Treason Trial of Aaron Burr before Chief Justice Marshall

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TREASON TRIAL OF AARON BURR

BEFORE CHIEF JUSTICE MARSHALL

By

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FOREWORD

The period during which Thomas Jefferson, John Marshall, and Aaron Burr were public men was, perhaps, the most interesting in the history of the United States. These men lived through the War of the Revolution, helped to lay a firm foundation of the new Republic, and lived to see their great political principles become an important part of the nation's phenomenal growth - Jefferson for his democratic ideals; Marshall for his principles of jurisprudence; and Burr for his adventurous expedition into the far Southwest.

While the names of Jefferson and Marshall have been accorded an unblemished record in the pages of American history, either as statesman or jurist, the name of Burr, up to the close of the nineteenth century, was commonly associated with that of Benedict Arnold - a mere symbol of treason. Most historians thought that all the facts concerning Burr had been carefully appraised, the popular verdict rendered, and nobody ever thought of questioning the decision until the turn of the present century. Since 1900, such distinguished scholars as Professor Walter F. McCaleb, Albert Beveridge, Isaac Jenkinson, Samuel H. Wandell, Meade Minnigerode, and Nathan Schachner
have re-opened Burr's case and delved deeper into the disputed phases of the case.

The result of these exhaustive investigations has been a new portrait of Aaron Burr; one that, in the light of new evidence available, must alter the long established popular verdict.

The numerous landmark decisions rendered by John Marshall, as Chief Justice of the Supreme Court, have enabled him to surmount the severe condemnation which he incurred in connection with the Burr conspiracy trial. The chief charge against him - a biased attitude toward the government - has convinced most biographers of Jefferson that Marshall's conduct constituted political favoritism. It is with the clarification of Burr's case that Marshall's conduct is truly revealed. Such is the aim and purpose of this investigation.
CHAPTER I.

EARLY LIFE OF AARON BURR

The Reverend Aaron Burr, an eminent divine and teacher, who became President of Princeton College while still a young man, and Esther Edwards Burr, the daughter of Jonahan Edwards, were the parents of Aaron Burr, the Vice-President in Thomas Jefferson's first administration. Burr was born on February 6, 1756. His father died on September 24, 1757, to be followed by the death of his mother the following year. Until the time when Aaron left to join the War of the Revolution, his home was with his uncle, Timothy Edwards, who provided a good education for his nephew, together with a sternly enforced Puritanical discipline.

In his boyhood, Aaron was fond of outdoor sports, particularly hunting, fishing and riding. These pleasures, however, never interfered with his book learning, for at the age of eleven he was considered ready to enter college. His application at Princeton was rejected, due to his extreme youth and diminutive stature. His application was reconsidered two years later, and he was admitted in 1769, and permitted to join the sophomore class.¹ Burr was soon ahead of his class, and was

graduated with honors, and elected to deliver the Commencement oration, in 1772, at the age of fifteen. Even at this early period, he was a constant reader of literature, history, and the biographies of great military men. Burr's father was a graduate of Yale College and possessed all the requisites of a scholar, which he in turn inherited.\(^2\)

Though Aaron came from a family of ministers, there was no evidence that he ever possessed any deep religious feelings; however, it was known that he browsed among books that were tinged with skepticism. Of this, the good Samuel Spring was not aware, for he wrote to Burr on May 15, 1772, that he hoped "to see the time when you feel it to be your duty to go into the same study with a desire for the ministry. Remember, that was the prayer of your dear father and mother, and is the prayer of your friends to this time."\(^3\)

Thus, at the urging of Mr. Spring, and other relatives, Burr undertook the study of theology in the school of Doctor Joseph Bellamy, who had studied theology under Jonathan Edwards, Burr's grandfather. In the Spring of 1774, the young student decided that theology did not suit his temperament, and, also, "came to the conclusion that the road to heaven was open to all alike."\(^4\) With this declaration, Burr left his

4. Ibid., I, 45.
mentor, to the disappointment of his relatives, and particularly Uncle Timothy Edwards, who, perhaps, became somewhat impatient toward his ward, for on February 11, 1774, in reply he said: "Whether you study law with Reeve or your Uncle Pierpont is a matter of indifference to me. I would have you act your pleasure therein." Burr was now seriously thinking of turning to the other great profession to which young men of good family and education turned to, and was, hereafter, practically to live his own life and own devices.

Burr found the study of law more suitable to his liking, and enjoyed studying under Tapping Reeve, who had married his only sister, Sally, and was a lawyer with a considerable reputation in the town of Litchfield, Connecticut. As in the case of theology, the study of law was to last a year, when it was interrupted, in 1775, by the approaching war. Burr, now nineteen, volunteered his services under General Washington, the Commander of the Colonial forces. Anticipating immediate action, he was disappointed when things did not move rapidly enough to satisfy his young and impetuous nature. Upon learning that Colonel Benedict Arnold was calling for volunteers for an expedition against Quebec, Burr offered his services and was accepted. During this Canadian venture, Aaron became acquainted with James Wilkinson, and their friendship was to continue until Burr's own western adventure.

5- Ibid., I, 46.
When Aaron Burr entered the Colonial army, he was a youth of nineteen, small in appearance, fearless, but not in possession of very good health. Contrary to the charges of Hamilton, who, in later years, belittled Burr's military services, the records seem to disclose that Burr joined the army against the orders of his physician, and the wishes of his guardian. 6

Burr's display of courage immediately brought him to the attention of Arnold, who assigned him to a difficult mission to General Montgomery. Having accomplished this task with unusual distinction, he was promoted to the rank of captain in Montgomery's division. While the expedition to Quebec ended in failure, and in the death of General Montgomery, Burr's desperate bravery in action earned him the promotion to the rank of major.

Major Aaron Burr then decided to transfer to Washington's forces in New York, but was soon again dissatisfied and left him in disgust. Parton explains the ill impression of Burr for Washington briefly: "In one word, there was an antipathy between the two men, each lacking qualities which the other highly prizes; each possessing virtues which by the other were not admired." 7 Major Burr apparently was determined to remain in the war and was further rewarded by being promoted to

6. Parton, Burr, 64-69.
7. Ibid., 84.
lieutenant-colonel on July 29, 1777, by General Washington, who undoubtedly recognized the great possibilities in the young officer and was magnanimous enough to overlook his impetuosity.

Colonel Burr became the youngest officer - he was just twenty-one - with such a high rank in the Army of the Revolution. In spite of his youthfulness, however, he demanded and received the proper respect, and eliminated the lax discipline which prevailed among the men under his charge. He tended the sick personally and aided those in need out of his own private fund. "His attention and care of the men," wrote an officer in Burr's division, "were such as I never saw, nor anything approaching it, in any other officer, though I served under many." 8

After three years of continuous military service, Colonel Burr's health had become seriously impaired and he reluctantly requested, on October 24, 1778, for a furlough from General Washington, who agreed to grant it, with pay, until such time as Burr's health would permit his return to duty. Burr refused to accept compensation while not in service, and decided to reject the furlough. 9 It was not until the spring of 1779 that Burr was finally forced to send in his resignation to Washington, who accepted it with regrets. Burr retired to private life, having earned an enviable reputation of being a veteran of four campaigns, an inspiring leader, and had won

the affections of the men in his division. 10

Aaron Burr's illness remained with him until eighteen months after he submitted his resignation to General Washington. In 1780, however, his health improved sufficiently for him to resume the study of law, first under Judge Patterson of New Jersey, and later under Thomas Smith of New York. The law student devoted many hours to reading the law, but also found time to read Voltaire, Rousseau, and Chesterfield, with a lady friend, whom he had met shortly after his promotion to the rank of a Colonel. The lady was Mrs. Theodosia Prevost, a widow of a British officer, with five children and possessing little material wealth. What attracted young Burr to the lady was her high attainments in literature and philosophy; her exquisite manner; and a mutual desire for companionship.

The young Colonel, now in love, desired to complete his legal training and he admitted to the bar; however, after a year of study, he decided to apply for admission. Lacking the necessary qualifications, he addressed a letter to Chief Justice Morris on October 21, 1781, requesting that the strict rule of three years of law reading be waived in his case. "Before the revolution," he began, "and long before the existence of the present rule, I had served some time with an attorney of another state. At that period I could have availed myself of this service; and surely, no rule could be

10. Wandell and Minnigerode, I, 77.
intended to have such retrospect as to injure one whose only misfortune is having sacrificed his time, his constitution, and his fortune to his country."

Although the New York Legislature had, on November 20, 1781, enacted a law disqualifying all Tory lawyers from practicing within the State, Burr discovered that new members were not too welcome into the profession. He was unable to find a lawyer to argue his motion of admission, and personally argued his own motion, praying that the three year requirement be dispensed with in his case. The court ruled that the candidate be submitted to an examination. To the surprise of the examiners, Burr answered all questions with ease, and on January 19, 1782, was licensed as an attorney at Albany, in his twenty-sixth year of age.

Lawyer Burr began his legal career in Albany, where he soon acquired a large volume of business, due mainly to his reputation in the army and to the law which prohibited all Tory lawyers from appearing in the Courts of the State. Following his admission, Burr and Theodosia Prevost were married, July 2, 1782, and established their residence at Albany, with her two young sons, for whom Burr developed a great fondness and assumed the responsibility of their education. Of this marriage a daughter was born, June 21, 1783, and named after her mother.

After peace had been declared, Burr removed to New York

City, November, 1783, where he was to enjoy greater success than in Albany. He arrived in the city as the last of the British forces were leaving. According to Parton, Burr entertained no idea to enter politics, but simply continue to build his lucrative law business. Whatever caused him to change his mind is not known, but in 1784 and 1785, he was elected and served in the State Legislature. It may be assumed, however, that Burr's gallantry in the war which had just ended was spread wherever he went.

Moreover, Burr's eloquence and striking appearance soon placed him in the front rank of his profession. One of his leading rivals was Alexander Hamilton, with whom he enjoyed friendly social intercourse until he defeated the latter's father-in-law, General Philip Schuyler, in 1791, then a candidate for re-election to his seat in the Senate of the United States. John Davis, an English traveller, after seeing Burr conduct a case, said that "his distinguished abilities attracted so decided a leaning in his favor, a deference to his opinions so strongly marked, as to excite in no small degree the jealousy of the bar."12

Aaron Burr's family life was a most happy one. The high human qualities and attainments which he himself aspired, he strove to instill into his devoted wife and later into his

12. Wandell and Minnigerode, I, 132.
daughter. Burr had his own ideas of improving the mind and body. He was worried about the cursed effects of fashionable education, and once warned his wife with these words, concerning their young daughter: "If I could foresee that Theo would become a mere fashionable woman with all the attendant frivolity and vacuity of mind, adorned with whatever grace or allurement, I would earnestly pray God to take her forewith and hence."¹³

Unlike most men of his period, Colonel Burr felt that women were entitled to certain rights as well as charms. He admitted to his wife that the book, "Vindication of the Rights of Woman, by Mary Wollstonecraft, was not popular because, in his opinion, the errors of education, of prejudice, and of habit."¹⁴ This attitude of liberalism Burr held not only in the matters of private life, but also in matters involving the affairs of the State.

As Burr's income increased, so did his style of living and entertainment. His expenses were now enormous, for he maintained a palatial country home at Richmond Hill, and a town house in the city. He became the host of European royalty and celebrities. In addition to this lavish entertainment, he was educating his own daughter and the two boys by Mrs. Burr's previous marriage. These responsibilities always kept

¹³. Ibid., I, 117.
¹⁴. Ibid.
him in debt, and he was forced to borrow from his clients, friends, and usurers at exorbitant rates of interest. Although he made every effort to meet his obligations, he found it impossible to overcome the overdue notes, which were constantly multiplying.

To an unnamed friend involved with him in an indorsement, Burr mournfully wrote these words: "As to pecuniary matters, I am very sorry both for your sake and my own that I can say nothing agreeable. I have met with the most vexatious and ruinous disappointments, and it is I assure you with extreme difficulty that I keep along."15

He was pressed for funds until he was finally, in desperation, forced to leave the Richmond Hill mansion and dispose of all the expensive household goods. It was not until after Burr's trial at Richmond that John Jacob Astor increased his fortune by taking over Burr's lease and title to the house and land. These financial difficulties did not seem to deter Burr from acquiring new obligations. He loved to aid struggling talent to fame and fortune. The famous painter, John Vanderlyn, owed his success to Colonel Burr. Others, over whom Burr went deeper into debt to support and encourage, yet remain unknown.16

There is no trace of Burr participating in the contro-

16. Ibid., 120.
versy over the acceptance of the Federal Constitution, and Parton is of the opinion that the Colonel did not possess the "intellect to shine in the pages of the Federalists." Burr was either too absorbed in the practice of his profession, or like some leading men of his time, had little faith in the proposed scheme of government. Historian Parton, in his research, quotes Burr as havin made this statement: "When the Constitution was first framed, I predicted that it would not last fifty years. I was mistaken. It will evidently last longer than that. But I was mistaken only in point of time. The crash will come, but not quite as soon as I thought." 17 For adopting this attitude of aloofness, Hamilton referred to him as one with an equivocal position. 18

The high reputation which Aaron Burr enjoyed at the New York bar, and his independent tendency in politics caused Governor Clinton to appoint him, in 1780, as Attorney General of New York State. Although in his thirty-fourth year, he served with intelligence and distinction. This honor was conferred upon Burr, notwithstanding the fact that he had joined forces with Hamilton to bring about the defeat of Governor Clinton. It seems that Burr was becoming aware that there was a greater political future by joining forces with the

17. Parton, Burr, 171.
Governor, than with the equally ambitious Hamilton. The result of this political union was the defeat of Senator Schuyler, in 1791, by Burr. It so happened that the Livingstons desired the defeat of Hamilton's father-in-law, and they, too, used their wealth and influence on behalf of Burr.¹⁹

The defeat of General Schuyler infuriated Hamilton, and ended his friendship with the Colonel, although he continued to appear friendly, professionally, and, as late as November 10, 1802, came to the assistance of his brother lawyer by satisfying a large judgment recovered against Burr.²⁰ Hamilton's jealous calumny continued, however, and Burr was soon to feel it on every turn. Haughty old General Schuyler, although he must have felt his defeat just as keenly as his proud son-in-law, wrote to the latter, on January 29, 1792: "As no good could possibly result from evincing any resentment to Mr. Burr for the part he took last winter, I have on every occasion behaved toward him as if he has not been the principal in the business."²¹

Aaron Burr's triumph over General Schuyler made him one of the most popular men in New York, and in the gubernatorial election of April, 1792, leaders of the Federalists and the Republican parties sought to secure the advantage of his name

¹⁹. Wandell and Minnigerode, I, 142.
²⁰. Ibid., 150.
and talents. The Federalists, in their desire to retire Governor Clinton, thought that the interest of their party could be best served by the election of Burr, and they wrote Hamilton to that effect. It was pointed that, by supporting the popular Colonel, he might become attached to their party or they, at any rate, might succeed in making him guilty of political intrigue.

Alexander Hamilton had dedicated himself to obstructing all of Burr's political advancement, and, therefore, vetoed any proposal that would benefit Burr. Consequently, the Federalists nominated John Jay, but Governor Clinton was re-elected in a disputed election. When the election officials appealed to their two United States Senators - King and Burr - they gave their opinion to their respective party. Historians all agree that Senator Burr made efforts to persuade Senator King to withhold their opinions; however, King forwarded his opinion in favor of Jay, and Burr submitted his in favor of Clinton. Clinton was declared elected Governor because the canvass board contained a Republican majority; however, Burr was accused of being an adherent of the Governor. Three months after the election, Clinton nominated Senator to the Supreme Court, but it was declined. 22

When the United States Senate opened its session, on

22. Parton, Burr, 186-190.
November 5, 1792, Burr commenced his campaign to open the Senate doors to the public during all debates; however, the startled Senators defeated the motion by a large majority. 23 It was not until the February session of 1794, that he finally won his long struggle for open-sessions, except where secrecy was specifically required. 24

Burr continued his liberal policies by advocating, on February 28, 1794, in favor of sitting Albert Gallatin, who was of Swiss birth and had lived in the United States since 1780. Although duly elected to the Senate, the contention that he had not been sufficiently long in the country prevailed and a seat was denied to him. Senator Burr also fought in the Fourth Congress, which met on December 7, 1795, against imprisonment for debt, and for more liberal laws on bankruptcy. 25

On January 31, 1795, Hamilton resigned from Washington's cabinet, as Secretary of the Treasury, but remained in high esteem and influence with Washington. Hamilton always entertained a high opinion of himself, and believed that he was the only man who could save the country. He even endeavored to dictate the governmental policies in the administration of John Adams, who was invariably forced to comply, and was eventually defeated for re-election when he refused to be

guided any longer by Hamilton and his powerful Federalist cohorts. 26

According to Parton, Washington "was the rock to which the ship of State was moored." This biographer of Burr and of Jefferson, seems to be convinced that the great measures of Washington's administration were devised by his Secretary of the Treasury, who thought the support of the interest of the wealthy classes was paramount for a strong government. "The English government was his ideal," states Parton, "his dream was to make America a larger and better England. In the people he had no faith..." 27

Prior to the adoption of the Federal Constitution, the form of government in New York was less democratic than that of any other state in the country. According to Hammond, this was due to the presence of more aristocracy than in any other state. The most wealthy and powerful families were the Morrises, the Van Cortlands, the Livingstons, the Van Rensselaers, and the Schuylers. Another reason was the State Constitution, which was written by John Jay, and which conferred all the patronage of the State in the hands of the Governor. This state of affairs, undoubtedly, made it possible for

27. Parton, Burr, 212.
perennial election of George Clinton, as Governor, once he had come into power. 28

After the formation of the Union, men with political aspirations were forced to seek the support of one or more of these powerful families. Even Burr, with his keen political ingenuity, benefitted when the Clintons and the Livingstons united to bring about the defeat of Senator Schuyler. And it was the combinations of the Republican Clintons and Livingstons, aided by Hamilton and the Virginian dynasty which caused the political downfall of Aaron Burr.

As long as Burr played the political game, he was acclaimed the great hero of the Republican Party. While serving as Attorney-General in the administration of Governor Clinton, he was charged with disposing of large tracts of public land at a very low price. 29 Some of the recent historians, however, have removed this stigma, with proof showing that he could not have participated in these land scandals. Letters have been brought to light which indicate that Burr was traveling about the State discharging business in connection with his office. 30

30. Ibid., 291, Wandell and Minnegerode, I, 110, and Schachner, 98. Schachner found that the New York Legislative grant of power to the Commission, for the disposition of the land, was made on March 22, 1791. The land in question was disposed between June and October of the same year, when Burr was traveling, as shown by his letters to Theodosia.
Land speculation was a common enterprise in Burr’s time, and his connection with the Holland Land Company brought him more severe criticism, although historians have not condemned Hamilton and General Schuyler, who were also interested in this organization. The company was founded in 1792, for the purpose of making extensive purchases of land to be sold to European investors. It was headed by one Cazenove, a Dutchman.

A similar organization, known as the Pennsylvania Population Company, operated by one John Nicholson, was formed about the same time as the foreign company. Burr became interested in the American company, and held one hundred shares of its stock, purchased in 1793.31

In 1796, Burr contracted to buy from the Holland company 100,000 acres of land, in the Presque Island, to be paid in instalments. The covenant with Cazenove provided for a penalty of $20,000 in case Burr defaulted in his performance. As security for this penalty, he assigned to Cazenove a bond of Thomas L. Witbeck, payable to Burr, for the penal sum agreed. The same year this contract was executed, the bottom dropped out of the land boom, and Burr was left with the contract, due the following year.

The Holland Company, meanwhile, sought to have a law passed in New York, permitting aliens to hold land without limitation as to time. This effort was defeated, but a com-

promise bill was enacted, granting aliens the right to hold land for a period of seven years. This law was put through with the influence of Hamilton. He had been retained by Cazenove, who later sought and obtained General Schuyler's aid in having the period of alien tenure raised from seven to twenty years. In return for the General's efforts, the Holland Company agreed to make a loan of $250,000 to a navigation company in which Schuyler was President.

As the depression in land value continued, Cazenove refused to go through with the bargain with Schuyler, unless the restriction in alien land tenure was totally removed.Aaron Burr was not retained, and on April 2, 1798, the unrestricted law desired was passed by the Legislature. By this law the Holland Company was able to market their lands to European investors with less difficulties. The charge against Burr in this connection was that he had an interest in the Company, secondly, he was suspected of having been paid a high fee for his services. While the company's records show the payment of $5,500 to Burr, they also indicate that he rendered his services in order to obtain a loan, as in the case of General Schuyler. In the face of this evidence Burr was charged with accepting bribery.

32. Ibid., 155, citing Laws of New York, Chapter 58, Nineteenth Session, April 11, 1796, and Chapter 36, Twentieth Session, March 17, 1797.
When Burr's term in the United States Senate expired, he became a candidate and was again elected to the New York Assembly. In March 28, 1799, the legislature enacted a law authorizing the establishment of the Manhattan Company. The duty of this company was to furnish funds to the City of New York, with which the city was to obtain an adequate supply of pure and wholesome water. The measure further provided for a third bank in New York City, which already had two, founded and under control by Federalists. Although some of the Federalists voted for the measure, and the bill was signed by Governor Jay, also a Federalist, the members of this party charged that the purpose had been misrepresented to them, and that Burr, and the Republicans were guilty of fraud and double-dealing. Burr and his party went down in defeat at the next election, and most historians attribute it to the Manhattan Company. 34

The passage of the law granting the people pure water and the establishment of another needed bank, which would not discriminate against Republican merchants, and the defeat of Burr seem difficult to reconcile until one examines certain letters written by a few of Hamilton's followers. One Troup, in a letter to Rufus King, written in May 6, 1799, makes this confession: "We have at last prevailed upon the merchants to exert themselves. In the last election they were essentially useful. They told the cartmen that such of them as supported the democratic ticket would be dismissed from their employ...Mr. John

34. Parton, Burr, 238-9, and Wandell and Minnigerode, I, 177-8.
Murray spent one whole day at the poll of the Seventh Ward - sometimes called the cartmen's ward or the Livingston's stronghold - and his presence operated like charm..."35

Such conduct coming from the Hamiltons and the Livingstons was apparently deemed entirely proper, but was considered political intrigue when indulged in by Colonel Burr. Even Parton seems to be shocked at Burr's conduct in the Manhattan Company scandal and believed that the Colonel suffered his just punishment in his defeat at the polls. But, then, Parton, perhaps was not in full possession of all the evidence when he wrote Burr's biography in 1861.36

A modern historian, Gustavus Myers, who has delved into court records, brings to our attention that at least ten legislators knew of the real character of the bill, which also provided for the Manhattan Bank. Moreover, DeWitt Clinton was interested in chartering the bank, and as a nephew of former Governor George Clinton, exercised some influence. Finally, Governor Jay signed the bill, perhaps in return for the support of Burr and the Clintons in passing a law granting a steamboat monopoly to the Livingstons.37

36. Parton, Burr, 238.
Aaron Burr's difficulties with Alexander Hamilton date back to 1792, when the latter's father-in-law was defeated in a bitter election for the seat in the United States Senate. According to Parton's findings, Hamilton was the cause of Burr's failure to make a better showing in the election for Vice-President in that same year. He was also instrumental in Washington's refusal to approve Burr's nomination for Minister to France, in 1794, even after a Congressional Caucus had made three requests to the President. In 1796, Hamilton succeeded again in preventing Burr's nomination, and John Adams and Thomas Jefferson were chosen for first and second place in the National ticket. 38

Hamilton accomplished his pernicious sniping by secret conferences and correspondence. As early as September 26, 1792, he wrote a letter to an unknown Federalist and said: "Mr. Burr's integrity as an individual is not unimpeached. As a public man, he is one of the worst sort - a friend to nothing but as it suits his interest and ambition...'Tis evident that he aims at putting himself at the head of what he calls the 'popular party', as affording the best tools for an ambitious man to work with - secretly turning liberty into ridicule, he knows as well as most men how to make use of that name. In a word, if we have an embryo Caesar in the United States 'tis Burr."39

To Congressman Steele, however, who knew Burr, Hamilton used cautious words. "My opinion of Mr. Burr", said the former Secretary of the Treasury less than a month later, "is yet to form but according to the present state of it, he is a man whose only political principle is to mount at all events, to the highest legal honors of the nation, and as much further as circumstances will carry him."40

Hamilton's determination to religiously oppose Burr politically was due to his hatred and jealousy of Burr's success, or to his deliberate determination to organize a campaign of abuse and misrepresentation, until he had united most political leaders and parties in bringing about the total destruction of his victim. Hamilton succeeded in his campaign by supplementing these letters with speeches and secret conferences, in which he often indulged in a savagery of insinuation and accusation which effectually prejudiced the public mind.41

Oliver Wolcott, a Federalist, who succeeded Hamilton as Secretary of the Treasury, but who did not seem to bear any ill-feeling toward Burr, left an impartial picture of the political status of the two men. "The two most efficient actors on the political theatre of our country," wrote Wolcott

40. Ibid., October 15, 1792, V, 525.
to an unnamed politician in Virginia, "are Mr. Hamilton and Mr. Burr...I have watched the movements of Mr. Burr with attention, and have discovered traits of character which sooner or later will give us much trouble. He has an unequalled talent of attracting men to his views, and forming combinations of which he is always the centre. I shall not be surprised if Mr. Burr, is found, in a few years, the leader of a popular party in the Northern States; and if this event ever happens, this party will subvert the influence of the Southern States." 42

In these communications, it is fair to conclude, may be found the key to the political situation, then in existence, and the answer to the chief cause for the crumbling of Burr's political fortunes within the next few years. We find Hamilton being challenged in his leadership and power in the North. We see the Southern politicians headed by the Virginia dynasty, viewing with alarm the rapid rise of Colonel Burr. The aristocracy of the North and South, represented by Hamilton and Jefferson, respectively, discovered as early as 1794, that there was a real threat in the name of Aaron Burr. No concerted action was to be taken, however, until the beginning of the nineteenth century, and after Burr had been elected Vice-President.

CHAPTER II
BURR AND JEFFERSON

In the Presidential campaign of 1796, Aaron Burr received thirty electoral votes, without making any great effort on his own behalf. A letter to James Monroe, dated September 6, 1796, disclosed no aspiration on Burr's part, either for the Presidency or Vice-Presidency. "The approaching election for President," said Burr, "will be, on both sides, urged with much activity. Jefferson and Adams will I believe be the only candidates. The prospect of success is in favor of the former."¹

However, Burr had his eyes on 1800, the next Presidential election, and he thought it wise to remain in the limelight. Without difficulty he was returned to the State Assembly in 1798. Burr, too, could see that the nation was rapidly losing confidence in the Federalist party, which had swept into power by electing John Adams President, returned General Schuyler to his former seat in the United States Senate, and re-elected Governor Jay. Nevertheless, Burr, attending to his

¹ Schachner, 143. Citing Monroe Papers, September 6, 1796. Library of Congress.
duties in Albany, could foresee the impossibility of President Adams' re-election; that the next fight might revolve around him and Vice-President Jefferson.

As Burr anticipated, the New York election of April 29, 1800, returned the Republicans back to power. Again the Clintons and the Livingstons had combined, and caused Hamilton to suffer another severe political blow. Burr's greatest political enigma was now laid low, but not for long. Hamilton, like Burr, was never caught napping. He began to make preparation for the National election of 1800.

Whoever was destined to be chosen President in 1800, the country knew it was not to be a Federalist. The workers, small merchants and shopkeepers were preparing to revolt against the large land holding families, and the rising industrial and transportation aristocracy. Another important factor was the dissension within Hamilton's party, which contained a strong faction desiring to take the country to war against France. And, although President Adams did not sympathize with the French revolutionary tendencies, he refused to resort to war, and, thus risked his own defeat. ²

Hamilton must have realized the futility of attempting to re-elect President Adams, and sought to save the Federalist party from disaster by electing General Charles C. Pinckney, who proved to be a strong candidate by getting one less electoral vote than John Adams. Hamilton, however, also must realized the possibility of a close result between Jefferson and Burr, the two leading Republican candidates, and began his campaign of political intriguing among the Federalist members in the House of Representative. Hamilton's biographers have a tendency to condone his extraordinary conduct toward Burr; seem to interpret his letters, written between November 1799, and up to the time of the unfortunate duel, as constituting statesmanship. Aaron Burr, on the other hand, has been condemned and charged with political defects, based on rumors which have never been substantiated.

In Burr's time there were no nominating conventions; this task was accomplished by the respective party caucuses of members in Congress. 3

Moreover the Presidential election of 1800 contained the first political platform ever adopted by any party in the country. The Republican platform advocated these planks:

1. An inviolable preservation of the Federal Constitution in accordance with the principles of State rights.
2. A small army and navy.
3. Freedom of speech and religious toleration.
4. Free trade.
5. An avoidance of foreign treaties, and a minimum of international diplomatic intercourse.
6. Repeal of the alien and sedition laws. 4

The election machinery in 1800, under the provisions of the United States Constitution, the electors cast their votes for two men, without any distinction between them as to the office of President and Vice-President. The candidate receiving the highest number of all the ballots cast became President, and the candidate with the second highest number became Vice-President.

Moreover, general elections were unknown, and the most of the electors of the States were chosen by the legislatures of the various States, meeting in joint session. Since the great mass of the people were disfranchised, due to rigid property qualifications, the campaign had to be conducted on State and not on National lines; had to be directed mainly on the election of Legislatures. 4

4. Wandell and Minnigerode, I, 203.
5. Schachner, 168.
Thus, under the circumstances which then prevailed, Burr and Hamilton faced the most desperate political struggle of their career. Each man was to summon every ounce of energy, diplomacy and finesse. Fortunately, for Burr, Hamilton nominated a state ticket consisting of Federalist mediocrities, men who would vote as he wished. Burr, on the other hand, persuaded his party to nominate the ablest Republicans. For Governor, Clinton was drafted to become a candidate against Governor Jay; the Livingstons were called upon to contribute their wealth and influence to subdue the Schuylers and their proud son-in-law. The Federalists, astonished at the Republican ticket, attacked Burr and all who were suspected of aiding him. Jefferson, Madison, the Clintons, and the Livingstons were denounced as plotters.6

Burr’s immediate workers were John and Robert Swartwout, William P. Van Ness, Matthew L. Davis, and others; men with fanatical devotion to their leader.

Tammany Hall, then known as the Society of St. Tammany, consisted of mechanics, artisans and laborers members. Burr never joined the Society, but got control of it through its leader, William Mooney, who resented the Society of Cincinnati, which was composed of the country’s aristocrats, including

6. Ibid., 172-173. Burr also persuaded Horatio Gates and Brockholst Livingston to become candidates.
Hamilton and Burr. According to Davis, "Burr was our chief," at the Hall.  

Perhaps one of Aaron Burr's greatest contributions to Tammany was his solving of the disfranchisement problems, by a clever legal scheme. Through his lieutenants, he had the Tammanyites of each ward combine their small resources and purchase a small tract of land in joint tenancy. Under the State law, every participant in a joint tenancy was the owner of the entire parcel of land. The Federalists, upon learning of the sudden increase in Republican prospective voters, and forgetting Troup's conduct in the previous election, shouted "fraud". Burr's masterly move was entirely legal and won a smashing victory for the New York Republicans on April 29, 1800, and an unanimous Republican delegation of Presidential electors.  

While Hamilton never seemed to tire of accusing Burr of political intrigue, he now proposed to Governor Jay the immediate call of a special session of the Legislature and jam through a law which would defeat the will of the voters and steal the election from the Republicans. Briefly, Hamilton desired a new law which would deprive the Legislative body

7. Ibid., 175, citing American Citizen, July 18, 1809.  
of choosing the Presidential electors, and transfer such power into the hands of the officials in the various State districts. "It is easy," he wrote to the Federalist Governor, on May 7, 1800, "to sacrifice the substantial interests of society by a strict adherence to ordinary rules. The scruples of delicacy and propriety, as relative to a common course of things, ought to yield to the extraordinary nature of the crisis." Apparently, John Jay did not think much of Hamilton's idea, for he noted on the same letter: "Proposing a measure for party purposes, which I think it would not become me to adopt."10

The result of the New York election placed Aaron Burr in the same class as any of the strongest of the nation's leaders, whose wishes had to be consulted and heeded. Many others argued that he be a candidate for President, or at least be given second place on the Republican ticket. As Vice-President, however, it was extremely difficult to deny Jefferson the office of President. The only dispute, therefore, arose over the three possible candidates - Burr, Chancellor Livingston, and the former Governor Clinton - for Vice-President. Burr's biographer, Davis, wrote, on May 5, 1800, to Albert Gallatin,

10 Ibid., IV, 72 f.
a caucus member, advocating Burr's claim. In his letter Davis suggested that Clinton was old and wished to remain retired; that there was prejudice against Livingston's name and wealth, but that Colonel Burr was the logical candidate. "If he is not nominated," he concluded, "many of us will experience much chagrin and disappointment."\textsuperscript{11}

To further disprove that Burr did not entirely appoint himself a candidate for Vice-President, there is a letter from James Nicholson to his son-in-law, Albert Gallatin, who had requested Nicholson to interview Clinton and Burr. "I have conversed with the two gentlemen, mentioned in your letter," replied Nicholson. "George Clinton, with whom I first spoke, declined. He thinks Colonel Burr is the most suitable person and perhaps the only man. Such is also the opinion of all the Republicans in this quarter that I have conversed with; their confidence in A. B. is universal and unbounded. Mr. Burr, however, appeared averse to be the candidate. He seemed to think that no arrangement be made; alluding, as I understood, to the last election, in which he was certainly ill used by Virginia and North Carolina."\textsuperscript{12}

Obviously, the Virginian dynasty had failed to fulfill

\textsuperscript{12} \textit{Ibid.}, 242, May 7, 1800.
certain agreements in a previous election, for Nicholson concluded with the warning: "I believe he may be induced to stand if assurance can be given that the Southern States will act fairly. But his name must not be played the fool with."\textsuperscript{13}

Four days after the receipt of Nicholson's letter, the Republicans met, and on the following day, May 12, 1800, Gallatin writing to his wife, said: "It was unanimously agreed to support Burr for Vice-President."\textsuperscript{14}

As election day rapidly approached, Hamilton became alarmed over the popularity of Jefferson and Burr, and became particularly concerned over the possibility of Burr defeating Jefferson. Writing to James A. Bayard, Federalist Congressman from Delaware, he said:

"There seems to be too much probability that Jefferson or Burr will be President. The latter is intriguing with all his might in New Jersey, Rhode Island and Vermont; and there is a possibility of some success in his intrigues....if it is so, Burr will certainly attempt to reform the government a'la Buonaparte. He is as unprincipled and dangerous a man as any country can boast - as true a Cataline as ever met in midnight conclave."\textsuperscript{15}

Bayard refused to be alarmed by his friend, and in reply

\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid., 243.
\textsuperscript{15} Hamilton's Works, VI, 453, August 6, 1800.
said:

"The question has been asked whether if the federalists cannot carry their first points, they would not do as well to run the election .... to Burr? They conceive to be less likely to look to France for support than Jefferson, provided he would be supported at home. They consider Burr as actuated by ordinary ambition, Jefferson by that and the pride of the Jacobinic philosophy. The former may be satisfied by power and property, the latter must see the roots of our society pulled up and a new course of cultivation substituted...."16

After the strenuous and bitter campaign, the State Legislatures convened, and elected their Presidential Electors. With South Carolina casting its votes unanimously for Jefferson and Burr; Pennsylvania casting a majority of one vote in favor of the Republicans; and a switch of two hundred and fifty New York City votes going for Burr's party, the Republican party received its first national triumph. The final results were:17

Thomas Jefferson .................. 73
Aaron Burr ......................... 73
John Adams ......................... 65
General Charles G. Pinckney ....... 64
John Jay ............................ 1

The tie threw the election into the House of Representa-

16. Ibid., 454; Aug. 10, 1800.
tives where there was a Federalist majority. Jefferson wrote to Burr, on December 15, 1800, declaring that the election had been "badly managed." The letter continues in a friendly mood and Burr is congratulated for his efforts in the contest. However, historians disagree on another portion of the letter where the Vice-President states he feels "most sensibly the loss we sustain of your aid in our new administration. It leaves a chasm in my arrangements which cannot be adequately filled up. I had endeavored to compose an administration whose talents, integrity, names, and dispositions should at once inspire unbounded confidence in the public mind, and ensure a perfect harmony in the conduct of the public business. I lose you from the list, and am not sure of all the others."18

Did Jefferson want Burr in his Cabinet and not as presiding officer of the Senate, where an increase in popularity might have threatened his re-election? Was Jefferson presuming that Burr would decline the Presidency, if it were offered to him by the Federalist Congress? In any event, the Virginian seemed to have a high regard for his fellow Republican at this time.

Aaron Burr answered Jefferson's letter on the 23rd of the same month, and assured him that his personal friends had

been instructed on the subject. They "can never think of diverting a single vote from you," continued Burr. "On the contrary they will be found among your most zealous adherents. I see no reason to doubt of you having at least nine States if the business shall come before the H. of Rep." Thus, Burr is for Jefferson, provided his friends are for Jefferson, too. As to himself, Burr advised the Virginian, "I will cheerfully abandon the office of V. P. if it shall be thought that I can be more useful in any active action."

Most biographers seem to agree on the equality of political strength of Burr and Jefferson, in the Presidential race - both in the general election and in the House of Representatives. However, there is considerable disagreement as to the part Burr played in trying to prevent Jefferson from becoming President. Burr has been severely condemned for refusing to interfere and halt his friends from soliciting votes for him among the Federalists. The historian, Randall, for one, while unable to produce evidence tending to show corruption on Burr's part, yet wishes to persuade the reader that "all the real probabilities are the other way."

Although Aaron Burr appeared, at first, to be the one likely to be chosen by the House, yet he was greatly handicapped for two reasons: First, he was opposed by Hamilton, who sought to influence a sufficient number of Federalists to vote with the Republicans to elect Jefferson. Secondly, he had to rely heavily on the majority of the Federalist members of the House, whose tactics was to create a wrong upon which they sought to take advantage of - to block the wheels of government, even if anarchy followed. 21

Colonel Burr must have fully realized the futility of making any personal exertions on his own behalf, for on December 16, 1800, he wrote to General Samuel Smith, Congressman from Maryland, and a close friend of Jefferson. To him Burr wrote that he had no desire to enter into competition with Jefferson, for the office of President; nor does he state that he would prohibit his friends from seeking to obtain the office for him, if they so desired. "It is highly improbable that I shall have an equal number of votes with Mr. Jefferson," he wrote, "but if such should be the result, every man who knows me ought to know that I would utterly disclaim all competition. Be assured that the federal party can entertain no wish for such an exchange. As to my friends, they would

21. Ibid., 592.
dishonour my views and insult my feelings by a suspicion that I would submit to be instrumental in counteracting the wishes and expectation of the United States. And I now constitute you my proxy to declare these sentiments if the occasion should require."

Aaron Burr continues this sentiment when writing to his son-in-law, Joseph Alston. From Albany he wrote: "The equality of Jefferson and Burr excites great speculation and much anxiety. I believe that all will be well, and that Jefferson will be our President." If Burr had any other intention, it is not likely that he would have withheld it from the husband of his own daughter.

This letter General Smith had published about December 29, 1800. Yet Congressman James A. Bayard wrote to Hamilton, on January 7, 1801, advising him of the letter Smith had received from Burr, but added that information had been received that Burr was willing to consider the office of President as a gift from the Federalists. "I assure you, sir," Bayard warns the already excited Hamilton, "there appears to be a strong inclination in a majority of the Federal party to support Mr. Burr. The current has already acquired considerable force, and manifestly increasing." 22

22. Davis, II, 75.
23. Ibid., II, 144.
Bayard's letter charging Burr with a personal desire to obtain the Presidency as a gift from the Federalists can be discounted, for we have it on the authority of Jefferson himself, who wrote to his daughter, Mrs. Marie Eppes, three days before Bayard wrote his letter, in which Jefferson praises Burr to her, for acting in good faith, when he refused to take part to defeat him in the House, where Burr had many friends. "His conduct has been honorable," he tells Mrs. Eppes. 25

When did the Federalist, with or without Burr's consent, agree to support him? As early as December 11, 1800, Gouverneur Morris noted in his diary that, it seemed that Burr had the best chance of being elected President by the House. Morris was a Federalist, a member of the House, and a friend of Hamilton. Another notation on the same day reads: "I state it as the opinion, not of light and fanciful but of serious and considerable men, that Burr must be preferred to Jefferson."26 And in a letter to Hamilton, he repeated the same sentiment; that the House seemed to prefer Burr to Jefferson, who was considered as "infected with all the coldblooded vices." The "Virginians," Morris reminded his friend, "cannot bear to see any other man than a Virginian in the President's

As events developed, the Virginians and particularly Jefferson, could not even bear to see anyone try to challenge their dynasty of the Presidency. Burr was considered a political scoundrel, merely because he dared to keep silent and allow his friends to make him a formidable rival of Jefferson, the leading aristocrat of the South. Burr dared to aspire for the office of President, but took no part in the House struggle, during the balloting. He quietly attended to his duties as a Representative at Albany, where he remained from November 5, 1800, to February 17, 1801.

While Aaron Burr was contented with permitting matters to take their natural course in Washington, the same cannot be said of Hamilton. In his correspondence during the weeks preceding the House election, he continued his letter writing to leading members of the House, urging the defeat of Burr. And when he discovered that he was making little impression on the Federalist members, he threatened to withdraw from the party and public life, "if the federal party play so dangerous a game as to support Burr, and he should succeed in consequence of it."28

Hamilton's letters are filled with venom for Burr, and

27. Ibid., 401. Jan. 26, 1801.
a determination to bring about the election of Jefferson, for whom he harbored little affection. However, he had not forgotten General Schuyler's defeat by Burr; and, furthermore, he had no scruples about making vicious attacks, in secret. A day after Christmas, in 1800, he informed his friend, Gouverneur Morris that, "if there is a man in the world I ought to hate, it is Jefferson. With Burr, I have always been personally well. But the public good must be paramount to every private consideration. My opinion may be freely used with such reserve as you shall think discreet."29

The House of Representatives assembled in Washington, the new capital of the nation, in February of 1801, for the first time, to select a President of the United States. There were a variety of rumors - rumors that Jefferson and Burr would serve as joint President; rumors that John Marshall, the new Chief Justice, would take it upon himself to appoint a President; rumors that the end of the Union was approaching.30

On February 9th, the House adopted the rules of procedure by which it would be guided. After sitting in the Senate Chambers, where the official Electoral College return was ascertained, it returned to its own Chambers to proceed with the balloting, each State voting, according to the

Constitution, by State - a State's vote being determined by its Representatives. The House doors were closed to the general public, but Senators and special guests were allowed to witness the House discharge its constitutional function.

From House members, who participated in the selection from the two highest candidates, we have some interesting narrations of what took place during those critical days. A letter from John Randolph to St. George Tucker, written on February 11, 1801, states that Representative Joseph Nicholson, of Maryland, was taken from his sick bed at home, and rushed to the House Chambers, in order to cast his ballot for Jefferson. And by so doing, he created a tie, thus, making it impossible for his State to record her vote, as votes had to be cast by States and not by members. 31

Another Representative, Harrison G. Otis, writing to his wife on February 11, 1801, thinks that Nicholson's action might kill him, and adds, "I would not thus expose myself for any President on Earth." Speaking as a Federalist, he declares that "if we are true to ourselves we shall prevail." 32

Representative Gallatin, too, wrote to his wife, on February 12, 1801, and advised her that they continued balloting, except when the House took time off to eat; that those who were determined to make Jefferson, or Burr, President were in no mood to yield to the other. The first letter which mentions an early balloting result is that of Representative William Cooper, writing to Thomas Morris on February 13, 1801. After several weary sessions, he wrote to Morris: "All stand firm. Jefferson eight - Burr six - divided two. Had Burr done anything for himself, he would long ere this have been president. If a majority would answer, he would have it on every vote."34

In 1800 there were sixteen States in the Union, and a total of one hundred and six members in the House of Representatives. Had the members been allowed to express their individual choice, instead of State vote, there is little doubt, judging from the letters written by Representatives, that a majority would have selected Burr. The Federalist controlled House wished to preserve the financial, commercial and industrial interests of the country, as established under the rule of their party. The Republicans had advocated social reforms, and restraint on business which to their way

34. Davis, II, 113.
of thinking meant anarchy, and agrarianism. Fortunately for
Burr, he had been a gallant soldier, had been instrumental in
founding the Manhattan Bank, in 1799, and had demonstrated
that he could be reasonably sensible and moderate in matters
of politics. Moreover, he was a New Englander by descent,
and had never been a blind follower of Thomas Jefferson. Many
Federalists, contrary to the wishes of Hamilton, were per­
sistent in their belief that the "College philosopher", from
Monticello could not be trusted as President. 35

The Boston Centinel, advocating Burr's cause said of
him: "He is the grandson of the dignified Edwards, the great
American luminary of Divinity, and a son of President Burr
who was a burning and shining light in the Churches." 36

This same publication also predicted that "Congress
will give Mr. Burr their suffrages. Mr. Burr has never yet
been charged with writing libelous letters against the
Government of his country to foreigners, and his politics
always have been open and undisguised." 37 In the Nation's
Capital, the Federalist, an organ of the administration,
declared: "Mr. Burr never penned a declaration of indepen-

35. The Diary and Letters of Gouverneur Morris,
36. Schachner, 201, citing Boston Centinel, Jan. 17, 1801.
37. Wandell and Minngerode, I, 204-5. Citing Boston
Centinel (note date).
dence, but he has engraved that declaration in capitals with the point of his sword. He has fought for the independence, for which Mr. Jefferson only wrote. 38

It was not until February 17, 1801, that Jefferson was chosen by the House of Representatives - after a week of balloting, and on the thirty-sixth ballot. The victor received ten States and the loser four. The decisive vote came just two weeks before the end of the constitutional government, which the Federalists hoped for, and which might have resulted in a legislative usurpation, a dissolution of the Union, or another revolution.

The student examining the dispute between Jefferson and Burr may well ask: Which of the two candidates was really guilty of intriguing? Admitting that Aaron Burr should have bowed to Jefferson in the House contest, in accordance to a pre-election agreement whereby Burr was to be elected Vice-President, was he bound to do so upon receiving Jefferson's letter of February 1, 1801? An inspection of his famous Anas reveals that, while he was making entries of gossips he had heard about Burr, he found it necessary to write a letter of apology for a certain letter he is supposed to have addressed to Judge Breckenridge. According to this letter of apology,

38. Ibid., 208, citing the Federalist (note date).
written on February 1, 1801, Jefferson advises Burr that he was apprised of its existence by a Mr. Mulford, who saw it while in New York. "...The letter seen by Mr. Mulford must be a forgery," wrote Jefferson to his running-mate, "and if it contains a sentiment unfriendly or disrespectful to you, I affirm it solemnly to be a forgery...A mutual knowledge of each other furnishes us with the best test of the contrivances which will be practiced by the enemies of both."39

Had Burr been aware of the entries in the Anas, would he have been justified in repudiating any promise he had entered into with the Virginian Republicans, after receiving the letter of apology? Unless we are to accept the opinion of a modern biographer of Burr, who claims that Burr lacked that capacity to advance himself and his cause, because his spirit was too proud, 40 Burr had every right to consider himself free from any agreement. Instead, he replied to Jefferson, on February 12, 1801, assuring him that Mulford

   The letter from Jefferson to Judge Breckenridge, if it ever existed, was lost or destroyed. The fact remains, however, that such a letter, whether forged or otherwise, must have existed. The correspondence between Burr and Jefferson, concerning this mysterious letter, seems to indicate that the latter was very much concerned not to antagonize his opponent.
40. Schachner, 51.
had "never told me what you relate and if he had, it would have made no impression on me."41

This letter was never published by Thomas Jefferson, and has, until recently, been overlooked by historians. The obvious effect has been unfavorable to Burr. To correct this unfavorable implication, and in the interest of historical truth, credit is due Mr. Nathan Schachner. Unfortunately, the works of Claude G. Bowers,42 and of Gilbert Chinard43 remain uncorrected on this important point.

Another important entry made by Jefferson, on February 14, 1801, mentions General Armstrong advising him that, in a conversation, Gouverneur Morris asked Armstrong: "How come it that Burr who is four hundred miles off has agents here at work with great activity, while Jefferson, who is on the spot, does nothing?"44 On the same day, more rumor came to the Virginian Statesman and he recorded a conversation that was supposed to have been held between Representative John Brown of Rhode Island and Representative Mathew Lyon, in which the

41. Ibid., 200, citing Jefferson MSS. Lib. of Cong.
former urged the latter to support Burr, saying: "What is it you want Colonel Lyon? Is it office, is it money? Only say what you want, and you shall have it." 45

The week before the final election was made by the House, Burr, according to Representative Bayard, had the means of becoming President, "but this required his cooperation", by "deceiving" and "tempting" certain members of the House. This was a golden opportunity for professional intriguer; however, Burr remained in Albany. 46 And when, undoubtedly, without Hamilton's consent, his law partner, David A. Ogden, was selected as emissary by the Federalists to interview Burr, and he reported that the Colonel refused to make any terms, in disgust he advised the leaders of his party to turn to Jefferson "as the less dangerous man of the two." 47

It seems that there should be little hesitation in accepting the words contained in these remarkable documents, made by Federalists, very close to Alexander Hamilton. After many months, the Federalists in Congress decided they could not bargain with Burr and turned to the only alternative - Jefferson. It was not until April of 1806, that more light

45. Jefferson's Writings (Ford, ed.), I, 442.
47. Schachner, 205, citing statement from David A. Ogden to Peter Irving, in the New York Chronicle, Nov. 25, 1802.
was thrown on the struggle to elect a President in February of 1801.

In spite of Jefferson's repeated denials of ever having entered into any bargain for the office of President, Bayard charged, on February 4, 1802, on the floor of the House, that President Jefferson did make certain promises, in return for House votes. Bayard named W. C. Claiborne, who was appointed Governor of Mississippi Territory; Edward Livingston, who was made District Attorney of New York; and his brother, Chancellor Livingston, who was sent to France as Minister. 48

During April of 1806, James A. Bayard and General Samuel Smith gave their depositions in connection with several law suits for libel, in which they denied, as far as they knew, that Aaron Burr took any steps whatever to secure his election as President. They further asserted that, as Federalists members of the House, they offered to terminate the contest by aiding the election of Jefferson, after soliciting, through his friends in the House, his views as related to public debt, commerce, navy, and patronage. The deadlock was ended, they declared, upon receiving a favorable reply from Jefferson, through his friend, General Smith. 49

49. Davis, II, 101 and 182.
Upon learning of these sworn depositions, Jefferson pronounced them as untrue statements, but qualified his vehement denial with these words: "I do not recall that I ever had any particular conversation with General Samuel Smith on this subject.50

Did Thomas Jefferson forget? His Anas is silent except for the words, "I do not recall."

50. The Complete Anas of Thomas Jefferson, 240.
CHAPTER III

WESTERN ADVENTURE OF BURR

To understand the conditions and circumstances which forced Aaron Burr to embark on his western expedition, an account of his social and political status, after the close of his career as Vice-President, seems most appropriate with the opening of this chapter.

In a long letter to James Lloyd, former President John Adams wrote, on February 17, 1815, describing the attitude of Washington and Hamilton toward Senator Burr, when he desired to appoint the Senator a brigadier general in the army. At the urging of Washington, who had been influenced by Hamilton, Adams was forced to appoint Hamilton.

"How shall I describe to you", wrote Adams, "my sensation and reflection at that moment? He had compelled me to promote...one of his own triumvirate, the most restless, impatient, artful, indefatigable and unprincipled intriguer in the United States, if not in the world, to be second in command under himself...But I was not permitted to nominate Burr. Burr to this day," added Adams, "knows nothing of this."¹

The writings of contemporaries are in accord that Aaron Burr had become too powerful and was crossing the path of leading aspirants for national leadership.

"I have never known," said John Adams, "in any country the prejudice in favor of birth, parentage, and descent more conspicuous than in the instance of Colonel Burr." And according to Henry Adams, no other man in the history of the nation had to face such a combination of rival politicians as Burr did, after his decisions in the repeal debate, in the Senate, over the Judiciary Act of 1801, in which he unwittingly antagonized both Republicans and Federalists.

Parton asserts that Burr acted impartially when the Senate attempting to remove the twenty-three judges appointed by the Federalists, just before John Adams' term as President expired. According to this author, Burr did everything possible to do what was legal, and quoted a letter written by Burr to Barnabas Bidwell in which he indicates his concern over the repeal debate then in progress.

"The power thus to deprive judges of their offices and salaries must be admitted; but whether it would be constitutionally moral, if I may use the expression, and if so,

2. Ibid.
whether it would be politic and expedient, are questions on which I could wish to be further advised. Your opinion on these points would be particularly acceptable."4 Burr also consulted A. J. Dallas, a Democrat and a lawyer of Pennsylvania, who advised the Vice-President against the repeal bill.5

When the Senate, on January 26, 1802, was tied on the vote to pass the repeal bill, Burr voted with the Republicans to proceed with the passage. Gouverneur Morris, now a Senator, writing to Robert Livingston said:

"There was a moment when the Vice-President might have arrested the measure by his vote, and that vote would, I believe, have made him President at the next election; but there is a tide in the affairs of men which he suffered to go by."6

The next series of disputes were to lead him to the most tragic act of his life - his duel with Alexander Hamilton. One James Cheetham, editor of the Federalist mouthpiece American Citizen, had since May 26, 1802, accused Burr of intriguing with the Federalists and attempted to bring about Jefferson's defeat in the House election of 1801. Cheetham published a series of nine letters, through his paper, and in spite of denials from leading Federalists, the libelous editorials continued. Cheetham supplemented his atrocious

4. Parton, Burr, 309.
5. Ibid., 310.
editorials with several malicious pamphlets, in which he questions Burr's conduct during February, 1801. The pamphlet titled *View of the Political Conduct of Aaron Burr's Political Defection*, was published on July 16, 1802, and received considerable attention. According to this publication, Burr never performed any acts worthy of his country, or his party.

Under the name of "Aristides", William Van Ness, Burr's friend, took it upon himself to reply to Cheetham, in a pamphlet titled, *An Examination of the Various Charges Exhibited Against Aaron Burr ... And a Development of the Characters and Views of His Political Opponents*. This was published in December of 1803, and was a vigorous attack on all of Burr's former friends - the Clintons, the Livingstons, and, of course, Cheetham. An examination of the reply reveals that Van Ness's work adequately matched Cheetham's ability at name calling.

De Witt Clinton, then Mayor of New York City, took an exception to the pamphlet and when the publishers refused to disclose the name of author, he brought suit for libel and recovered damages. 7

Aaron Burr was now becoming aware that he was being avoided by the President, and perniciously attacked in the open by the press and Hamilton. Letters written by Charles 7. Wandell and Minngerode, I, 246.
Cooper and General Schuyler, during February, 1904, and brought to Burr's attention, disclosed that "General Hamilton...Looked upon Burr as a dangerous man, and one who ought not to be trusted with the reins of the government." This letter, written by Cooper and dated April 23, 1804, contained the fatal sentence which made Burr decide he could not afford to overlook. "I could detail to you," wrote Cooper, "a still more despicable opinion which General Hamilton has expressed of Mr. Burr." This letter appeared in the Albany Register, on April 24, 1804.

There being no legitimate justification for such malicious attack - such as would exist in a heated political campaign - Burr called on Hamilton either to admit or deny the contents in the letter. Unfortunately, Hamilton refused to disavow, explain or apologize, but sought to argue about certain phraseology in his exchange of letters with Burr. On June 21, 1804, Hamilton received this ultimatum from Burr: "Political opposition can never absolve gentlemen from the necessity of a rigid adherence to the laws of honor, and the rules of decorum. I neither claim such privilege nor indulge it in others."9

That Burr's letter of June 21, to Hamilton, expressed

9. Ibid., 297.
his life tenet in such matters is supported by Charles Biddle, a contemporary, and Burr's correspondence. According to Biddle, "he never knew Colonel Burr speak ill of any man." Burr's letters indicate firmness, but also left the door open for Hamilton to make amend for his many months of secret attacks on his political opponent. He chose to test Burr's life tenet, with the resulting famous duel, July 11, 1804, and his own tragic death.

While dueling was a common practice then - Hamilton's son having been killed in a duel three years before - Burr's engagement with Hamilton sealed his fate socially and politically. He became immediately aware that he was a marked man; to be destroyed once and for all. Parton believes that it was not the duel which made Burr an outcast, but the many months of calumny indulged in by his many political enemies.

With two indictments hanging over his head, as result of the duel, and with several warrants issued by the coroner's jury to apprehend all his friends for questioning, Burr realized that his home state had become dangerous territory. He made plans, therefore, to flee to the Southwest.

As early as 1802, while Vice-President of the Senate, Aaron Burr indicated his interest in the South and Southwest. Writing to his son-in-law, Joseph Alston, he said: "It has for months past been asserted that Spain had ceded Louisiana and the Floridas to France, and it may, I believe, be assumed as a fact. How do you account for the apathy of the public on this subject? To me the arrangement appears to be pregnant with evils to the United States. I wish you to think of it, and endeavor to excite attention to it through the newspapers."\(^\text{12}\)

It is not known when Aaron Burr definitely turned to the West. It can be said with some certainty that it was July 12, 1804, the day after the fatal duel, when Hamilton died from his mortal wound; or perhaps, January 26, 1804, as suggested in the diary of President Jefferson. The diary speaks of a visit from Burr. The visitor, according to the President, spoke of retiring from the Vice-Presidency, after March, 1805, for the best interest of the party. After expressing his respect for the President, Burr is quoted as requesting some Presidential favor in order that the world would know that he still enjoyed the esteem of the Chief Executive.

The President gave Burr no encouraging words, but recorded, after the interview, these strange words: "I had never

\(^{12}\text{Davis, II, 171.}\)
seen Colonel Burr till he came as a member of the Senate, in 1791; that Burr's conduct very soon inspired me with distrust. I habitually cautioned Mr. Madison against trusting him too much." This entry is a glaring revelation of Jefferson's attitude toward Burr while courting and accepting his political support in 1800.

Aaron Burr retired as President of the Senate, in March, 1805, under trying conditions. His Richmond Hill home had been sold under a forceful sale, in order to pay a portion of his debts. "In New York", he wrote to his daughter, "I am to be disfranchised, and in New Jersey hanged. Having substantial objections to both, I shall not, for the present hazard either, but shall seek another country." Burr had no thought of being defeated, for he ended with these words: "You will not, from this conclude that I have become passive, or disposed to submit tamely to the machinations of a banditti. If you should you would greatly err."14

Apparently, Burr had attempted to reform politics and had failed, but refused to admit it. As Vice-President, he had been succeeded by the aged George Clinton of New York. He was now faced with two great political powers, each interested to destroy him. The Virginian politicians, who

wanted to assure James Madison as Jefferson's successor, in 1808, were relieved; the Clintons and the Livingstons now well entrenched in high offices, through patronage denied Burr, were to remain politically unchallenged.

Burr's only consolation during these days must have been his last day in the Senate, March 2, 1805. On this day, Senator Plumer of New Hampshire made this memorandum: "His address was very correct and elegant and the sentiments very just. He said he hoped that the Constitution of the U. S. would never be destroyed but he ventured to predict that if such an unfortunate event should ever take place, on this floor it would meet with its last and most noble defence. This house is the last portion of the people, the last branch in the government that will abandon it. As to his conduct in office - he said he had with great care endeavored to know no party - no friend or political enemy - He had acted with promptitude and decision."15 As Aaron Burr bowed and left the Senate, Plumer noted that "several shed tears very plentifully."

John Quincy Adams tells of the Senate's reply to Burr's farewell address, which passed unanimously, thanking the re-

tiring Vice-President for his "impartiality, integrity, and ability with which he had presided in Senate, and their unqualified approbation of his conduct in that capacity."  

When Aaron Burr finally decided to seek his fortune in the West, he found that Jefferson's policy of the West had three main objects; To keep the West within the Union; to let nothing interfere with free navigation of the Mississippi River, in the interest of commerce; and prevent any aggressive European nation to displace decaying Spain, which might draw the United States into interminable European wars.

On October 15, 1802, the long-protracted French-Spanish negotiations were consummated, and the vast Louisiana Territory was ceded back to France, after Napoleon had pledged to Spain that he would never alienate it. This important transaction altered the American position, as one of the world's strongest and dreaded powers had now become our neighbor, and taken control of the mouth of the Mississippi. Believing that Napoleon's intentions were to establish an empire in America, Jefferson dispatched James Monroe and Robert R. Livingston to confer with the French dictator regarding some settlement under the Pinckney Treaty, signed in 1795.

Fortunately for the United States, Napoleon's hands became tied in another war with England and, regardless of his pledge to Spain, accepted the American envoys' offer of $15,000,00 and the representatives of each country signed, May 2, 1803, the **Louisiana Purchase Treaty**, which the American Senate and President, somewhat in a dilemma, for lack of constitutional authority, promptly approved the same year. The demands for Constitutional amendment to approve the stupendous transaction soon disappeared, as Jefferson's popularity increased, and no such amendment was ever passed. The realization that the President's act had doubled the size of the nation, and extended its laws and authority into the great southwest was considered sufficient authority.

Many of the people in the newly acquired territory were soon again dissatisfied, due to renewal of disputes with the Spaniards over boundaries, and because the Federal offices were filled with politicians from the East. Moreover, many thought it undesirable to be part of a government whose capital was several months' journey from their homes. It was in this West that the ambitious Burr hoped to engage in some scheme that would mend his broken fortune and restore his reputation. According to Parton, "neither his diary nor in his voluminous correspondence, published or unpublished, is
there the slightest reference to any but ordinary and legitimate objects during the year 1805."18

Having made a survey of the conditions in the Southwest, Burr was back in Washington in the winter of 1805-6, perhaps to raise funds and to enlist the support of men with military ability; particularly leaders who were at variance with the Administration. General William Eaton and Commodore Truxtun were among the first to lend their ears to Burr's plans. It is not known whether Eaton was requested to see the President, in view of his coolness toward the Administration that refused to recognize his claim for large sums of monies he had expended for military campaigns in Africa. However, Eaton did interview Jefferson and urged him to give Burr a foreign mission, in order to remove him from his sinister western activities, but the proposal was rejected. The President, according to Eaton, had complete confidence in the people of the West.19

While Jefferson was assuring Eaton of his confidence in the westerners not to rise against the Spaniards, Henry Clay, a citizen of Kentucky was declaring that "the whole country was in commotion and at the nod of the Government, would have

fallen on Baton Rouge and New Orleans, and punished the
treachery of the perfidious (Spanish) Government." The
Palladium of Frankfort, Kentucky, also used forceful words on
September 18, 1806, and said: "Kentucky has the advantage of
invasion; and she no doubt will use it, if unsupported by the
Union; she moves along to the combat; she is situated on the
waters rapidly descending to the point of attack; she will
overwhelm Orleans and West Florida with promptitude and ease." The admission of Kentucky and Tennessee into the Union,
and the acquisition of Louisiana was a signal to Spain to
employ American secret agents to prevent further expansion of
the United States, and to stir up the Indians against the
western whites. While New England remained indifferent to
these problems, the Southwest demanded that their Government
obtain relief for them. Some American were often terrorized
into seeking Spanish allegiance in order to obtain protection.
It was for this purpose that the Spanish Governor, Miro, main-
tained Americans on his payroll, and among them were James

20. G. D. Prentice, Biography of Henry Clay, 77,
J. J. Phelps, New York, 1831.
Dodd, Mead and Co., New York, 1803.
22. Wandell and Minnigerode, II, 4-7; and Parton, Burr, 399.
In the opinion of Randall, Burr and Wilkinson accepted Spanish gold in the hope of preventing the United States from pressing westward on Mexico's territories. However, neither one of them had any intention of being true, or becoming subservient to Spain. Moreover, if Burr, Wilkinson and others had any lawful design about the West, it was not only to dismember the Union, but to make Mexico part of Western America and build up a vast empire which would have been independent of the United States. While this three volume work is the official biography of Jefferson, it was written from the viewpoint of a friend and before newly discovered correspondence relative to the Burr conspiracy was published. Nor can Burr be classified as a regular pensioner of Spain.

When President Jefferson heard rumors of dissatisfaction in the West and the threats of separation, he wrote to Joseph C. Breckenridge, August 12, 1803: "If they see their interest in separation, why should we take sides with our Atlantic rather our Mississippi descendants? It is the elder and the younger brother differing. God bless them both, and keep them in union, if it be for their good, but separate them if it be better."24

A year after President Jefferson wrote this letter, there were several conferences between members of Congress from the

New England States, the Spanish and English Ministers, and Aaron Burr. In the course of the conferences, plans were discussed for the separation of New England States and the Western States from the Union. It would have been to the best interest of England and Spain, if such a dismemberment came about. 25

It may be concluded, thus, that Aaron Burr was encouraged in his later plans by representatives of foreign powers, as well as American political leaders. As to the ministers of Great Britain and Spain, Burr did deliberately and dishonestly mislead, by making promises he had no intention of fulfilling, merely to extract money from them. 26

While Burr was in the process of completing his western plans, a Latin American adventurer, Francesco de Miranda, prevailed on a group of Americans to charter the Leander and sailed to invade South America on February 2, 1806. This expedition had some resemblance to Burr's project, in that each was to effect, although the details varied, a filibustering adventure organized on American soil and against a friendly power. Secondly, each enjoyed a limited and indirect support

of the Government, whose officials were later involved in a trial. Lastly, each project was betrayed by a traitor, requiring a hasty repudiation by the Government. 27

As a means of raising revenue, Burr's agent, Jonathan Dayton, revealed Miranda's plans to the Spanish Minister, the Marquis Yrujo. Protests of breach of neutrality were lodged on the President, and Secretary of State Madison. The Spaniard became so indignant that he was ordered out of Washington, but refused, asserting that he took his orders only from his Catholic Majesty. The President was further embarrassed by Congress's declaration that the Spanish envoy did not have to take orders from Madison, and did not have to leave the country until recalled by his Government. 28

Jefferson and Madison made positive denials of any knowledge in the Miranda's affair, and promptly removed from office Colonel William Smith, United States Surveyor. Smith and his assistant, Samuel Ogden, were indicted for breach of the neutrality. Their defense was that they had acted in accordance with the wish of their superiors; that the expedition "was begun, prepared and set forth with the knowledge and approbation of the President...and of the Secretary of State of the United States." 29

27. Wandell and Minnigerode, II, 62.
28. Ibid., 65.
29. Ibid., 66.
Counsel for Smith and Odgen ordered subpoenas be issued for the Secretaries of War, Navy and Treasury. All were instructed to ignore the court order and none appeared, by order of the President.

From April 10, 1805, Burr was seriously engaged in raising funds for his western adventure. He required much money and many recruits, and having heard of Harman Blennerhassett, a wealthy emigrant from Ireland, he hastened to Blennerhassett Island, which was part of Wood County in Ohio. Until the cultured Blennerhassett met Burr, he seemed to have been contented living a life of quiet and solitude with his wife. Burr's talk of great wealth in the West aroused the Irishman's enthusiasm and after Burr left, he continued to talk and write about the expedition and the expediency of a separation of the western States from the Union. 30

Burr's next step was at Cincinnati, where he talked with Senator John Smith and Jonathan Dayton about the Indiana Canal Company, a project which Burr was interested in and which had been approved by the Territory of Indiana and incorporated by a special Act of the Indiana Legislature. Burr, Smith and Dayton were members of the board of directors.

At Louisville Burr was greeted by Senator Brown and

General Adair, two prominent Kentuckians. Nashville was Burr's next important stop. There, he was met by General Andrew Jackson and remained five days at his home. Kentucky being the seat of hatred for the Spaniards, the two must have talked much about Jefferson's indifference of the western American mistreatment at the hands of the "Dons", a subject very dear to General Jackson.

Burr's next important conference was held with General Wilkinson, at Fort Massac, where he spent four days, discussing, perhaps, the possibility of the country going into war against Spain and the expedition into Mexico. Wilkinson gave Burr a letter of introduction to Daniel Clark, a wealthy New Orleans merchant, who helped to make Burr's stay there both pleasant and profitable.

New Orleans, in 1805, was a city with about 9000 inhabitants, and did a large volume of business by hundreds of sea-going vessels and river flat-boats. The chief defense of the city was a volunteer company of Americans and Creoles, under the command of Daniel Clark. 31 An Englishman visiting this city in 1797, writes of its six gates, and that the inhabitants were a mixture of English, Irish, Scotch, American, French and Spanish. 32

While in New Orleans, Burr found conditions favorable to his plans. There were Creoles who were dissatisfied because citizenship was denied them and because of ill treatment by Governor Claiborne; there was the Mexican Association consisting of Americans consumed with a desire to invade Mexico at the earliest possible moment. The appearance of Aaron Burr caused these organizations to look to him for advice and leadership. When Burr started on his long journey East, he was provided with the means of transportation, and had three hundred dollars which he did not possess when he entered the gay city, three weeks previously. 33

In November of 1806, Burr was back in Washington and learned that Anthony Merry, the English Minister, had made no progress; could not assure Burr of obtaining a British squadron, nor the needed one hundred and ten pounds. Merry, in fact, was recalled and Burr turned to the Marquis de Yrujo, who, unlike Merry, was a shrewd Spaniard. Perhaps, wishing to profit by Merry's mistake, Yrujo demonstrated no enthusiasm for Burr's aid, Dayton, except when informed that there were plans on foot to seize the administration at Washington, together with the public money and arsenal. Yrujo seemed to be willing to add another pensioner to his payroll, but his

33. Wandell and Minnigerode, II, 46.
government refused to approve, and no contribution was made. 34

It must be noted at this time that Burr never mentioned names, nor spoke in precise terms of his plans. He merely gave broad outlines, which he promised to clarify at some future day. It is incorrect to charge, as Randall does, that Burr went about mentioning expeditions against Mexico; revolutionizing the Western States, and making New Orleans the capital of a new empire. These charges were to be advanced by his enemies. When Burr was forced to clarify his plans, he always maintained that he contemplated an invasion of Mexico only after the United States and Spain were at war. Most modern historians - McCaleb, Beveridge, Wandell and Schachner - after exhaustive researches have discovered evidence supporting Burr's declaration.

Professor McCaleb's research disclosed that only the conferences between Burr, Merry and Yrujo clearly show Burr's designs and plots. These two foreign ministers were convinced that Burr intended the separation of the West from the Union. However, as suggested by McCaleb, if we review these reports of Merry and Yrujo, to their respective governments as a whole, together with newly discovered evidence, it is reasonable to conclude that Burr's intrigue with these diplomats was only a deception used to increase the hatred of European powers for

34. Ibid., II, 56.
the American Republic, and, thus, authorize their representatives at Washington to make financial advancements for Burr's projects. It remained for Julien De Pestre, one of Burr's agents, to state, either through stupidity or for money, that Burr's expedition called not only for the severance of the Union, but also to invade the Spanish possessions and Mexico. 35

De Pestre's revelation must have confirmed Yrujo's suspicion of Burr's movements. The minister lost no time in dispatching messages of warning to Spanish officials in the Floridas and along the western boundaries. Carlos Grandpre, one of the officials stationed at Baton Rouge, wrote to Governor Claiborne at New Orleans, on April 8, 1806, for information regarding these hostile rumors and received this reply:

"Your Excellency's of the first instant, has been received, and to quiet your apprehension as far as is in my power, I hasten to assure you that I have never before heard of the hostile preparation which you seem to think are on foot in Mississippi Territory." 36

The Governor was not to remain long at peace, however, for unbeknown to him, Wilkinson's conduct was forcing him to write to Acting Governor Mead, of Mississippi, on September 9, 35. McCaleb, 96. 36. W.C.C.Claiborne, Official Letters of W.C.Claiborne, D. Rowland, Ed.), IV, 287. State Department of Archives and History, Jackson, Miss., 1917.
1806, that "my present impression is that all is not right. I know not whom to censure, but it seems to me that there is wrong somewhere." 37

If Claiborne suspected Burr at this time, his suspicion was temporarily diverted upon receipt of a letter from Andrew Jackson, dated November 12, 1806, in which he was advised to watch the General in Louisiana, - the only General of the United States in that territory being James Wilkinson. "Be upon the alert," warned Jackson, "keep a watchful eye on our General...You have enemies within your own City...I love my Country and Government, I hate the Dons - I would delight to see Mexico reduced, but I will die in the last ditch before I would yield a part to the Dons or see the Union disunited." 38 This valuable advice went unheeded, for on December 3, 1806, and at the urging of Wilkinson, Governor Claiborne issued a statement in which he informed the people that General Wilkinson had discovered an existing conspiracy "having for its objects, the revolutionizing of Louisiana and Mexico." The statement contained quotations from Burr's ciphered letter. 39

Andrew Jackson never lost confidence in his friend, Burr, and those who pronounced Wilkinson incapable of intriguing with the Spanish officials perhaps did not know him as well as

37. Ibid., 6.
38. Ibid., IV, 53-54.
39. Ibid., 38-42.
Jackson, or were never aware of a letter sent by Yrujo to his
government. "According to appearances," said the Minister, in
January 28, 1807, "Spain have saved the United States from
separation of the Union which menaced them...Wilkinson is en-
tirely devoted to us...He enjoys a considerable pension from
the King..."40 Thus, only a few months before Burr's trial
Wilkinson was still drawing gold from the Spaniards.

Aaron Burr brought his adventure to an end when he wrote
his famous letter in cipher, July 29, 1806, to General Wilkin-
son. This letter became one of the most important documents
at the Richmond trial. In brief, it acknowledged a communica-
tion from Wilkinson; advised that all plans were in readiness
to proceed; that Wilkinson was to be in charge of the recruits,
and second in command only to Burr. "Draw on Burr for all
expenses, etc." concluded the letter, "the people of the
country to which we are going are prepared to receive us. The
gods invite us to glory and fortune; it remains to be seen
whether we deserve the boon."41

Nothing was stated in the letter of declaring the in-
dependence of the Western States and Territories, as maintained
by Merry and Yrujo. The best interpretation that could be
obtained, even after it had been altered and deciphered by

41. Ibid., 253-4.
Wilkinson - an admission he made at the trial - and supported by oral testimony, was that only the Spanish possessions were to be attacked. However, it is reasonable to assume that, since Wilkinson's alterations were made to suit his convenience and to save himself from implication, the exact wording will never be known.

An important question which historians have been unable to agree on is when and why Wilkinson turned against his friend, Burr. Was it when Miranda's expedition failed and, perhaps, the Administration gave up the idea of a war with Spain. Did he abandon Burr when, on September 27, 1806, the Spaniards evacuated Bayou Pierre and withdrew on the western banks of the Sabine River, without a fight? Again, it might have been when Wilkinson received Burr's letter in cipher, became alarmed and decided to advise Jefferson of the expedition and to crush the movement. Probably all three reasons caused Wilkinson to reach his final decision, but as far as Jefferson was concerned any of the reasons was acceptable to him, for, if Wilkinson had decided to crush the expedition, Jefferson had decided to crush Aaron Burr.

Wilkinson's letter to the President, dated October 20, 1806, reached him November 25, and Jefferson issued his Proclamation two days later. It should be noted that neither
in Wilkinson's dispatches, which became numerous after his letter of October 20, nor in the Proclamation was the name of Burr mentioned. However, Wilkinson expressly and falsely stated that he was ignorant who the prime mover of the conspiracy was. And in his Sixth Annual Message, December 2, 1806, the President again mentioned no names, or violation of United States laws, except to state that "a great number of private individuals were combining together, arming and organizing themselves contrary to law, to carry on a military expedition against the territories of Spain.43

James Wilkinson knew about whom he was writing, and President Jefferson was well aware of Burr's activities in the West.44 What was their object in pretending not to know of Burr's actions? The answer, in the opinion of this writer, is found in the court proceedings before Judge Rodney in the Mississippi Territory, and before John Marshall at Richmond, Virginia. For years Burr's political enemies had desired to find him in some vulnerable situation, and now they had an opportunity to make the most of it. Burr was to be driven into a net, never, it was hoped, to escape.

42. Parton, Bùrr, 432. See also, J. D. Richardson, a Complete Compilation of the Messages and Papers of the Presidents, 1789-1897, 404. Published by Authority of Congress, Washington, D. C., 1900.
43. Ibid., 405.
CHAPTER IV

BURR INDICTED FOR TREASON

Aaron Burr retained the support of public opinion in the Southwest until the publication of the Proclamation, November 27, 1806. Thereafter, the people began to favor Jefferson, believing that the President possessed strong proofs against the conspirators. Many of Burr's former friends now became his outspoken enemies, and were ready to aid the Federal officials in suppressing the expedition.¹

Upon receipt of General Wilkinson's letter, dated October 20, 1806, in which the name of Burr is still undisclosed, the President is advised that a powerful group, extending from the Western States to New York, had been formed for the purpose of leading an expedition into Mexico.² On the following day, the General dispatched another letter to Jefferson in which he said:

"Although my information appears too direct and circumstantial to be fictitious, yet the magnitude of the enterprise, the desperation of the plan, and the stupendous consequences with which it seems pregnant, stagger by belief and excite doubts of the reality, against the conviction of my senses; and it is for this reason I shall forbear to commit names, because it is my desire to avert a great

1. McCaleb, 197.
public calamity, and not to mar a salutary design to injure anyone undeservedly."

The author of this remarkable letter was informing the President that he was attempting to uncover the names of the conspirators with great care; that no one not connected with the expedition should be made to suffer. The truth is that he was preparing for his violent usurpation of power in New Orleans. However, the President was to be misled gradually; Wilkinson was to picture himself as a man with a great task before him. And, so he ended his letter with more falsehood:

"I have never in my whole life found myself in such circumstances of perplexity and embarrassment as at present; for I am not only uninformed of the prime mover and ultimate objects of this daring enterprise, but am ignorant of the foundations on which it rests of the means which it is to be supported, and whether any immediate or collateral protection, internal or external, is expected."

This letter reached the President on November 25, 1806, and on the same day the Cabinet was summoned in haste. According to the Anas, the members present agreed that the object of the conspirators was against Mexico; that the Executive powers be used to frustrate any enterprise which was hostile either to the United States or Mexico. 4

There can be little doubt that the President's Proclamation, and his message to Congress, of December, 1806, not

3. Ibid., October 21, 1806.
only excited the country, but committed Jefferson and his Administration to the opinion of Burr's guilt. It now became imperative to bring about the indictment and conviction of the former Vice-President. To accomplish this task, the entire machinery of the Government was set in motion; an army of Federal agents, and officials overran the nation, seeking evidence against Burr. 5

It was not till the 16th of January, 1807, that Congress took notice of Burr's activities, when John Randolph introduced a resolution in the House of Representatives. The resolution demanded that the Chief Executive submit to the House a full and complete report on the Burr conspiracy, and state what steps had been taken for its suppression. According to Professor McCaleb, Randolph's resolution had two purposes in view: To embarrass the President because he wished to avoid conflict with Spain, while the people in the Southwest clamored for war; secondly, to prove that Burr's enterprise was not an independent movement, but that Spain was indirectly supporting any adventure which aimed to detach the Western States from the Union. 6

5. Parton, Burr, 455, and Wandell and Minnigerode, II, 176.
President Jefferson complied with the House resolution on January 22, 1807. His report was accompanied with Burr's letter in cipher, and Wilkinson's letters to Jefferson. The House was informed that the Chief Executive had arrived at three conclusions: First, that Burr intended to separate the Union from the Alleghany Mountains; second, to attack Mexico; third, that the purchase of the Bastrop tract of land on the Washita was a mere pretext, or cover under which Burr's followers were to retreat in the event of failure of the expedition. 7

The House of Representatives, however, was not convinced with the President's attempt to justify Wilkinson's reign of terror in the Southwest, and when the Senate bill suspending the operation of the writ of habeas corpus for three months reached the House, it was rejected. Representative Eppe, Jefferson's son-in-law, led the fight against the bill, which the President wished enacted into law to strengthen Wilkinson's hands. In a stirring address, Eppe denounced the bill in these words:

"Is there a man present who believes...that the public safety required a suspension of the habeas corpus? Shall we, sir, suspend the chartered rights of the community for the suppression of a few desperadoes? - of a small banditti already surrounded by your troops?... I consider the means at present in operation amply sufficient for the suppression of this

combination. If additional means were necessary, I should be willing to vote as many additional bayonets as shall be necessary for every traitor. I cannot, however, bring myself to believe that this country is placed in such a dreadful situation as to authorize me to suspend the personal rights of the citizens, and to give him in lieu of a free Constitution the Executive will for his Charter. Believing that the public safety is not endangered, and that the discussion of this question is calculated to alarm the public mind at a time when no real danger exists, I shall vote for the rejection of the bill in its present stage."

Eppe's address to the House was a declaration that he refused to be a blind follower of General Wilkinson, as his father-in-law seemed to be. Moreover, the President's report on Burr stated that "on the whole, the fugitives from the Ohio with their associates from the Cumberland or any other place in that quarter, cannot threaten serious dangers to the City of New Orleans." It is very probable that Eppe refused to support Jefferson's bill because it would have made Wilkinson practically a dictator in the West; would have given the General another weapon by which he could spread terror and then declare that Burr's followers were the cause of the trouble. 9

While the debates kept the Congress occupied, Burr

8. Ibid., 195.  
experienced his first arrest in the hands of the United States District Attorney for Kentucky, Joseph Hamilton Daveiss, a Federalist and a great admirer of Hamilton, whose middle name he bore. On November 3, 1806, Burr appeared before Judge Innis, to answer the charges of violating the laws of the United States by being engaged in an unlawful enterprise. Henry Clay, who had been elected to the United States Senate less than a week, was Burr's counsel.

Daveiss' motion that Burr be arrested on the charges alleged was denied, and a grand jury was impanelled. When the District Attorney failed to produce his principal witnesses - after several continuances - the court discharged the jury and the defendant. The people, it seems were overwhelmingly in sympathy with Aaron Burr. They charged Daveiss with manifesting personal hatred and attempting to persecute the accused merely to enrich his own political fortune.10 Prosecutor Daveiss, however, explained his failure to Jefferson by complaining that Burr's friends were supporters of the President.11

Burr and his party proceeded on their journey southwestward. General Wilkinson, apparently aware of Burr's approach, became more violent. On his own authority he demanded of

10. Schachner, 344; Parton, Burr, 418, and Randall, III, 183.
11. McCaleb, 181, or see A View of the President's Conduct, by Daveiss, page 7.
Governor Claiborne to suspend the writ of habeas corpus and declare martial law. Failing to persuade the Governor, he turned to the Territorial Legislators who refused to be coerced. As a challenge to the General, this body passed a Memorial to the Congress of the United States, advising it of Wilkinson's conduct. Protesting to the National Legislative body, the Memorial charged:

"Though nothing can justify, yet circumstances of extreme danger in the moment of invasion, during the suspension of civil authority, might excuse some of these violent measures. But here no foreign enemy or open domestic foe was then, or has yet been proved to have been within any perilous distance of this city, or that treason lurked within our walls... The acts of high-handed military power to which we have been exposed are acts too notorious to be denied, too illegal to be justified, too wanton to be excused."12

This document speaks for itself. It is not in harmony with certain historians, who assert that the Louisiana legislators were prepared to make their state part of Burr's new empire.13 But it is in accord with the findings of the President's investigator, who reported that the Creoles were friendly to the Union and that he was unable to discover anything that might criminate them.14

General Wilkinson was pressing Governor Claiborne for more cooperation in quashing the public sentiment against him. The troops, headed by Colonel Burr, were not in sight and the alarmed people were becoming skeptical, especially the former friends of the Colonel. On December 12, 1806, the Governor wrote to Wilkinson:

"I am sincerely desirous to cooperate with you, in all your measures...many good disposed Citizens do not appear to think the danger considerable, and there are others who (perhaps from wicked Intentions), endeavor to turn our preparations into ridicule." 15

Finally, in January of 1807, Wilkinson was able to induce the New Orleans City Council to pass an ordinance requiring all persons and goods, entering the city, to be reported to city officials. The people resented this form of censorship, and the Orleans Gazette, on January 8, 1807, declared that such laws "served only to agitate and mislead the public mind. From the best information we can collect the object of Colonel Burr is obviously an attack upon Mexico, and not, as has been alleged, the parricidal attempt to dismember the Union." 16

Later, this same publication ridiculed the warning by

certain public officials, who appeared to be in a panic over Burr's approaching army. In May it said, editorially:

"That such an army was approaching was never believed or affected to be believed but by those who were interested in keeping up the alarm; by the great men, as all their greatness depended on it, and by their little ones, because they have among them some snug contract for supplying the government with materials of defense." 17

On December 23, 1806, the several boats in charge of Burr met those in charge of Blennerhassett at the mouth of the Cumberland River. The entire flotilla, consisting of nine vessels and about sixty young men, with some necessary arms and supplies, then proceeded toward the Southwest. Arriving at Bayou Pierre, near Natchez, in the Mississippi Territory, six days later, Burr was advised of the Presidential Proclamation, and learned that he was wanted as a rebel. Territorial officials were invited to inspect Burr's vessels, and District Attorney Pointdexter, Mayor Shields, and Acting Governor Cowles Meade accepted the invitation. This investigation was permitted by Burr, after Meade had pledged to protect Burr and his men, provided there was no violation of the law.

Acting Governor Meade's findings were published in the Orleans Gazette. His report stated that Burr's expedition had been exaggerated; that the alleged army consisted mostly of

17. Ibid., May 8, 1807.
young men, just out of school; that they knew of no design against the Government. 18

The machinery of government had been set in motion, however, and Meade's report to Governor William was completely ignored. William ordered Burr be seized and taken before Federal Judge Rodney at Washington, the Mississippi Territorial Capital. On February 2, 1807, Burr appeared before Rodney, who was sitting with Judge Bruin. The District Attorney made a motion to discharge Burr. The motion, perhaps, was made on his personal investigation, with Meade and Shield. Rodney overruled the motion and ordered the defendant be turned over to the grand jury.

Upon investigation the Territorial grand jury refused to indict Burr, declaring the defendant had not violated any of the laws of the United States or of the Territory; nor "given any just cause of alarm or inequietude to the good people of the same." The grand jury took this opportunity to rebuke General Wilkinson and all other public officials who were supporting him in spreading the reign of terror in the Southwest. The findings concluded with these significant words:

"The grand jurors present, as a grievance, the late military expedition, unnecessarily, as they conceive, fitted out against the person and property of the said Aaron Burr,

18. Ibid., 268, Jan. 30, 1807.
when no resistance had been made to the civil authorities.

The grand jurors also present, as a grievance, destructive of personal liberty, the late military arrests, made without warrant, and as they conceive, without other lawful authority; and they do sincerely regret that so much cause has been given to the enemies of our glorious Constitution, to rejoice at such measures being adopted, in a neighboring Territory, as if sanctioned by the Executive of our country, must say the vitals of our political existence, and crumble this glorious fabric in the dust."

The haughty old Judge, father of United States Attorney General, Caesar A. Rodney, was astonished at the audacity of the grand jury. But Rodney was part of a great governmental machine, now moving against Burr, and resorted to the unheard of proceeding of refusing to release Burr's bond. It became obvious to Burr that a net was being set for him. Was Rodney planning to keep him within the jurisdiction of the Court, without any legal authority, until Wilkinson could seize him? He had been informed that Wilkinson wanted some of his aids "cut off." Burr's life was thus in danger.

Burr consulted his friends and it was agreed that he leave the jurisdiction of the court until he was assured that his civil rights would not be violated. There is no evidence that Burr harbored any intention to leave the United States,

19. Parton, Burr, 440-41. Also see Randall, III, 185.
as some authors claim. As an avowed enemy of Spain, it does not seem likely that Burr would have further endangered his life by taking such a step. Judge Rodney and Governor William declared Burr a fugitive from justice and forfeited his bond.

While Burr remained in hiding, General Wilkinson had ordered the arrest of five of Burr's associates, and sent them to the District of Columbia Circuit Court for trial. Erich J. Bollman and Samuel Swartwout were the first prisoners transferred to Washington, where they arrived on January 22, 1807, and were committed to jail. The District Court, consisting of two Republican judges and one Federalist, voted to sustain the arrest warrant signed by Wilkinson. An appeal was taken immediately to the United States Supreme Court for a writ of habeas corpus. Luther Martin appeared for the defendants.

The Supreme Court, basing its decision on Burr's cipher letter and the affidavits of Eaton and Wilkinson, rendered an opinion on February 21, 1807. Chief Justice Marshall, reading the majority opinion held that there was no evidence whatever of acts constituting treason under the Constitution "To conspire to levy war and actually to levy war are distinct offenses. The first must be brought into open action by an

22. McCaleb, 276.
assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Having concluded his decision, Marshall added an obiter dicta, which the Government attempted to rely upon in convicting Burr. In his dictum, the Chief Justice said:

"If a body of men be actually assembled for the purpose of effecting by force a treasonable purpose; all those who perform any part, however minute, or however remote from the scene of the action, and who are actually leagued in the general conspiracy, are to be considered as traitors." 24

The other defendants, including General John Adair and Peter Ogden appeared before Judge Nicholson and he discharged them for lack of sufficient evidence. The Judge, writing to President Jefferson, told of his experience:

"Very much to my surprise and mortification there was no proof of any nature whatsoever with them, although I administered an oath to Lieutenant Luckett with a view to acquire the necessary information from him. He could give none except the common conversation of the day. And I was under the necessity of discharging the prisoners." 25

Upon his release, General Adair demanded an investigation by the Attorney General against Wilkinson, but was persuaded that evidence was lacking. Adair then instituted legal action

24. Ibid.
for damages and recovered a judgment for $25,000, which was eventually paid by Congress.26

It was not until February 18, 1807, that Burr's adventure was definitely brought to an end. On this day, as he was fleeing from the Mississippi Territory, he was recognized by Nicholas Perkins, a young lawyer. The actual arrest came shortly after Perkins had directed Burr to the home of Colonel Hinson, in the village of Wakefield, Washington County, Alabama. Young Perkins was unable to persuade the sheriff to seize Burr, after the officer had met the former Vice-President. And, according to Parton, the sheriff "came to arrest and remained to admire."27

The thought of the reward - $2,000 - was a tremendous temptation to the penniless barrister, and he obtained the assistance of Lieutenant Edmund P. Gaines, in command at Ft. Stoddard, Perkins, Gaines and four soldiers overtook Burr about two miles out of Wakefield, and when the soldiers presented their arms, Burr admitted his identity. After several weeks of imprisonment at the Fort, Gaines became uneasy over his distinguished prisoner, and turned him over to Perkins and several soldiers, to deliver him to the President.28

26. Ibid., 300.
27. Parton, 444-45.
On March 26, 1807, after traveling twenty-one days, the party arrived at Fredericsburg, Virginia, where Perkins received orders from Jefferson to convey the prisoner to Richmond. Upon completion of his duty, Perkins rushed to Washington and collected $3,331 as his share of various rewards for Burr's capture.29

The day of reckoning for Aaron Burr had finally arrived and on March 30, he was arraigned before Chief Justice Marshall, sitting as a Federal District Judge, at Richmond. The district in which the alleged charges of treason and misdemeanor were supposed to have been committed. The Government, however, had a choice of trying Burr either in Mississippi, Indiana, and Ohio. And, according to Schachner, Ohio was decided on for three reasons: First, because the assemblage to commit treason had gathered on Blennerhassett Island on December 10, 1806; secondly, Wood County was presided over by Marshall, as a District Judge; and lastly, it was thought that under the dictum in the Bollman and Swartwout case, Burr could not escape conviction.30

The preliminary examination was held in private before Marshall, with Caesar A. Rodney, son of Judge Rodney of the Mississippi Territorial court, Attorney General of the United

States, and George Hay, United States Attorney for the Virginia District. Assisting Burr were Edmund Randolph and John Wickham. The only evidence introduced was that of Perkins, who told of the arrest of the prisoner and of his conveyance of him to the Richmond Federal authorities. The prosecution, as was to be expected, offered in evidence a copy of the record in the case of Bollman and Swartwout in the Supreme Court of the United States, which contained the depositions of Eaton and Wilkinson directly connecting the defendant, Burr, with the offense charged against him. 31

Prosecutor Hay then moved to commit Aaron Burr on two charges:

(1) For high misdemeanor, in setting on foot, within the United States, a military expedition against the dominions of the King of Spain, a foreign prince, with whom the United States, at the time of the offense, were, and still are, at peace.

(2) For treason in assembling an armed force, with a design to seize the city of New Orleans, to revolutionize the territory attached to it, and to separate the western from the Atlantic States. 32

Pendente lite, Burr was admitted to bail of $5000, and court adjourned until the following day for arguments on Hay's motion. At the insistence of Hay, Marshall agreed to hold further hearings in the State Capitol building. According to some authors, this was Jefferson's idea. The President is charged with attempting to dramatize the trial and keep every move of the Chief Justice under full glare of publicity.

When the court convened in its new quarters, the great room of the House of Delegates was immediately jammed to capacity. To Richmond's population of six thousands, hundreds were added; strangers who eagerly came to witness the opening scenes of this important trial. Among the prominent visitors were John Randolph, Senator Giles, a friend of the President, Winfield Scott, then a young lawyer, and Andrew Jackson. According to Parton, a contemporary hurrying to the trial heard some one haranguing and, stopping to inquire, was informed that it was "one Andrew Jackson, making a speech for Burr, and damning Jefferson as a persecutor." Just as Jackson had correctly warned Governor Claiborne, as to Wilkinson, in his letter of November 12, 1806, he was now warning the people of Richmond of the President's plans.

33. Schachner, 401.
34. Parton, Burr, 458-9.
The argument on the Government's motion lasted two days. It was opened by Hay and closed by Wickham, Randolph and Burr. Hay maintained that Burr's letter in cipher to General Wilkinson was proof positive of treasonable intent. Burr's counsel, on the other hand, declared that nowhere in the letter was there a single phrase that could possibly be construed as traitorous. Moreover, they argued, if an expedition was contemplated by the defendant, it was directed against Spanish possessions, if and when the United States declared war on Spain. Such a project, they concluded, was perfectly laudable and patriotic. Burr confined his short argument to the history of his trials in Kentucky, and in the Mississippi Territory, where he had been uniformly found not guilty of any crimes. 35

On April 1, 1807, Marshall delivered a lengthy and carefully prepared opinion. On the question of the misdemeanor, he thought there was sufficient evidence, in the cipher letter and Wilkinson's deposition, to constitute a prima facie case to warrant committing Burr for grand jury action. As to the treason charge, however, the Chief Justice felt he was compelled to discharge the accused for insufficient evidence. He pointed out that the Government had several months in which to obtain the required information, if it existed.

35. Robertson, I, 6-8.
"Treason against the United States," said Marshall, "shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." To this he repeated the words contained in section two of article three of the Federal Constitution, and said that "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."

He then review carefully the testimony of Eaton and Wilkinson in the Bollman and Swartwout case to show how far these charges were supported by probable cause, and in conclusion, said:

"If, in November or December last, a body of troops had been assembled on the Ohio, it is impossible to suppose that affidavits establishing the fact could not have been obtained by the last March...I cannot doubt that means to obtain information have been taken on the part of the prosecution if it existed, I cannot doubt the practicability of obtaining it; and its nonproduction at this late hour, does not, in my opinion, leave me at liberty to give to those suspicions which grow out of other circumstances, that weight to which at an earlier day they might have been entitled. I shall not therefore insert in the commitment the charge of high treason."

The next question was on the amount of bond Burr had to furnish for the misdemeanor charge. On this point, there was much discussion; but Marshall said he wished bail to be "neither

36. Ibid., 14-18.
too large amount to amount to oppression, nor too small to defeat the objects of justice." Bail was finally fixed at $10,000, which was furnished, and Burr was a free man until the next term of Court, May 22, 1807. 37

Jefferson received the decision as a personal challenge, and, writing to James Bowdoin, the next day declared, with some heat:

"Hitherto we have believed our law to be, that suspicion on probable grounds was sufficient ground to commit a person for trial, allowing time to collect witnesses till the trial. But the judges here have decided, that conclusive evidence of guilt must be ready in the moment of arrest, or they will discharge the malefactor. If this is insisted on, Burr will be discharged; because his crimes having been sown from Maine, through the whole line of the western waters, to New Orleans, we cannot bring witnesses here under four months. The fact is, that the federalists make Burr's cause their own, and exert their whole influence to shield him from punishment, as they did the adherents of Miranda. And it is unfortunate that federalism is still pre-dominant in our judiciary department, which is consequently in opposition to the legislative and executive branches, and is able to baffle their measures often." 38

By April 20, the President was accusing the Supreme Court

37. Ibid.
of resorting to "tricks of the judges to force trials before it is possible to collect the evidence." But Jefferson had faith in the people, for "the nation", he continued, "will judge both the offender and judges for themselves. If a member of the executive or legislature does wrong, the day is never far distant when the people will remove him. They will see then and amend the error in our Constitution, which makes any branch independent of the nation." 39

Thus, before Aaron Burr had been indicted by the grand jury, the trial had broadened into a wholesale battle of political principles and parties, with the President and the Chief Justice playing the leading role. The prisoner before the bar was to become merely the flame to keep the great struggle ignited.

On the 22nd of May, 1807, the United States District Court convened in the Hall of Delegates, in Richmond, with Chief Justice Marshall and Judge Cyrus Griffin presiding. The city was visited with a greater throng than on the occasion of the preliminary hearing. Congressmen, Senators, Governors, and other prominent persons came to witness the famous trial. Burr's daughter, Theodosia, and her husband, who was now Governor Alston of South Carolina, came to Richmond. 40

40. Brady, 14-16.
Not until the court settled down to the business of selecting and impaneling a grand jury, was the height of prejudice against Burr discovered. Burr personally challenged Senator William B. Giles and former Congressman Wilson C. Nicholas, who were known enemies of the accused and were forced to withdraw. However, when all prospective jurors requested to be excused because they had formed an opinion, Burr rose and said: "I am afraid we shall not be able to find any man without this prepossession." Hay agreed, saying: "There was not a man in the United States, who probably had not formed an opinion on the subject; and if such objections as these were to prevail, Mr. Burr might as well be acquitted at once."\(^{41}\)

When the grand jury had been impaneled, it consisted of fourteen Republicans and two Federalists. After Marshall had charged the grand jury, the real legal battle began, and according to Schachner, "to be conducted, at least on the side of the defense, with infinite resource, learning and a maze of legal technicalities that obviously bewildered the prosecution and astounded even Marshall himself."\(^{42}\) With John Randolph named as foreman, the grand jury was instructed on the definition and nature of treason, and the testimony requisite to prove it.

After the jurors had retired, Burr addressed the court,

\(^{41}\) Robertson, I, 45.
\(^{42}\) Schachner, 410.
requesting that the grand jury be instructed on the admissibility of certain evidence, which he stated would be laid before the grand jury by the Government. Hay objected, declaring that Burr "stood on the same footing with every other man charged with crime." "Would to God," replied Burr, "that I did stand on the same ground with every other man. This is the first time that I have been permitted to enjoy the rights of a citizen." 43

While the star witness of the Government, General Wilkinson, was preventing the grand jury from proceeding, Hay conceived the idea of having Burr committed to jail for treason. Burr's battery of lawyers protested that no notice of this new motion had been given them; that Hay was attempting to compel the court to usurp the functions of the grand jury. Hay frankly admitted that he failed to serve notice of this motion because of fear that Burr might make his escape, "merely upon paying the recognisance of his present bail." 44

On May 26th, Marshall rendered his decision on the question of jurisdiction. He ruled that the motion to commit was proper in form, and could be used instead of presenting the bills for indictment to the grand jury then sitting. However, it was necessary that the Government present the evidence of

43. Robertson, I, 46.
44. Ibid., 55.
treason as defined by the Federal Constitution. 45

Prosecutor Hay was unable to comply with the definition as prescribed in the Constitution, and was, therefore, subjected to a constant flow of technical objections by the defense. In a moment of exasperation Hay cried to Marshall: "If, sir, exceptions are thus to be continually taken to the most common measures; if in this way every inch of ground is to be disputed, contrary to every practice that has prevailed in our country; instead of ten hours, or ten days, this trial will take up ten years." 46

When Marshall ruled that Hay be allowed a certain latitude in the introduction of his testimony, he immediately offered Wilkinson's affidavit, which the Supreme Court had already decided it contained no proof of the overt act and could not be admitted as evidence.

Benjamin Botts, one of Burr's counsel, objected to the affidavit on four grounds: (1) No actual war had been proved; (2) under the Constitution, there can be no constructive war, or constructive treason; (3) the overt act by the accused, as an actual war, must not only be proved, but it must be proved to have been committed within this district; (4) the overt act must be proved by two witnesses. 47

45. Ibid., 79-81.
46. Ibid., 83.
47. Ibid., 88-9.
John Marshall, sustaining his view in the Bollman and Swartwout case, declared Botts' argument to be the correct law, and Wilkinson's deposition was put aside as being inadmissible.

Failing to have Burr committed to jail, or obtain bail on the treason charge, Hay then moved to double the accused's bond on the misdemeanor charge. Luther Martin, who appeared for the first time, became one of Burr's sureties. Martin declared in open court that he was happy to have this opportunity to give public proof of his confidence in client, and, sarcastically remarked in the direction of the prosecution:

"The motion of the gentleman amounts to this: 'We have no evidence of treason, and are not ready to go to trial for the purpose of proving it; we therefore move the court to increase the bail.'"48

When June 9th came and Wilkinson still had not arrived, things became dull. General Jackson was now more convinced than ever of Burr's innocence, and continued to harangue the crowds in the Capitol Square, almost in front of the Court. The General was daily in a threatening mood and found relief in defending Burr and denouncing the President as a man afflicted with a desire to persecute. Moreover, he prophesied that Wilkinson would not dare to show his face anywhere in Richmond.49

On the same day, however, Burr submitted a motion to

48. Ibid., 102.
49. J. Parton, Life of Andrew Jackson, I, 333.
Marshall, which was to startle everyone, and perhaps attract the crowds from Andrew Jackson back to the Hall of Delegates. Burr moved the court to issue a subpoena duxer tecum, addressed to the President of the United States, requiring him to produce in court a letter he had received from Wilkinson, dated October 21, 1806, as mentioned in the President's message of January 22, 1807, and the reply. Burr explained that these documents, together with other military and naval orders given by the President, were material in his defense; that a request had been made for copies of these documents, but that he had been refused.

Luther Martin rose to support Burr's request with a great argument:

"This is a peculiar case, sir. The President has undertaken to prejudge my client by declaring, that 'Of his guilt there can be no doubt.' He has assumed to himself the knowledge of the Supreme Being...He has proclaimed him a traitor in the face of that country, which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend. And would this president of the United States, who has raised all this absurd clamour, pretend to keep back the papers which are wanted for this trial, where life itself is a stake?... Can it be presumed that the president would be sorry to have Colonel Burr's innocence proved?" 50

Rejecting the advice of Hay, to produce the papers re-

50. Robertson, I, 128.
quested, Jefferson, instead sent him a letter to read to the Court. The letter bluntly stated that, while the President wished to cooperate, yet he was to be the judge of what constituted confidential communications, "independently of all other authority." Jefferson thought these documents could not divulge except such parts as were not material. 51

Was the President of the United States in the same category as the king? Apparently Jefferson thought he was, but the Chief Justice disagreed and issued the subpoena duces tecum, on June 13, 1807. In his elaborated opinion Marshall declared that he could not find in the Constitution, or in any of the Statutes, any exception to compulsory process in favor of the Chief Executive of the Nation; that he, therefore, could not be placed in the same class as the king, who "can do no wrong, that no blame can be imputed to him, that he cannot be named in debate." 52

When the messenger brought the news to Jefferson, he became violent and immediately wrote to Hay: "Shall we move to commit Luther Martin as particeps criminis with Burr? Grayball will fix upon him misprison of treason at least, and, at any rate, his evidence will pull down this unprincipled and impudent Federal bull-dog, and add another proof that the most

52. Robertson, I, 180-88.
clamorous defenders of Burr are all his accomplices."53

On the following day, the President again wrote to Hay, arguing that it was the intention of the framers of the Constitution to make each branch of the Government independent of each other. Furthermore, he asserted:

"If the Constitution enjoins on a particular officer to be always engaged in a particular set of duties imposed on him, does not this supercede the general law, subjecting him to minor duties inconsistent with these? The Constitution enjoins his constant agency in the concerns of 6 millions of people. Is the law paramount to this, which calls on him on behalf of a single one?...The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary."54

President Jefferson ignored the subpoena issued by Marshall, and never appeared in court. The Chief Justice realizing the futility of enforcing the writ, quietly dropped the whole matter.

On June 13th, twenty-two days after the proceedings before grand jury began, General Wilkinson arrived in Richmond and was taken before the grand jury the next day. Washington Irving described the General's entrance into the courtroom in these interesting words: "Wilkinson strutted into court

swelling like a turkey-cock." This author says that Burr ignored the Government's star witness "until the judge directed the clerk to swear General Wilkinson; at the mention of the name Burr turned his head, looked him in the face...swept his eye over his whole person from head to foot...and then coolly resumed his former position..."55

As the witnesses filed in and out of the grand jury room, public opinion veered in Burr's favor. Jackson's continuous lectures to the public, Wilkinson's long delay, and Burr's serene attitude increased the number of partisans in his favor. Dinners were given in his honor, and several hundred men acted as his bodyguard.56

The festivities continued until June 24th, when the grand jury, headed by John Randolph, filed into court and brought indictments against Aaron Burr and Harman Blennerhassett. The jury indicted the two defendants for treason and misdemeanor.57 Hay then moved that Burr be committed to jail. Burr and his counsel made every effort to have him admitted to bail again,

57. Robertson, I, 306.
but when Marshall requested their authorities, they were unable to produce it, and Marshall then said, "he was under the necessity of committing Colonel Burr." 58

Aaron Burr was indicted, but a contemporary said of the approaching trial: "...whether it prove serious or comical, will be the product of error in the grand jury that found the treason bills." This writer claimed to have been informed by two jurors that the indictment was based on a misapprehension of Marshall's charge as to what constituted the overt act in treason, as delivered in the case of Ex parte Bollman and Swartwout. 59

Was the grand jury misled by the famous obiter dicta of this case? Most historians do not venture any opinion, but Beveridge maintains that, had the grand jury understood Marshall's definition of treason, Aaron Burr would not have been indicted. 60

58. Ibid., 312.
59. Safford, Blennerhassett Papers, 314.
60. Beveridge, III, 507.
CHAPTER V

THE TRIAL

On June 26, 1807, Aaron Burr was installed in the peni­
tentiary for Federal prisoners, which was situated outside of
the city of Richmond. Perhaps, due more to the eloquent appeal
of his counsel than the services he had rendered to his country,
as a soldier and Vice-President, Burr received a more comfort­
able and commodious quarters. This was to be the distinguish­
ed prisoner's home until August 3, 1807, when the trial
commenced.

Aaron Burr was now preparing to fight the greatest
struggle of his life. Writing to his daughter, he said:

"The most indefatigable industry is used
by the agents of government, and they have
money at command without stint. If I were
possessed of the same means, I could not
only foil the prosecutors, but render them
ridiculous and infamous. The democratic
papers teem with abuse of me and my counsel,
and even against the Chief Justice. Nothing
is left undone or unsaid which can tend to
prejudice the public mind, and produce a
conviction without evidence...machina­
tions...are practiced against me...not
only with impunity but with applause; and
the authors and abbetors suppose, with
reason, that they are acquiring favor
with the administration."1

Burr was granted uninterrupted access to his lawyers, and

also the privilege of corresponding and receiving gifts from friends and admirers. And, according to a young reporter, Washington Irving, there was "not a lady...in Richmond, whatever may be her husband's sentiments on the subject, who would not rejoice on seeing Col. Burr at liberty."3

The court pursuant to adjournment met promptly at noon on Monday, August 3, 1807, in the House of Delegates, Richmond, Virginia. To the accompaniment of an excited city and crowded courtroom,4 John Marshall opened the trial of the People of the United States vs Aaron Burr. Judge Cyrus Griffin, judging by the reports of the trial, was either over-awed for having to sit next to the Chief Justice of the United States, or was willing to permit Marshall to assume complete charge of the court. The trial records disclose that Judge Griffin sat almost mute throughout the proceedings.

Having pleaded not guilty to the indictment, Burr's trial commenced in earnest. The accused was first to be tried on the treason indictment, which charged him with "unlawfully, falsely and traitorously assembling with a great multitude of persons...to the number of thirty...and upwards, armed and arranged in a

4. Parton, 483.
warlike manner", on December 10, 1806, at Blennerhassett Island, in the County of Wood, Virginia, and "most wickedly, maliciously and traitorously" prepared and levied war against the United States. He and his associates, were also charged with the crime of misdemeanor for organizing an expedition against Mexico, a friendly State, but for this alleged crime, Burr was put on trial after the trial for treason. 5

It now became the duty of the Government to prove that war had in fact been levied at the time and place, and by the persons named in the indictment. 6

The same brilliant array of lawyers appeared for the trial as participated in the proceedings leading to the indictment. George Hay, the Federal District Attorney, was a prominent Jeffersonian and James Monroe's son-in-law. While he enjoyed more than average standing at the bar, he was not to be compared with his first assistant, William Wirt, nor with any member of Burr's counsel. According to Parton, the stream of letters from the President, rendering advice and encouragement, enabled Hay to withstand the onslaught of arguments and objections which he was subjected to from the imposing list of defense counsel. 7

5. Robertson, I, 430-32.
Though much of the burden fell on his associates, Aaron Burr was very active in every phase of the trial. His four assistants were all men of exceptional ability; each possessing some special legal qualification. Edmund Randolph, perhaps, enjoyed the greatest reputation, having been Attorney-General and Secretary of State in Washington's Administration. He also had served as Governor and Attorney-General of Virginia, and was now an elderly man with experience and dignity. John Wickham, considered the leading lawyer in Richmond, brought learning and eloquence. John Botts, the least renowned of Burr's lawyers, was learned and thorough.

Biographers seem to be unanimous in agreeing that Luther Martin, of Maryland, was the most clamorous of Burr's associates. Martin, of whom Jefferson referred to as the "federal bull-dog," had an excellent memory and was a very good scholar. His greatest professional triumph, up to Burr's trial, was in the impeachment trial of Judge Chase, in January, 1805, while Burr still presided over the Senate. Martin's powerful arguments brought a favorable verdict and Chase was acquitted. In spite of his coarse appearance, ill-fitted clothes, and fondness for liquor, Luther Martin is said to have possessed an extraordinary personality.

8. Ibid., 461. And Schachner, 400.
Chief Justice Marshall was intimately acquainted with all of the lawyers participating in the Burr trial and was liked by most of them, except George Hay, who blindly accepted President Jefferson's attitude in everything that was proposed to him during the trial. It is the opinion of this writer that Hay might have made a better showing at the trial, had he the courage to repel the President's constant interference. Historians agree that Hay's heart was not in the trial, and Wirt reluctantly consented to participate in the trial only at the request of Jefferson.

After a series of adjournments, requested by the Government, the examination of prospective jurors commenced. Even at this early stage of the trial it was apparent that the fight would be on the interpretation of article three, section three of the Constitution, which declared that "treason against the United States shall consist only in levying war against them..." and that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on the confession in open court."

The process of picking a jury proved extremely difficult; juror after juror indicating that he had formed an opinion of

10. Beveridge, III, 408.
11. Schachner, 400; Parton, 460; and McCaleb, 321.
the prisoner's guilt. It was discovered that the rooted opinions were formed as a result of newspapers antagonistic to Burr; from the President's Proclamation; and from the depositions of Eaton and Wilkinson which had appeared in most of the newspapers in the country. Some of the prospective jurors openly expressed the hope that the accused would receive the extreme penalty. 13

Of the first venire only four out of the forty-eight were retained, and out of the second venire none qualified. 14 The outpouring of prejudicial propaganda had been so successful that it became impossible to obtain a jury of twelve men without formed opinions, and Burr was forced to remark to the court:

"Either...I am under the necessity of taking men in some degree prejudiced against me, or of having another venire. I am unwilling to submit to the further delay of other tales, and I must therefore encounter the consequence." 15

In the midst of extended argument concerning the general principles to be applied in rejecting prospective jurors, because of formed opinions, Marshall ruled that, while any deliberate opinion was sufficient to disqualify from jury service, light impressions should not be sufficient ground for rejection. 16

13. Robertson, I, 426.
15. Ibid.
At the end of the first day, four jurors were chosen; by the 15th, ten jurors were sworn, and on the 17th the jury was completed. Undoubtedly, Marshall's ruling on the extent of opinions formed which would exclude a man from serving on a jury had expedited matters. However, Hay was not pleased with the decision, and he complained to Jefferson:

"The bias of Judge Marshall is as obvious as if it was stamped on his forehead. I may do him an injustice, but I do not believe that I am, when I say that he is endeavoring to work himself up to a state of firmness which will enable to aid Burr throughout the trial without appearing to be conscious of doing wrong."

After the jury had been sworn and the indictment read, Hay rose to make his opening address. The Government intended to prove, he said, that Aaron Burr, on December 10, 1806, at Blennerhassett's Island, had congregated with about thirty other persons, and with arms in their possessions, agreed to levy war on the United States. Furthermore, he would prove that, on the following day, Burr and his associates descended down the Ohio and Mississippi rivers to take possession of the city of New Orleans.

Hay then delved into the various species of treason ex-

18. Robertson, I, 446.
isting in England and in the United States. He told the jury that:

"In Great Britain there are no less than ten different species of treason...but in this country, where the principle is established in the Constitution, there are only two descriptions of treason; and the number being fixed in the Constitution itself, can never be increased by the legislature, however important and necessary it should be, in their opinion, that the number should be augmented." 19

As the Chief Justice, perhaps, anticipated, Hay asserted that Burr's conduct constituted treason against the United States as prescribed in the Constitution, even though the accused was not present. The prosecutor was relying - and he mentioned the case to the jury - on Ex parte Bollman and Swartwout, in which Marshall said:

"If a body of men be actually assembled for the purpose of effecting by force, a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action and who are actually leagued in the general conspiracy, are to be considered as traitors; but there must be an actual assembling of men, to constitute a levying of war." 20

General William Eaton - of the War of Tripoli fame - was the first witness called. The General was now eager to testify, as Congress had appropriated $10,000 in satisfaction of his long-unheeded claim, for expenses he is supposed to have in-

19. Ibid., 434-5.
20. Ibid., 43.
occurred somewhere in Africa. Eaton, like Wilkinson, was now proclaiming that he had saved the nation at a great sacrifice. However, before he could give a recital of his version of Burr's story, he was stopped by an objection from the accused himself. Burr argued that, until Hay had established an overt act, there could be no corroborative evidence, such as Eaton was about to offer.

On August 18, Marshall delivered his opinion on this important point of law. He said that as to testimony of Eaton, which "relates to the fact charged in the indictment, so far as it relates to levying war on Blennerhassett Island, so far as it relates to a design to seize on New Orleans, or to separate by force, the Western from the Atlantic States, it is deemed relevant and is now admissible." However, continued the opinion:

"So far as it respects other plans to be executed in the City of Washington, or elsewhere, if it indicate a treasonable design, it is a design to commit a distinct act of treason, and is therefore not relevant to the present indictment. It is merely additional or corroborative testimony, and therefore, if admissible at any time, it is only admissible according to the rules and principles which the court must respect after hearing that which it is to confirm."

Marshall agreed with Hay's contention that the crime of

22. Robertson, I, 472.
23. Ibid.
treason consisted of both the fact and the intention; that both had to be proved. Moreover, the court would not interfere with the prosecution if it saw fit to introduce its evidence of the intention first, or vice versa. However, he significantly stressed that such evidence must be relevant to the crime charged, not merely corroborative of a general nature and outside of the actual crime. 24

This ruling seemed to be favorable to both sides; however, as the trial proceeded, it actually saved Aaron Burr's life, for the Government was unable to prove an overt act, and, therefore, was not allowed to proceed.

General Eaton was returned to the stand and at once requested of Marshall to be permitted to explain his statements. The Chief Justice advised him that it was up to the court to "decide upon the propriety of the explanation, when the particular case occurs." 25

Eaton then proceeded with his testimony, and admitted that:

"Concerning any overt act, which goes to prove Aaron Burr guilty of treason, I know nothing... But concerning Colonel Burr's expression of treasonable intention, I know much, and it is to these, that my evidence relates." 26

24. Ibid., 470.
25. Ibid., 473.
26. Ibid.
Against the objections of Martin and Wickham, Eaton was allowed to relate his story about a conversation he had with Burr, in the winter of 1805 or 1806; about Burr's plans to invade the Spanish provinces; and that he understood that the accused had authority of the Government. He also recalled Burr using "strong expressions of reproach against the Administration...accused them of want of character, want of energy, and want of gratitude." 27

On cross-examination, Burr brought out the large payment which Eaton had received from the Government, for claims previously rejected, and then dismissed the General, who still sought the court's indulgence to explain statements. 28

The next witness called by the prosecution was Commodore Thomas Truxton, who promptly acknowledged:

"I know nothing of overt acts, treasonable designs or conversation, on the part of Colonel Burr." 29

Special Assistant Prosecutor McRae, Lieutenant Governor of Virginia, was brought into the case for political reasons. 30 Knowing more about politics than law, he ventured this question to the witness:

"Did he wish to fill your mind with resentment against the Government?"

27. Ibid., 474.
28. Ibid., 485.
29. Ibid., 485.
30. Schachner, 400-1.
The answer was:

"I was pretty full of it myself, and he joined me in opinion."31

In reply to Martin's question, as to the time Burr's expedition was to take place, he said:

"All his conversation respecting military and naval subjects, and the Mexican expedition, were in the event of a war with Spain."32

The Commodore proved a more reliable witness for Burr than for the prosecution, and, therefore, was soon recalled from the stand.

Before the day's session ended, Peter Tayler, Blennerhassett's gardner, was called to the stand. He recited his story of the people becoming alarmed over his master's participation in Burr's expedition; how he warned Burr about the people; and, finally, of Blennerhassett's preparation, with several other armed men. He admitted that Burr was not present on the Island during the assemblage of the men, on the night of December 10, 1806.33

It was apparent that the Government was not obtaining any damaging evidence against Burr, and devious methods were resorted to induce some of his associates to confess and bring about his conviction. According to Blennerhassett,

31. Ibid., 490.
32. Ibid., 488.
33. Ibid., 492-97.
Colonel De Pestre was approached and urged to aid the Government and be rewarded with a high army post. The Colonel replied that:

"He understood the hint, but it neither suited his honor nor character to serve such employment."34

Blennerhassett was warned that Burr was about to turn against him, but that he could save himself by making a written confession of the whole plot. Although Blennerhassett was now bitter toward Burr, because of Alston's failure to undertake some of the heavy obligations incurred in connection with the western adventure, he refused to deliver the information requested.35

Indeed, things must have looked dark for Hay, as the next witnesses, Jacob Allbright, Dudley Woodbridge, William Love, Maurice P. Belknap, and Edmund B. Dana, could testify only to the assemblage of men on December 10, 1806; and their agreement to make New Orleans the base of operation; however, no proof was had to establish the act of levying war, or that Burr was on the Island when the assemblage of the men took place.36

The only witness who gave any direct testimony on the

36. Robertson, I, 506, et seq.
overt act, which the prosecution was desperately trying to prove, was obtained from Allbright, but he was discredited on cross-examination, by Burr. This witness testified that General Edward Tupper appeared on Blennerhassett Island on the evening of December 10, 1806, for the purpose of arresting Blennerhassett and the rest of the party. According to Allbright's testimony, Tupper said to Blennerhassett, "Your body is in my hands, in the name of the Commonwealth."

When several muskets were leveled at the General, continued Allbright, he quickly changed his attitude and assured the assemblage of men that he never intended to detain anyone. Whereupon, Blennerhassett and his party proceeded down the river. On cross-examination Burr shattered whatever damaging effect the testimony may have had on the jury, by bringing to the attention of the jurors that, while Tupper was sitting in the court room, he was not permitted to take the stand. 37

Hay never explained his motive in failing to put Tupper on the stand, and it was not till after the trial that the reason was disclosed. In a deposition made by Tupper, he denied Allbright's testimony and declared that he visited Blennerhassett at the latter's request that he never intended

37. Ibid., 506-10.
to make any arrests. 38

Obviously, Allbright's testimony made General Tupper an important witness of the prosecution. Yet Hay's failure to make use of his testimony, and the deposition made after the trial, is but another glaring instance of the Government's determination to obtain a conviction based on rumors and hearsay. None of the Government's star witnesses could directly connect Burr with any conspiracy, and after the Morgans testified, on August 19th, that they believed Burr guilty merely on his manner of speech, the case collapsed. 39

On the 20th of August, the prosecution, believing it had proved the required overt act, commenced to introduce collateral and indirect evidence. This was objected to by Burr's counsel, and Wickham argued this point of law for two days. He said that out of about one hundred and forty Government witnesses, seven were supposed to have proved the existence of the overt act. He contended that these seven had not proven any overt act; that if the prosecution was permitted to continue, "weeks, perhaps months" would elapse before the case was completed.

39. Ibid., 500, et seq., and Beveridge, III, 491.
He said this would prove a hardship on all parties concerned and nothing would be accomplished in the end. 40

Wickham took the position that no person could be convicted of treason who was not personally present when the act was committed. He argued that the old English doctrine of constructive treason, whereby the overt act of associates could be imputed to another, no matter how far distant from the scene, had no application under our Constitution. He maintained that the Federal Constitution was a new and original compact, and was not derived from England. He read section three of article three of the Constitution, and concluded that nothing was contained therein about the overt acts of others; only the overt acts of the accused could convict him. 41

As to the Bollman and Swartwout case, Wickham reminded the court that it was pronounced in the Supreme Court in connection with a case of commitment; that it was a mere dictum and had no relation whatsoever with the present point of law, which was not then before the court. 42

Edmund Randolph, and other of Burr's counsel, argued to arrest the admission of further evidence on the ground that the Government had failed to prove an overt act, as required

40. Ibid., 531, et seq.
41. Ibid., 533.
42. Ibid., 555-56.
by the Constitution, but none seemed to be equal to Wickham's rich and scholarly argument.

On the prosecution, only William Wirt made an answer that was worthy of a reply to Wickham. Wirt eloquently contended that the Government had the right to prove Burr a traitor by connecting him indirectly, with what was done by others, through his orders. He maintained that the Constitution permitted the doctrine of constructive treason; that Marshall's dictum in the Bollman and Swartwout case was applicable in the present case. 43

According to Harman Blennerhassett, who sat and made careful notes of the great debate, said all discharged their duties magnificently, except Prosecutor McRae, whose Scotch wrath - or perhaps a strong desire to equal the other great legal orators - caused him to become so excited that he became almost incoherent. 44 On the whole, Parton assured us, the nine days of arguments constituted "the finest of legal knowledge and ability of which the history of the American bar can boast." 45

In his rage, McRae cried:

"Let all who are in any manner concerned in treason be principals, and it will tend more than anything to prevent and suppress treason." 46

43. Ibid., II, 61-65.
44. Blennerhassett Papers, 354-55.
45. Parton, 497.
46. Robertson, II, 42.
It is Beveridge's belief that McRae was speaking the language of the terrible Jeffreys, and that he had forgotten, in his excitement, that he was living in the United States. 47

Luther Martin closed the great legal duel on August 28th, sparing, in his tremendous invective, neither the Government, Marshall, nor, according, to Blennerhassett, brandy. 48 In exalted rhetoric he lectured the Chief Justice for his dictum in the Bollman and Swartwout case, and insisted that "it ought to have no more weight than the ballad of Chevy Chase." 49

Martin called on Marshall to protect the rights of his client by being firm with the tired and weary prosecutors. He spoke of Theodosia and then closed his long and solemn argument with these words of hope and encouragement for Marshall, who did not seem to require any:

"But if it require in such a situation firmness in a jury, so does it equally require fortitude in judges to perform their duty...If they do not and the prisoner fall a victim, they are guilty of murder in foro soeli whatever their guilt may be in foro legis...May God who now looks down upon us, and who had in his infinite wisdom called you into existence and placed you in that seat to dispense justice to your fellow citizens, to preserve and protect innocence against persecution - may that God so illuminate your understandings that you may know what is rightl and may he nerve your souls with firmness and fortitude to act according to that knowledge." 50

47. Beveridge, III, 495.
49. Robertson, II, 344.
50. Ibid., 377-8.
On August 29th, the great debate was concluded, and on the 31st, the fate of Aaron Burr was in the hands of John Marshall. Upon his decision was also the fate of one of our greatest rule of law - namely, the definition of the law of treason, as applicable under the Constitution. Marshall indicated his appreciation for the scholarly efforts of all the lawyers in these words:

"The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them. A degree of eloquence seldom displaced on any occasion has embellished a solidity of argument, and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver." 51

A close study of Marshall's opinion discloses that he borrowed heavily from the arguments of the defense, especially from the argument of John Wickham. The Chief Justice, adopting the logic and reasoning of Wickham, began:

"That conformably to the Constitution of the United States, no man can be convicted of treason who was not present when the war was levied. No testimony can be received to charge one man with the overt act of others until those overt acts, as laid in the indictment, be proved to the satisfaction of the court." 52

51. Ibid., 446.
52. Ibid., 401.
"The overt act must be", continued the opinion, "proved by two witnesses. It is not proved by a single witness. Treason against the United States shall consist only in levying war against them."\(^53\)

Moreover, the "Constitution and law require that the fact should be established by two witnesses; not by the establishment of other facts from which the jury might reason to this fact."\(^54\)

Regarding the doctrine of constructive treason, Marshall ruled that it did not apply under our Constitution.

"The presence of the accused at the assemblage (Blennerhassett Island) being nowhere alleged except in the indictment, the overt act is not proved by a single witness; and of consequence all other testimony must be irrelevant... because such testimony, being in its nature merely corroborative and incompetent to prove the overt act in itself..."\(^55\)

Replying to an indirect attack made by Hay, in which he reminded the court of Chase's impeachment for this "arbitrary, oppressive and unjust" conduct in the John Fries case, in 1800,\(^56\) Marshall replied with these challenging words:

"That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true..."\(^57\)

53. Ibid., 402.
54. Ibid., 425.
55. Ibid., 425.
56. Ibid., 193-4.
57. Ibid., 437.
With these significant remarks, Marshall settled definitely the American rule of treason; defeated the pernicious efforts to establish the rule of constructive treason in the United States. The traitor, he said must "truly and in fact levy war" against the United States; he must "perform a part of the prosecution of the war." In this case, even Hay admitted that Burr was in Kentucky on December 10, 1806.

In explaining his dictum in the Bollman and Swartwout case, Marshall asserted that it was misinterpreted; that the act of levying war required "an assemblage in force", and not merely "a secret furtive assemblage without the appearance of force." In other words, if the assemblage does not gather to make war on the country, it is not levying war.

The next morning Hay informed Marshall that, in view of Marshall's opinion, he had neither argument nor further evidence to offer to the jury. The jury then retired, but returned with a verdict within twenty-five minutes. The verdict was:

"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."

58. Ibid., 472.
59. Ibid., 415-23.
60. Ibid., 444-4
The jurors, intentionally or not, had not complied with Marshall's instruction to find "a verdict of guilty or not guilty as their own consciences may direct."\(^6\)\(^1\) Burr's lawyers demanded that the jury comply with the court's instruction, and when informed by the jury foreman that an acquittal was intended, Marshall ordered that a not guilty verdict be entered in the record.\(^6\)\(^2\)

With the principal discharged, Hay became discouraged and entered a *nolle prosequi* on the treason charge against the other defendants. However, in obedience to Jefferson's orders, all of them, Burr included, were to be held under the charge of treason and sent where they might have committed an overt act. Preparations were then made for the trial on the indictment for misdemeanor.

Some historians have suggested that the jury's irregular form of verdict was its way of resenting Marshall's decision in refusing to admit the evidence offered by the Government. This explanation is well taken, except that - and the author admits it - the legal question involved was difficult and intricate, and the possibility is that the jurors were confused as to what

\(^{61}\) Ibid., 443-5.
\(^{62}\) Ibid., 446-7.
was required of them by the court. 63

On September 4, 1807, the President wrote to Hay and said:

"The event has been...not only to clear Burr, but to prevent the evidence from ever going before the world. But this latter case must not take place." 64

Jefferson's method of preventing such a miscarriage of justice was to collect the testimony from all the witnesses and present it to Congress, "that they may decide whether the defect has been in the evidence of guilt, or in the law, or in the application of the law, and that they may provide the proper remedy for the past and the future." 65

The Congress might have provided a remedy for the future, but how could it provide a "remedy for the past," except by impeaching the Chief Justice? The President was eager to give Marshall another opportunity to convict Burr - with or without sufficient evidence - and thus save the face of the Administration, both for its attitude toward the accused and for its stand on the judiciary.

The Chief Justice however, could see that Jefferson's purpose of trying on the misdemeanor charge was merely for making a court record for the benefit of Congress. While Burr

64. Jefferson's Writings, (Monticello Ed.), XI, 360-1
65. Ibid.
was still the defendant, actually Marshall was the Administration’s prisoner at the bar. All efforts were now to be directed to prove his bias; to remove him from the bench by impeachment. 66

On September 3, 1807, Burr was admitted to bail and the second trial opened six days later. While preparations for this trial were being made, Jefferson advised Hay of his future plans. He wrote:

"I am happy in having the benefit of Mr. Madison’s counsel on this occasion. We are both strongly of opinion that the prosecution against Burr for misdemeanor should proceed at Richmond. If debated, it will heap coals of fire on the head of the judge; if convicted, it will give time to see whether a prosecution for treason against him can be instituted in any and what other court." 67

The President was to experience another disappointment, for this trial lasted only six days; and when Hay offered evidence as to acts committed outside of the jurisdiction of the court, objections were raised and sustained. Hay admitted that he could offer no testimony that would prove a military expedition to the Spanish dominions, or that the accused performed within the district any of the crimes charged in the indictment. Marshall then instructed the jury to return a not

guilty verdict, and after admitting Burr to bail for $5000, for another misdemeanor charge in Ohio, Burr was discharged. 68

If in two trials John Marshall found no admissible evidence to convict Aaron Burr, why did he refuse to free him without bail, for the alleged misdemeanor in Ohio? Was he frightened by Jefferson's wrath, and so sacrificed his principle to conciliate the Chief Executive? Schachner claims that Jefferson did lay the trial records before Congress, seeking Marshall's impeachment, but, apparently, the matter was never pressed. 69

After Burr's trial, the United States was having difficulties with England as well as with Spain. Writing to Edward Tiffin, on January 30, 1808, Jefferson mentioned the possibility of the nation going to war with either nation. 70

It can be safely asserted, thus, that had it not been for the gravity of the foreign situation, to which the Administration was compelled to turn its attention, Marshall and Burr would not have been permitted to rest. 71

68. Robertson, II, 481-503.
71. Schachner, 446.
CHAPTER VI

CHIEF JUSTICE MARSHALL

AND THE TRIAL

In order to form a sound estimate of John Marshall's conduct and attitude in the trial of Aaron Burr, it is necessary to survey the contemporary opinion, and the opinion of historians who have contributed additional knowledge on the subject, since the trial.

As we examine Marshall's attitude and conduct, it is important that we bear in mind the fundamental question with which he was confronted, and was forced to answer: Who should decide in case of disagreement as to constitutionality of acts performed by any of the branches of the Federal Government? Since the Constitution contained no answer, he decreed, according to a reliable and modern author, "by mere force of character and extraordinary courage," that such questions should be answered by the judiciary. Marshall's solution, it is granted, was not perfect, but seems the best answer to the problem; based more on practicability than on existing law, or logic.¹

Marshall was well aware that the President demanded a

conviction; but he presided over the trial, day after day with calmness and impartiality. With the exception of Jefferson and his partisans, the people who had listened to his analysis of the legal questions arising in the case, felt that justice had prevailed. "The majesty of the law", wrote General Winfield Scott, "was...nobly represented and sustained by John Marshall..." ² And Senator William Plumer noted in his diary:

"Had the late Vice-President...been convicted and executed for treason, it would in the opinion of Europe, have reflected disgrace upon our country."

However, in spite of Professor Lewis, who states that Marshall's supreme fitness for the judicial office was recognized after the Burr trial, over which he presided with "dignity, impartiality, and ability never surpassed", ⁴ Marshall has been severely criticized.

Upon learning of the Chief Justice's decision, Senator Giles of Virginia, a partisan of Jefferson, of whom John Randolph referred to as the "President's bach-stair cabinet", was in a rage. He threatened to introduce an amendment to

the Federal Constitution, to take away all jurisdiction of the Federal Judiciary in criminal cases.5

William Thompson made himself prominent by writing a series of "Letters to John Marshall," which appeared in several newspapers. Thompson's letters in the *Aurora*, and the *Enquirer* revealed only that he was a master of invectives rather than of the law. In his irresponsible accusations, Marshall is called a life-long "bigoted politician", whose attitude in the Burr trial was "a disgrace to the bench of justice". To Thompson, the Chief Justice was a combination of Jeffrey, Bromley, and Mansfield, three terrors in the English judicial annals.6

In his second letter, Thompson took the liberty of giving Marshall some legal advice. The jurist was told to reverse himself, because "common sense, and violated justice cry aloud against such conduct; and demand against you the enforcement of these laws, which you refuse to administer."7

Thompson's denunciation of Marshall reached the climax in his third and last letter, when he bluntly accused him of

7. Ibid., *Enquirer*, Dec. 8, 1807
being "morally guilty" with Burr; both being "traitors in heart and in fact". Moreover, said Thompson, "such a criminal and such a judge, few countries ever produced...You are forever doomed to blot the fair page of American history, to be held up, as examples of infamy and disgrace, of perverted talents and unpunished criminality, of foes to liberty and traitors to your country." The only regret in Thompson's life, it seems, was his inability to remove the great Chief Justice from office, which he had dishonored by his own crimes; for protecting a criminal; and for degrading Judge Griffin, who heard the trial with Marshall.  

Even Harman Blennerhassett was now turning against Marshall. After he had been committed, together with Burr, to be tried for misdemeanor in the State of Ohio, he noted in his diary:

"Timidity of conduct, which was probably as instrumental in keeping him from im­bruising his hands in our blood as it was operative in inducing him to continue my exaction to pacify the menaces and clamor­our yells of the ceberus of Democracy with a sop which he would moisten at least, with the tears of my family."

And, according to this co-defendant of Burr, John Marshall, on the afternoon of November 3, 1807, was found guilty by "every

8. Ibid., Enquirer, Dec. 12, 1807.
honest man in the community" of Baltimore, and decreed that he be executed by the hangman on "Gallows Hill" - in effigy. To this tragic ending, continues Blennerhassett, the Baltimore mob had included Burr, Luther "Brandy-Bottle" Martin, and himself. All were to be meted out the same punishment for the part each played in the trial, but Marshall's attitude had reminded the mob that he was repeating "his X,Y,Z. tricks, which are said to be much aggravated by his felonious capers in open Court, on the plea of irrelevancy."10

Of the modern historians who feel that Marshall might have presided over the trial without bringing the only "serious blemish in his judicial record", also charge Jefferson with deplorable behavior. Author Corwin maintains that, both the Chief Justice and the President were responsible for the repeated objections raised by Burr's lawyers that he was the victim of political persecution.11

John Marshall's mode of reasoning in his contention that the English authorities did not apply in America - and particularly to his refusal to adopt the doctrine of constructive treason - is criticized. Corwin takes the view that the Constitution was derived from the English laws and,

10. Ibid., 477.
11. Corwin, III.
therefore, constructive treason is part of the fundamental laws. It is even suggested that Marshall's distrust for the President, due to his conduct during the trial, was the cause for the Chief Justice's change of attitude when the rule in the Bollman and Swartwout case was presented in the Burr trial.  

It is commendable that modern biographers of Jefferson do not hesitate to assert that his numerous communications to Hay, during the trial, constituted "a very high-handed manner, condoned acts which were technically illegal and maintained without sufficient proofs of Burr's guilt." Author Chinard believes particularly deplorable Jefferson's letter to W. B. Giles, of April 20, 1807, in which he said there was not "a dandid man in the United States who did not believe some one, if not all of these overt acts to have taken place." If some of these charges reached the ears of Marshall - and historians do not admit or deny that such did not occur - was he not justified in distrusting the President? As a lawyer, Jefferson should have known that he could have rendered the court greater assistance by withholding his promiscuous opinions about Burr's guilt, or of the conduct of the presiding judges, and

12. Ibid., 93, et seq.
13. Ibid., 108. The change of attitude this author refers to is the part of Marshall's opinion known as the obiter dicta, which was added to the decision by the Chief Justice, but is not binding upon the Court.
the lawyers.

With some justification, Randall reminds us that it is the constitutional duty of the President to see that laws are faithfully executed. As Chief Executive, this great biographer of Jefferson continues, it is the business of the President to see that proofs of law violation are collected and placed in the possession of the Attorney General, whose duty it is to prosecute. Moreover, since the Constitution gives the President the power to pardon after conviction, it becomes his duty to know all the facts in the case. Thus, according to Randall, the President may interfere, in the course of the trial, through Government counsel.¹⁶

Randall's view is somewhat extenuating, for while it cannot be denied that it is the constitutional duty of the Executive Branch of the Government to see that the laws are enforced, yet Jefferson's conduct in Burr's trial constituted more than supervision. His letters written just prior to and during the trial clearly disclose a fear for an adverse decision. The challenge upon the court was made quasi public, if not public, through Hay's conduct. Marshall, as head of the Judicial Branch accepted Jefferson's challenge.

In an astounding letter to Hay, Jefferson asks him if

the mute Judge Griffin cannot be approached and be made useful to the Administration. "Will not the associate judge" demands the President, "assume to divide his court and procure a truce at least in so critical a conjuncture?" Historians seem to make little comment about this important letter. It is obvious, however, that Jefferson was worried when he penned it. Having imposed himself on the court, was he begging Hay to try and effect a truce? It cannot be determined if Hay replied to the President, and it is very doubtful that he attempted to see Griffin.

Writing to Judge Peters, after the trial, Marshall tells of the trying conditions he was subjected to. "But it was most deplorably serious," he told his friend, "and I could not give the subject a different aspect by treating it in any manner which was in my power." Even if the offer of a truce indirectly reached Marshall, apparently, he was determined to ignore it, and continued to assume the calm and impartial attitude which contemporaries say he was a master.

17. Jefferson, Writings, (Ford Ed.), X, 406-7. Ford states that this letter was written between August 7 and 20, 1807.
It has been suggested that a certain part of the prejudice against Marshall may be traced back to the fact that he lacked formal legal training; that he was known to be accustomed - both as a practicing lawyer and Chief Justice - to adopt the arguments, reasoning and citation of other lawyers.\textsuperscript{20} Whatever was Marshall's great gift for learning, his ability of "putting his own ideas into the minds of others, unconsciously to them", is considered by some contemporaries as his greatest asset.\textsuperscript{21}

As the Burr trial progressed, it became evidence that Marshall did not mean to accept the judgment of the President, as the judgment of the court. The Chief Justice served notice on the Administration that he would not usurp the power belonging to other Government officials, nor would he brook interference from agencies outside the court.\textsuperscript{22}

This remark by Marshall undoubtedly led to the charges made by Jefferson, that the Chief Justice was conducting his court for the benefit of the judiciary and not for the people; that "the people...will see and amend the error of our Constitution, which makes any branch independent of the nation."

The President hoped that, since Marshall did not see fit to

\textsuperscript{21} Bibbs, II, 350.
\textsuperscript{22} Robertson, II, 437.
convict Burr merely on popular demand, the Judicial Branch, "will do more good than his condemnation would have done."23

It is significant to note that with the exception of Jefferson and Hay, no charges were made in the trial of Aaron Burr, accusing Marshall of oppressive tactics. The trial was almost devoid of such charges because the Chief Justice allowed every counsel an opportunity to be heard, without interruption. Indeed, Marshall must have been fully aware of the importance of the trial and eagerly sought all shades of opinion on the law of treason. He attentively listened to the lawyers on both sides; he communicated with his associates on the Supreme Court, seeking their opinion.24

Thus, Marshall's opinion on the American law of treason may be said to have been based not only on his own conception, but also on the views of some of the Associate Justices of the Supreme Court, and of the great lawyers in the Burr case. The charges of Jefferson and his friends, therefore, accusing Marshall of ignoring the law, or being partial to Burr, may be discounted as being based merely on partisan feeling and a desire to dominate the Court. Marshall would have been

derelict of his high office, had he failed to repel the ruthless forces emanating with the Chief Executive. 25

Shortly after the Burr trial, Jefferson's friends in Congress attempted to pass a law for the punishment of treason, though an individual was not personally present when the act was committed. Every member who believed in the doctrine of constructive treason reported a bill, and one such bill did pass in the Senate; however, no further action was taken in the House. Randall advances two reasons for the failure of any of these bills being enacted into law: First, the Administration's attention became occupied with the approaching clouds of war from Europe; second, the unwillingness of the majority members of Congress to question, or interfere with the judiciary. 26

After a careful appraisal, historians, who have made a searching investigation in Burr's trial, have concluded that Marshall's conduct and decision in the case cannot be questioned. Professor McCaleb states his conclusion thus:

"It is much easier to show that Burr escaped through the connivance of the judge, or the aid of the Federalists... than it is to admit the failure of the evidence. The logic of Marshall's position was irresistible. If it was sensorious and oversevere, the fundamental argument presented was not then, and has not to this day been successfully refuted." 27

25. Ibid., Marshall to the Associate Justices of the Supreme Court, June 29, 1807, in which he seeks their opinion in what he calls "new and different subjects."


27. McCaleb, 312. Also G.T. Clark, Great Sayings by Great Lawyers 452. Vernon Law Book Co., Kansas City, Mo., 1926. (Citing speech by A.J. Beveridge, Mar. 12, 1921.)
While it cannot be stated with certainty what Marshall's attitude in this trial would have been, had Justice Chase been convicted, it is obvious that the acquittal must have recovered the Chief Justice's composure. And when the Burr trial came before him, he was prepared to face the Administration with greater confidence and determination. Marshall's conduct of the trial, says Corwin, was a complete triumph, and only in one instance did Jefferson score. This was in the much disputed action of Marshall in issuing the subpoena duces tecum. The weight of authorities seems to be that the President was entirely justified in ignoring Marshall's summons to appear in Court. 28

CHAPTER VII

JOHN MARSHALL - JURIST OR POLITICIAN?

The trial of Aaron Burr came in the early years of John Marshall as Chief Justice; during the years when the Judiciary Branch of the Government was being subjected to constant attacks from all quarters. "Marshall faced a problem of uncommon difficulty", says Beveridge. "It was no small matter to come between the populace and its prey - no light adventure to brave the vengeance of Thomas Jefferson. Not only his public repute - perhaps even his personal safety and his official life - but also the now increasing influence and prestige of the National Judiciary were in peril."

While Beveridge believes that Marshall was determined to do justice in the case; be an understanding jurist, and enforce the law in accordance to the evidence, two other modern authors assert that "the Burr trial was rather a political campaign than a judicial process." The other declares that Marshall could not have presided without lending a "political coloring." Moreover, this popular writer continues, "Marshall

1. Beveridge, III, 421.
2. Ibid.
   Chas. Scribner's Sons, New York, 1918.

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was the fairest and wisest of jurist" only in cases having no political significance. Without explaining why the Chief Justice could not preside over this particular case, as in cases with no political significance, he proceeds to charge as being a "consummate politician."\(^4\)

That Jefferson and Marshall had no love for one another, it cannot be denied. Replying to Hamilton, as early as January 1, 1801, Marshall said of Jefferson:

"To Mr. Jefferson, whose political character is better known than that of Mr. Burr, I have felt almost insuperable objections...By weakening the office of President, he will increase his personal power. He will diminish his responsibility, sap the fundamental principles of the Government, and become the leader of that party which is about to constitute the majority of the legislature."\(^5\)

This opinion of Marshall for Jefferson is followed by other late historians, except that they sometime insert the name Federalist to that of Marshall. "The prisoner at the bar of justice was Aaron Burr," declare these writers, but the "contest" was "between Federalists and Republicans."\(^6\)

A contemporary writer seems to intimate that Marshall came to preside over the Burr trial with a formed opinion; that the accused was merely the victim of the President. "It would

be difficult or dangerous for a jury to venture to convict Burr, however innocent they might think him." This significant statement was made - if we can believe Blennerhassett, who was subject to grudges - by Martin to Blennerhassett. The author of this story recorded in his daily notes that Marshall made the remark to Martin. Considering Luther Martin's fondness for conversation, it is very probable that the story is a myth, concocted perhaps either by Blennerhassett or the lawyer.

An unfortunate incident, occurring during the early part of the trial, caused Marshall to be charged with playing politics, without regard to good ethics. And although biased historians do not mention this instance as the reason for their malignant criticism, it is reasonable to assume that such is at least an important factor for their conclusion. Wandell, Bowers, and Muzzey, it should be noted, have made important contributions to history, but are not considered authorities on constitutional law.

During the May, 1807 term of the Federal District Court, John Wickham, of Burr's counsel, gave a dinner and invited Marshall, Burr and many other prominent members of the Virginian bar. The gathering was not to honor any particular lawyer,

or judge, but was an established custom, a principal form of hospitality practiced by all leading members of the legal profession in Richmond. Moreover, the Chief Justice, being an old neighbor of Wickham was never known to have declined any of the "lawyer dinners" given by his intimate friend. 8

On the night of the dinner, Marshall found himself in the same dining room with Aaron Burr, the man over whose trial he was to preside. According to a guest who was in attendance, Marshall did the best he could under the circumstances, and left earlier than usual. Professor Tucker was present at the festivity and wrote the following account:

"It is proper to add, this gentleman (Wickham) informed the Chief Justice in the course of the morning, that he expected Colonel Burr to dinner. The Chief Justice considered that, having already accepted the invitation, it might be regarded as undue fastidiousness, and perhaps a censure on his friend, then to decline it. He accordingly went to the dinner, but he had no communication whatever with Burr; sat at the opposite end of the table, and withdrew at an early hour after dinner...There was evident impropriety in this association between parties thus related to the public and to each other, and no one was afterwards more sensible of it than the Chief Justice himself, but it was not an act of deliberation, but merely inconsiderate." 9

8. Beveridge, III, 394.
Historian Thayer, however, gives another version of this dinner at Wickham's home. This author is of the opinion that Marshall did not know, at the time he accepted the invitation, that Burr was to be present; but, as stated by Tucker, learned that Burr had been invited on the morning of the day the dinner was to be held. The Chief Justice could have declined to attend then, or, according to Thayer, he could have accepted the advice of Mrs. Marshall, who advised him not to attend. However, both Beveridge and Thayer doubt the authenticity of the source which claims that Marshall was aware that Burr was to be present. They rather believe that Marshall was completely unaware; that he would not have committed such a reckless act at a time when public suspicion was very intense. 10

In view of Tucker's statement, it is certain that such a dinner was given, and that Marshall and Burr were present. Those who adhere to the idea that Marshall deliberately committed the gross indiscretion and attended the dinner merely to show a defiant attitude to Jefferson, consider him a political judge. On the other hand, those who believe that he was too honorable to commit such a reckless act - and on this side we find the best of authorities - he is considered a great jurist. 11

The Republican organ, the Richmond Enquirer denounced the Chief Justice's conduct, in several of its editions. An anonymous writer who signed his letters merely "A Stranger from the

11. Ibid., and Randall, III, 205.
Country," accused Marshall of disgracing his country; of "wanton insult", and "conduct so grossly indecent." The writer demanded to know Marshall's motive for attending this "treason rejoicing dinner."\(^{12}\)

Beveridge states that Marshall never explained or apologized for attending the dinner, but quietly took his seat on the bench "to conduct the historic trial...with kindly forbearance which never deserted him, that canny understanding of men and motives which served him better than learning..."\(^{13}\) If Marshall, in the course of the trial, manifested any sign of being a politician, it was in connection with Wickham's dinner. He appeared to have understood the devices by which politicians sought to embarrass him, and so he held his tongue.

Great efforts have been made by certain writers to paint Marshall a political judge merely on the ground of his issuance of the subpoena duces tecum to President Jefferson; that such action only added fuel to the flame of partisan dispute. Furthermore, what was Marshall's object in issuing the order, since the Court lacked authority to enforce it? Politics is the answer of these historians. These writers have been well answered by a trustworthy student of the Constitution, who has said that the issuance of the subpoena was, after all, a secondary matter; that if it should not have been issued, since it could not have been enforced, it was "an honest mistake of judgment."\(^{14}\)

\(^{12}\) Beveridge, III, 396. Citing Enquirer, April 10 and 28, 1807.

\(^{13}\) Ibid., 397.

John Marshall was a student of history and an author. His writings indicate that he had made a thorough study of the English laws; how they had been flouted under the reigns of the Tudors and Stuarts. And when Jefferson demonstrated his determination to convict Burr, regardless of evidence, the Chief Justice became just as determined that there was to be no repetition of a reign of terror in America. Had not Marshall ruled in a previous case, that "the government of the United States has been emphatically termed a government of laws, and not of men?"

James Bryce, an acknowledged authority on our Constitution said of John Marshall, that he "did not forget the duty of a judge to decide nothing more than the suit before him requires... never treading on purely political ground, never indulging the temptation to theorize, but content to follow out as a lawyer the consequences of legal principles..." Bryce's opinion of Marshall is supported by another serious historian, who declares that "the literature of judicial decisions in all


countries will be searched in vain for a more complete, scientific and practical conclusion than this at which he arrived. 18

The discrepancy in Marshall's estimate as a jurist seems to be overwhelmingly in his favor. The greatest authorities maintain that, even in the Burr trial, Marshall came out as the "staunch and unshakable champion of legality..." 19 What appears to be the weakest part of his decisions - the subpoena duces tecum - may still be said that it is in harmony with the rule prevailing today. The Legislative Branch of our Federal Government may, by resolution, call upon the President to furnish state papers and documents in his possession. The only difference lies in that Congress makes the request, while the court issues an order.

Professor McLaughlin seems to maintain that John Marshall made his position inconsistent by subpoenaing the President. He calls to our attention a speech made by the Chief Justice during the Virginian Convention of 1788. Upon examining the speech, Marshall is reported as having said:

"I hope that no gentleman will think that a state will be called at the bar of the federal court. It is not rational to suppose that the sovereign power should be dragged before a court." 20

In view of this statement, why did Marshall alter his position, so as to deny the President of the United States the same right he would have granted to a State? Did he mislead the delegates who demanded complete State Sovereignty? Rather than being a political opportunist, Marshall was then performing a patriotic duty. He was eager to do his part in the establishment of a strong Federal Union of States. He could not foresee the conditions of the Nation twenty years hence. Speaking as a delegate, therefore, he sought the establishment of a government and make improvements as problems arose.

In 1807, Marshall was speaking in the capacity of the head of the Judicial Branch of the country; he had had twenty additional years of experience in public affairs. Unlike Washington and Adams, Jefferson strove to make radical changes the moment he took office. And, according to Parton, Marshall was unjustly accused of intriguing with the Federalists, for performing his duty as Secretary of State.21

If Marshall was busily engaged in signing commissions, late in the evening of March 3, 1801, it was due to Hamilton, who had persuaded President Adams in dividing the country into twenty-four judicial districts, with a Federalist presiding over each court.22 Upon taking office on March 4th, Jefferson

22. Ibid., 585.
discovered that his predecessor had stuffed every Federal Judicial office with last minute appointments. As Secretary of State, Marshall's duties included the signing of the commissions for the newly appointees, and Jefferson's resentment against Marshall was not properly directed. There is no evidence that the Chief Justice ever sought political appointments. On the contrary, there is abundance of evidence showing that he declined public offices.23

As in all other great judicial opinions, Marshall's decision in the Burr trial has stood the test of time. In this case, perhaps, his courage was greater than his knowledge of the law, which was lacking in precedence. And, undoubtedly, it was for this lack of precedence that caused the President to accuse the Chief Justice of assuming power not in the Constitution; fearing that such assumption of power "would make the judiciary a despotic branch" of the Government.24

Jefferson's fears were unfounded, as time has proved, Whether Marshall was establishing the American doctrine of constructive treason, or defining treason under the Constitution, he was concerned with interpreting the Constitution as would benefit a strong centralized government, then in dire need. He had no precedent to guide him in solving the judicial

23. Beveridge, II, 81, 144-46, 200-2 and 347.
problems, such as presented themselves in Burr's trial, except the English law. This law he refused to accept, except when, in his opinion, it did not conflict with the Constitution. In this contention, he has, with few exceptions, been sustained by all succeeding members of the Supreme Court and great legal scholars. "His conduct on the bench" says Cotton, "was always decisive and judicial. If he possessed a strong personality and dominated the court, when he had reached the height of his intellectual powers, for this he cannot be condemned."25

Professor Wandell, who devoted about twenty years to the study of Burr's conspiracy and trial, concluded that Marshall's decision was "founded on the most irreproachable principles of law, in harmony with the most solemn provisions of the Constitution in the matter of treason, was equally incontestable."26

That there should be any question as to Marshall's conduct and attitude in the Burr trial is perhaps largely due to his being the least known of our great historical figures. "The general conception which even learned American lawyers have of this extraordinary personage," says Beveridge, "is that he was a sort of legal Buddha, sitting among the clouds and giving forth by some strange process those opinions which have made his name immortal."27

John Marshall's legal accomplishments introduced new governing principles, founded on the "rock of justice and good sense." It was natural for him to bring his political experience on the bench, but, according to an English historian, Marshall enriched politics in the government by maintaining a high standard in the conduct of the Burr trial; he established respect for the Judiciary by refusing to doff his judiciary robes and become a political instrument of the President.28

Randall rejects the idea that Chief Justice Marshall would "ever knowingly and voluntarily allow mere partisan or personal feelings to influence his action on the bench." His errors, if any, states this great biographer of Jefferson, were due to the system which Marshall was striving to improve.29

My conclusion in this thesis is best answered by Chief Justice Marshall himself, who, upon receiving a written invitation from Hamilton, urging him to enter the political intriguing then flourishing in the House of Representatives, over the Jefferson-Burr Presidential tie, politely replied: "I can take no part in this business."30

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