THE TREASON TRIAL OF AARON BURR

LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION

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Prologue

A Mind-Jostling Trial

"There never was such a trial from the beginning of the world to this day."

George Hay[1]

"The far famed trial of Aaron Burr . . . has jostled the public mind from one end of the Union to the other . . . ."

Richard Bates, September 20, 1807[2]

Americans in 1807, proud of their hard-won status as a nation among nations, were prone to exaggerate their own importance. Thus could George Hay, President Jefferson's chief prosecutor in the Burr treason trial, make his extravagant claim. The world at large, of course, took no notice of what was transpiring in Chief Justice Marshall's circuit court in Richmond. Such was decidedly not the case, however, with the several thousand people who swarmed into town to catch the action. Nor was it true of the tens of thousands across the country who followed the sensationalist coverage of the trial in the partisan newspapers of the day. What Americans saw and read about –what "jostled the public mind"— was in fact one of the most dramatic trials in American history, one that pitted the president against the chief justice of the United States, that saw some of America's finest lawyers locked in seven

months of legal and personal combat, and featured a defendant whose fall from grace remains an enduring mystery.

Aaron Burr was one of the most promising young statesmen of the Revolutionary generation. As grandson of Jonathan Edwards, and son of the president of Princeton, his family credentials marked him for distinction. He was also a military hero, a gifted lawyer, and a charismatic politician who delivered New York's electoral vote to Jefferson in 1800. Two events ended Burr's meteoric rise. One was his refusal to withdraw from the disputed presidential contest in l800, in which he was tied for electoral votes with Jefferson. The House of Representatives settled the dispute after 36 ballots, making Jefferson president and Burr vice-president. Burr served effectively in that position for four years, but Jefferson but never forgave him for his hubris. The second blow to Burr's political aspirations was his duel with Hamilton, whose death ended Burr's prospects for advancement in the Federalist Party. Like so many Americans who were down and out in the East, Burr went west to recover his fortune and his honor. It was his suspicious comings and goings there in l805 and 1806 that caused Jefferson to charge him with treason, which in turn brought him into Marshall's circuit court for trial.

Burr's presence alone was enough to make the Richmond trial a national event, but the president of the United States was

also involved. Well before the proceedings opened in Richmond, it was clear that Jefferson was out to destroy his vice president—first by driving him from the party, and then in January 1807, by publicly declaring him to be guilty of treason (this without benefit of grand jury indictment or jury trial). The president also took personal charge of the prosecution in Richmond in order to secure Burr's conviction. Jefferson's role in the trial guaranteed yet another showdown with Marshall, who after *Marbury v. Madison* (1803) was on the president's list of enemies. Adding yet more drama and importance to the trial was the appearance of a remarkable array of talented lawyers competing for adversarial honors and fighting for truth and justice as they saw it.

Marshall's circuit court, which generally dealt with run-of-the-mill economic issues of Virginians, suddenly became the focal point of national political controversy and unprecedented press coverage in newspapers across the nation. If one includes arraignment and bail hearings and the grand jury selection, the proceedings lasted from April through October. If one also counts the trial of Burr's confederates before the federal Circuit Court for the District of Columbia (*Ex parte Bollman* and *Ex parte Swartwout*) and the Supreme Court of the United States in early l807 (*U.S. v. Bollman)* the legal proceedings lasted the better part of a year.

The stenographic report of the trial, running to well over 1000 pages, poses a number of intriguing issues. One concerns the vastly important (and generally underestimated) role of lawyers in the law-making process. Not all of the lawyers in the trial were memorable, of course, but the best had a striking command of law, rhetoric and adversarial skill. The trial record also reveals the dynamic relationship among counsel, judge and jury during what appears to be a unique moment in courtroom advocacy.

Observing Chief Justice Marshall as trial judge is also revealing. On circuit in Richmond--in contrast to his role on the Supreme Court in Washington--he spoke and acted for himself alone. As presiding judge he was responsible for keeping nine highly competitive, partisan lawyers in line. Some fifteen on-the-spot rulings in the course of the trial put his legal knowledge and legal agility on display for the entire nation to criticize. His judicial duties varied widely. Sometimes he sat as a simple magistrate whose job was to settle arraignment and bail. He also oversaw both the grand and trial jury process, which in turn involved ruling on trial procedure and evidence, often without the guidance of precedent. While seeing to it that Aaron Burr got a fair trial, he necessarily had to determine the meaning of the constitutional provisions concerning treason—ironically by clarifying his own opinion for a divided Supreme Court in the case

involving Burr's associates Erick Bollman and Samuel Swartwout, who were also charged with treason. Complicating matters further for Marshall was the tidal wave of public opinion, first against Burr and then against himself, generated by the partisan press with the active encouragement of the president.

More than drama, Jefferson's unprecedented role added constitutional significance to the trial. It was the president who decided to charge Burr with treason—mainly on the word of one James Wilkinson, who was widely recognized, even by Jefferson himself, as a questionable character. Having usurped the role of both the grand jury and the trial jury by publicly pronouncing Burr guilty, Jefferson also intervened in the Richmond proceedings. In doing so he drew fire from Burr's lawyers, which further intensified the partisan tone of the proceedings and inevitably drew Marshall into the political and ideological squabbles surrounding the trial. Whether his well-know antipathy toward the president and his party distorted Marshall's sense of fairness, as his enemies claimed, is a question begging for an answer.

Complicating matters for Marshall was the mystery of Aaron Burr himself. The former vice-president was not only the catalyst for the case, but was also the charismatic lawyer who masterminded his own defense. Whether the trial revealed or instead obscured the truth of his actual innocence or guilt remains

an open issue. What the trial did do was to stir up a number of puzzling questions. How was it, for example, that Burr, who had so many advantages and so much promise, could fall so low? This particular question is a subject for Burr's biographers rather than for a book concerning his treason trial. Still, when considering the evidence against him presented at his trial, it is impossible not to wonder whether a soldier who had fought courageously to create the American nation would then undertake to destroy it, as Jefferson claimed. And, had Burr not been out to sever the Union, why (astute lawyer that he was) would he behave so as to make himself vulnerable to the charge? Why the secret association via cipher letters with Wilkinson, who was the chief witness against him at the trial? And how was it that Burr acting as private citizen thought he could drive Spain from Mexico and brashly attempt to enlist the British minister in such an enterprise while at the same time dealing with Spanish officials by playing on their hostility to Great Britain?[3] Such a plan, as John Adams observed, was so far-fetched that it would have had to be hatched by an "Idiot or a Lunitick," neither of which Burr was.

Jefferson's actions also defy easy explanation. As president and commander-in-chief, he was of course responsible for the security of the nation; he was also in charge of American foreign policy. In both capacities, Jefferson was rightly concerned about

persistent rumors that Burr was raising money and men to attack New Orleans (an American territory) as a first step in a military expedition to free Mexico from Spanish colonial domination. Even though Burr had not yet committed himself to a course of action, Jefferson had reason to fear he was the leader of a criminal conspiracy—either to commit treason by attacking New Orleans, or to violate of the Neutrality Act of l794 by attacking Spanish authorities in Mexico.

So why did the president not stop the conspiracy (whatever its objective) before it matured, which he could have done simply by putting the chief conspirator on warning? And why was it that Jefferson, once he decided to act, took the law into his own hands in order to secure Burr's conviction—especially since doing so invoked a concept of federal executive power that he and his party repudiated? And rather than prosecuting Burr for treasonably levying war against the United States (for which there was little solid evidence), why not prosecute him only for mounting a military campaign against Spanish Mexico in violation of the Neutrality Act—a high misdemeanor for which there was more evidence and a much less stringent standard of proof? Why as sitting president would he undertake to micromanage the prosecution in Richmond down to the manipulation of witnesses? And why as master strategist for the prosecution would he rely on

the much-hated English doctrine of constructive treason--especially when that doctrine ran directly counter to his republican values and his distaste for English legal precedents?

The trial itself is also replete with puzzles, one of which was Marshall's decision to let it continue until both he and the lawyers were totally exhausted. Also, did public opinion have as much impact on the proceedings as lawyers on both sides claimed it did? And what does it say about the nature of the legal profession 1807 that lawyers on both sides could hold forth so brilliantly? And why, in search of American law, did they spend so much time, in the words of one of them, traversing "a wilderness of investigation in England"? [4]

Finally, there are questions about Marshall's conduct of the trial, questions asked by contemporaries and historians alike. How, for example, did the mutual hatred between the president and the chief justice play out during the trial; and in what way did this animosity affect the trial's final outcome? And what about "the Rhadamanthine calm" Henry Adams attributed to Marshall?[5] Was he really all that calm; or perhaps, as his critics insinuated, Marshall's calm was simply a cover to disguise a sinister determination to free Burr at any cost in order to embarrass the president? But if Marshall's aim was to free Burr why, after Burr

had been acquitted of all charges in Richmond, did Marshall commit him to yet another trial in Ohio?

And finally, what impact did the encounter between the chief justice and the president have on the yet to be defined principle of separation of powers in the Constitution? And what was settled—and left unsettled—regarding the constitutional meaning of treason that Marshall and the lawyers fashioned for the new nation?

Indeed it is the newness of the nation and the resulting fluidity of ideas, institutions and national boundaries, that helps us understand the conspiracy, the trial and the seemingly inexplicable behavior of the leading characters. Context as always is the starting point of interpretation. Burr and Wilkinson, for example, could scheme grandly about gold and glory in the Southwest, because that vast area was a contested and largely ungoverned region open to disputed claims between Spain and the United States. Americans were obsessed with traitors and the crime of treason because loyalty to the new nation was still fragile. If Jefferson was paranoid about secession plots, it was because national unity under the new Constitution remained an unfulfilled promise. For Marshall the unfinished nation translated into uncertainty about the law governing the trial process in federal courts, about the constitutional meaning of treason, and indeed about the authority of the federal judiciary itself.

And finally, because the American nation was still a work in progress, there were conflicting visions of what it should look like when completed--visions, as fate would have it, that were clearly represented by Jefferson, Marshall, and Burr. All three were elite members of the founding generation: Burr as a privileged son of New England, and Jefferson and Marshall as born-to-rule Virginians connected by blood to each other through one of the Old Dominion's first families. And each man could lay claim to the Revolutionary heritage, though none so clearly as Jefferson. No man envisaged so fully the cultural possibilities of independence, or wrote so inspiringly about the meaning of republican liberty. Marshall and Burr were too young to have been leaders in the break with England, but both men fought bravely to achieve the liberty that Jefferson wrote about. All three men could justly claim the mantle of the Revolution, which may help explain why they disagreed so passionately about its meaning.

By the time of the Burr trial their disagreements about politics, law and he future of the nation were irreconcilable. Marshall and Jefferson parted company during the 1790s over the French Revolution. As minister to France in the l780s, Jefferson witnessed the revolution there during its early, idealistic phase and came to see it as a continuation of the tradition begun by America's revolution against England. Marshall saw the American

Revolution as a constitutional and political movement fundamentally at odds with the social upheaval and violence in Revolutionary France. Marshall liked Edmund Burke; Jefferson liked Tom Paine. As the leading Federalist in Virginia during the l790s, Marshall championed the nationalist policies of Presidents Washington and Adams. While Marshall was working to strengthen the national government and curtail the democratic tendencies of the age, Jefferson, as Washington's secretary of state and then as vice-president under John Adams, was busy organizing a new political party dedicated to states rights, political democracy and friendship with France.

The election of l800 brought the clashing views of Marshall and Jefferson into dramatic focus. Jefferson believed that his election to the presidency was a second Revolution that would reassert the true meaning of the first one that had been vitiated by a decade of Federalist misrule. Marshall was certain that Jefferson's radical theorizing would destroy the republic and the Constitution on which it rested. Lame-duck President John Adams nominated Marshall as chief justice in the hope that he would make the Supreme Court a bulwark against Jefferson's radicalism. Marshall got the message and so did President Jefferson, who set out to "eradicate" the spirit of "Marshallism" and reduce the power of the Court. The Burr trial, like *Marbury v. Madison* in1803 and the

case of Burr's co-conspirators Erick Bollman and Samuel Swartwout in l807, was a battle in this ongoing war over the future of the nation.

By l807 Aaron Burr was no longer a player whose views on the future counted; he was beyond the pale, a man without a party and possibly without a country. Even before his fall, however, he had never cared greatly who won the ideological contest between Jefferson and Marshall. Burr's indifference might seem strange, since it was his organizing genius that delivered New York and the election to Jefferson and his party in 1800. But in fact, Burr had never belonged to any of the ideological schools of thought that divided the founding generation. Unlike the president or the chief justice, he had no official podium after leaving the Senate. Although he was an astute observer of human nature, he did not philosophize or moralize. Except for his farewell speech to the Senate in l805, which brought tears to the eyes of his fellow senators, he made no uplifting public addresses. Neither did he write elaborate position papers on the great issues of the day, although he clearly could have done so. His surviving political correspondence and his lengthy private journals are largely devoid of self-examination and self-justification.[6]

In short, Burr was preeminently a man of action, a role he seems to have envisaged for himself while still a student at

Princeton in the l770s.[7] What separated him most clearly from Jefferson and Marshall and most other leading statesmen of the Revolution was his single-minded, self-centered and un-apologetic ambition. Jefferson wrote eloquently about the universal right to pursuit of happiness; Burr pursued his own happiness. Probably he would have done so less aggressively had fate had been kinder to his talents: if he had received the military promotion he angled for during the Revolution; if he had not lost his beloved wife Theodosia in l794; had he not been undercut by Hamilton at every turn for a dozen years; if the presidency had not been denied him in 1800 (or if he had not tried so hard to get it); if he had not killed Hamilton in the duel at Weehawken in l804; or had he gotten the chief justiceship of Pennsylvania, which "he applied for indirectly" shortly before undertaking his western enterprise.[8]

Burr never complained about these setbacks, which rather than quelling his ambition, instead added an element of reckless urgency to his plans to make it big out West--either by driving the Spanish from Mexico or by separating the western states from the Union (depending on whose account one believed). In Burr's universe God helped those who helped themselves. His audacity, arrogance and sense of frustrated entitlement set in motion the unlikely series of events that brought him into Chief Justice Marshall's circuit court, with President Jefferson in hot pursuit.

So here they were, a popular and justly famous president and a uniquely gifted judge locked in combat, each focused on the fate of Aaron Burr, the man who, in the words of John Adams, "must and would be something,"[9] if not the president of the United States than maybe the emperor of Mexico. The conflicting visions of the young nation symbolized by Jefferson, Marshall and Burr would reveal themselves in the trial and would likely influence its outcome. The lawyers in the case, though less well known to history, were barely less important than the principal players, and they, too, reflected the partisan and cultural divisions of the age.

Personal character counted heavily in the small world of republican statesmen where all the participants knew one another. And this too was revealed in the texts of the trial report.[10] Not surprisingly, the struggle in Marshall's packed courtroom often verged on chaos, which furnished entertainment for the spectators and copy for the press. Out of the chaos, however, came some sound law suitable for the new nation and for ours as well. The challenge is to understand how politicians, lawyers, and judges created first the chaos and then the law.

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[1] Hay is quoted in Richard B. Morris, *Fair Trial: Fourteen Who Stood Accused from Anne Hutchinson to Alger Hiss* (Rev. ed., New York, Evanston, and London, 1967), 12l.

[2] Richard Bates to Frederick Bates, Sept. 20, 1807, Edward Bates Manuscript Collection, Va. Hist. Soc.

[3] The full extent and audacity of Burr's elaborate scheme to extort money from Spain and Great Britain is explained in Henry Adams, *History of the United States of America during the Administrations of Thomas Jefferson.* The Library of America Editon. (New York, 1985), vol. 2, especially chapters 10 and 11, 754-787. Adams was the first to make extensive use of Spanish Archives, but according to John Randolph, it was suspected as early as January, l807 that Burr was extorting money for his plan from both Spain and Great Britain. John Randolph to James Monroe, Jan. 2, l807, Monroe Papers, LC, as quoted in William Cabell Bruce, *John Randolph of Roanoke, 1773-1833* (2 vols., N.Y., 1970), 1: 299.

[4] Albert Beveridge, *The Life of John Marshall* (4 vols., Boston and New York, 1919), 4: 35

[5] Adams, *History*, 915

[6] See Gordon S. Wood, "The Real Treason of Aaron Burr," 143 *Proceedings of the American Philosophical Society*," No. 2 (June 1999), 280-95. Also see chapter 8 in his *Revolutionary Characters* (New York, 2006)

[7] Nancy Isenberg, drawing on Benjamin Rush's letter to John Adams (April 3, l807), makes the point in her *Fallen Founder: The Life of Aaron Burr* (New York, 2007), l6.

[8] On Burr's frustrated search for success, see Benjamin Rush to John Adams, April 3, 1807, Papers of John Adams, MHS.

[9] Adams to Rush, June 23, 1807, ibid.

[10] Robert A. Ferguson discusses the vulnerability of the legal text to interpretation in *The Trial in American Life* (Chicago and London, 2007), 27.

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CHAPTER 5
JUDGING THE JUDGE

"The Nation will judge both the offender and Judges for themselves."

Jefferson to William B. Giles, April 20, 1807[i]

". . . his Honor did not for two days understand either the questions or himself . . . ."

Burr on Marshall, September 20, 1807[ii]

"Our Treason Laws may be defective, but I believe Marshall's Conduct strictly and correctly legal as the Laws now stand."

John Adams to John Quincy Adams, February 12, 1808[iii]

Why, in Jeffrey's rendition of the Burr trial, does the "great Chief Justice" appear as a barely distinguishable figure far to the rear of the declaiming Wirt and the spellbound spectators? One likely reason, beyond the indisputable fact that Wirt and the lawyers were indeed the chief public attraction, is that the "great" chief was not yet great in 1807. To be sure, he was a popular figure in Richmond, where he and his family had resided since 1780. Thanks to his bold diplomacy in the XYZ affair in l798, he was also a celebrated hero. Those in a position to know, friend and

foe alike, agreed that he was a uniquely gifted lawyer. As evidence of promised greatness, there was his opinion in *Marbury v. Madison*, but that opinion had not yet achieved iconic status and neither had the man who wrote it. Whether Marshall would be a great chief justice was yet to be determined.

Virginia Republicans, numerous and well-placed in l807 and spurred on by a popular president, had decided feelings about that question. They remembered Marshall as Virginia's leading Federalist in the 1790s, a closet Hamiltonian named to head the Supreme Court by departing Federalist President John Adams to subvert President-elect Jefferson's democratic "revolution;" not for a moment did they believe that a judicial robe neutralized Marshall's partisan instincts. As for *Marbury*: Rather than a mark of genius, it was proof final of his aggrandizing agenda.

Two additional factors led Marshall's enemies to expect the worst in the impending trial. One was Marshall's barbed criticism of Jefferson and his party in the final volume of his biography of Washington, which appeared in 1805. Even more to the point was his *Marbury*-like rebuke of the president's overreach in his Bollman opinion. Jefferson's decision to take charge of the prosecution in Richmond was almost certainly prompted by his conviction that Marshall would try to embarrass him again by siding with Burr.

Marshall knew that the lines of battle had been drawn and that he would be shown no mercy by the president, the ever-vigilant partisan press, perhaps even by the people themselves. The legal terrain was full of pitfalls and challenges, too. He had to keep nine talented and touchy lawyers on task and steer them away from personal attacks and partisan grandstanding. With little help from Judge Griffin, with no clear guidance from precedent, and with little time for study or reflection, he had to settle new and complicated matters of trial procedure.

Above all, there were important and perplexing legal issues to be decided: The constitutional definition of treason remained to be clarified; and the law of evidence pertaining to treason, touched on so briefly in Article III, Section 3, and in previous decisions by the justices on circuit, had to be settled. Marshall's own authority as a federal judge, especially as it related to the mythic power of the trial jury, was also on the line. Finally, embodied in the escalating rivalry between the president and himself was the profound issue regarding separation of powers that had been broached in *Marbury*: In l807 as in l803 the line between politics and law was the central issue.

Marshall understood all this: the "many real intrinsic difficulties" of the case, and how they "are infinitely multiplied by intrinsic circumstances," as he complained to his colleague Justice

Cushing. He wished "earnestly" to consult with all his "brethren on the bench," but he knew that "this wish cannot be completely indulged." He could and did lean on the arguments of counsel, but ultimately the decisions were his alone, to be rendered "according to the best lights I possess."[iv]

For his effort he was depicted by his enemies as America's own "hanging-judge" George Jeffreys—never minding that it was not Marshall who wanted to do the hanging.

Feasting with the "Traitor"

The pending trial in Richmond had become the subject of political controversy long before it began; and Marshall found himself at the center of the storm well before he confronted Burr in the Eagle Tavern for arraignment on March 30, l806. When Marshall committed Burr for a high misdemeanor instead of treason, as the government insisted, it was assumed by his enemies that he had taken sides with the traitor.

Several things gave instant traction to this notion, starting with Marshall's statement during Burr's commitment hearing on April 1. After quoting Blackstone, Marshall added that the great judge did not mean to say "that the hand of malignity may grasp any individual against whom its hate may be directed, or whom it may capriciously seize, charge him with some secret crime, and put him on proof of his innocence." Marshall hurried to point out

that he was not referring to the conduct of the government—and his clarification appeared as a note in Robertson's report—but the damage was done.[v]

More damaging than Marshall's provocative reference to "the hand of malignity" was his appearance shortly thereafter, at a party for Burr given by John Wickham. As reported in the April 7, 1807 issues of both the *Virginia Argus*[vi] and the Philadelphia *Aurora,*[vii] the story of Marshall's attendance at Wickham's party set off a firestorm. The author of the letter in the *Aurora* accused Marshall of polluting "the ermine of justice" by "coming into contact with an acknowledged criminal," one "who had been proclaimed a traitor by the executive of the union." The *Enquirer* of April 10 embellished the charge in an anonymous article entitled "A Stranger from the Country," which in fact was known at the time to have been written by Benjamin W. Leigh.[viii] On April 22, the *National Argus* in Worcester, Massachusetts reprinted the article from the *Virginia Argus*. By the time the story was reprinted in the *Petersburgh Republican*, the dinner had morphed into the "Feast of Treason," which article then made its way into the *Democratic Press* of Philadelphia[ix] and the *Republican Advocate* of Fredericktown, Maryland,[x] among many other Republican newspapers around the nation.

The "Feast of Treason" article accused Marshall of taking Burr "by the hand," of "joining in a Bacchanalian revelry, and drinking the toasts and sentiments of a traitor!" All this in plain sight. "Marshall, Burr, and Wickham—a chief justice, a traitor, and a tory! Save us from such a *trio* of *honest* men."[xi] Word spread as far north as Portsmouth, New Hampshire, where Fourth of July toasts to President Jefferson, "The Fair Daughters of Columbia," and General James Wilkinson (for his "patriotism, firmness and vigilance") also included a blast at the "Judiciary of the United States," hoping that its "honor" might be restored and that "its chief judge be no more found a companion to traitors."[xii]

The partisan newspaper network of the early republic was obviously a force to be reckoned with.[xiii] Marshall was well aware of this fact from past experience, so why did he make himself vulnerable by attending Wickham's party? Could it be, as his critics claimed, that he was blatantly partial and simply did not care who knew it?

From the limited evidence available, it is difficult to answer these questions about Marshall's behavior. We know he attended Wickham's party, but we do not know whether he knew that Burr would be present. There is no evidence that the two men conversed, but also no evidence that they did not. When the guests toasted Burr's health, did Marshall lift his glass? We can only

surmise that he did, since not to have done so would have been an egregious violation of established social convention. In fact convention, the gentlemanly tradition of the Richmond bar, and Marshall's long friendship with Wickham best explain his being there in the first place.

Whatever the reasons for it, Marshall's presence was a costly lapse of judgment, one that according to William H. Cabell, Marshall lamented "more than any act of his life."[xiv] Cabell believed that the act was unintentional, but what Marshall ought to have known and what ought to have warned him away was simply that Wickham was Burr's leading lawyer and his own friend. Marshall never tried to justify or explain his indiscretion publicly. Perhaps he remained silent simply because explaining might make things worse; at the same time, *not* explaining called forth the suspicions of the *Virginia Argus.*[xv] The best Marshall could hope for was that his reputation for integrity would carry him through, and to some extent it did: Even Marshall's detractors at the *Enquirer* conceded that he did not "consciously" weigh in on Burr's side.

In the emergent age of popular politics, however, party allegiance counted as much as a gentlemanly sense of honor, and perception was just as important as truth, perhaps even more so, since truth was hard to come by and harder still to prove. Whether

conscious or not, the indisputable consequence of the episode was to elevate the partisan tone of the proceedings and to give Marshall's political enemies another opportunity to assail his character. Later on in the trial, rumors circulated that Marshall and Wickham consulted privately about the course of the trial, this time over a game of chess.[xvi]

The Great Subpoena Debate: Law or Politics or Both?

The role which public perception played in the trial—a role measured by the sensationalist coverage of the trial in the press and the apparent gullibility of readers—is an indication that legal proceedings were no longer the exclusive domain of lawyers and judges and the elite portion of the public. It followed that editors interested in selling papers were not much interested in the un-dramatic aspects of Marshall's day-by-day conduct of the trial.

A fair reading of the entire trial transcript, however, shows that Marshall was evenhanded, modest and remarkably patient. If he failed to halt Martin's verbal assault on Jefferson, he also failed to stop Wirt's tirade against Burr. Recall too that Marshall cut the prosecution considerable slack when they demanded the right to argue intent before they proved that treason had been committed. When he misspoke he apologized; when he was wrong he admitted it. When both sides were wrong, he let them both know. And when he did not know the answer he asked for time to study. When

there was no "general rule" to be found, he said so and did not try to find one.[xvii] He also restrained himself when lawyers on both sides lectured him on his judicial duties, and warned him of the consequences of not fulfilling them.

In short, Marshall in *Burr* went out of his way to not be Chase in *Callender,* which is to say he was neither highhanded nor domineering. This said, it is also true that Marshall's fairness has to be judged by his decisions on the great issues before him—the question of treason which he decided on August 31, and the question of whether he could subpoena a sitting president and order him to produce papers in his possession that the defense requested, and indeed appear in person if he failed to do so.

Marshall's decision to issue the subpoena *duces tecum* on June 13 was a dramatic highlight of the trial that lent itself perfectly to partisan spin. Coming on the heels of "The Feast of Treason" story, it appeared to many who were already predisposed to think so that Marshall had, in Wirt's words, made his court "a canal" through which Burr and his lawyers "may pour upon the world their undeserved invectives against the government."[xviii]

Wirt was referring to Marshall's failure to stop Martin's unrestrained attack on Jefferson during the course of the argument over the subpoena, in which Martin lambasted the president for behaving like George the III if not God Almighty.

There is no doubt that Martin's verbal assault on Jefferson was a breach of adversarial etiquette that threatened the very goal of rational discourse Marshall professed to uphold.[xix] Nevertheless, before judging Marshall too harshly, remember that neither he nor anybody else could have known what Martin was going to say in the heat of battle. What he said, vitriol aside, was that Jefferson had launched a personal vendetta against Burr; other lawyers on Burr's team and Burr himself made the same point throughout the trial, albeit in less inflammatory language. As defense lawyers that was their job, just as it was the duty of the prosecution to complain about the defense's having done so, which the prosecution did with escalating vigor. The passions on both sides were no doubt genuine, but their complaints were also designed to put Marshall on the spot in the hope he might give them a break.

In fairness, however, ought Marshall to be blamed for the passionate political feelings that burst forth spontaneously during the long, grueling trial? The best he could do, and what he did in fact do, in response to Wirt's complaints at the conclusion of the rancorous day of argument on June 10, was to appeal to "the dignity" of the defense to stop "abusing" the government. Marshall was reluctant to interfere, but he wanted to make it clear that both sides "in the heat of debate" said things "of which the court did not approve," and that both "had acted improperly in the

style and spirit of their remarks; that they had been to blame in endeavouring to excite the prejudices of the people; and had repeatedly accused each other of doing what they forget they have done themselves." He then urged both sides to "confine themselves on every occasion to the point really before the court; that their own good sense and regard for their characters required them to follow such a course; and it was hoped that they would not hereafter deviate from it."[xx]

The offending parties paid but scant attention to Marshall's plea for moderation and restraint. And indeed it is hard to see how he could have made them behave differently except by exercising a heavy-handed authority that was against his nature, and which his enemies, and probably his friends, would have condemned him for using.

As it turned out, there was condemnation aplenty when Marshall issued the subpoena to Jefferson on June 13. The confrontation between the two men could not have been more obvious. Once again Marshall appeared to be siding with Burr the traitor; and once again he was condemned for using his court as a personal bully pulpit to chastise the president.

Whether Marshall secretly enjoyed once again lecturing Jefferson on his legal duties is impossible to know, but Marshall clearly went out of his way to rest his decision on solid legal and

institutional ground. The court, he admitted, felt "peculiar motives" for manifesting a respect for "the chief magistrate of the Union." What those motives were, he did not say; but he did say that the court's respect had to be "compatible" with its "official duties," which in his opinion it was not.[xxi]

On the subject of judicial duty, he spoke personally, explaining that he would "deplore most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him."[xxii]

The letter in question was Wilkinson's letter to Jefferson dated October 21,1806, which Jefferson had mentioned specifically in his proclamation of Burr's guilt on January 22, 1807. The subpoena as it was actually issued on June 13 requested not only the letter of October 21 but also "the document accompanying the same letter," which was Wilkinson's main narrative of the conspiracy, dated October 20, and which had been delivered to Jefferson along with the letter of October 21.[xxiii] Thanks to Marshall's issuance of the subpoena and Jefferson's compliance, Burr and his lawyers would ultimately receive authenticated copies of both letters.

Since Burr's lawyers obviously required these letters to prepare his defense, it is difficult to see how Marshall could have ruled differently than he did. Even so, Marshall had no reason to think that the president would comply with the subpoena; indeed, given the bad faith between them, he had reason to think that Jefferson would not comply. Thus Marshall's resolute justification of his decision to issue the subpoena, which he grounded on an elemental principle of criminal procedure in capital felony cases: "So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual, who was charged with any crime, to prepare for his defense, and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient, and is as consonant to justice, as it is to humanity."[xxiv] He then rejected out of hand the prosecution's contention that the subpoena could issue only after the grand jury had brought an indictment. In Marshall's words: "Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of the opinion, that any person, charged with a crime in the courts of the United States, has a right, before, as well as after indictment, to the process of the court to compel the attendance of his witnesses."[xxv]

This basic right of criminal defendants to compulsory process, which Marshall located in the 6th Amendment, was dispositive. The remaining and more dramatic question was whether, in order to secure that right, a subpoena *duces tecum* could issue to a sitting president. Connected to this issue was an even more explosive question: whether the court could compel the personal appearance of the recipient if the requested papers were not forthcoming. The subpoena addressed to Jefferson "commanded" him "to appear before the Judge of the Circuit Court . . . for the fifth Circuit," that is to say before John Marshall. Burr signed a formal waiver of personal attendance, however, noting that copies of the materials requested will be "admitted as sufficient observance of this process."[xxvi]

Marshall's opinion was a forceful justification of the court's authority, including its power to compel performance. Concerning judicial authority: "The court perceive no legal objection to issuing a subpoena *duces tecum* to any person whatever, providing, the case be such as to justify the process." Concerning the obligation of the president to obey: while a king could not be summoned to appear in person, because it would be said to be "incompatible with his dignity," the President of the United States is no king--the same point Luther Martin had already made in much harsher language. "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." Then: "If in any court of the United States, it has been decided, that a subpoena cannot issue to the president, that decision is unknown to this court."[xxvii] Marshall abruptly dismissed the argument that the duties of the president "demand his whole time for national objects," since "it is apparent that this demand is not unremitting."[xxviii] Jefferson understandably took that remark as a gratuitous personal slur. It was gratuitous because Marshall knew that Jefferson was not about to appear as a witness in his court and that there was no way to force him to do so.

The government's most compelling argument against the issuance of the subpoena, one that has resurfaced at critical times in American history, was that a president cannot "for state reasons" be expected to comply with a subpoena ordering him to produce papers in his possession. On this point, Marshall spoke boldly, affirming that it was up to the court not the president to say what was relevant to the defense or inadmissible because of national security interests. Marshall granted that the letter requested by Burr raised "a delicate question," but added there was "certainly nothing before the court which shows, that it contains any matter, the disclosure of which, would endanger the public safety."[xxix] If such were the case, and if the matter in question were not "immediately

and essentially applicable to the point," than such matter would be suppressed--but it was the court's call upon the return of the subpoena.

Marshall abruptly dismissed the prosecution's contention that a ruling in favor of Burr's subpoena motion would give "the countenance of the court" to suspicions regarding the veracity of the witness"—that is, James Wilkinson.[xxx] That of course is precisely what the defense wanted to do, which is to say that their request for the subpoena was designed in large part to make the prosecution and the president look bad for building their case on Wilkinson's testimony.

The confrontation between the chief justice and the president over the subpoena—the tone of Marshall's argument, the complaints of the affront by Jefferson through his lawyers--was not without its personal side. But mainly, the confrontation was a textbook example (Madison's *Federalist* Number 51 being the text) of how the Constitution's separation of powers should operate: how the office holders in each branch, by zealously defending their institutional turf, would prevent a tyrannical concentration of power in any one branch. In 1807 the danger resided not in the judiciary, but in the executive branch backed by public opinion and a compliant Congress.

Marshall's forceful defense of the court's subpoena powers would later bolster the Burger Court during the Watergate hearings in its victorious battle with President Nixon over executive privilege.[xxxi] In l807, however, the struggle between Marshall and Jefferson ended in a draw. While it is true that Jefferson complied with Burr's request for the letter of October 21, along with the accompanying document of October 20, Jefferson (speaking through his lawyers in Richmond) never conceded that he was duty bound to obey Marshall's subpoena.[xxxii] The issue of the subpoena would come up during the final stage of the trial, as will be noted shortly; and once again the contest between the president and the chief justice would end with both men defending their institutional turf.

The Decision that Freed Burr (Almost), Defined Treason, and Damned John Marshall in the Eyes of His Enemies

Marshall's decision of August 31 was the grand climax of the trial. The decision settled many things: the meaning of levying war first broached by the Supreme Court in *Bollman* was clarified. By implication the contest between jury and judge was settled in favor of the latter (although the question would be argued again in the last phase of the trial). The matter of admissible evidence, the immediate point of dispute, was also settled. All of these things

led to the jury's decision on September 1 to acquit Burr on the charge of treason.

What Marshall did to bring about the jury's verdict, although not to guarantee it, was to rule favorably on Burr's motion to suppress all further evidence that did not bear directly on the formal charge against him: that is, that he had levied war against the United States on Blennerhassett's island on December 10. To rule on this question of evidence, however, Marshall also had to explain to the jury what the Constitution meant by "levying war" in Article III. And to do that he had to say what the Supreme Court had intended to say in *Bollman*. Beyond that conflicted decision were the circuit opinions of Chase, Paterson, and Iredell to be considered. And further back still, and most important of all, were the provisions regarding treason in the Constitution.

From the beginning to the end, the words in Article III loomed large and this fact played to Marshall's strength. He was the "master spirit of the scene" in Richmond because he was a master interpreter of the written Constitution. Still, nothing he had done previously in this regard, *Marbury* included, rivaled his effort in the Burr trial. Although Marshall was still learning on the job in 1807, the trajectory of greatness was readily apparent.

A leading Marshall scholar referred to his Burr decision as "masterly,"and so it was.[xxxiii] It was also the decision that drew the

most fire from his enemies. In particular, what his critics found most objectionable was Marshall's ruling to withhold further evidence from the jurors, not only because it all but guaranteed Burr's acquittal, but also because, as with Chase in *Callender*, the ruling seemed to pit Marshall the conservative Federalist against the trial jury—the jury representing, according to republican theory, the sovereign people themselves.

However, what the critics did not do was to attend sufficiently to the entire opinion and to Marshall's minutely reasoned legal justification for his holding. According to Dumas Malone, even Jefferson probably did not read the opinion closely.[xxxiv] Hay found its excessive length and intricate reasoning off-putting, and like his boss, assumed that Marshall manipulated the law to serve partisan ends. Wirt too seems to have agreed, at least before the wounds of defeat had healed. With the possible exception of the essays of Lucius (aka William Thompson) published in the *Enquirer* and the Philadelphia *Aurora*,[xxxv] most of the partisan press simply condemned the decision without analyzing it.

One person who took the opinion with utmost seriousness, however, was Marshall himself. One compelling reason for doing so, to which he alluded several times during the trial, was that a

man's life was on the line. Also, Marshall was keenly aware of the importance of the constitutional question to be decided. Technically, as he observed, a single justice sitting on circuit could not settle the meaning of Article III, Section 3, especially since the Supreme Court en banc had already spoken. Marshall understood too that he could shape the law himself by clarifying what the Supreme Court meant by what he had written in *Bollman.* Nevertheless, all this is not to suggest that Marshall created treason law by himself, that he cut his doctrine out of whole cloth. Months of often learned discourse by the lawyers on both sides, the original words of the Framers, and the rich legacy of English law, were all indispensable elements in the mix.

In addition, Marshall made an effort to solicit advice from his colleagues on the Supreme Court. Writing to his colleague Justice William Cushing early in the Richmond proceedings, he cut directly to the major issues, those that troubled the Court in *Bollman* and were certain to trouble Marshall in Richmond.[xxxvi]

The most perplexing issue, concerning which he wanted "the aid of all the judges," concerned "the doctrine of constructive treasons." Specifically: "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?"[xxxvii]

Whether Cushing consulted his colleagues on these legal points and whether he or they advised Marshall, as he requested, is impossible to say for sure, since Marshall seems to have destroyed his correspondence dealing with the internal affairs of the Court. It is a good guess he got some advice from his colleagues, but one thing is certain: the questions pressing on Marshall's mind in Richmond were legal in nature and not political. Legal also were the issues argued by counsel during the long trial; and they were argued in fact because they were *not* fully settled in the text of the Constitution, nor in the Court's decision in *Bollman*.

One thing that was settled by the Bollman decision is seen in Marshall's concession to Cushing that the Bollman Court "certainly adopts the doctrine of constructive treasons." And this is what the prosecution argued in Richmond and what Burr's lawyers vociferously denied. For Marshall, however, the question was not whether the doctrine of "constructive treasons" had been adopted in *Bollman*, but rather how far that decision carried the doctrine.[xxxviii]

In answering this question Marshall most likely got aid from his colleagues and certainly from the learned arguments of counsel

in Richmond. In the final analysis, however, the call was his to make. And the authority of what he said depended on the quality of his own scholarly analysis and the persuasiveness of his own reasoning. Since the decision issued under his name alone, its reception as law would be inseparable from Marshall's reputation, which would in turn be linked with the record of his fairness as manifest in the trial itself.

Marshall understood both the opportunity and the pitfalls. To those waiting to denounce his effort and impugn his integrity as a judge, he had this to say: "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."[xxxix]

Rarely, if ever, among Marshall's many opinions, be they great or small, did the chief justice write so personally about the duties of judicial office. And nowhere in those opinions did he go to such lengths to ground his decision on logical analysis and

discerning scholarship. Albert Beveridge concluded that Marshall's August 31 effort equaled, if it did not exceed, the best of his great constitutional opinions, being the only one "in which an extensive examination of sources is made."[xl] Indeed, there is no better example of Marshall's mastery of the common law methodology as applied to the new Constitution and the needs of the new nation. In this common law interpretive universe, he was meshed with the lawyers who argued the case so brilliantly; in fact he was the first among equals.

The adjudicative problems were complicated because facts in the case were complex, because the issues were personally and ideologically fraught, and because the words in the treason clause of the Constitution were not as clear as they at first appeared to be, or as Burr's lawyers insisted they were. To be sure, the requirement that treason had to be proved "by two witnesses to the same overt act" (the Treasons Trial Act of 1696 required two witnesses but not to the same overt act) was itself straightforward. Its inclusion, moreover, was a sure sign that the Framers intended to prohibit the political uses of treason that had darkened English history.[xli]

What muddied the waters was that the definition of treason as "levying war" against the government came pretty much verbatim from III Edward 25, a fact that made several centuries of English

case law, along with treatises and parliamentary acts regarding treason, an unavoidable part of the interpretive matrix. Rather than clarifying doctrine this long history opened up a confusing array of possible interpretations: Blackstone listed seven versions of treason, while Hay claimed he could detect at least fifteen. But whatever the number, it was clear that as a guide to a republican constitution, English legal history afforded ample room for both judicial discretion and judicial error.

So also did American legal history at the state and national levels in the post-Constitutional period. The debates of the Philadelphia Convention, conducted in secret, were not available; and even when they were published in 1840, they threw surprisingly little light on the meaning of Article III, Section 3. One thing that did illuminate the intent of the Framers, in addition to the two-witness provision, was the fact that the English treason act of 1351, as Sir William Blackstone explained, explicitly prohibited judicially constructed treasons. If the Framers of Article III had not read the old statute themselves, then assuredly they were familiar with Blackstone's account of Parliament's effort to keep judges from making treason law, as they had freely done before 1351.[xlii]

When Marshall read Blackstone on this point, and it is a sure thing he did, he certainly realized that the prosecution was asking

him to do precisely what the great statute of 1351 prohibited. He was also aware, as were the lawyers in the trial, of Madison's warning in *Federalist* 43 against "new fangled and artificial treasons" that America's Constitution was designed to prevent.[xliii]

Blackstone and Madison provided clues as to the meaning of treason in the Constitution, but neither was binding. More directly apposite although still inconclusive were the positions on levying war taken by Justices Iredell, Paterson, and Chase in the l790s. Their opinions were not controlling either, however, first, because they were circuit rulings; and second, as Marshall recognized, because the cases they decided involved acts taken in opposition to specific federal laws rather than efforts to overthrow the government. Obviously then, the most authoritative source available to Marshall in Richmond was his own opinion for the Supreme Court in *Bollman.* But as noted above, it was also the most troublesome because his words in that opinion were not absolutely clear, and also because the prosecution could and did read into them a definition of treason sufficiently broad to embrace Burr's improbable western adventures.

With such wide latitude for judicial discretion, the particular questions to which the sources spoke ended up being mainly those framed by the prosecution's legal strategy, particularly by the initial decision to indict Burr specifically for levying war on

Blennerhassett's island on December 10. Because those events were so unwarlike, the government needed to interpret "levying war" broadly; to legitimate this broad construction, they relied on their reading of Marshall's Bollman opinion. And to support their interpretation of that opinion, and perhaps to make it easier for Marshall to accept their argument, they turned to English sources and American decisional law from the l790s.

Because the prosecution relied mainly on their own reading of his *Bollman* opinion, Marshall might have settled the matter peremptorily with a simple statement of what he meant in that opinion; and the main thrust of his ruling in Richmond was in fact a close textual and contextual analysis of his own words in the Bollman case. But the prosecution insisted, although not without contradicting Jefferson's bias against Blackstone and other Tory judges, that English treason law was a relevant guide to the intent of the Framers.[xliv] So reluctantly did the defense.

And so unavoidably, and uncharacteristically, Marshall turned legal historian. The definition of "levying war" he derived from English legal history, however, was distinctly at odds with the sweeping definition extracted by the prosecution. Marshall did concede their point that levying war did not always include actual hostilities, and he also agreed that those who levied war did not in every instance have to be armed. His main conclusion from

English experience, however, was that "levying war" required, if not actual hostilities, then a show of martial force, "an assemblage with such appearance of force as would justify the opinion that they met for the purpose." [xlv] On its face, this definition did not embrace the events of December 10 on Blennerhassett's island.

In short, Marshall viewed English law as moving away from the broad definition of treason that the prosecution liked. His interpretation of the opinions of Chase, Iredell, and Paterson fortified his conclusion: "The Judges of the United States . . . seem to have required still more to constitute the fact of levying war, than has been required by the English books."[xlvi] So too, as Marshall saw it, did the Framers of Article III, as they set about to reshape the law of monarchical England to match the republican spirit of the new nation.

By refuting the prosecution's interpretation of English law regarding the meaning of "levying war," Marshall also undercut their reading of his Bollman opinion. Still remaining, however, were portions of that opinion that appeared to endorse constructive treason, or "constructive presence," as Marshall called it. The specific question here was whether Burr could be guilty of treason if he had not been present when war was levied. To that question the prosecution answered "yes," and to prove their point they confronted Marshall with his own words in *Bollman,* which

Marshall repeated and was about to clarify: "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 in order to effect by force a treasonable purpose, all those who perform any part, however minute, etc., and who are actually leagued in the general conspiracy are traitors."[xlvii]

Taken out of context, these words seemed capable of transporting Burr to the gallows, especially since Marshall appeared to make the same point at other places in his Bollman opinion. The defense was quick to challenge the logic of such an interpretation, but they were clearly worried that Marshall and his colleagues on the Supreme Court had conceded too much to their opponents. Both sides now pressed Marshall, sitting as a trial judge, for a definitive ruling on what he had said as Chief Justice and as the author of the majority opinion in *Bollman*.

Marshall responded in an opinion that laid the cornerstone of American treason law. For the prosecution lawyers who misread his Bollman opinion, he laid out the rules of interpretation that would have prevented their misreading. For the jury he explained the legal principles established in *Bollman* that should guide their deliberations. For one and all, he justified his decision to terminate

all further testimony not directly related to the levying of war on Blennerhassett's island.

Marshall minced no words in setting forth the general principles of construction the prosecution violated in their interpretation of *Bollman*. Rule one: "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered."[xlviii] *Bollman*, that is to say, was a habeas corpus hearing regarding two men who were not involved in "executing the plan" that Burr had in mind, whatever that was. In short, the Bollman "opinion was not a treatise on treason, but a decision of a particular case . . . ." Rule two: "General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect."[xlix] That is to say, comments on treason in *Bollman* ought not to be construed out of context as overturning four centuries of English law, or a decade of reasoning by supreme court justices on circuit.

Rule three was especially telling since Marshall spoke as the author of the *Bollman*: "The opinion of a single judge certainly weighs as nothing if opposed to that of the supreme court; but if he were one of the judges who assisted in framing that opinion, if while the impression under which it was framed was yet fresh upon his mind, he delivered an opinion on the same testimony, not contradictory to that which had been given by all the judges

together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself."[l]

Rules one and two guided his exposition of *Bollman*; Rule three explained candidly why his exposition deserved respect. Thus armed he set out to say what the Court (and Chief Justice Marshall) meant to say about treason in *Bollman*--had that subject been properly before the justices. His exposition of the law boiled down to this definition of levying war: "It is said that war must be levied in fact, that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object, that it must not be an equivocal act, without a warlike appearance, that it must be an open assemblage for the purpose of force."[li]

To clarify further, Marshall quoted from his May 22 charge to the Richmond grand jury, when the meaning of his words in *Bollman* was fresh: "to constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced by engaging in military force of the United States, or that measures of violence against the government shall have been carried into execution. But levying war is a fact, in the constitution of which force is an indispensable ingredient. Any combination to subvert by force the government of the United States, violently to

dismember the union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war, and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling of men for the purpose of executing the treasonable design which was previously conceived, it amounts to levying war. It has been held that arms are not essential to levying war provided the force assembled be sufficient to attain, or perhaps to justify attempting the object without them."[lii]

As to the guiding spirit of the Supreme Court's decision in *Bollman*, Marshall had one further observation to make and he quoted his own opinion in that case to make it, declaring, "it is more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes, not already within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."[liii]

The constitutional meaning of "levying war" was now settled--at least for the purpose of ruling on Burr's motion to suppress further testimony. On that determinative procedural issue, Marshall made two points that settled the matter in Burr's favor. Point one: "That this indictment having charged the prisoner with levying war on Blannerhassett's island and

containing no other overt act, cannot be supported by proof that war was levied at that place by other persons, in the absence of the prisoner, even admitting those persons to be connected with him in one common conspiracy." Point two: "That admitting such an indictment could be supported by such evidence, the previous conviction of some person, who committed the act which is said to amount to levying war, is indispensable to the conviction of a person who advised or procured that act."[liv]

Marshall's argument here, which explained his ruling to suppress further testimony, was unanswerable. His first point meant that in presenting evidence and witnesses, the prosecution was confined to proving the precise charge levied in the indictment. Burr was charged with levying war on Blennerhassett's island and that was the charge he and his lawyers were prepared to refute. To proceed against him on charges not in the indictment would deprive him—or any criminal defendant—of the most elemental principle of due process. In Marshall's words: "The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation and the circumstances which will be adduced against him."[lv]

Marshall's second point, which finessed the question of whether Burr could be guilty of levying war when he was not present at the time war was allegedly levied, was that before that question could be settled, it would have to first be proved that war had in fact been levied. Although Marshall noted that the question of "constructive presence" was not before the court, it would appear that he was prepared to endorse the principle which held that those who planned treason, and who rounded up recruits and procured supplies to implement it, could be tried for treason even if they were not actually present when their plan was set in motion. Marshall also went out of his way to emphasize that if the acts of planning, procurement and the like were considered treason, then those acts would have to be proved by two witnesses to the same overt act.[lvi] In any case, before an indictment for such acts would stand, the government would have to prove that war had actually been levied.

Thus it all came back to what happened—or did *not* happen--on Blennerhassett's island on December 10. Marshall prudently refrained from stating his opinion as to whether the facts proved that war had been levied, since that was for the jurors to determine on the basis of the evidence presented. But in ruling on Burr's motion to suppress, Marshall instructed them on the relationship between the law and the facts they were to consider. As he

explained, in a sentence that defies easy understanding: "It has been thought proper to discuss this question at large and to review the opinion of the supreme court, although this court would be more disposed to leave the question of fact, whether an overt act of levying war was committed on Blannerhassett's island to the jury under this explanation of the law, and to instruct them, that unless the assemblage on Blannerhassett's island was an assemblage in force, was a military assemblage in a condition to make war, it was not a levying of war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place."[lvii]

Marshall was careful to explain that the question of whether war had been levied "is not to be understood as decided."[lviii] But for practical purposes it had been, not because of anything Marshall said, but because the evidence already presented by the prosecution --the best they had to present--did not come close to proving that war had been levied. Before Marshall cut them short, Hay and his colleagues had presented 14 witnesses, several of whom recounted in vivid language what they heard Burr say he intended to do, from which they surmised that he anticipated that thousands of westerners, who hated Spain and were doubtful about

the government back East, would join Burr as he headed for New Orleans on his way to Mexico.

The problem for the prosecution was that no witness claimed to have seen this vast army on the move; and as Marshall observed, it would be impossible to hide such an army if it truly existed. What a couple of witnesses did see on the evening of December 10, instead of the assembling of a military force capable of taking Washington and Mexico by force, was the chaotic comings and goings of a bunch of young men hurrying to escape the clutches of the Wood County militia. According to Marshall's definition of levying war, this motley band need not have committed violent acts or even have been armed. But they did have to exhibit "the appearance of force" competent to accomplish the crime they were accused of having committed. And this question was up to the jury.

Marshall's ruling on Burr's motion to suppress, the main target of Marshall's critics, has thus been misunderstood. Marshall did not in fact rule to withhold *relevant* testimony from the jury as charged. Nowhere is this distinction between relevant and irrelevant evidence more forcefully explained than by Luther Martin during the trial-after-the-trial.[lix] What Martin argued and what Marshall ruled was that only those witnesses could be heard who were prepared to testify about the overt act of levying war on

Blennerhassett's island. The government presented no further witnesses, one must assume, because they had none who could testify about that issue. What doomed the case--what freed Burr on the charge of treason, to put it another way--was not Marshall's ruling, but rather the fact that nothing happened on Blennerhassett's island, or anywhere else on the western frontier, that looked remotely like war levied against the United States.

Given the stubborn facts of the case, Marshall's ruling on evidence and the jury's deliberations led to Burr's acquittal. As a trial judge, Marshall rendered justice and defined the law to the best of his ability. He defined "levying war" in such terms as would permit the government to stop treasonable action before it turned into full-fledged warfare. He also agreed with the prosecution that Burr could have been convicted of treason even though he was not present when war was actually levied—provided that it was established that war had been levied, and provided that there were two witnesses to Burr's activities that connected him materially to the act of levying war.

The principle Marshall enunciated here was compatible with one aspect of the English doctrine of "constructive treasons." What Marshall repudiated in English treason law—that which the prosecution tried to press on him during the trial--was the proposition that a conspiracy to commit treason was itself treason.

For Marshall, a conspiracy to commit treason and treason were separate and distinct crimes.

By withholding irrelevant and inflammatory evidence, Marshall's decision encouraged the jurors to do what the law required: to give the accused the benefit of the doubt. At the same time, his decision also set forth a workable treason doctrine that enabled the government to defend itself against its own citizens who would use force to bring it down.

Needless to say, Marshall's enemies did not see matters this way. Impatient with nuanced and carefully drawn legal distinctions, they saw only the bottom line and assumed that Marshall had manipulated the law to free a traitor. None of Marshall's other opinions—not even *McCulluch v. Maryland* in 1819, not *Cohens v.Virginia* in l821, not the Cherokee Indian opinions of the l830s—elicted such a personally vicious response. The Baltimore mob that hanged Marshall in effigy, along with Burr, Blennerhassett and Martin, said it all. Even Marshall's favorable ruling on Hay's motion to re-try Burr for high misdemeanor, and possibly treason, in Ohio, where he rejoined the flotilla that departed Blennerhassett's island on December 10, did not quell the outrage. In fact with that decision, Burr himself joined the chorus of criticism against Marshall.[lx]

Law and Politics in a Delicate Balance: The Chief Justice as "Examining Magistrate"

David Robertson stopped detailed reporting of the proceedings of the trial following Marshall's August 31 opinion and the jury's acquittal of Burr the next day. After recording Marshall's order presenting Burr to another grand jury in Ohio on September 9, he stopped reporting altogether and set about marketing the first two volumes of his reports. Robertson had good reasons to assume that the real trial was over and that the remaining business—the pending misdemeanor charge against Burr, the treason and misdemeanor charges against Blennerhassett and the treason charges against Burr's subalterns--would be wrapped up expeditiously.

And by any count it should have been. It was apparent to all parties, for example, that Blennerhassett could not be convicted for treason when the main instigator had already been acquitted, and especially after Wirt's unforgettable portrait of Blennerhassett as an innocent victim of Burr's malicious charm. Treason charges against Jonathan Dayton, Israel Smith and Comfort Tyler were almost certain to be dropped, too, since they had been indicted in the first place mainly to elicit testimony against Burr--thus the package of blank pardons.

Finally, pointing to a quick end to the trial was the fact that all the main participants desperately wanted the ordeal to end. The lawyers on both sides were exhausted and increasingly frustrated and testy. Burr was irritable and depressed and, according to Blennerhassett, was taking laudanum to ease his persistent stomach pain. After months on the hot seat Marshall needed a rest. Given the fact that further proceedings would necessarily be a reprise of much that went before, it would seem reasonable to assume that Marshall's previous definition of treason and his ruling on evidence in his August 31 opinion would settle outstanding questions.

Everyone was ready to pack it in—except President Jefferson. Writing to Hay six days after Burr's acquittal, Jefferson reaffirmed his position on the subpoena--that it was his call as to what should be divulged and not Marshall's—and then instructed Hay as to what course he should pursue: "I am happy in having the benefit of Mr. Madison's counsel on this occasion, he happening to be now with me. We are both strongly of opinion, that the prosecution against Burr for misdemeanor should proceed at Richmond. If defeated, it will heap coals of fire on the head of the Judge; if successful, it will give time to see whether a prosecution for treason against him can be instituted in any, and in what other

court." As an afterthought Jefferson suggested that Blennerhassett and Israel Smith be prosecuted for treason in Kentucky.[lxi]

Thanks to Jefferson's instructions and Hay's compliance, the trial-after-the-trial lasted from September 3 until Marshall handed down his final commitment ruling on October 19—proceedings that consumed all 418 pages of volume three of Carpenter's report of the trial. In important ways, the final phase of the trial was uniquely revealing. Exhausted lawyers on both sides returned to the fray, and if they behaved as they had done previously, they did so with a fury that highlighted what had earlier been mostly suppressed; reputations were settled for better or worse; and long-time professional friendships were permanently severed. Also, in reprising previous arguments, points of evidence and of law were clarified; so too were the respective positions of Marshall and Jefferson regarding the subpoena *duces tecum*. Even the secrets of the earlier grand jury proceedings were unpacked for all to see.

And most importantly, Marshall was put to a new test. This was especially true in the final phase of the proceedings during which he sat as a committing magistrate. In that role his responsibility was to determine whether there was sufficient evidence to commit Burr on charges emanating from events following the December 10 episode on Blennerhassett's island. In the principal treason trial Marshall evaluated arguments of counsel

about the law in order to charge the jury; in the commitment hearings his duty was to evaluate both the facts and the law so as to determine whether there was reason to believe that a properly constituted grand jury would bring in an indictment.

The situation was fraught with painful choices and dangerous pitfalls that even John Marshall could not avoid. As frustrated counsel on both sides reminded him in no uncertain terms, his personal and professional reputation was on the line. Jefferson, who was anxiously watching events and calling the shots from Monticello, seemed destined to win no matter what Marshall did or did not do.

Burr's trial for misdemeanor as charged in the original grand jury indictment of June 26 lasted from September 3 through September14, and consumed the first 110 pages of Carpenter's report. The proceedings opened on a hostile note when the question was debated as to whether Burr needed to be bailed again since he was already in the custody of the court. The investigation of the question once again took Marshall and the lawyers back to English common law, to the Judiciary Act of 1789, and to judicial decisions from the l790s. Debate also ensued about the amount of bail, especially when Hay, following Jefferson's instructions, intimated that Burr might be charged with treason in the future, "either in Kentucky, Tennessee, or the Mississippi territory."[lxii]

Marshall set bail at $5,000 according to the present charge, but not to a future one. After treason charges against Blennehassett and Israel Smith were dropped, they were both bailed at $5,000 for the misdemeanor count. The charges against Jonathan Dayton were dropped and those against Robert Smith were declared by Hay to not be before the Court.

The spotlight was now on Burr who beat Hay to the punch by requesting full compliance to the previously issued subpoena *duces tecum* regarding the October 21 letter from Wilkinson to Jefferson. Burr finally settled for an authenticated copy of that letter. Burr's lawyers also insisted on seeing the entire November 12, 1806 letter from Wilkinson to Jefferson, arguing that selected portions of the letter had been used by Wilkinson during the grand jury proceedings to save himself by incriminating Burr.

Sparks flew when Marshall issued a subpoena *duces tecum* to Hay ordering him to produce the letter. What the defense wanted to demonstrate—and this would be their major strategy for the remainder of the trial—was that Wilkinson and Jefferson were collaborating to convict Burr and that Jefferson was covering for Wilkinson, including his illegal actions in New Orleans. Hay was caught in a bind regarding the November 12 letter. Jefferson had given him explicit instructions to divulge only those portions of the letter that he had agreed to; Marshall ordered the full letter to be

disclosed. Hay argued that "state secrets" were involved and refused to produce the letter, protesting that he was willing to go to prison before betraying "a sacred trust."[lxiii]

Hay considered his obligation to cover up Jefferson's involvement a matter of personal honor; counsel for Burr looked on this obligation as a sign of weakness, if not corruption. Jefferson's ongoing involvement in the trial now became apparent to all; also obvious was the fact that Hay was simply following the president's orders. Wickham drove home the point in his closing remarks on Saturday September 12, and in addition to calling Hay a puppet of Jefferson, also accused him of being "unacquainted with the facts, and ignorant of the law," and of having "repeatedly avowed the conviction of Burr's guilt," in violation of professional ethics.

A highly agitated Hay promised to answer the charge when the court met Monday, but could not help venting his feelings in a personal letter to Wickham written over the weekend. Hay repeated Wickham's offensive comments and then declared that those remarks constituted "a direct attack, upon my integrity, both as an individual and a public officer." After announcing that their long friendship was over, Hay concluded his letter by demanding a "public apology." [lxiv]

Wickham never apologized and the fact that no one believed Hay when he protested in open court, "that he had never received any instructions or communications from him [Jefferson], nor could be governed by any 'orders on the subject from the executive,'" only made matters worse for the hapless prosecutor.[lxv] It was not easy being the president's man in Richmond.

Marshall's major opinion of September 14 contained several points, all of which doomed the prosecution's main argument. Point one concerned the indictment, which accused Burr of having launched the military expedition against Spain from Blennerhassett's island on December 10. The charge, said Marshall, was not for conspiring to launch an attack against Spain, but for actually doing so.[lxvi] Moreover, the indictment contained no reference to conspiracy. Consequently all the evidence not directly related to the military expedition launched on the island was excluded—that is to say, all testimony of third parties, except as it applied to those events; all evidence of events regarding Burr's activities which took place elsewhere; and finally all acts of Burr's accomplices, except as they related to the events of December 10 on the island.

Hay realized that Marshall's ruling on evidence excluded almost all of the testimony he was prepared to present. One day after Marshall's decision, on September 15, Hay moved to

discharge the jury. Marshall pointed out that the jury could not be discharged without the consent of both parties. Burr demanded a verdict and after 20 minutes of deliberation, the jury returned with an acquittal.[lxvii] Blennerhassett called Marshall's opinion "an able, full, and luminous opinion as ever did honor to a judge, which has put an end to the present prosecution."[lxviii] Jefferson considered the opinion one more reason for impeaching Marshall.

The second and final stage of the trial-after-the-trial began shortly after the jury's verdict, when Hay, following Jefferson's instructions, moved to commit Burr along with Blennerhassett and Israel Smith, for levying war against the United States "at the mouth of the Cumberland in Kentucky and also at Bayou Pierre, in the Mississippi Territory."[lxix]

Hay's motion put Marshall in a bind. On the most elemental level, the commitment hearing, if it should be granted, would mean that Marshall sitting alone would have to revisit and reassess much of the evidence previously heard—in the principal treason trial and in the misdemeanor trial which had just ended. To be sure, the issue would be probable cause only, but practically speaking it would be difficult not to let the previous jury verdict affect his decision of whether or not to commit Burr to yet another grand jury and possibly another trial. Aside from the question of his own capacity to render an impartial assessment of the evidence after all

that had transpired, there was the question of whether he could hold up for yet another go-around.

Adding immeasurably to the physical and intellectual challenge now facing Marshall were the no-win political choices confronting him. While a ruling against commitment would obviously please Burr and his lawyers, several of whom were Marshall's personal friends, such a ruling would also strengthen Jefferson's case for impeachment. On the other hand, sending Burr to Ohio for trial, if that were the outcome of the hearing, would appear to be bending to pressure from Jefferson and from public opinion. Either option would have been painful. In addition, a verdict of guilty in the new trial, as Jefferson saw it, would not only net Burr but also Marshall, for bending the law to free him in the earlier trial.

Marshall's first decision was to proceed with the commitment hearing; his second was to permit a wide range of testimony, some of which had been excluded by his August 31 decision and also by his September 14 decision. His rulings called forth a torrent of abuse, this time from Burr and his lawyers. "I found Burr, just after a consultation with his counsel," reported Blennerhassett in his journal entry of September 20, "secretly writhing under much irritation at the conduct of the Judge," claiming that "his Honor did not for two days understand either the

questions or himself . . . ." Burr instructed his counsel that Marshall should "be put right by strong language" or possibly even "abuse."[lxx]

Burr's lawyers now had their marching orders. Before setting Marshall right, however, they first had to turn up the heat on Wilkinson, who reappeared as the government's chief witness, and then to establish Wilkinson's collusion with Jefferson in their joint effort to convict Burr. If Burr had his conspiracy, then so did Jefferson and Wilkinson. Hay, whose demeaning association with the president had already been shown, was also marked for public exposure. Burr's orders along with a sense of frustration shared by his lawyers made for some of the most dramatic courtroom action of the long, action-packed trial.

Eaton was called to the witness stand once again, and was once again humiliated, but Wilkinson as the chief witness for the government was the main target of the defense. As already noted, it was in order to establish the general's illegal action in New Orleans and Jefferson's compliance with it, that Burr moved to subpoena Hay for the full text of the November 12 letter. More innovative still, at least for that time, was the request that the court call Littleton Tazewell, Joseph C. Cabell, and John Brokenbrough to testify about Wilkinson's testimony before the grand jury that had led to Burr's indictment back in May.

By probing the secret deliberations of the grand jury, Burr sought to demonstrate that Wilkinson manipulated evidence in order to implicate Burr and disguise his own involvement in the conspiracy. This was a bold strategy, but also a risky one, since by showing Wilkinson's complicity in the conspiracy Burr might confirm his own involvement as well. Wickham's point was not that Wilkinson was guilty, however, but that both men were innocent. Wilkinson's crime was to perjure himself before the grand jury by tampering with evidence (the cipher letter and the letter of November 12), and by testifying falsely against Burr to save himself. If it could be shown that Wilkinson was acting at the behest of Jefferson, so much the better.

The testimony of Tazewell, Cabell and Brokenbrough, though restrained, pretty much neutralized Wilkinson's testimony in the commitment hearings. The subpoena of the November 12 letter, since its contents were never fully disclosed, left open the possibility that Jefferson and Wilkinson were in close collaboration—the mere suggestion of which was all that Burr's lawyers needed to make their point.

Defense counsel's other major gambit, which kicked in as the time approached for Marshall's decision, was to lecture the judge about his legal authority and moral duty as an examining magistrate. Burr chose Luther Martin to deliver the message.

Martin was not quite abusive, as Burr suggested he might be, but he was insultingly arrogant and brilliantly clever. Martin realized that a ruling by Marshall to commit Burr for a new trial would be to put Burr at the mercy of a new grand jury somewhere in the West, where it was all but certain that Jefferson's message of Burr's guilt had already taken root. To forestall such an eventuality, Martin demanded that Marshall use his legal power as committing magistrate—powers which Martin expounded with great authority—to end the trial. As Martin framed the issue it was judge versus jury: law against popular politics and public opinion.

Martin had reason to think that Marshall the conservative would get the point. And what if Marshall did not get it? Martin warned him of the consequences of bringing Burr to a new trial for the same crime in defiance of the constitutional protection against double jeopardy: "And there has been no judge dared to grant a new trial in such a case, to bring a person twice to answer for the same crime, and hazard his life. . . ." "If he does, his conduct might be approved, perhaps, at this moment, by a certain part of the community, whose minds have become highly inflamed against the prisoner; but I warn him, that, if he was so to play with life, he would find it the most unpopular of all the actions of his life; and in a little time, he would find himself loaded with detestation."[lxxi]

Those who had chastised Marshall for favoring the defense during the trial must surely have been surprised at Martin's dressing-down of the Chief Justice—and more surprised still when Marshall decided to commit Burr and Blennerhassett for trial in Ohio where they would answer to yet another grand jury.

Marshall's ruling was straightforward and carefully reasoned; it was also politically calculated to make the best of a bad situation. Regarding the plea of *autrefois acquit*—that Burr had been tried once and acquitted—Marshall refused to rule, not because of "my fear to meet a great question"–but because it was a constitutional question which ought to be settled by the full Supreme Court and not by single judge sitting as an examining magistrate. After reviewing the evidence, Marshall concluded "that the real and direct object of the expedition [Burr's flotilla] was Mexico."[lxxii]

In short, Marshall did not buy the prosecution's argument that Burr's objective was to separate the Union and that he planned a direct attack on American territory in New Orleans as a first step; neither did he believe Burr's argument that his plan depended on a war with Spain, nor that a de facto war in fact existed at the moment Spanish troops crossed the Sabine river. Nor indeed was Marshall persuaded that Burr seriously intended to settle the Bastrop lands once it was clear that there would be no war. Instead,

Marshall committed Burr and Blennerhassett "for preparing and providing the means for a military expedition against the territories of a foreign prince, with whom the United States were at peace." He also added significantly: "If those whose province and duty it is to prosecute offenders against the laws of the United States, shall be of opinion, that a crime of a deeper die has been committed, it is at their choice to act in conformity with that opinion."[lxxiii] The problem—and Burr's fate—was once again in Jefferson's hands.

One can readily understand why Burr and his lawyers were incensed and also why Blennerhassett reasoned that Marshall had succeeded in getting both Jefferson and Burr. A fairer assessment might be that the Chief Justice of the United States did not want to be hung out to dry by his old enemy, and that he was willing to offend Burr and his lawyers in order to avoid that fate—especially since it was Marshall's belief that Burr would never be brought to trial in Ohio anyway. Marshall did not emerge unscathed for the way he mixed law and politics—echoes of *Marbury v. Madison*—but he did escape the trap set for him by his old adversary.

The court records including Marshall's commitment ruling were forwarded to the federal district court in Chillicothe, where a grand jury indicted Burr and Blennerhassett for high misdemeanor.[lxxiv] As it turned out, neither man appeared for trial in Ohio, and as everyone including Marshall expected, the

government abandoned further proceedings against both men. After seven months "the greatest criminal trial in American history" came to an end--not with a bang, nor a single conviction, but a whimper.[lxxv]

Bashing Marshall

Even before the trial began, Jefferson had predicted that Marshall would be judged, and so he was. The president and his friends, including his lawyers in Richmond, had long since concluded that Marshall was a political judge. After the final commitment ruling, Blennerhassett reported that Marshall's professional friends had abandoned him for trying to "stroke" the "tiger of Democracy" rather than muzzling him.[lxxvi] Burr agreed that Marshall's friends as well as enemies believed that his final opinion "was a sacrifice of principle to conciliate *Jack Cade*."[lxxvii] Blennerhassett himself, although he had admired Marshall for his integrity and fairness throughout the trial, concluded reluctantly that the Chief Justice "must be disposed to favor alike the ruin of Burr, Wilkinson and Jefferson."[lxxviii]

Richard Bates, another close observer of the trial, also proffered a political explanation for Marshall's behavior, one that had considerable traction at the time, as well as later on. According to Bates, "The judge in all probability wishes Burr to be acquitted for he is a Federalist, and the federalists are all friends to Burr,

because Burr [is] a traitor who wished to sever the union, and because he is an enemy of Thomas Jefferson." It is worth noting that Bates himself withheld final judgment, declaring that he was "not ready to say that any opinion of his [Marshall's] delivered in this prosecution is an unconscientious one."[lxxix] The Baltimore mob who hanged Marshall in effigy for "his *felonis* capers in open Court" was not so charitable.[lxxx]

And neither were the leading administration newspapers. The most scathing and most widely circulated attack appeared in the *Enquirer* and the *Aurora* in the form of four letters. The author was William Thompson, who was also the author of previous attacks on Marshall in the *Enquirer.* Thompson sent the first lengthy draft of his diatribe to Jefferson who clamored for more. In "Letter the First," Thompson writing as "Lucius" proposed arraigning Marshall "at the bar of the public" in order to brand him "a disgrace to the bench of justice," and expose him as a leader of a Federalist conspiracy, who no less than Burr the traitor was out "to destroy the liberty and happiness of America." In subsequent letters Lucius detailed Marshall's partisan bias, which he claimed infused every aspect of the proceedings.[lxxxi]

For Lucius as for the president, *U.S. v. Burr* was vindictive politics pure and simple. As Lucius summed it up in the *Aurora,* Marshall had manipulated "*legal forms*" to reach a political

objective and in the process destroyed both "*the spirit of justice, and the meaning of the law*."[lxxxii] Or as Jefferson would explain to Hay later regarding the Burr trial, the law in Marshall's hands was "of a plastic nature."[lxxxiii] In "Letter the Second," Lucius joined the president in inviting "the *people* of the U. States" to do some "justice" to the chief justice—by removing him from office.[lxxxiv]

Thus the Burr trial reinvigorated the movement to impeach Marshall and reduce the power of the Supreme Court, which had been Jefferson's plan since Marshall's appointment in 1800.[lxxxv] Jefferson called on his friends in Congress to make it happen. Two months after the trial, Marshall was attacked viciously on the floor of the Senate--"with insidious warmth," recalled young Joseph Story, who witnessed the carnage--and indirectly threatened with impeachment.[lxxxvi] Congressional Republicans also introduced a resolution for an amendment limiting the terms of all federal judges and permitting their removal by the president upon a 2/3 vote of each House.[lxxxvii] When Senate Republicans moved to amend the treason provisions of the Constitution, Senator Giles and others got yet another opportunity to denounce the chief justice and the Supreme Court. Even John Quincy Adams, in his Report for the Senate Committee on the expulsion of Senator John Smith for his role in the Burr adventure, was harshly critical of Marshall's conduct of the trial.[lxxxviii]

The campaign against Marshall, orchestrated by Jefferson and implemented by Thompson, Duane, Giles and others, treated the particulars of Marshall's conduct of the trial, but the all-embracing charge was that he was the leader of a vast Federalist conspiracy who played free and easy with the law in order to defeat the will of the people. Aside from the fact that the Federalists were no longer a force to reckon with in l807, the evidence indicates that it was Jefferson not Marshall who took the law into his own hands. It was Jefferson who initiated the case precipitously on the basis of questionable evidence. Also by announcing Burr's guilt to the nation, Jefferson usurped the role of the grand jury and the trial jury. Further, Jefferson violated established legal procedures when he encouraged and defended Wilkinson's law-defying actions in New Orleans; when he pressured his party in Congress to suspend the writ of habeas corpus; when he intervened personally in the trial of Bollman and Swartwout; when he took control of the prosecution in Richmond; when he attempted to manipulate witnesses by promising them pardons; and finally, when he authorized and encouraged a partisan newspaper war against Burr which made a fair trial difficult.

Jefferson's disregard of the law is easier to document than to explain, but it seems fair to say that character and self-perception, along with the president's dark view of judges and lawyers, played

a significant role. Whatever the explanation for Jefferson's actions, it is worth noting that Marshall's decision that was denounced as treachery by Jefferson's party in fact saved Jefferson, the champion of life and liberty, from having Burr's blood on his hands.

Equally ironic is the fact that Marshall's interpretation of treason, in contrast to the extreme version of English treason law relied on by Hay and company, comported closely with the republican principles of limited government and individual liberty that Jefferson and his party endorsed. The president's party had also championed the rights of the criminally accused in the sedition and treason trials of the l790s, but it was Marshall, in both the Bollman and Burr trials, who defended and enlarged those rights.

Finally, regarding the independence of the jury, another cherished Jeffersonian principle that Marshall was damned for violating, the chief justice was as sound, if not more so, than the president himself. Jefferson did praise the republican jury, but he also inflamed public emotion against Burr, which he surely knew would influence the jurors. Marshall's August 31 decision, while it did limit jury discretion, also aimed to keep the popular prejudice against Burr from corrupting jury deliberations. Moreover, his authority to rule on matters of evidence, far from constituting

judicial aggrandizement, was an authority almost universally held to be judicial in nature.[lxxxix]

In addition, Marshall's strenuous effort to explicate the law to the jury, while it revealed a conservative's skepticism about popular opinion, did not cross the line between informing and coercing. In any case, his ruling on evidence did not prevent the jury from going its own way if it chose to do so. What would have transpired had the jurors found Burr guilty on the basis of the evidence they heard is impossible to say. And in fact the jurors did have their say when they refused to find him "not guilty," but instead declared that he "was not proved guilty under this indictment under any evidence submitted to us." Their verdict freed Burr, but invited the public to think he was really guilty.

Nevertheless, the jury also refused to convict Burr for what he might have intended to do, and might have done had thousands of angry citizens emerged magically from the forests of the West to follow him to New Orleans and Mexico City. We will never know for sure what Burr would have done had the opportunity to lead such a volunteer army presented itself. What we do know is that Marshall as a trial judge refused to speculate on the matter, which is to say he urged the jury to stick to the relevant facts as revealed in the evidence.

And so they did. Given the partisan passions of the day, this result was no small victory for the jury process and for John Marshall as trial judge. Concerning Marshall's attitude toward juries, it should also be recalled that his final order committing Burr and Blennerhassett to trial in Ohio put the matter in the hands of a grand jury, which was something the president ought to have done at the outset.

Marshall's order to recommit Burr for trial in Ohio did not appease Jefferson, and given Marshall's dark assessment of the president, there is no reason to think that Marshall thought it would. In fact, neither Jefferson nor his supporters found a single thing to praise regarding Marshall's conduct of the trial. The newly emergent culture of democratic politics required villains to chastise, and Marshall fit the bill. Long after the political accusations of the moment had been forgotten, the legacy of Jefferson's negative assessment of Marshall lingered on—witness the curious statement of the distinguished scholar William McLaughlin: "Marshall's law may have been good; but a critical examination may lead the trained lawyer to agree with [Edward] Corwin that the case is a blemish on Marshall's career."[xc] The chief justice could not win for losing—at least according to the Saturday morning quarterbacks.

Marshall himself was not surprised at his critics. He expected the case to be hard and so it was: the most "unpleasant" one, as Marshall put it to Richard Peters, "ever brought before a judge in this or perhaps in any country which affected to be governed by laws." Marshall also noted somewhat wistfully that he could "have made it less serious" to himself "by obeying the public will instead of the public law & throwing a little more of the sombre upon others."[xci]

Clearly, Marshall understood the political pitfalls involved in the case; it is also clear that he did not succeed in avoiding all of them. But the fact that both sides ended up criticizing him strongly suggests that he favored neither, but rather was guided by a faith in due process of law and a deeply held sense of judicial duty. After rendering justice to the best of ability, he shrugged off the insults heaped on him as best he could. When the ordeal finally ended, the chief justice "galloped to the mountains" to rest up for his fall circuit—and for the continued struggle with his old adversary that he knew was sure to continue.

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[i] Jefferson to W. B. Giles, April 20, 1807. Lipscomb and Bergh, eds. *Writings of Jefferson*, 11: 187-91

[ii] As quoted by Blennerhassett, Safford, *Blennehassett Papers*, 412-13

[iii] John Adams to John Quincy Adams, Febr. 12, 1808, Adams Family Papers, MHS

[iv] Marshall to Cushing, June 29,1807, PJM, 7: 60

[v] Robertson, *Reports*, 1: 11

[vi] Malone, *Jefferson*, 5: 302

[vii] "To the Editor of the Aurora," April 7, l807 as reprinted in *The Sun*, May 2, 1807

[viii] William H. Cabell to Joseph C. Cabell, April 12, 1807, identified Leigh as the author. Joseph Carrington Cabell Papers, copies at Swem Library, College of William and Mary, from originals at UVM. Thanks to Charles Hobson for calling my attention to this letter.

[ix] April 22, l807

[x] May 1, l807

[xi] From the *Petersburgh Republican* as reprinted in *The Democratic Press*, April 22, l807

[xii] *New Hampshire Gazette*, July 21,1807

[xiii] On this point, see Jeffrey L. Pasley, *"The Tyranny of Printers": Newspaper Politics In the Early American Republic* (Charlottesville, Va., 2001).

[xiv] William H. Cabell to Joseph C. Cabell, April 12, 1807, Joseph Carrington Cabell Papers (copy, Swem Library)

[xv] As reprinted in the Pittsfield, Mass. *Sun*, May 2, l807

[xvi] Safford, *Papers of Blennerhassett,* 355

[xvii] Robertson*, Reports*, 2: 536

[xviii] Ibid., 1:144

[xix] For Martin's speech see pp. 30-31 in Ch. 3.

[xx] Robertson, *Reports*, 1:148

[xxi] Ibid.,187

[xxii] Ibid.,188

[xxiii] *"Message from the President of the United States, transmitting a copy of the proceedings and of the evidence exhibited on the arraignment of Aaron Burr, and others, before the Circuit court of the United States, held in Virginia, in the year 1807* (City of Washington, 1807), Va. Hist. Soc., Rare Books, E334.J48, l807

[xxiv] Ibid.,177-78

[xxv] Ibid.,180

[xxvi] For a photocopy of the original subpoena *duces tecum* see Aaron Burr Mss 2 B94a, Virginia Historical Society; also see the explanatory letter of R. Grayson Dashiell (ViHMss 2 B94 a1).

[xxvii] Robertson, *Reports*, 1:180-82, *Papers of Marshall*, 7: 41-43. In fact, Justice Chase on circuit refused to issue a subpoena *duces tecum* in the treason trial of Cooper in 1798. Cooper, who served

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as counsel in his own defense, asked the court to issue a subpoena *duces tecum* to John Adams to attend the trial as a witness and bring relevant documents with him. Such was hardly a convincing precedent, however, since Justice Chase not only refused to issue the process but roundly berated Cooper for asking for it. Beveridge, *Marshall*, 3: 33-34

[xxviii] Robertson, *Reports*, 1: 181

[xxix] Ibid.,186-87

[xxx] Ibid.,186

[xxxi] As in Chief Justice Burger's opinion for the Court in *United States v. Nixon* 418 U.S. (1974). On Marshall's relevance see Paul Freund, "Foreword: On Presidential Privilege, The Supreme Court, 1973 Term," 88 *Harvard Law Review* (1974).

[xxxii] For Jefferson's position on the subpoena question and related matters see Malone, *Jefferson*, 5: Ch. 18.

[xxxiii] Hobson, ed., *Papers of Marshall*, Editorial Note, 7:7

[xxxiv] Malone, *Jefferson*, 5*:* 339

[xxxv] Beveridge, *Marshall*, 3: 533-55 discusses the Thompson letters.

[xxxvi] Marshall to Cushing, June 29, 1807, Hobson, *Papers of Marshall*, 7: 60-62

[xxxvii] Ibid., 60

[xxxviii] Ibid., 60-62

[xxxix] Robertson, *Reports*, 2: 444-45

[xl] Beveridge, *Marshall*, 3: 504

[xli] For Blackstone on the English rule and Tucker's observation on its American modification see Tucker, *Blackstone's Commentaries*, 5: 357 and footnote 21.

[xlii] Tucker, ed., *Blackstone's Commentaries*, 5: 84

[xliii] Benjamin F. Wright, ed., *The Federalist* (Cambridge, 1961), 310

[xliv] Robertson, *Reports*, 2: 402-403

[xlv] Ibid., 416. Marshall explains *Bollman* on the meaning of "levying war," ibid., 407-23.

[xlvi] Ibid., 414

[xlvii] *U.S. v. Burr*, 25 *Fed. Cas*. No.14,693 (C.C.D.Va.),166

[xlviii] Robertson, *Reports*, 2: 415

[xlix] Ibid.

[l] Ibid., 421

[li] Ibid., 420

[lii] Ibid., 421-22. Marshall read his May 22 charge to the grand jury. Charles Hobson notes that no manuscript of that charge exists, noting further that Marshall "did not allow his grand jury charges to be published." *Papers of Marshall*, 7: 117, note 37

[liii] Robertson, *Reports*, 2: 420

[liv] Ibid., 423

[lv] Ibid., 424

[lvi] In his letter to Cushing, Marshall acknowledged that the Bollman court had endorsed the doctrine of "constructive presence." Marshall to Cushing, June 29, 1807, Hobson, *Papers of Marshall*, 7: 60. Marshall explored the question of "constructive treasons" at Robertson, *Reports*, 2: 425-45. Regarding the two-witness rule as applicable to the crime of "advising or procuring treason," Marshall is emphatic (ibid., 436-37).

[lvii] Hobson, *Papers of Marshall*, 7: 94

[lviii] Ibid.

[lix] Carpenter, *Trial of Burr*, 3: 412. For Martin's discussion of the duties of the court in relation to those of the jury, see ibid., 407-14.

[lx] Beveridge, *Marshall*, 3: 528, quoting Hay to Jefferson, Oct. 21, l807, Jeff. Mss., Lib. Cong.

[lxi] Jefferson to Hay, Monticello, September 7, 1807, Bergh, ed., *Writings of Jefferson,* 11: 365-66

[lxii] Carpenter, *Trial of Burr*, 3: 14

[lxiii] Ibid., 21-38 for the prolonged debate over the subpoena

[lxiv] George Hay to John Wickham, September 16, 1807, John Wickham Papers, Part VI, Loose manuscripts, Division 14, Reel 3 of 3, Misc. Reels, Library of Virginia

[lxv] Ibid., 128

[lxvi] Carpenter, *Trial of Burr*, 3: 94

[lxvii] Robertson sums up the decision on the final two pages of his *Report*, 2: 538-39; for Carpenter's fuller account see *Trial of Burr*, 3: 93-110.

[lxviii] Safford, *Blennerhassett Papers*, 403

[lxix] Carpenter, *Trial of Burr,* 3: 113

[lxx] Safford, *Blennerhassett Papers*, 412-13, entry of September 20

[lxxi] Carpenter, *Trial of Burr*, 3: 413. Note that due to an error in pagination, page number 413 (with different content each time) appears twice in Carpenter's report.

[lxxii] For Marshall's commitment ruling see, ibid., 409-18.

[lxxiii] Ibid., 418

[lxxiv] See U.S. Circuit Court (7th Circuit). Ohio District. Records, l805-1808, in the case of *U.S. v. Burr* et al. Section 4. Manuscripts, Mss1 Y854a 1-11, Va. Hist. Soc.

[lxxv] Edward S. Corwin, *John Marshall and the Constitution* (New Haven, 1919), 86

[lxxvi] Blennerhassett to Mrs. Blennerhassett, Oct. 22, l807, ibid., 300; Blennerhassett to Mrs. Blennerhassett, Nov. 17, l807, ibid., 516.

[lxxvii] Burr to Theodosia Burr, Oct. 23, l807, Matthew L. Davis, *Memoirs of Aaron Burr* (2 vols., 1836), 2: 411-12

[lxxviii] Ibid., entry of October 27, 466

[lxxix] Bates to Frederick Bates, 20 Sept. 1807, Edward Bates Mss Collection, Va. His. Soc.

[lxxx] Quoted by Beveridge, *Marshall*, 3: 536

[lxxxi] Beveridge discusses Thompson's attack at ibid., 533-35.

[lxxxii] From the *Aurora* as published in *The Democrat*, Nov. 28, 1807

[lxxxiii] Jefferson to Hay, June 18, 1810, J. Jefferson Looney, ed., *Papers of Thomas Jefferson, Retirement Series*, 2: 473

[lxxxiv] *Aurora,* Nov. 25, 1807

[lxxxv] Jefferson to Giles, April 20, 1807, Ford, ed., *Works of Jefferson*, 10: 383-88

[lxxxvi] Story to Samuel Fay, June 18, 1807, W. W. Story, ed., *Life and Letters of Joseph Story*, (2 vols., 1851), 1: 157

[lxxxvii] Warren, *Supreme Court*, 1: 313

[lxxxviii] See the Report submitted by John Q. Adams for the Senate Committee on the expulsion of Senator John Smith for Smith's role in the Burr adventure in W. C. Ford, *Writings of John Quincy Adams* (New York, 1914), 3: 730-844 (10th Cong. 1st Sess., 56-63, Febr. 24,1808).

[lxxxix] On the historical origins of judicial authority concerning rules of evidence see: James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprint Little, Brown, 1969),

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180; and John Langbein, “The Criminal Trial before the Lawyers,” *Un. Chicago Law Rev.*, 45: 263, 306 (1978).

[xc] *Am. Bar Assoc. Jour.*, 7: 233 (1921) as quoted by Warren, *Supreme Court*, l: 315, note 2

[xci] Marshall to Peters, Nov. 23, 1807, Hobson, *Papers of Marshall*, 7:165