

The Law

Jefferson and the Burr Conspiracy: Executive Power against the Law

LOUIS FISHER

The Constitution Project

In a message submitted to Congress on January 22, 1807, President Jefferson called attention to activities by a combination of private individuals who had endangered the nation. Admitting that a mixture of rumors and suspicions made it difficult to determine the actual facts, he nevertheless chose to identify Aaron Burr as the principal actor “whose guilt is placed beyond question.” In advance of a trial, submission and evaluation of evidence, and final verdict by a court, Jefferson publicly found Burr guilty of treasonous conduct punishable by hanging. What prompted Jefferson to make this accusation and what constitutional and legal violations occurred in his pursuit of Burr?

Jefferson’s reputation as constitutional guardian rests in large part on drafting the Declaration of Independence and articulating the values of individual rights, liberty, free exercise of religion, self-rule, and the need for checks on government abuse. He strongly criticized the Alien and Sedition Acts pushed through by the Federalist Party in 1798. In one of his first steps as president, he used the pardon power to release individuals punished and imprisoned under the Sedition Act (Smith 1956, 268). His first inaugural address on March 4, 1801, announced, “If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left to combat it” (Schlesinger and Israel 2010, 16). That spirit of tolerance did not extend to Aaron Burr. Instead, Jefferson chose to act against legal and constitutional principles in a concerted effort to convict him. As will be explained, the Burr trial has been misinterpreted by federal courts and the Justice Department to sanction the state

Louis Fisher is scholar in residence at the Constitution Project and visiting professor at the William and Mary Law School. For four decades he worked at the Library of Congress as Senior Specialist in Separation of Powers at Congressional Research Service and Specialist in Constitutional Law at the Law Library. Many of his articles and congressional testimony are available at <http://loufisher.org>.

AUTHOR’S NOTE: I express appreciation to Henry Cohen, Chris Edelson, Dick Pious, and Mitch Sollenberger for their close review and helpful recommendations.

secrets privilege used from 1953 to the present time to deny private litigants access to executive branch documents.

Jefferson's Public Charge

In his annual address of December 2, 1806, President Jefferson alerted Congress to a combination of armed individuals in the Western Territory (west of the Allegheny Mountains) planning to carry out a military expedition against Spanish possessions. By proclamation, he had taken measures to suppress the insurrection.¹ Responding to this message, Representative John Randolph introduced a resolution on January 16, 1807, requesting Jefferson to lay before Congress information on this illegal combination of private citizens. The resolution passed, 109 to 14.²

On January 22, President Jefferson responded to this resolution by sending a message to Congress placed in the legislative record under the heading "Burr's Conspiracy." Jefferson acknowledged that little of the information he possessed had been given "under the sanction of an oath, so as to constitute formal and legal evidence." The letters he received often contained "such a mixture of rumors, conjectures, and suspicions, as renders it difficult to sift out the real facts, and unadvisable to hazard more than general outlines, strengthened by current information, on the particular credibility of the relator." Neither "safety nor justice will permit the exposing of names, except that of the principal actor, whose guilt is placed beyond question." He identified the "prime mover" as Aaron Burr. Having named someone guilty of a crime, Jefferson continued to underscore the lack of confidence in the information he received: "The grounds of these intimations being inconclusive, the objects uncertain," the only available measure "was to urge the informants to use their best endeavors to get further insight into the designs and proceedings of the suspected persons, and to communicate them to me."³

In receipt of dubious information, Jefferson decided "to send to the scene" someone in "whose integrity, understanding, and discretion, entire confidence could be reposed," with instructions to investigate the plots, discover the designs of the conspirators, "arrest their means, bring their persons to punishment, and to call out the force of the country to suppress any unlawful enterprise in which it should be found they were engaged." He noted that a letter received from General James Wilkinson on November 25, 1806 (dated October 21) was written "partly in cypher and partly oral." It described the designs of Burr, "exaggerating his resources, and making such offers of emoluments and command, to engage him and the army in his unlawful enterprise as he had flattered himself would be successful."⁴

According to Wilkinson's letter, Burr appeared to contemplate "two distinct objects, which might be carried on either jointly or separately, and either the one or the

1. 16 *Annals of Cong.* 12 (1806).

2. *Ibid.*, 334-59 (1807).

3. *Ibid.*, 39-40.

4. *Ibid.*, 40.

other, as circumstances might direct.” One objective was to sever from the United States the land west of the Allegheny mountains, including Kentucky and Tennessee. The second objective was to attack Mexico to free it from Spanish rule. Having discovered that the attachment of the Western Territory to the Union was too firm “to be shaken,” Jefferson said that Burr decided to “seize on New Orleans, plunder the bank there, possess himself of the military and naval stores, and proceed on his expedition to Mexico.”⁵

On the basis of this information, Jefferson ordered army regulars and the militia to seize boats and stores provided for Burr’s venture, arrest persons concerned, and suppress “the enterprise in its outset.”⁶ Because of presidential initiatives, the conspirators “cannot threaten serious danger to the city of New Orleans.”⁷ Several individuals associated with Burr, including Erick Bollman and Samuel Swartwout, were apprehended by the military and transferred to the East Coast for trial.⁸

Analysis of this conspiracy is difficult because historians sometimes choose to either demonize or idolize Burr (Pratt 1945). Other studies, without citing evidence, claim he intended to assassinate President Jefferson and overthrow the government in Washington, DC (Shafroth 1932, 671). Two witnesses for the government presented wholly implausible testimony that Burr with 200 men could drive President Jefferson and Congress into the Potomac River and with 500 could take New York City (Robertson 1879, 1:562, 566-67). Book-length treatments of Burr’s trial sometimes lack documentation (Beirne 1959). Gore Vidal’s novel on Burr mixes fact and fiction, often with little distinction between the two (1973).

Congress Asked to Suspend the Writ

Drawn from British precedents, the writ of habeas corpus developed into the right of a prisoner to seek release from unjustified confinement. It became a symbol of individual liberty against executive abuse (Duker 1980). One of the first moves to strip Burr and others of their constitutional rights was to deny them access to the writ. Senator William Branch Giles of Virginia, with close ties to Jefferson, introduced a bill to suspend the constitutional privilege for three months. Quickly passed, the bill was sent to the House of Representatives “in confidence” (to be debated in secret) with a request that the House concur “as speedily as the emergency of the case shall, in your judgment, require.”⁹

Why suspend the writ? The information Jefferson provided Congress indicated no signs of an emergency. His message of January 26, 1807, reported that Bollman and Swartwout had arrived in Washington, DC, to face prosecution. According to a letter from Wilkinson to Jefferson, Peter Ogden (a Burr associate) and James Alexander (an attorney who requested a habeas writ for Bollman) had been charged with “crimes.”¹⁰

5. *Ibid.*, 41.

6. *Ibid.*

7. *Ibid.*, 42.

8. *Ibid.*, 43.

9. *Ibid.*, 44.

Although the Sixth Amendment states that persons accused of a criminal offense shall have the right of “assistance of counsel for his defense,” the administration appeared ready to punish Alexander for providing that constitutional support.

The House made short work of the Senate’s request that the bill to suspend habeas corpus be debated in secret. Representative Peter Early thought a previous order “should be taken to remove the injunction of secrecy. To open the doors and admit strangers to hear the debate, and yet continue the injunction of secrecy on members would present a singular spectacle.”¹¹ The Speaker of the House decided that the motion to open the doors was in order. The vote to debate the Senate bill in public passed by the lopsided vote of 123 to three.¹²

House debate on the Senate bill clarified that suspension of habeas corpus “in certain cases” referred to persons “charged on oath with treason, misprision of treason, or other high crime or misdemeanor.”¹³ Misprision refers not to treasonous activities but to concealment of treason by someone who did not participate in treason. Under Article III of the Constitution, treason against the United States “shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” No person shall be convicted of treason “unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” Article III further provides that Congress “shall have Power to declare the Punishment of Treason.”

Legislation passed on April 30, 1790, provided for the punishment of certain crimes. Persons adjudged guilty of treason against the United States “shall suffer death.” Under Section 33 of that statute, the manner of inflicting death “shall be by hanging the person convicted by the neck until dead” (1 Stat. 119). Those who conceal the commission of treason “shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars” (1 Stat. 112, sec. 2). Any person accused and indicted of treason “shall have a copy of the indictment, and a list of the jury and witnesses,” delivered at least three days before he shall be tried. Every person accused of treason shall be allowed and admitted to make his full defense “by counsel learned in the law” (1 Stat. 118, sec. 29).

Prompted by public charges against Burr in 1807, the House debated for three months the bill to suspend habeas corpus in cases of treason. To Representative William Burwell, the conspiracy described by President Jefferson “was once formidable, extensive, and threatening; but it has been dissipated by the vigilance of Government.”¹⁴ He recalled that in two previous instances (the Whiskey Rebellion and the Fries Rebellion), there had been insurrections that “defied the authority of Congress, and menaced the Union with dissolution,” but in neither case did Congress suspend the constitutional right of habeas corpus.¹⁵ With regard to the Burr conspiracy, Burwell said “he had

10. *Ibid.*, 45.

11. *Ibid.*, 402 (Mr. Early).

12. *Ibid.*, 403

13. *Ibid.*, 402.

14. *Ibid.*, 404.

15. *Ibid.*, 404-5.

already seen, that men, who are perfectly innocent, would be doomed to feel the severity of confinement, and undergo the infamy of the dungeon. What reparation can be made to those who shall thus suffer?"¹⁶ To Burwell, "it seems the country was perfectly safe, and the conspiracy nearly annihilated."¹⁷ Suspending the writ would permit a "corrupt and vicious Administration, under the sanction and example of this law," to "harass and destroy the best men of the country." It would only "be necessary to excite artificial commotions, circulate exaggerated rumors of danger," and proceed to subject every person, "however honest . . . to the vindictive resentment of the Government."¹⁸ House members voted 113 to 19 to reject the Senate bill.¹⁹

Reliability of Wilkinson's Testimony

General Wilkinson maintained close ties to Burr over the years and had his own political and financial ambitions in the Western Territory. During the winter of 1804-5, he shared evenings with Burr "mapping out what might have been an invasion of Spanish Mexico" (Hoffer 2008, 38). Scholars suggest "it was probably Wilkinson who came up with the idea for a foray into Spanish territory," including Mexico (Isenberg 2007, 286). Although Wilkinson was already commander-in-chief of the U.S. Army, in January 1805 President Jefferson nominated him to be governor of the new Louisiana Territory, and he was confirmed by the Senate. The appointment was made at Burr's urging (Lomask 1982, 27). Critics objected it was "anti-republican" to unite civil and military powers in one person (Linklater 2009, 218).

The Western Territory "was a hive of conspiracies, and Wilkinson figured in most of them," including severing "the Kentucky region from the union" (Hoffer 2008, 38-39). Wilkinson often communicated in code and used that method when corresponding with Burr (Hoffer 2008, 40). Scholarly studies wonder why both Burr and Jefferson decided to rely on the word of Wilkinson, "one of the most accomplished double-dealers in America" (Lomask 1982, 27). Jefferson's communications to Congress concealed the degree to which "he had been hoodwinked by America's ranking army officer" (Kline 1983, 2:983).

At a certain point, Wilkinson decided that instead of acting in concert with Burr, he would turn against him. He did that by writing to President Jefferson on October 22, 1806, followed by subsequent letters and documents describing various conspiracies planned by Burr (Isenberg 2007, 312). Jefferson sent many of these letters to Congress, and they were placed in the congressional record.²⁰ A constitutional issue surfaced when Wilkinson urged the governor of Lower Louisiana, William Claiborne, to declare martial law in New Orleans. Claiborne reminded Wilkinson that the writ of habeas corpus could

16. *Ibid.*, 405.

17. *Ibid.*

18. *Ibid.*, 406.

19. *Ibid.*, 424-25.

20. *Ibid.*, 1008-19.

be suspended only by the territorial legislature, which was not in session. Acting independently without legislative authority or legal support from civil authorities, Wilkinson ordered soldiers to arrest Bollman, Swartwout, Ogden, and others (Lomask 1982, 183-84).

Wilkinson recommended that the governor have “Alexander, Esq., taken up on the ground of strong suspicion.”²¹ The “suspect” activity of James Alexander consisted of providing legal counsel to Bollman by filing a habeas writ. According to Wilkinson, Alexander said if Bollman “was a traitor I was one also” (Melton 2002, 126). After his arrest by military authorities, Alexander was brought from New Orleans to Fort McHenry in Baltimore and from there to the City of Washington, where a judge decided that no charge against him warranted his arrest and he was released.²²

Wilkinson took little note of the right of habeas corpus specified in Article I, Section 9, of the Constitution: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require.” Nothing in the Constitution implies that the privilege may be suspended by military commanders. Judge James Workman in New Orleans issued two writs for Odgen and Swartwout. Ogden was released, but Wilkinson responded to the writ for Swartwout by ordering the military to seize him and take him to Washington. To Wilkinson, Workman was “strongly suspected of being connected with Burr in his conspiracy.” What led Wilkinson to that conclusion? Part of the evidence: “I have proof this man declared some time since that ‘the republican who possessed power, and did not employ it to establish a despotism, was a fool.’”²³ Workman, frustrated with Wilkinson’s actions and the failure of the governor to intervene, resigned his judgeship (Lomask 1982, 184-85).

A principal document, originally in cipher, was supposedly from Burr. It begins, “I, Aaron Burr,” and proceeds to detail treasonous plans, pointing out that “Wilkinson shall be second to Burr only.” The letter thus underscores how closely Wilkinson was tied to conspiratorial plans. The document describes how Burr’s men would travel down the river toward their destination, and on what date, and that the people of Mexico “say that, if we will protect their religion, and will not subject them to a foreign Power, in three weeks all will be settled.”²⁴

For what purpose would Burr, knowing that treason carried the death penalty, detail his plans and strategy in a signed document? The fact that Wilkinson received the ciphered letter proved he and Burr were part of an inside team with knowledge about the code. In translating the ciphered document for Jefferson to read, Wilkinson had an opportunity to remove from it any evidence about his involvement in the conspiracy. He could doctor the letter, “carefully omitting any incriminating references to himself” (Isenberg 2007, 313). Moreover, the cipher letter was not written by Burr. It was written by one of his associates, Jonathan Dayton (Lomask 1982, 118-22).

21. *Ibid.*, 1009.

22. *Ibid.*, 524 (statement by Representative Broom); *Ex parte* Bollman and *Ex parte* Swartwout, 4 Cr. (8 U.S.) 75 (1807). See asterisked note at the bottom of page 75.

23. 16 *Annals of Cong.* 1010 (1807).

24. *Ibid.*, 1011.

Why would Jefferson and executive officials accept at face value Wilkinson's translation of a ciphered document? To ensure its accuracy, they needed to see the original and the code. Otherwise, they could be manipulated by a potential conspirator. The same precaution applies to grand jurors and federal courts that rely on documents that have been translated. In the Bollman-Swartzwout case, Attorney General Caesar Rodney "admitted that General Wilkinson was interested to make the worst of the story."²⁵

During Burr's trial in Richmond, some grand jurors concluded that Wilkinson's involvement in the conspiracy justified his indictment. In studying the cipher used in certain documents, they found errors committed by Wilkinson in the translation that confirmed their suspicions. He admitted he had mistranslated the letter by omitting the incriminating first line: "Your letter postmarked 13th May is received," which demonstrated Wilkinson's close and long-term correspondence with Burr. That point appears in another line that Wilkinson altered to conceal his link to Burr. Originally it read, "Our project, my dear friend, is brought to a point so long desired." Wilkinson changed it to "The project is brought to the point so long desired" (Lomask 1982, 165). In extensive analysis, Mary-Jo Kline compares the letter that Wilkinson received and the alternations he made (1983, 2:984-90). Of sixteen grand jurors, seven voted to indict Wilkinson for misprision of treason (Wheelan 2005, 168). Wilkinson's conduct precipitated debate by the House of Representatives on legislation to consider strengthening the writ of habeas corpus.

Legislative Debate on the Writ

On February 7, 1807, the House of Representatives began debate on a resolution to secure the privilege of the writ of habeas corpus. The privilege appears in Article I, Section 9, of the Constitution, while Section 14 the Judiciary Act of 1789 provided that federal courts "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute." That power existed "for the purpose of an inquiry into the cause of commitment" (1 Stat. 73, 81-82). Actions by General Wilkinson, military officers, and the Jefferson administration demonstrated little regard for the writ.

In introducing the resolution, Representative James Broom referred to "violations" by Wilkinson "of our Constitutional privileges at New Orleans."²⁶ The Fifth Amendment declares that no person shall be tried for a crime "unless on a presentment or indictment of a Grand Jury" except for members of the military. No citizen shall "be deprived of liberty without due process of law." Under the Sixth Amendment, in all criminal proceedings the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Yet, as Broom explained, in New Orleans and elsewhere, citizens were "arrested without any warrant, and without any process of law whatever; deprived of their liberty; confined in military prisons, and transported, under military guards, two thousand miles from the

25. *Ex parte Bollman* and *Ex parte Swartzwout*, 4 Cr. (8 U.S.) 75, 116 (1807).

26. 16 Annals of Cong. 506 (1807).

place where the offence was committed.” The constitutional privilege of the writ of habeas corpus, intended to secure the rights of citizens, “has been treated with contempt.”²⁷

Broom noted that citizens whose rights had been violated “must sue for false imprisonment, and it depends entirely on the jury to say whether they will give him anything or nothing.” What was needed were laws that “punish in the most prompt and exemplary manner all judges who refuse to grant the writ of habeas corpus, and all officers who refuse to obey it.”²⁸ Representative John Eppes recommended that any judge who refused to grant a writ (except when the writ was properly suspended by Congress) should be removed from office.²⁹ To Representative James Elliot, the Constitution “has just been violated by the commander of your army; violated at the point of the bayonet, and in more than one or two of its most essential articles.”³⁰ In the judgment of scholar Andro Linklater, Jefferson was willing to “support whatever Wilkinson did, regardless of the cost to the principles of individual liberty and the rule of law” (2009, 261).

As House debate continued over a period of days, Representative Broom proposed that the resolution not be debated and voted on the floor, but rather be referred to a select committee for closer study.³¹ Some lawmakers stated that if Wilkinson had disobeyed the writ of habeas corpus, “he stands in contempt, and your judicial courts have already power to punish contempts. If he has violated any law, he is liable to be punished.”³² Wilkinson was never punished for his actions. Legislative debate continued for a third day, after which the House voted to indefinitely postpone consideration of Broom’s resolution. The motion carried by the close vote of 60 to 58.³³

After this resolution was set aside, on December 31, 1807, the House began a debate that focused solely on Wilkinson. Initially it considered a resolution to request President Jefferson to conduct an inquiry into whether Wilkinson, while in the service of the United States, “corruptly received money from the Government of Spain or its agents.”³⁴ In seeking funds from Spain for a pension, Wilkinson insisted that his name “ought not to be disclosed” and that he “always shall be designated by the number 13” (Abernethy 1954, 11). Beginning in 1787, Wilkinson gained from Spain the exclusive right to use the Mississippi to market his goods. In return, he took an oath of allegiance to Spain, served as Agent Number 13, and received a yearly pension of \$2,000 (Lomask 1982, 17), or about \$60,000 in today’s dollars.

In debating Wilkinson’s record, members of Congress in 1807 pointed out that Article I, Section 9, of the Constitution provides that no title of nobility shall be granted by the United States, and no person “holding any Office of Profit or Trust” shall, without congressional consent, “accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”³⁵ Some lawmakers recommended

27. *Ibid.*

28. *Ibid.*, 507.

29. *Ibid.*, 515.

30. *Ibid.*, 529. See Amendments 4, 5, and 6, *ibid.*, 530.

31. *Ibid.*, 538.

32. *Ibid.*, 546 (Rep. James Holland).

33. *Ibid.*, 589-90.

34. 17 *Annals of Cong.* 1261 (1807).

35. *Ibid.*, 1297.

that the Wilkinson resolution be referred to a select committee with power to call for witnesses and documents.³⁶ After a lengthy debate that lasted until January 14, 1808, it was moved to appoint a special committee to inquire into Wilkinson's service in the military, receiving a pension from Spain, and his involvement in any way "to dismember these United States." The motion to create this committee failed, 46 to 59.³⁷

Prosecuting Bollman and Swartwout

The administration prosecuted Erick Bollman and Samuel Swartwout for engaging in treason as part of the Burr conspiracy. The case was heard in the circuit court for the District of Columbia. In complying with Jefferson's order to bring them to Washington from New Orleans, they were denied their Sixth Amendment right to be tried in the "state and district wherein [their] crime shall have been committed." Walter Jones, Jr., a federal attorney, charged them with treason on the basis of a Wilkinson affidavit. Jones argued that although the "ultimate object of the contemplated expedition might be the conquest of the Spanish province in Mexico," it was also intended to "seize and plunder" New Orleans to supply the means of accomplishing that object. Use of a military force for that purpose would be "an overt act of levying war against the United States."³⁸

Attorney General Rodney objected to the defendants "being heard by counsel, to show cause why they ought not to be committed." He reasoned upon "principles of humanity, because it would excite a public prejudice against them, if they should be committed after being heard by counsel." Charles Lee, counsel for the defendants, countered: "To deny a man to be heard by counsel is to deny him a hearing." He insisted that the Constitution required that the accused in a criminal prosecution "has a right to the assistance of counsel."³⁹ The circuit court permitted the prisoners to be heard by counsel.

Chief Judge William Cranch held that Bollman and Swartwout should be committed to trial for the crime they had been charged. However, he did not think the facts presented to the court "showed probable cause to believe that either of the prisoners had levied war against the United States." After further deliberation "and a more mature examination," both of the evidence and the law, "my doubts are very much confirmed." He said that in times of emergency, "when wars and rumors of wars, plots, conspiracies and treason excite alarm," it was the duty of courts to be particularly watchful lest public opinion influence the courts and establish precedents "which may become the ready tools of faction in times more disastrous. The worst of precedents may be established upon the best of motives." In punishing one criminal, "we may furnish the means by which an hundred innocent persons may suffer."⁴⁰

Cranch distinguished between treason and "constructive treason"—actions that can be construed or interpreted as treason. He offered hope "that we shall never, in this

36. *Ibid.*, 1261.

37. 17 *Annals of Cong.*, 1257-1440 (1807-8); 18 *Annals of Cong.* 1441-61, 1487 (1808).

38. *United States v. Bollman*, 24 *Fed. Cas.* 1189 (C.C. D.C. Jan. 30, 1807) (Case No. 14,622).

39. *Ibid.*, 1191.

40. *Ibid.*, 1192.

country, adopt the long list of constructive treasons invented in England, by the worst of judges in the worst of times.” For Cranch, treason “requires an assemblage of men, ready to act, and with an intent to do some treasonable act, and armed in warlike manner, or else assembled in such numbers, as to supersede the necessity of arms.” He concluded that there “is not probable cause, supported by oath or affirmation, within the meaning of the constitution, to charge either Dr. Bollman or Mr. Swartwout with treason, by levying war against the United States.” Then he added a thought that appeared to refer to the message that President Jefferson sent to Congress on January 22, 1807: “I can never agree that executive communications not on oath or affirmation can, under the words of our constitution, be received as sufficient evidence in a court of justice, to charge a man with treason, much less to commit him for trial. If such doctrines can be supported, there is no necessity of a suspension of the privilege of the writ of habeas corpus, by the authority of the legislature.”⁴¹

For Circuit Judge Duckett, Wilkinson’s depositions proved the connections of Bollman and Swartwout to Burr. If it could be shown that Burr “has probably committed treason,” their association with him “create the same probability against them, as in the same treason all in this stage of the business must be considered principals.”⁴² Circuit Judge Fitzhugh agreed “there is probable cause to believe” that Burr committed treason,⁴³ and in fact his treason was “established.”⁴⁴ As to Bollman and Swartwout, the issue was whether they committed treason or misprision of treason (“a neglect to disclose the knowledge of a treason”).⁴⁵

The case came to the Supreme Court. In a ruling on February 13, 1807, Chief Justice John Marshall distinguished *Marbury v. Madison* (1803)⁴⁶ as confined to the issue of the Court being limited by Article III in matters of original jurisdiction, whereas what the Court “is now asked to exercise is clearly *appellate*.”⁴⁷ If at any time the public safety requires the suspension of the writ of habeas corpus, “it is for the legislature to say so.”⁴⁸ That decision could not be left to President Jefferson or General Wilkinson. Marshall granted the motion of habeas corpus for Bollman and Swartwout.

In dissent, Justice William Johnson (placed on the Court by Jefferson) held that the Court “has not authority to issue the writ of *habeas corpus* now moved for.”⁴⁹ He seemed not to understand Marshall’s distinction between the limitation on the Court in *Marbury* regarding original jurisdiction and the plainly appellate jurisdiction of the Bollman-Swartwout case. From February 17 to February 20, Marshall heard oral argument on the evidence needed to prove treason. Counsel for the defendants objected to relying on Wilkinson’s translation of the ciphered letter because he “has not sworn that it is a true translation, nor sent the original, with the key, so that the court can have a correct translation

41. *Ibid.*, 1193.

42. *Ibid.*

43. *Ibid.*, 1194.

44. *Ibid.*, 1195.

45. *Ibid.*, 1196.

46. *Marbury v. Madison*, 5 U.S. 137 (1803).

47. *Ex parte Bollman and Ex parte Swartwout*, 4 Cr. (8 U.S.) 75, 101 (1807) (emphasis in original).

48. *Id.*

49. *Id.*

made. Nor is it proved that the original was written by Colonel Burr, or by his direction, nor that the prisoners were acquainted with its contents.”⁵⁰

On February 21, Marshall delivered the Court’s opinion on the definition of treason. There were no dissents to this ruling. He said it was 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.” If war is actually levied, “all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.”⁵¹

The breadth of this language seemed to include constructive treason, an issue Marshall found necessary to clarify in the subsequent Burr trial. As for Bollman and Swartwout, Marshall cautioned that “the crime of treason should not be extended by construction to doubtful cases.”⁵² Was there a minimum number of men required to levy war? Could it be done by five men or a dozen? As to a military enterprise against Mexico, Marshall said it would amount to a “high misdemeanor,” not treason.⁵³ He did not define high misdemeanor, but apparently he meant the Neutrality Act of 1794, which carried criminal penalties for Americans who used military force against another nation. Those convicted faced a fine not to exceed \$3,000 and imprisonment for not more than three years (1 Stat. 384, sec. 5).

As to treason, Marshall said there was nothing in the letter delivered to Wilkinson, “so far as that letter is laid before the court, one syllable which had a necessary or a natural reference to an enterprise against any territory of the United States.”⁵⁴ Not a single syllable supported treason! Regarding the crime charged against Bollman and Swartwout, “the court can only direct them to be discharged.” Acquittal did not cover “the offence which there is probable cause for supposing they have committed,” an apparent reference to the Neutrality Act.⁵⁵ These rulings by the Court provided important precedents for the prosecution of Burr.

The Trial of Aaron Burr

Burr and Wilkinson shared several interests, patterns, and pursuits. Just as Wilkinson reached out to Spain to receive a pension and serve as Agent Number 13, Burr in his remaining days as vice president in August 1804 discussed with Anthony Merry, British minister to the United States, the possibility of acting jointly to separate the Western Territory from the United States (Melton 2002, 53-54, 66-67). Burr continued those negotiations over the next few years, seeking England’s financial assistance to act militarily against Mexico (Melton 2002, 90-91). Jefferson received a letter in December 1805 describing how Burr sought British help to overthrow his administration (Melton 2002, 88).

50. *Id.* at 120 (statement by Robert Goodloe Harper).

51. *Ibid.*, 126.

52. *Ibid.*, 127.

53. *Ibid.*, 131.

54. *Ibid.*, 132-33.

55. *Ibid.*, 136.

In Kentucky, District Attorney Joseph Hamilton Daveiss kept Jefferson closely informed of Burr's political activities (Abernethy 1954, 84, 87, 90-92). In November 1806, Daveiss thought he had sufficient evidence to convict Burr of planning a military expedition against Mexico. At his request, a grand jury was impaneled in Frankfort, Kentucky, but Daveiss found it necessary to repeatedly excuse jurors while searching for witnesses. During the trial, editors of a newspaper that had reported on Burr's plans testified they had no information that would amount to evidence. It was their practice to publish various rumors and hearsay they received (Lomask 1982, 148-49). After listening to the witnesses called by Daveiss, the grand jury concluded "there has been no testimony before us which does in the Smallest degree [in]criminate the conduct" of Burr (Abernethy 1954, 99).

In February 1807, a grand jury in the Mississippi Territory considered criminal charges against Burr, but once again jurors found insufficient grounds to indict him (Lomask 1982, 213-18). Finally recognizing he was now in genuine danger, he attempted to disguise himself and took flight. Eventually he was arrested by the military and brought to Richmond, Virginia, for trial, with Chief Justice Marshall the presiding officer.

Contemporary federal courts often point to Burr's trial as the source of the state secrets privilege, used by the executive branch to withhold documents from private litigants seeking to hold government accountable for illegal and unconstitutional actions (Fisher 2006). A district court in 1977 claimed the state secrets privilege "can be traced as far back as Aaron Burr's trial in 1807."⁵⁶ In 1989, the District of Columbia Circuit reported that although "the exact origins" of the state secrets privilege "are not certain," the privilege in the United States "has its initial roots in Aaron Burr's trial for treason."⁵⁷

In the government's brief to the Supreme Court in the seminal state secrets case of *United States v. Reynolds* (1953),⁵⁸ the Justice Department cited some early precedents: "more directly apposite to the power of department heads to withhold production, [which] include . . . Burr's trials, where counsel for the Government refused to divulge, in response to subpoenas, confidential portions of documents in the possession of the executive."⁵⁹ The department produced a list of examples of "successful assertions of the [evidentiary] privilege, comprising partly assertions by the President and partly assertions by department heads." "Confidential information and letters relating to Burr's conspiracy" was listed second.⁶⁰ These references to the Burr trial by federal courts and the Justice Department are misinformed and erroneous. Burr and his attorneys sought and received documents that the Jefferson administration claimed as evidence of treason. In a criminal trial, with the death penalty looming, Chief Justice Marshall stood ready to give Burr access to documents he needed to defend himself.

Marshall recognized that if he issued a subpoena to Jefferson for the letters from Wilkinson, it might be interpreted as a sign of disrespect for the office of the presidency. However, Marshall was more concerned that the judiciary would lose respect if it failed

56. *Jabara v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977).

57. *In re United States of America*, 872 F.2d 472, 474-75 (D.C. Cir. 1989).

58. *United States v. Reynolds*, 345 U.S. 1 (1953).

59. *United States v. Reynolds*, Brief for the United States, No. 21, U.S. Supreme Court, October Term, 1952, 10-11.

60. *Ibid.*, 24.

to give an accused access to information needed for his defense. He declined to say whether that result would “tarnish the reputation of the government; but I will say, that it would tarnish the reputation of the court which had given its sanction to its being withheld.” If Marshall were a party to the withholding of documents needed by a defendant, “it would be to 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.”⁶¹

Jefferson’s letter of June 12, 1807, to George Hay, one of the government attorney’s handling the Burr prosecution, contained some caveats about the president’s right to independently decide “what papers coming to him as president the public interest permits to be communicated, and to whom.” But he then assured the court of his “readiness under that restriction voluntarily to furnish on all occasions whatever the purposes of justice may require.” As to the October 21, 1806, letter from General Wilkinson, Jefferson said he had given it to Attorney General Rodney to be taken to Richmond for the trial. He closed by expressing “a perfect willingness to do what is right.”⁶²

In a letter of June 17, 1807, Jefferson expressed satisfaction that the correspondence he released to Rodney “will have substantially fulfilled the object of a subpoena from the district court of Richmond.”⁶³ He added that if Burr believed “there are any facts within the knowledge of the heads of department or of myself, which can be useful for the defense, from a desire of doing anything our situation will permit in furtherance of justice,” those officials would be available for deposition in Washington, DC.⁶⁴ He drew the line only at having to personally attend the trial at Richmond, pointing to the impracticality of a president being drawn from one court to another throughout the country.⁶⁵ An article by John Yoo claims that Jefferson could have withheld Wilkinson’s letter as “a state secret because it contained national security and military information” (1999, 1456). However, any decision to withhold from Burr documents he needed for his defense would have required dropping the prosecution, a step Jefferson would not take.

Burr faced two charges: treason and a high misdemeanor for “setting on foot” a military expedition against Mexico. In circuit court with Chief Justice Marshall presiding, the government on May 27, 1807, wanted to “first introduce General Wilkinson’s deposition,” even though he was not present to be questioned by the defense (Robertson 1879, 2:63, 71). The government’s motion violated the Sixth Amendment Confrontation Clause, which allows an accused to cross-examine witnesses. In all criminal prosecutions, the accused shall “be confronted with the witnesses against him.” Marshall decided to “put aside” Wilkinson’s deposition (Robertson 1879, 2:74). On June 1, the government expressed “embarrassment” that Wilkinson had not arrived in Richmond as expected. He did not appear in court until June 15 (Robertson 1879, 2:87, 196).

61. *United States v. Burr*, 25 Fed. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d).

62. *Ibid.*, 65.

63. *Ibid.*, 69. For full letter of June 17, 1807, see Bergh 1904 (11:230-33).

64. *United States v. Burr*, 25 Fed. Cas. 30, 69 (C.C.D. Va. 1807) (No. 14,692d).

65. *Ibid.*

On September 1, the jury found Burr not guilty of treason.⁶⁶ The verdict turned in part on Marshall's decision to depart from his definition of treason in *Ex parte Bollman*. He had concluded in that case that if men assembled on the property of Harman Blennerhassett to effect by force a treasonable purpose, "all those who perform any part, however minute, or however remote from the scene of the action," were in league with the conspiracy and to be considered as traitors.⁶⁷ In *Burr*, Marshall announced that this reasoning need not be followed, and it might be better to present that precise issue to the court in a future case.⁶⁸ He pointed out that Burr was not present on Blennerhassett's Island when men assembled to carry out military force, in the county of Wood, "nor in the district of Virginia."⁶⁹ To Marshall, the language of the indictment against Burr could be supported only by testimony that he was present when the assemblage took place on Blennerhassett's Island.⁷⁰

The indictment did indeed repeatedly refer to Burr's activities "at a certain place called and known by the name of Blennerhassett's [sic] island, in the county of Wood and district of Virginia" (Robertson 1879, 1:483). It was prepared in that manner to put the case "within the jurisdiction" of the federal circuit court in Richmond (Robertson 1879, 1:484). The court record demonstrates, however, that when the men proceeded down the river with their weapons and ships, Burr was not on the island but in Kentucky, several hundred miles away (Robertson 1879, 1:636, 676).

Marshall's reasoning that someone must actually be present at an assemblage to use force before being held guilty of treason may seem strained. It implied that Burr could conceive of a treasonable plan, recruit both the leaders and the followers needed to carry it out, secure the necessary funds, weapons, and equipment, but could be held not guilty of treason if he managed to withhold his presence on the staging ground. In this trial, however, Marshall's reasoning was correct because he followed the specific language that appears in the indictment. Had the government accused Burr of conceiving and supporting the military activity, from whatever distance, the verdict might have been different.

After listening to Marshall's explanation of the law, the jury announced, "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."⁷¹ Burr, objecting that the jury's language was "unusual, informal, and irregular," asked that it limit itself to saying "guilty" or "not guilty." The jury foreman, Colonel Carrington, said that if the verdict seemed informal, the jury would alter it, because "it was, in fact, a verdict of acquittal." Marshall agreed and ordered that "not guilty" be entered on the record.⁷²

The court proceeded to consider seven counts of the misdemeanor charge. Burr referred to the letter he had demanded from Jefferson, "which had often been promised but not yet produced." He asked if that letter was in court. Hay said he had searched for it but could not find it, but he was ready to produce a copy. Burr replied he "was not

66. *United States v. Burr*, 25 Fed. Cas. 180-81 (C.C.D. Va. 1807) (No. 14,693).

67. *Ex parte Bollman and Ex parte Swartwout*, 4 Cr. (8 U.S.) 75, 126 (1807).

68. *United States v. Burr*, 25 Fed. Cas. 161 (C.C.D. Va. 1807) (No. 14,693).

69. *Ibid.*, 169-70.

70. *Ibid.*, 177.

71. *Ibid.*, 180.

72. *Ibid.*

disposed to admit a copy." Marshall ruled that "unless the loss of the original be proved, a copy cannot be admitted."⁷³

Burr insisted that the letter written by Wilkinson to Jefferson on November 12, 1806, "was material to his defense." Hay responded that he "had that letter, and would produce it."⁷⁴ Indicating there were some matters in the letter "which ought not to be made public," he was willing to put them "in the hands of the clerk confidentially, and he could copy all those parts which had relation to the cause." Burr's counsel rejected that proposal, demanding to see the entire letter. Hay agreed. Burr and his attorneys were able to read the letter.⁷⁵ On the misdemeanor charge, the government's case grew progressively weaker until the prosecution finally moved to discharge the jury. Burr objected, insisting on a verdict. The jury retired and returned with a verdict of "Not guilty."⁷⁶

Throughout the Burr trial, Jefferson remained in close touch with federal attorney Hay to provide instructions. In a letter of May 20, 1807, he said that Secretary of State James Madison "will forward a pardon" for Bollman. In the event Bollman did not appear at Burr's trial, Jefferson asked that Hay "take effectual measures to have him immediately taken into custody" (Bergh 1904, 9:205). The apparent purpose was to offer Bollman a pardon to induce him to testify against Burr. In a letter of May 28 to Hay, Jefferson enclosed Bollman's written statement. If Bollman "prevaricated," Hay could ask him if "he did not say so and so to Mr. Madison and myself" (Bergh 1904, 9:210). Jefferson advised Hay that if Bollman rejected the pardon, Hay should move to "commit him immediately for treason or misdemeanor, as you think the evidence will support" (Bergh 1904: 9:233).

When Hay offered Bollman a pardon at the trial and he refused, Hay nonetheless insisted that he had been pardoned. Burr's attorneys objected that forcing someone to accept a pardon would require the person to "criminate himself" (Robertson 1879, 1:189-90). Hay did not retaliate by charging Bollman with treason or a misdemeanor. In addition to the pardon for Bollman, Jefferson sent to Hay "other blank pardons . . . to be filled up at your discretion" (Bergh 1904, 9:205). That marked an extraordinary delegation. The constitutional pardon power is vested exclusively in the president, to be exercised personally rather than transferred to subordinate executive officials.

Following Burr's acquittal in Richmond, Hay moved to hold Burr and Blennerhassett for trial in the District of Ohio. Chief Justice Marshall directed that they be tried only for high misdemeanor for the planned military enterprise against Mexico. Placed under a \$3,000 bond, they were never tried in Ohio.⁷⁷ Wilkinson's role in the Richmond trial "seemed to hurt his reputation more than that of Burr" (Jacobs 1938, 238). After leading the prosecution against Burr, Hay concluded it was a mistake to rely on

73. *United States v. Burr*, 25 Fed. Cas. 189 (C.C.D. Va. 1807) (No. 14,694).

74. *Ibid.*, 190.

75. *Ibid.*

76. *Ibid.*, 201.

77. *Ibid.*, 207.

Wilkinson's testimony. He confided to Jefferson: "My confidence in him is shaken, if not destroyed" (Lomask 1982, 289).

Jefferson closely followed Marshall's performance at the Burr trial. Had Marshall appeared too partial to Burr or hostile to Jefferson, there might have been an impeachment initiative to remove him from office. Yet because of Marshall's objective, even-handed conduct, there was no such attempt. Nevertheless, some members of Congress reacted to the Burr verdict by introducing a constitutional amendment to make it easier to remove federal judges. Instead of relying on the "totally inefficient" impeachment process, requiring action by the House and trial in the Senate, Representative G. W. Campbell submitted a constitutional amendment to empower the president to remove federal judges by jointly addressing both Houses of Congress, requiring three-fourths of each chamber to concur.⁷⁸ His amendment failed to gain sufficient support.

Conclusion

In a critique of Jefferson's record in the field of civil liberties, Leonard Levy covered not merely the Burr trial, but other legal and constitutional violations, including prosecutions for seditious libel and Fourth Amendment violations taken to implement Jefferson's embargo barring trade with England (Levy 1973). Although Jefferson spoke in defense of limited government and individual rights, at times he invoked presidential power and acted against constitutional and statutory provisions. It has been said that after Jefferson learned about Burr's plans in the Western Territory he "had to take action" (Newmyer 2012, 23). That is correct, but Jefferson needed to act in compliance with legal principles, not against them.

Jefferson justified independent presidential power in a letter he sent to a private citizen after the Burr conspiracy. John B. Colvin had asked whether circumstances might make it a duty of high executive officials "to assume authorities beyond the law." In a reply on September 20, 1810, Jefferson argued that a "strict observance of the written law is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country in danger, are of higher obligation" (Washington 1861, 5:542; emphasis in original). To lose the country by scrupulously adhering to written law, including the Constitution, "would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means" (Washington 1861, 5:542).

Jefferson's use of presidential power in some cases, as with his decision to agree to terms in the Louisiana Purchase that exceeded the legal bounds established by Congress, can be defended because he understood that his decision lacked constitutional and legal justification. He knew he needed Congress to appropriate additional funds, and the Senate had to agree to the treaty with France (Fisher 2014, 74). That precedent has no bearing on Jefferson's actions with the Burr conspiracy. The dispute over the Louisiana Purchase did not require violations of the writ of habeas corpus, publicly charging

78. 18 Annals of Cong. 1525 (1808).

someone with a crime before trial, misuse of the pardon power to induce witnesses to testify against the accused, and other violations of express provisions in the Constitution. In defending actions taken against Burr, Jefferson advised Colvin that in judging the case, “We are bound to consider the state of the information, correct and incorrect,” that Wilkinson “then possessed.” There was no need to rely on Wilkinson’s self-interested assertions, correct or incorrect. What the government was bound to do was submit evidence to support the indictment and consider the credibility, or lack thereof, of Wilkinson’s claims. No circumstances justified sending defendants to the city of Washington when “the written law [by which Jefferson meant the Sixth Amendment] gave them a right to trial in the territory” (Washington 1861, 5:543).

Jefferson considered his conduct in the Burr conspiracy as legitimate because it made “the *salus populi* supreme over the written law” (Washington 1861, 5:544). Public health and safety were not jeopardized by Burr’s activities. As Jefferson told Colvin, “we knew here that there never was danger of a British fleet from below [to assist Burr’s plan to invade Mexico], and that Burr’s band was crushed before it reached the Mississippi” (Washington 1861, 5:544). With regards to actions against Burr, the *salus populi* required Jefferson to follow the written law and not violate it.

References

- Abernethy, Thomas Perkins. 1954. *The Burr Conspiracy*. New York: Oxford University Press.
- Bergh, Albert Ellery, ed. 1904. *The Writings of Thomas Jefferson*. 20 vols. Washington, DC: Thomas Jefferson Memorial Association.
- Beirne, Francis F. 1959. *Shout Treason: The Trial of Aaron Burr*. New York: Hastings House.
- Duker, William F. 1980. *A Constitutional History of Habeas Corpus*. Westport, CT: Greenwood Press.
- Fisher, Louis. 2006. *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case*. Lawrence: University Press of Kansas.
- . 2014. *The Law of the Executive Branch: Presidential Power*. New York: Oxford University Press.
- Hoffer, Peter Charles. 2008. *The Treason Trials of Aaron Burr*. Lawrence: University Press of Kansas.
- Isenberg, Nancy. 2007. *Fallen Founder: The Life of Aaron Burr*. New York: Viking Penguin.
- Jacobs, James Ripley. 1938. *Tarnished Warrior: Major-General James Wilkinson*. New York: Macmillan.
- Kline, Mary-Jo, ed. 1983. *Political Correspondence and Public Papers of Aaron Burr*. 2 vols. Princeton, NJ: Princeton University Press.
- Levy, Leonard W. 1973. *Jefferson and Civil Liberties: The Darker Side*. New York: Quadrangle.
- Linklater, Andro. 2009. *An Artist in Treason: The Extraordinary Double Life of General James Wilkinson*. New York: Walker.
- Lomask, Milton. 1982. *Aaron Burr: The Conspiracy and Years of Exile, 1805–1836*. New York: Farrar, Straus, Giroux.
- Melton, Buckner F., Jr. 2002. *Aaron Burr: Conspiracy to Treason*. New York: Wiley.
- Newmyer, R. Kent. 2012. *The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation*. New York: Cambridge University Press.
- Pratt, Julius W. 1945. “Aaron Burr and the Historians.” *New York History* 26 (4): 447-70.

- Robertson, David. 1879. *Trial of Aaron Burr for Treason*. 2 vols. Jersey City, NJ: Frederick D. Linn.
- Schlesinger, Arthur M., and Fred L. Israel, eds. 2010. *My Fellow Citizens: The Inaugural Addresses of the Presidents of the United States, 1789–2009*. New York: Facts on File.
- Shafroth, Morrison. 1932. "The Aaron Burr Conspiracy." *American Bar Association Journal* 18 (10): 669-73.
- Smith, James Morton. 1956. *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*. Ithaca, NY: Cornell University Press.
- Vidal, Gore. 1973. *Burr: A Novel*. New York: Vintage Books.
- Washington, H. A., ed. 1861. *The Writings of Thomas Jefferson*. 9 vols. New York: H. W. Derby.
- Wheelan, Joseph. 2005. *Jefferson's Vendetta: The Pursuit of Aaron Burr and the Judiciary*. New York: Carroll and Graf.
- Yoo, John C. 1999. "The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power." *Minnesota Law Review* 83 (5): 1435-79.