent*, is, perfectly certain; since no power at present exists by which it is probable a Judge could be punished even for palpable treachery to his country and wilful perversion of the law; a trial before the supreme court of impeachments being only a solemn and expensive farce.

Every friend of a free government must wish the members of the Judiciary to be independent of all improper influence; to be free from the smallest suspicion of being governed by fear, favor, or affection; and to enjoy salaries sufficient to set them far above the temptation of bribery or corruption.

But this desirable independence of the Judges is very different from that which places them above the law; enabling them not only to legislate by their decisions, but to vary from and dispense with those decisions, whenever it suits their purposes.

It is evident that in delivering his opinions in the case of *Burr*, Judge *Marshall* must have known that he possessed the latter of these two species of independence; that he felt himself to be *legislating* on the subject of treason, and even dispensing with the law which the supreme court of the United States had previously declared on the same subject; that as he looked down with contempt on the opinions of the people, so also he was conscious of being above the reach of punishment.

But such a state of things ought not to be tolerated in a free country. No person should be above the law;—and, especially those who interpret and apply it to the cases of others should be compelled to obey it strictly themselves. True it is that a Judge ought not to be *punished* for an error of opinion, where that error is not produced by an improper bias. But where the opinions of a Judge are found to be continually or

systematically hostile to the liberties of the people, or injurious to their safety, even though no proof of corrupt motives can be exhibited against him, he ought to be *removed from office*.

Offices ought not to be considered as the property of *individuals, but of the public*; and those who fill them are only trustees for the general good. They do not hold their honors and salaries for their own sakes; that they may live at ease and fatten on the treasury; but merely for the purpose of performing useful and laborious duties, for which they are entitled to, and ought to receive, an adequate compensation. A *removal from office* ought not therefore to be considered as a *punishment* for a crime; neither ought it to take place in those cases only where a *crime* has been committed.

A want of skill and knowledge in the law, a defect of understanding, or the possessing, and acting under the guidance of erroneous and dangerous principles, are all good and sufficient reasons for removing a Judge from office—If the point is frequently otherwise considered, it must arise from the mistaken impressions generally entertained concerning the independence of the Judiciary, or from the idea that the office is the property of the Judge who holds it, and that he ought not to be deprived of his *property* without conviction of a crime; opinions which are certainly contrary to those laid down in the Bill of Rights of Virginia as the foundation of all good government.

Yet, for none of these glaring defects, can a Judge be removed from office, as the constitution of the United States now stands.

It is time, therefore, that an amendment should be proposed authorising and requiring the President to remove any Judge from office at the request of a majority of both houses of Congress. Such an amendment could not have the effect of producing any improper influence on the minds of the Judges, or of diminishing their *legitimate and useful independence*. A good Judge would never be prevented from doing justice by the fear of losing his place, and a bad one ought to be subject to the wholesome concord of his country. The opinion of the majority of both houses of Congress would generally be on the side of justice; and, if it sometimes erred, it is better in a free country that the will of the people should prevail, (the government being instituted *for them* and to be administered according to *their wishes*) rather than the will of a few persons, whose interest (being in conflict with that of the great body of the community,) will much oftener lead them to do wrong.

All human institutions are imperfect; but the proposed amendment, though it would not be altogether free from evil, would, most assuredly, be a great and important improvement to the constitution of the United States.

We hope, therefore, that the General Assembly of Virginia, always ardent and active in the cause of republicanism, will not be hindmost on this occasion; but will take up the subject early in the session, and propose the amendment as speedily as possible.

Historical Documents Related to the Burr Case

All of the documents are transcribed as they appear in the original. The italicized text provides historical background and context for understanding the documents.

The “cipher letter” to James Wilkinson, July 22–29, 1806

This celebrated document was the key piece of evidence linking Aaron Burr directly to the act of treason for which he was subsequently charged. In October 1806, Wilkinson sent a translated copy of the letter to President Jefferson, setting in motion the administration’s efforts to suppress the conspiracy and to prosecute Burr. As legal evidence, the cipher letter had problems at the outset, however, when Chief Justice Marshall denied that it showed probable cause to commit Burr’s associates, Bollman and Swartwout, or Burr for treason. In subsequent testimony, Wilkinson admitted altering this version of the letter by striking out the first sentence, apparently to disguise his own close involvement with Burr. To historians, the cipher letter presents a documentary puzzle that will likely never be fully resolved. Although the letter was long thought to have been written by Burr, no copy exists in his hand. A copy does exist in the hand of Jonathan Dayton, another Burr associate and former Speaker of the House of Representatives. The best informed scholarly opinion now holds that Dayton wrote the cipher letter that Wilkinson received, substituting it for one that Burr had written. The bombastic language of the letter contrasts with Burr’s unadorned style. Other internal evidence, as well, casts doubts on Burr’s authorship of the letter. For example, Burr almost certainly did not intend to bring his daughter and ailing grandson (see the third paragraph) with him on a dangerous western expedition. Another odd characteristic of the letter is the switch from first to third person in references to Burr.

[Document Source: *Political Correspondence and Public Papers of Aaron Burr*, eds., Mary-Jo Kline and Joanne Wood Ryan, 2 vols. (Princeton, N.J., Princeton University Press, 1983), 2: 986–87.]

Your letter post marked 13th May, is received. I have at length obtained funds, and have actually commenced. The eastern detachments, from different points and under different pretence, will rendezvous on Ohio on 1 November.

Every Thing internal and external favor our view. Naval protection of England is secured. Truxton is going to Jamaica to arrange with the admiral there and will meet

us at Mississippi. England, a navy of the United States ready to join, and final orders are given to my friends and followers. It will be a host of choice spirits. Wilkinson shall be second to Burr only and Wilkinson shall dictate the rank and promotion of his officers.

Burr will proceed westward 1 August—never to return. With him go his daughter and grandson. The Husband will follow in October with a corps of worthys. Send forthwith an intelligent and confidential friend with whom Burr may confer. He shall return immediately with further interesting details. This is essential to concert and harmony of movement. Send a list of all persons known to Wilkinson westward of the mountains who could be useful, with a note delineating their character. By your messenger send me 4 or 5 of the commissions of your officers which you can borrow under any pretence you please. They shall be returned faithfully. Already an order to the contractor to forward 6 months provisions to points you may name. This shall not be used till the last moment, and then under proper injunctions.

Our project my dear friend is brought to the point so long desired. I guarantee the result with my life and honor, with the lives, the honor and fortune of hundreds, the best blood of our country.

Burr's plan of operation is to move down rapidly from the falls on fifteenth November, with the first 500 or 1000 men in light boats now constructing for that purpose; to be at Natches between the 5 and 15 December, there to meet you; then to determine whether it will be expedient in the first instance to seize on or pass by B. R. On receipt of this send me an answer. Draw on me for all expenses.

The people of the country to which we are going are prepared to receive us--their agents, now with me, say that if we will protect their religion and will not subject them to a foreign power, that in three weeks all will be settled.

The gods invite us to glory and fortune. It remains to be seen whether we deserve the boons.

The bearer of this goes express to you. He will hand a formal letter of introduction to you from me.

He is a Man of inviolable honor and perfect discretion, formed to execute rather than to project—yet capable of relating facts with fidelity and incapable of relating them otherwise; he is thoroughly informed of the plans and intentions of [space] and will disclose to you as far as you shall enquire and no further. He has imbibed a reverence for your Character and may be embarrassed in your presence—put him at ease, and he will satisfy you.

Doctor Bollman equally Confidential better informed on the subject & more enlightened will hand this duplicate.

Marshall's opinion (excerpts), U.S. Circuit Court, Virginia, June 13, 1807

Following four days of acrimonious debate, John Marshall delivered his opinion on Burr's motion for a subpoena to President Jefferson and two other government officers. The subpoena in this instance was not just an order to appear and testify, but a subpoena "duces tecum" ("bring with you") commanding the person to bring certain documents the defendant believed to be material to his defense. Marshall had hoped in vain that the parties would come to an agreement to produce the requested documents without the necessity of issuing a subpoena. In this excerpt the Chief Justice considered the prosecution's objection that until a grand jury returned an indictment an accused party was not entitled to subpoenas. After a brief exposition showing that principle and practice favored the right of the accused to prepare for his defense as soon as his case was in court, the Chief Justice turned to the Constitution.

[Document Source: *United States v. Burr*, 25 Fed. Cases 32–38.]

The constitution and laws of the United States will now be considered for the purpose of ascertaining how they bear upon the question. The eighth [sixth] amendment to the constitution gives to the accused, "in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor." The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court. This observation derives additional force from a consideration of the manner in which this subject has been contemplated by congress. It is obviously the intention of the national legislature, that in all capital cases the accused shall be entitled to process before indictment found. The words of the law are, "and every such person or persons accused or indicted of the crimes aforesaid, (that is, of treason or any other capital offence,) shall be allowed and admitted in his said defence to make any proof that he or they can produce by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial as is usually granted to compel witnesses to appear on the prosecution against them."

Marshall proceeded to inquire whether a subpoena duces tecum could issue to the President, taking up first the question whether a general subpoena could issue. At issue here, though not explicitly stated, was a question of separation of powers. Could the judicial branch by legal order compel the executive to perform some act? This matter had come up a few years earlier in the case of Marbury v. Madison, when a party sought the Supreme Court's intervention to command the executive to deliver a commission. As President during the Burr trial, Jefferson was perfectly willing to cooperate in seeing that the defendant obtain the information and testimony necessary for his defense. He would even testify, though by deposition rather than personal appearance. As a witness, Jefferson insisted that his participation would be voluntary. To be compelled to answer legal process, he said, would admit the judiciary's right to interfere with executive matters—in effect making a coordinate department supreme over another.

In the provisions of the constitution, and of the statute, which give to the accused right to the compulsory process of the court, there is no exception whatever. The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them, but one who would not be a witness. At any rate, if an exception to the general principle exist, it must be looked for in the law of evidence. The exceptions furnished by the law of evidence, (with one only reservation,) so far as they are personal, are of those only whose testimony could not be received. The single reservation alluded to is the case of the king. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate.

By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors.

By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject.

By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again.

How essentially this difference of circumstances must vary the policy of the laws of the two countries, reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former

Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum.

If, in any court of the United States, it has ever been decided that a subpoena cannot issue to the president, that decision is unknown to this court.

If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and, if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued. In point of fact it cannot be doubted that the people of England have the same interest in the service of the executive government, that is, of the cabinet counsel, that the American people have in the service of the executive of the United States, and that their duties are as arduous and as unremitting. Yet it has never been alleged, that a subpoena might not be directed to them. It cannot be denied that to issue a subpoena to a person filling the exalted position of the chief magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the court can have no choice in the case.

If, then, as is admitted by the counsel for the United States, a subpoena may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued.

If, in being summoned to give his personal attendance to testify, the law does not discriminate between the president and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it. A subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any paper of which the party praying it has a right to avail himself as testimony; if, indeed, that be the necessary process for obtaining the view of such a paper.

Subpoena duces tecum, June 13, 1807

The court issued this subpoena in consequence of Marshall's opinion of June 13 in support of Burr's motion for this process. In addition to Jefferson, the writ named Secretary of the Navy Robert Smith and Secretary of War Henry Dearborn. William Marshall, clerk of the U.S. Circuit Court for the District of Virginia, was the brother of the Chief Justice.

[Document Source: *United States v. Burr*, U.S. Circuit Court, Va., *Ended Cases (Restored)*, Library of Virginia.]

The president of the United States of America

To Thomas Jefferson, Robert Smith, Henry Dearborne or either of them who may have the papers hereinafter mentioned or any of them within his or their keeping or power. You are hereby commanded to appear before the Judges of the circuit court of the United States, for the fifth circuit, in the Virginia District in the city of Richmond, at the Court now sitting forthwith to testify in behalf of Aaron Burr in a controversy now depending, between the United States and the said Burr, and to bring with you the letter from General James Wilkinson dated the twenty first day of October 1806 mentioned in the message of the president of the twenty second of January 1807, to both houses of Congress together with the documents accompanying the same letter and copy of the answer of you the said Thomas Jefferson or any one by your authority to the said letter and also copies of all the orders and instructions given by the president of the United States either directly or through the departments of war and of the navy to the officers of the Army and Navy at or near the New Orleans, stations touching or concerning the said Aaron Burr or his property. And this you shall in no wise omit:

Witness John Marshall Esquire chief Justice of the United States of America at Richmond in the Virginia District, this thirteenth day of June 1807 and in the thirty first year of the Independence of the United States of America.

Wm Marshall, Clk

The above subpoena is issued by special order of the court on motion of the said Aaron Burr, and after argument by counsel as well on the part of said Burr as of the United States.

William Marshall

Burr's subjoined note to the subpoena:

The transmission to the Clerk of this Court of the original letter of Genl Wilkinson, and of Copies duly authenticated of the other papers and documents described in the annexed process will be admitted as sufficient observance of the process without the personal attendance of any or either of the persons therein named, but in case of such transmission it is expected that the copies of the orders and instructions to

the naval and military officers be accompanied by the Certificates of all the persons named in the process declaring that no other orders or instructions have been given to the said naval and military officers respecting the said A. Burr or his property, but those which are set forth in the said Copies.

A. Burr

Richmond 13th June 1807.

Indictment for treason, U.S. Circuit, Virginia, June 24, 1807

In criminal law, the person accused of a crime must first be indicted by a grand jury before being tried by a petit jury. An indictment is a written accusation framed by the prosecutor upon the grand jury's "presentment" that a crime has occurred. In Burr's case the grand jury was composed of sixteen members, at least twelve of whom had to concur that the facts alleged were true. Foreman John Randolph's endorsement of "a true bill" signified that this minimum number agreed to Burr's indictment. The indictment below follows a set form and contains much standardized language. Certain terms of art were required in treason indictments, as for example wording to the effect that the accused acted "treasonably" (or "traitorously") and against his "allegiance." Also endorsed on this indictment is the petit jury's verdict, as entered by foreman Edward Carrington, implying that the jury might have voted to convict if it had heard additional evidence. Burr protested against this irregular verdict, but Chief Justice Marshall allowed it to stand as the jury wished, while noting that the entry on the official record would be "not guilty."

[Document Source: *United States v. Burr*, U.S. Circuit Court, Va., *Ended Cases (Restored)*, Library of Virginia.]

Virginia District:

In the Circuit Court of the United States of America in and for the fifth Circuit and Virginia district: The grand inquest of the United States of America, for the Virginia district, upon their oath do present that Aaron Burr, late of the City of New York, and state of New York, attorney at law, being an inhabitant of and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, not having the fear of god before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquillity of the said United States to disturb and to stir move and excite insurrection, rebellion and war against the said United States, on the tenth day of December, in the year of Christ one thousand eight hundred and six at a certain place called and

known by the name of Blannerhassetts island in the County of Wood and district of Virginia aforesaid, and within the jurisdiction of this Court, with force and arms, unlawfully falsely, maliciously and traitorously did compass imagine and intend to raise and levy war, insurrection and rebellion against the said United States, and in order to fulfil and bring to effect the said traitorous compassings imaginations and intentions of him the said Aaron Burr, he the said Aaron Burr, afterwards to wit on the said tenth day of December in the year one thousand eight hundred and six aforesaid at the said island called Blennerhassetts island as aforesaid in the County of Wood aforesaid in the district of Virginia aforesaid and within the jurisdiction of this Court, with a great multitude of persons whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say with guns, swords and dirks, and other warlike weapons as well offensive as defensive, being then and there unlawfully maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there with force and arms did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there that is to say on the day and in the year aforesaid at the island aforesaid, commonly called Blannerhassetts island in the County aforesaid of Wood, within the Virginia district, and the jurisdiction of this Court, in pursuance of such their traitorous intentions and purposes aforesaid, he the said Aaron Burr with the said persons so as aforesaid traitorously assembled and armed and arrayed in manner aforesaid most wickedly, maliciously, and traitorously did ordain prepare and levy war against the said United States, contrary to the duty of their said allegiance and fidelity, against the constitution peace and dignity of the said United States and against the form of the act of the Congress of the said United States in such case made and provided

And the grand inquest of the United States of America, for the Virginia district upon their oaths aforesaid, do further present that the said Aaron Burr, late of the City of New York, and state of New York, attorney at law, being an inhabitant of and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, not having the fear of god before his eyes, nor weighing the duty of his said allegiance but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquillity of the said United States to disturb, and to stir, move, and excite insurrection rebellion and war against the said United States on the eleventh day of December in the year of our Lord one thousand eight hundred and six, at a certain place, called and known by the name of Blannerhassetts island in the County of Wood and district of Virginia aforesaid and within the jurisdiction of this Court, with force and arms, unlawfully, falsely, maliciously and traitorously did compass, imagine and intend to raise and levy war, insurrection and rebellion

against the said United States, and in order to fulfil and bring to effect the said traitorous Compassings imaginations and intentions of him the said Aaron Burr, he the said Aaron Burr, afterwards, to wit, on the said last mentioned [blank space] day of December in the year one thousand eight hundred and six aforesaid at a certain place commonly called and known by the name of Blannerhassett's island in the said County of Wood, in the district of Virginia aforesaid, and within the jurisdiction of this Court, with one other great multitude of persons, whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit:, to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and dirks and other warlike weapons as well offensive as defensive being then and there unlawfully, maliciously & traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States and then and there with force and arms did falsely and traitorously and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there that is to say, on the day and in the year last mentioned, at the island aforesaid in the County of Wood aforesaid, in the Virginia district, and within the jurisdiction of this Court, in pursuance of such their traitorous intentions, and purposes aforesaid, he the said Aaron Burr with the said persons so as aforesaid traitorously assembled and armed and arrayed in manner aforesaid most wickedly maliciously and traitorously did ordain prepare and levy war against the said United States, and further to fulfil and carry into effect the said traitorous compassings, imaginations and intentions of him the said Aaron Burr against the said United States, and to carry on the war thus levied as aforesaid against the said United States, the said Aaron Burr with the multitude last mentioned at the island aforesaid, in the said County of Wood, within the Virginia district aforesaid and within the jurisdiction of this Court, did array themselves in a warlike manner, with guns and other weapons offensive and defensive, and did proceed from the said island down the river Ohio, in the County aforesaid within the Virginia district, and within the jurisdiction of this Court, on the said eleventh day of December in the year one thousand eight hundred and six aforesaid, with the wicked and traitorous intention to descend the said river and the river Mississippi and by force and arms traitorously to take possession of a City commonly called New Orleans, in the territory of orleans belonging to the United States: contrary to the duty of their said allegiance and fidelity, against the Constitution peace and dignity of the said United States and against the form of the act of the Congress of the United States in such case made and provided.

Hay. Attorney of the United States for the Virginia district [Endorsed: "A true bill / John Randolph."] [Endorsed jury verdict: "We of the Jury find that Aaron Burr is not proved to be guilty under this Indictment by any evidence submitted to us. We therefore find him not Guilty. / E. Carrington/ foreman."]

Letter from Chief Justice Marshall to Associate Justice William Cushing (excerpts), June 29, 1807

After the grand jury indicted Burr for treason, Marshall knew that a trial was unavoidable. As he often did when faced with novel and perplexing questions on circuit, he consulted with his fellow justices. William Cushing was then the senior justice of the Supreme Court, having been appointed in 1789. One of the open questions about treason law in the United States concerned the doctrine of “constructive treason,” by which the crime might be extended to persons who were connected with a conspiracy but did not participate in the armed assemblage. Note that Marshall did not deny the doctrine—indeed, the Supreme Court had adopted it in the Bollman case. If he was uncertain about the doctrine’s applicability in the United States, Marshall did clearly recognize that English treason law went well beyond the Constitution’s definition of the crime. In the questions he raised about the proof of overt acts, he hinted at the decision he was to give at the trial.

[Document Source: *The Papers of John Marshall*, vol. 2: *Correspondence, Papers, and Selected Judicial Opinions April 1807–December 1813*, eds., Charles F. Hobson, et al. (Chapel Hill: University of North Carolina Press, 1993), 60–62.]

It has been my fate to be engaged in the trial of a person whose case presents many real intrinsic difficulties which are infinitely multiplied by extrinsic circumstances. It would have been my earnest wish to consult with all my brethren of the bench on the various intricate points that occur, on which a contrariety of opinion ought not to prevail in the different circuits, but which cannot easily be carried before the supreme court. Sincerely do I lament that this wish cannot be completely indulged.

...

Many points of difficulty will arise before the petty jury which cannot be foreseen & on which I must decide according to the best lights I possess. But there are some which will certainly occur, respecting which considerable doubts may be entertained, & on which I must anxiously desire the aid of all the Judges. One of these respects the doctrine of constructive treasons. How far is this doctrine to be carried in the United States? If a body of men assemble for a treasonable purpose, does this implicate all those who are concerned in the conspiracy whether acquainted with the assemblage or not? Does it implicate those who advised directed or approved of it? Or does it implicate those only who were present or within the district? . . .

The opinion of the supreme court in the case of Bollman & Swartwout certainly adopts the doctrine of constructive treasons. How far does that case carry this doctrine? Ought the expressions in that opinion to be revised? . . .

The English books contain many cases in which, for the purpose of proving the general objects of a conspiracy, the acts & writings of one conspirator have been given in evidence against others. But in England, treason may be committed by imagin-

ing the death of the King, & a conspiracy is an overt act of this treason. The general objects of the conspiracy may be proved by the conduct of any of the conspirators, and these general objects attach in a certain degree to every member. Yet, even in England, after proving the general objects of the conspiracy, the jury must enquire how far the individual whose case is before them participated in those objects; & in this enquiry I am not certain that the conduct or declarations of any person, not assented to by the prisoner, can be brought to bear upon him. I am inclined to believe that this kind of testimony is admissible only in those prosecutions where the crime is consummated by the intention, & a conspiracy is an overt act. I do not know how far it can be allowed where the crime must be the embodying of men or any other open deed. . . .

I am aware of the unwillingness with which a Judge will commit himself by an opinion on a case not before him & on which he has heard no argument. Could this case be readily carried into the supreme court I would not ask an opinion in its present stage. But these questions must be decided by the Judges separately on their respective circuits, & I am sure there would be a strong & general repugnance to giving contradictory decisions on the same points. Such a circumstance would be disreputable to the Judges themselves as well as to our judicial system. This consideration suggests the propriety of a consultation on new & difficult subjects & will I trust apologize for this letter. . . .

Argument of John Wickham (excerpts), U.S. Circuit Court for the District of Virginia, August 20–21, 1807

The key moment of the Burr treason trial was the defense's motion on August 20 to exclude further testimony as irrelevant to proving the indictment's charge that Burr had levied war on Blennerhassett's Island on December 10, 1806. Wickham led off for the defense in support of the motion on August 20, 1807, concluding the next day. He devoted most of his speech to showing that under the Constitution no person could "be guilty of treason, by levying war, unless he was personally present when and where an overt act of war was committed, and participated therein." In the first excerpt, he contended that on the subject of treason the Constitution was not to be interpreted according to English law. The document is a journalist's account of Wickham's remarks rather than an exact transcription.

[Document Source: *United States v. Burr*, 25 Fed. Cases 116–22.]

In support of the first proposition, Mr. W. contended that the clauses of the constitution which declare that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and that "no person shall be convicted, unless on the testimony of two witnesses to the same overt act," must be construed according to the plain, natural

import of the words. The constitution is a new and original compact between the people of the United States, and is to be construed, not by the rules of art belonging to a particular science or profession, but like a treaty or national compact, in which words are to be taken according to their natural import, unless such a construction would lead to a plain absurdity. It being new and original, and having no reference to any former act or instrument, forbids a resort to any other rules of construction than such as are furnished by the constitution itself, or the nature of the subject. Hence, artificial rules of construction, drawn from the common law and the usages of courts in construing statutes, cannot be resorted to, to prove that these words of the constitution are to be construed, not according to their natural import, but that an artificial meaning, drawn from the statute and common law of England, is to be affixed to them, entirely different.

Here Wickham argued that treason in the United States was a crime created by the Constitution and statute, which must be construed without any reference to a supposed national common law.

Under the federal constitution, I presume, it will hardly be contended by the counsel for the prosecution that we have any common law belonging to the United States at large. I always did believe, and still believe, that we have no common law for the United States, especially in criminal cases. The only ground on which the common law becomes a rule of decision in the federal courts, is under that clause in the judiciary law, which makes the laws of the several states a rule of decision, as far as they respectively apply. The common law is part of the law of Virginia, and the act of congress has adopted the laws of Virginia as the rule of decision in cases where they apply. With respect to crimes and offences against the United States, which must be punished in a uniform manner throughout the Union, it seems clear, for the reason already given, that none such can exist at common law, as the United States have in that character no common law, and that they must be created by statute. Unquestionably the gentlemen will not deny this uniformity; they will not contend that what is treason in Maryland is not treason in Virginia, or vice versa. If it exist at all, it must be uniform, embracing the whole of the United States. That the United States have no common law, and that offences against them must be created and prohibited by statute, is the opinion of the learned Judge Chase; and I believe that this opinion received the unqualified approbation of those who thought most unfavorably of his opinions and judicial conduct on other occasions. Now, as there is no general common law of the United States, the act of congress must be construed without any reference to any common law, and treason is to be considered as a newly created offence, against a newly created government.

The Constitution, said Wickham, must be interpreted according to the intention of the framers, whose wise understanding of human nature led them to prescribe a strict definition of treason so that it would not become an instrument of government or party tyranny.

This brings me to the consideration of the constitution itself. I have before endeavored to demonstrate that this instrument is not to be explained by the same narrow, technical rules that apply to a statute made for altering some provision of the common law; but that such a construction should be given as is consistent not only with the letter but the spirit in which the great palladium of our liberties was formed. The object of the American constitution was to perpetuate the liberties of the people of this country. The framers of the instrument well knew the dreadful punishments inflicted, and the grievous oppressions produced, by constructive treasons in other countries, as well where the primary object was the security of the throne as where the public good was the pretext. Those gentlemen well knew from history, ancient as well as modern, that, in every age and climate, where the people enjoyed even the semblance of liberty, and where factions or parties existed, an accusation of treason, or a design to overturn the government, had been occasionally resorted to by those in power as the most convenient means of destroying those individuals whom they had marked out for victims; and that the best mode of insuring a man's conviction was to hunt him down as dangerous to the state. They knew that mankind are always the same, and that the same passions and vices must exist, though sometimes under different modifications, until the human race itself be extinct. That a repetition of the same scenes which have deluged other countries with their best blood might take place here they well knew, and endeavored as far as possible to guard against the evil by a constitutional sanction. They knew that when a state is divided into parties, what horrible cruelties may be committed even in the name and under the assumed authority of a majority of the people, and therefore endeavored to prevent them. The events which have since occurred in another country, and the sufferings under Robespierre, show how well human nature was understood by those who framed our constitution. The language which they have used for this purpose is plain, simple, and perspicuous. There is no occasion to resort to the rules of construction to fix its meaning. It explains itself. Treason is to consist in levying war against the United States, and it must be public or open war; two witnesses must prove that there has been an overt act. The spirit and object of this constitutional provision are equally clear. The framers of the constitution, with the great volume of human nature before them, knew that perjury could easily be enlisted on the side of oppression; that any man might become the victim of private accusation; that declarations might be proved which were never made; and therefore they meant, as they have said, that no man should be the victim of such secret crimination; but that the punishment of this offence should only be incurred by those whose crimes are plain and apparent, against whom an open deed is proved.

Wickham concluded his argument by inquiring, "What properly constitutes the crime of levying war?"

In support of the fourth proposition, Mr. W. went into an examination of the question, "What properly constitutes the crime of levying war?" He contended that force and military array were essential ingredients; neither of which had been proved at Blennerhassett's Island. He did not claim that actual force was absolutely necessary when there was a sufficient display of men and means to effect the object by intimidation. If a body of men, sufficient in number and means to take the capital, and all the property in it, should march into the city, and find no opposition, they would accomplish their object by terror of numbers and warlike appearance. This is denominated potential force; the object is accomplished without the actual exertion of force, though force sufficient to accomplish it is employed. He referred to the trial of Fries, to show that even Mr. Rawle and Mr. Sitgreaves, the counsel for the prosecution, admitted that force of this character, at least, was necessary. He also referred to many English authorities to prove that force and military array are necessary ingredients, under the statute of 25 Edw. III, of the crime of levying war. He insisted that in so far as any expressions were to be found in the opinion of the supreme court in the Case of Bollman and Swartwout, which might seem to imply that force was not necessary, they were obiter and extra-judicial. He cited other authorities which are here omitted, and insisted that the evidence wholly failed to show that there had been anything like force, or violence, or military array displayed on Blennerhassett's Island.

Argument of William Wirt (excerpts), U.S. Circuit Court, August 25, 1807

Wirt was the second of the three prosecution lawyers to speak against the motion to exclude further evidence. His speech was mainly a point-by-point reply to Wickham. Here he attacked what he considered to be the weakest part of Wickham's argument—his studious avoidance of the Supreme Court's opinion in Ex parte Bollman and Swartwout. The prosecution relied heavily on this precedent to show that Burr had committed treason even though he was not present on Blennerhassett's Island. The document is a journalist's account of Wirt's remarks rather than an exact transcription.

[Document Source: *United States v. Burr*, 25 Fed. Cases 122–36.]

Sir, if the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument, for the path of inquiry in which he was led him directly to it. Interpreting the American constitution, he would have

preferred no authority to that of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity. He would have set it before you in every possible light. He would have illustrated it. He would have adorned it. You would have seen it, under the action of his genius, appear with all the varying grandeur of our mountains in the morning sun. He would not have relinquished it for the common law, nor have deserted a rock so broad and solid to walk upon the waves of the Atlantic. But he knew that this decision closed against him completely the very point for which he was laboring. Hence it was that the decision was kept so sedulously out of view, until, from the exploded materials of the common law, he thought he had reared a Gothic edifice so huge and so dark as quite to overshadow and eclipse it. Let us bring it from this obscurity into the face of day. We who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the supreme court of the United States. The inquiry is whether the presence at the overt act be necessary to make a man a traitor. The gentlemen say that it is necessary—that he cannot be a principal in the treason without actual presence. What says the supreme court in the Case of Bollman and Swartwout? “It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.” He insisted that this decision of the supreme court had settled the principle that actual presence was not necessary, and that the passage upon which he relied was not a mere obiter dictum, and not extra judicial; that in the Case of Bollman and Swartwout the question whether actual presence at the place where the overt act was committed was necessary to constitute the crime of treason was a material question to be considered by the court.

To demonstrate the absurdity of regarding only those physically present on Blennerhassett’s Island as the principals, Wirt drew a contrast between Burr, the planner and contriver of treason, and Harman Blennerhassett, a willing but naive innocent who enlisted in Burr’s cause. Wirt’s literary and rhetorical gifts are amply demonstrated in this excerpt, which became a classic of American oratory.

Who is Blennerhassett? A native of Ireland, a man of letters, who fled from the storms of his own country to find quiet in ours. His history shows that war is not the natural element of his mind. If it had been, he never would have exchanged Ireland for America. So far is an army from furnishing the society natural and proper to Mr.

Blennerhassett's character, that on his arrival in America, he retired even from the population of the Atlantic states, and sought quiet and solitude in the bosom of our western forests. But he carried with him taste and science and wealth; and lo! the desert smiled. Possessing himself of a beautiful island in the Ohio, he rears upon it a palace, and decorates it with every romantic embellishment of fancy. A shrubbery, that Shenstone might have envied, blooms around him. Music that might have charmed Calypso and her nymphs, is his. An extensive library spreads its treasures before him. A philosophical apparatus offers to him all the secrets and mysteries of nature. Peace, tranquility, and innocence shed their mingled delights around him. And to crown the enchantment of the scene, a wife who is said to be lovely even beyond her sex and graced with every accomplishment that can render it irresistible, had blessed him with her love, and made him the father of several children. The evidence would convince you that this is but a faint picture of the real life. In the midst of all this peace, this innocent simplicity and this tranquility, this feast of the mind, this pure banquet of the heart, the destroyer comes; he comes to change this paradise into a hell. Yet the flowers do not wither at his approach. No monitory shuddering through the bosom of their unfortunate possessor warns him of the ruin that is coming upon him. A stranger presents himself. Introduced to their civilities by the high rank which he had lately held in his country, he soon finds his way to their hearts, by the dignity and elegance of his demeanor, the light and beauty of his conversation, and the seductive and fascinating power of his address. The conquest was not difficult. Innocence is ever simple and credulous. Conscious of no design itself, it suspects none in others. It wears no guard before its breast. Every door and portal and avenue of the heart is thrown open, and all who choose it enter. Such was the state of Eden when the serpent entered its bowers. The prisoner, in a more engaging form, winding himself into the open and unpracticed heart of the unfortunate Blennerhassett, found but little difficulty in changing the native character of that heart and the objects of its affection. By degrees he infuses into it the poison of his own ambition. He breathes into it the fire of his own courage; a daring and desperate thirst for glory; an ardor panting for great enterprises, for all the storm and bustle and hurricane of life. In a short time the whole man is changed; and every object of his former delight is relinquished. No more he enjoys the tranquil scene; it has become flat and insipid to his taste. His books are abandoned. His retort and crucible are thrown aside. His shrubbery blooms and breathes its fragrance upon the air in vain; he likes it not. His ear no longer drinks the rich melody of music; it longs for the trumpet's clangor and the cannon's roar. Even the prattle of his babes, once so sweet, no longer affects him; and the angel smile of his wife, which hitherto touched his bosom with ecstasy so unspeakable, is now unseen and unfelt. Greater objects have taken possession of his soul. His imagination has been dazzled by visions of diadems, of stars and garters and titles of nobility. He has been taught to burn with restless emulation at the names of great heroes and conquerors. His enchanted island is destined soon to relapse into a

wilderness; and in a few months we find the beautiful and tender partner of his bosom, whom he lately “permitted not the winds of” summer “to visit too roughly,” we find her shivering at midnight, on the winter banks of the Ohio, and mingling her tears with the torrents, that froze as they fell. Yet this unfortunate man, thus deluded from his interest and his happiness, thus seduced from the paths of innocence and peace, thus confounded in the toils that were deliberately spread for him and overwhelmed by the mastering spirit and genius of another—this man, thus ruined and undone and made to play a subordinate part in this grand drama of guilt and treason, this man is to be called the principal offender, while he by whom he was thus plunged in misery is comparatively innocent, a mere accessory! Is this reason? Is it law? Is it humanity? Sir, neither the human heart nor the human understanding will bear a perversion so monstrous and absurd! so shocking to the soul! so revolting to reason! Let Aaron Burr, then, not shrink from the high destination which he has courted, and having already ruined Blennerhassett in fortune, character and happiness forever, let him not attempt to finish the tragedy by thrusting that ill-fated man between himself and punishment.

Marshall’s opinion (excerpts), U.S. Circuit Court, Virginia, August 31, 1807

After ten days of argument on the motion to exclude further testimony, Chief Justice Marshall delivered the principal opinion in the Burr treason trial. Broadly speaking, the opinion addressed the question, What is the meaning of treason under the Constitution? He devoted a major portion of the opinion to explaining and clarifying the Supreme Court’s opinion in Ex parte Bollman and Swartwout.

In this first excerpt, the Chief Justice rejected the defense’s argument that the opinion was “extrajudicial,” that is, not directly related to the court’s decision and thus not having the authority of precedent. He also denied the prosecution’s contention that the opinion adopted the English common law doctrine that an accessory—one who advised, aided, or abetted the crime—could be implicated as a principal in treason.

[Document Source: *United States v. Burr*, 25 Fed. Cases 159–80.]

It may now be proper to notice the opinion of the supreme court in the case of the United States against Bollman and Swartwout. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory because it is extra-judicial and was delivered on a point not argued. This court is therefore required to depart from the principle there laid down. It is true that, in that case, after forming the opinion that no treason could be committed because no treasonable assemblage had taken place, the court might

have dispensed with proceeding further in the doctrines of treason. But it is to be remembered that the judges might act separately, and perhaps at the same time on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them. The court had employed some reasoning to show that without the actual embodying of men war could not be levied. It might have been inferred from this that those only who were so embodied could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the court proceeded to observe: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." This court is told that if this opinion be incorrect it ought not to be obeyed, because it was extra-judicial. For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous; but I would certainly use any means which the law placed in my power to carry the question again before the supreme court for reconsideration, in a case in which it would directly occur and be fully argued. The court which gave this opinion was composed of four judges. At the time I thought them unanimous, but I have since had reason to suspect that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussions, on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous, it would have been given by a majority of the judges. But should the three who were absent concur with that judge who was present, and who perhaps dissents from what was then the opinion of the court, a majority of the judges may overrule this decision. I should, therefore, feel no objection, although I then thought and still think the opinion perfectly correct, to carry the point, if possible, again before the supreme court, if the case should depend upon it. In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued as if the supreme court had adopted the whole doctrine of the English books on the subject of accessories to treason. But certainly such is not the fact. Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "perform a part," which will furnish the overt act; and they must be "leagued in conspiracy." The person who comes within this description in the opinion of the court levies war. The present motion, however, does not rest upon this point; for if under this indictment

the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony, in its present stage.

In this excerpt, Marshall attempted to clarify another troublesome point arising from the Bollman and Swartwout opinion concerning the meaning of "levying war." He denied the prosecution's contention that the Supreme Court countenanced the doctrine that neither arms nor force was an indispensable ingredient in levying war.

But it is said all these authorities have been overruled by the decision of the supreme court in the case of U.S. v. Swartwout. If the supreme court have indeed extended the doctrine of treason further than it has heretofore been carried by the judges of England or of this country, their decision would be submitted to. At least this court could go no further than to endeavor again to bring the point directly before them. It would, however, be expected that an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have expressly declared that any assemblage of men whatever, who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the supreme court.

In the following excerpts, Marshall explained why the evidence that the prosecution planned to present could not meet the criteria for establishing treason under the definitions set out in the U.S. Constitution. All had agreed that Burr was neither present nor actively involved in the assemblage on Blennerhassett's Island. To convict him for playing a role as advisor or preliminary organizer would only be possible under the definitions of treason in English law rather than the Constitution.

It may not be improper in this place again to advert to the opinion of the supreme court, and to show that it contains nothing contrary to the doctrine now laid down. That opinion is, that an individual may be guilty of treason "who has not appeared in arms against his country; that if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising, certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war than of the actual levying of war. According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part: that part is the act of levying war. That part, it is true, may be minute, it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act of which alone the person who performs it can be convicted.

...

It is, then, the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's Island; or by the admission of the doctrine that he who procures an act may be indicted as having performed that act. It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place; indeed, the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion that if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and therefore is not admissible in this country unless by virtue of a similar operation; a point far from being established, but on which, for the present, no opinion is given.

In concluding his opinion, Marshall anticipated the criticism that would inevitably follow from his decision to prevent the jury from hearing further evidence in the case. He cast himself as the embattled judge obeying the stern dictates of judicial duty in resisting the popular tide.

Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly; but which may, perhaps not improperly, receive some notice. That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace. That gentlemen, in a case

the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should, on each side, press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is, perhaps, a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that it would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

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