

THE
AARON BURR CONSPIRACY
AND
PARTY POLITICS
by
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PREFACE

The subject of Aaron Burr and his activities in regard to the history of the United States continues to be an intriguing one for the student of history. In the century since his death Burr has been characterized in various ways by his biographers: a genius of political organization, a traitor to his country, a visionary whose only fault was his tremendous foresight regarding the territorial expansion of the United States and one of the most efficient men who ever held the high office of Vice-president of the United States. Of all the phases of his activities, from the Revolution to his death in 1836, none is so prominent as the conspiracy of Aaron Burr. Historians have filled volumes concerning it, they have discussed it and argued about it, and despite this comprehensive treatment, it still furnishes a subject for research and study among the most interesting in United States history.

The purpose of this thesis is to inquire into but one segment of the vast network of facts that comprise the "conspiracy" of this much maligned man: to show what connection and influence Burr's activities in the west, in 1805 and 1806, had on the party politics of his time; and, conversely, to show what influence party politics had on Burr's activities, especially his trial for treason. The limitations

of this thesis do not allow for an exhaustive treatment of all the various details that go to make up this vast topic but it has been thought necessary, as a background, to sketch Burr's political activities up to 1805, the previous party struggle over the judiciary and then, after these relationships have been established, to treat, more fully, the political aspects of his conspiracy and trial. In order to furnish a more complete picture of the political repercussions stemming from Burr's conspiracy the conclusion will inquire into the political aftermath of the conspiracy.

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CHAPTER I

AARON BURR'S POLITICAL ACTIVITIES TO 1803

After an heroic career in the American army during the Revolution, Aaron Burr set up a law practice in New York City and six months later, in 1784, was elected to his first public office, a member of the state legislature. Although at this early date political parties, as such, had no existence,¹ Aaron Burr had embarked on a course

¹ Matthew L. Davis, Memoirs of Aaron Burr, 1:249.

of activity in the public service that was to set the stage for the most momentous events of his life. At the end of his term in the legislature he returned to the practice of law and in 1789 was appointed Attorney General of New York State by Governor Clinton. His success in this position led to his election to the United States Senate in 1791 through the defeat of General Schuyler, the father-in-law of Alexander Hamilton.² The winter

² Walter F. McCaleb, The Aaron Burr Conspiracy, 6-7.

of 1791-1792, while Burr was a Senator from New York, gives us the first clue that he would eventually align himself with the Republican cause; at this time, Jefferson, who was on the brink of a break with the administration, granted him free access to all documents in the State

Department to further his research into the Revolution. President Washington, however, ordered this stopped and Burr was denied this opportunity.³

³ Matthew L. Davis, op.cit., 1:331.

After his term in the senate he returned to state politics and as an active leader in New York City his aid was recognized by all as indispensable to the success of the Republican cause.⁴ It was at this time that Doctor

⁴ William O. Lynch, Fifty Years of Party Warfare, 92-93.

Benjamin Rush, a confidant of Thomas Jefferson, wrote him that "his friends everywhere" looked to him "to take an active part in removing the monarchical rubbish of our government".⁵ The implication is evident. Burr was

⁵ Matthew L. Davis, op.cit., 1:317.

considered as leagued with Jefferson in his struggle against the monarchical Federalists who then controlled the government.

The presidential election of 1796 saw Burr receive thirty electoral votes to sixty-eight for Jefferson and seventy-one for Adams⁶ but his next series of activities

⁶ Walter F. McCaleb, op.cit., 9.

with political impact took place in the elections to the New York legislature in the spring of 1800. Its importance was recognized by all because it was this legislature that was to choose the presidential electors for the coming election.⁷ Burr's reputation as a political

⁷ William O. Lynch, op.cit., 95.

genius is based, to a great extent, on his efforts exerted for the Republican cause at this time. Using Tammany, which he transformed from "an effusive speech-making society to an active political club"⁸, he decisively de-

⁸ Gustavus Myers, The History of Tammany Hall, 14.

feated the Federalists, who were managed by Alexander Hamilton, and carried the city and the state for Jefferson. Aaron Burr was the first man to appreciate the value of party organization; he presented a ticket superior to Hamilton's; when funds were needed he formed a finance committee and assessed wealthy members of the party; he organized precinct and ward meetings and aroused the people through political speakers. The result was a democratic landslide⁹ and Burr was more firmly entrenched as a Republican

⁹ Claude G. Bowers, Jefferson and Hamilton, 452-454.

leader.

The national election crisis of 1801 furnished the first political setback of any consequence for Burr. It is unnecessary to go into detail concerning this event in Burr's political life. A few general statements will suffice. The circumstances surrounding this crisis are well known and all will agree that they were "conducive to intrigue and bargaining."¹⁰ Much has been said

¹⁰ William O. Lynch, op.cit., 104.

concerning Burr's relations with the Federalists at this time and the "deals" that were in the making to elect him instead of Jefferson. It is well known that the Federalists took up Burr's cause wholeheartedly; it is not so well known that Burr, even before these momentous political events, expressed his sentiments plainly and unmistakably to General Samuel Smith of Baltimore:

"It is highly improbable that I shall have an equal number of votes with Mr. Jefferson; 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 dishonor my views and insult my feelings by a suspicion that I would submit to be instrumental in counteracting the wishes and expectations of the United States."¹¹

¹¹ Matthew L. Davis, op.cit., 2:75.

This statement of Burr's and his consequent inactivity evidently influenced the House Republicans to stand fast during the balloting, while the Federalists depended upon his insincerity in their continued dealings to make him president.¹² That Burr gave the Federalists

¹² William G. Lynch, op.cit., 104.

no occasion for optimism in their struggle is attested to by Senator James Bayard in a letter to Hamilton on March 8, 1801, when he said that "the means existed of electing Burr, but this required his cooperation. By deceiving one man (a great blockhead), and tempting two (not incorruptible), he might have secured a majority of the States".¹³

¹³ John C. Hamilton, ed., The Works of Alexander Hamilton, 6:524.

On the other hand, it is an established fact that Jefferson was conveying his opinions to the Federalists and vice versa and although he may have been elected without this exchange, still his election immediately followed what the Federalists regarded as "a proper understanding".¹⁴

¹⁴ Charles A. Beard, Economic Origins of Jeffersonian Democracy, 144.

These events provided a sizeable step in the political downfall of Aaron Burr. He was Vice-president of the United States but Jefferson practically ignored him through-out the term; he was becoming an outcast among his own party members and was looked at askance by the Federalists, who still thought that he would have accepted the presidency. Both Republicans and Federalists believed he had played the game from both ends so that whatever the outcome he could not lose politically.¹⁵

¹⁵ William O. Lynch, op.cit., 137.

Whatever his status, politically, in the eyes of both parties during his term as Vice-president, he so won the esteem of the Senate that on March 2, 1805 when Burr announced that he would leave as presiding officer, a resolution passed unanimously to give "the thanks of the Senate . . . to Aaron Burr" because "of the impartiality, dignity, and ability with which he presided over their deliberations" and the members gave "their entire approbation of his conduct in the discharge of the arduous and important duties assigned him as President of the Senate".¹⁶

¹⁶ Annals, 8th Congress, 2nd Session, 72.

If Burr's political fortunes were low during his

term as Vice-president, they received their fatal blow shortly after he left that office. Seeing an opportunity to salvage what was left of his political ambitions and possibly to recoup them entirely, he entered the New York gubernatorial race of 1804. Having been disowned by the Republicans, Burr ran on an independent ticket against the official Republican candidate, Morgan Lewis. It would be difficult to prove that Burr at the time seriously planned to ally himself with the subversive elements in New England which planned to dismember the Union, but that he entered the race with the support of the Federalists and with the prayers of the disunionists there can be little doubt.¹⁷ The Federalist cause, at this time,

¹⁷ Claude G. Bowers, Jefferson in Power, 245.

had degenerated to such an extent that they did not put up a candidate of their own but supported Burr in order to bring about a division within the Republican ranks.¹⁸

¹⁸ William O. Lynch, op.cit., 166.

They were unsuccessful both in their attempt to elect Burr and in their plans to divide Jefferson's party; on May 1, 1804 Burr wrote to his daughter, Theodosia, that the election was lost "by a great majority".¹⁹

¹⁹ Matthew L. Davis, op.cit., 2:235.

Actually, he was beaten by about seven thousand votes out of a total of approximately sixty-three thousand.²⁰

²⁰ William O. Lynch, op.cit., 165.

The coup de grace to Burr's political aspirations was furnished as a direct aftermath of this election. Burr attributed his defeat to the efforts of Alexander Hamilton and as a result of the publicity given to certain of Hamilton's remarks concerning him, Burr challenged him to the fatal duel of July 11, 1804.²¹

²¹ Walter C. McCaleb, op.cit., 11.

It was shortly after this event that Burr, broken in political and financial fortune, turned seriously to plans concerning the western part of the United States. Little did he dream that this would result in even more disastrous results than any of his undertakings thus far; the account of these activities will be supplied in a later chapter.

CHAPTER II

THE PARTY STRUGGLE OVER THE JUDICIARY

At the time of the election of 1800 the Federalist party was well on its way toward dissolution, but its cause would not have been entirely hopeless if it had not been for gross errors in matters of national and international politics during the last few years of Adams' administration. The people were still impressed by the services rendered the country by the party, the mercantile and financial interests were still united to uphold it, and the XYZ Affair which brought about a Federal revival in 1798 was still fresh in the minds of the people.¹ All these things could have combined

¹ Albert J. Beveridge, The Life of John Marshall, 2:532.

to elect another Federalist president in 1800, if it had not been for two things: relations with France and the Alien and Sedition Laws.

As it became more probable that war with France was inevitable, the administration of John Adams under the influence of Alexander Hamilton made provisions for a vastly enlarged army. Hamilton gained the position of second in command and was extremely anxious for hostilities in the hope that they would prove a stimulus for the

waning fortunes of the Federalists and the administration. War with France, in Hamilton's plans, could lead, with the help of Francisco de Miranda, to annexation of Florida and Louisiana and thus secure the wavering west to the Federalist cause. But President Adams, without consulting party leaders, suddenly resumed diplomatic relations with France and peace was concluded. The disappointed Hamilton turned on Adams and thereby "disrupted the already tottering Federalist party with factional bickering".² "This unnecessary army . . .

² Wilfred E. Binkley, American Political Parties, Their Natural History, 82.

was the primary cause of the downfall of that administration, and of the irretrievable ruin of the Federal party",³

³ John Quincy Adams, Parties in the United States, 28.

for the people had no glorious campaigns to remember but only an increased taxation to support a force for which there was no foreseeable use.⁴

⁴ William O. Lynch, op.cit., 74.

The imprudent use of the Sedition Act, also, just prior to the election of 1800 not only furnished fuel

for the smoldering embers of the Republican party but also deepened the chasm that had already been opened within the Federalist ranks. The pardon by Adams of a man who had twice been convicted of treason under the Sedition Act widened the breach between the President and Hamilton.⁵ These events coupled with Burr's

⁵ John Quincy Adams, op.cit., 29.

unrelenting efforts toward party organization in New York spelled the doom of the Federalists, for their ideology that political parties and party organizations were illegitimate creations made it impossible for them to keep in step with the fast growing Jeffersonian Republicanism.⁶ There can be no doubt that, although

⁶ Wilfred E. Hinkley, President and Congress, 46-47.

these are the external events that proved the undoing of the Federalists, still the underlying reason and the chief basis for the political distinctions and the overthrow of Federalism was the westward expansion of the country. The economic interests of the agrarian interior furnished the foundation of the Republican program, while the coastal interests determined the program of Federalism. When the southern planters leagued with the western farmers against the northern capitalists Republicanism had

an opportunity to expand while the Federalists struggled with the antagonism between the coast and the interior.⁷

⁷ Homer C. Hockett, "The Influence of the West on the Rise and Fall of Political Parties," Mississippi Valley Historical Review, 4:459-460.

Then too, the Federalist party had "outlived its usefulness"⁸ for by the year 1800 all the problems that

⁸ John S. Bassett, The Federalist System, 295.

had vexed the country fourteen years before had disappeared; it had rendered valuable service to the country and was no longer needed to insure the success of the democratic "experiment".⁹

⁹ Anson D. Morse, "Causes and Consequences of the Party Revolution of 1800", Annual Report of the American Historical Association, 1894, 537-538.

When the Republicans won the election of 1800 Jefferson expressed the opinion and the desire that the "distinction" between the Federalists and the Republicans would "soon be lost, or at the most that it will be only of republican and monarchist: that the body of the nation . . . will rejoin the republicans, leaving only those who were pure monarchists, and who will be too few to form

a sect."¹⁰ This was an idle dream, as Jefferson was

¹⁰ H.A. Washington, ed., The Writings of Thomas Jefferson, 4:353.

soon to discover for, although the Federalists had been removed from the executive and legislative departments, they had retreated through last minute appointments into the stronghold of the Judiciary. The Judiciary Act of 1801 angered the Republicans because its provisions were contrary to their theories of government in extending the federal jurisdiction at the expense of the state courts,¹¹ and, although this act was repealed

¹¹ Edward Channing, The Jeffersonian System, 27.

on March 3, 1802,¹² the federal courts had already

¹² Annals, 7th Congress, 1st Session, 183, 982.

been filled with Federalists. Not the least among these was Chief Justice John Marshall who was to play a major role in the political struggle in the succeeding years. The friendship of Aaron Burr and Thomas Jefferson at this time was not furthered by the former's opinion concerning the repeal of the Judiciary Act. He expressed

the opinion that such action may not have been "constitutionally moral" or "politically expedient".¹³

¹³ Matthew L. Davis, op.cit., 2:169.

However this may have been, there remained only one method to take the judiciary out of the hands of the Federalists: impeachment. On February 3, 1803, Jefferson recommended the impeachment of John Pickering, district judge of New Hampshire, on charges of drunkenness and incompetency. Shortly after he was removed, Chief Justice Marshall gave his opinion on *Marbury v. Madison*,¹⁴ the famous "obiter dicta" of which further

¹⁴ 1 Cranch, 137 (February 24, 1803).

infuriated Jefferson.¹⁵ However, six days later, on

¹⁵ Joseph P. Cotton, Jr., The Constitutional Decisions of John Marshall, 1:xiii.

March 8, 1803, a case upholding the constitutionality of the Circuit Court Act of 1802 was decided by the Court¹⁶ and Marshall was praised highly even by

¹⁶ *Stuart v. Baird*, 1 Cranch, 299 (1803).

politically hostile newspapers. As a result, Republican talk of impeachment lapsed for a time, but this was merely the calm before the storm. Supreme Court Justice Samuel Chase furnished the fuel for Jefferson's next outburst against the "stronghold of Federalism". The actions of Judge Chase on the bench had long subjected him to attack, but the Republican opportunity came in May, 1805, when he expressed his views concerning state and federal legislation to a federal grand jury in Baltimore. He attacked the act abolishing Circuit Judges, the new State Constitution of Maryland and universal suffrage. He was immediately called to task by the National Intelligencer, a Washington newspaper, and when a move for impeachment proceedings was made by Jefferson and the Republicans, the Federalists claimed it was an attempt by the executive and legislative to eliminate the judicial because it stood in the way of Republican designs.¹⁷ These were not calm days, politi-

¹⁷ Charles Warren, The Supreme Court in United States History, 1:269, 273, 278.

cally, and "the general public seemed to accept the fact that the prosecution was purely a party move".¹⁸

¹⁸ Ibid., 282.

When, on March 1, 1805, the Senate failed to convict

Chase on any of the charges brought against him,¹⁹ the

¹⁹ Annals, 8th Congress, 2nd Session, 669.

Federalists rejoiced and the Republicans were bitter. Jefferson confided to Senator Plumer of New Hampshire that impeachment was a "farce which will not be tried again".²⁰

²⁰ Albert J. Beveridge, op.cit., 3:222.

The effect of this trial on United States history has been great, for there is no doubt that if the Republicans had been successful in this case they would have proceeded to find charges against all the judges of the Supreme Court and this political struggle would have been accentuated.²¹ This does not mean that

²¹ Charles Warren, op.cit., 1:293.

Jefferson, seeing himself blocked on one course of action, allowed his efforts against the Judiciary to lapse; on the contrary, the spirit that drove him to the attempt to remove Chase "burst forth with redoubled violence from its defeat" and took a "more pointed and deadly aim" at judicial independence.²²

²² Worthington C. Ford, ed., Writings of John Quincy Adams, 3:107.

Jefferson was not to try impeachment again but the other "battery . . . opened upon the judiciary, the operation of which only futurity can determine,"²³

²³ Ibid., 3:117.

was not far in the future. The case of Aaron Burr was to furnish an opportunity to hammer again at the judicial department but this time with a different method. Impeachment was not sought, but, as we shall see, the attempt was made to bring the political struggle before the bar of public opinion and to force a decision in Congress through the will of the people.

CHAPTER III

THE BURR CONSPIRACY

The situation in which Aaron Burr found himself in March, 1805, is well expressed in a letter to his son-in-law, Joseph Alston:

"In New York I am to be disenfranchised, and in New Jersey hanged. Having substantial objections to both, I shall not, for the present, hazard either, but shall seek another country."¹

¹ Matthew L. Davis, op.cit., 2:365.

Disowned by the leaders of his own party and hounded by the Federalists as the murderer of their leader, Burr turned his attention to the west. What he intended to accomplish by his actions of the next eighteen months is impossible and unnecessary to determine. The mass of conflicting evidence brought forth at his trial in 1807, and the differences of opinion among historians in interpreting this evidence ² tempts the reader to

² For a contrast of opinions see McCaleb's Aaron Burr Conspiracy and Henry Adams' History of the United States, Vol. 5.

despair of ever coming to a decision on the subject. Shortly before his death, in 1835, Burr said that he had two objectives: to revolutionize Mexico and to

settle the Bastrop tract in Louisiana. The latter was a tract of land thirty miles square near Natchitoches which Baron P.N. Tut Bastrop had received from the Spanish government prior to 1803. Colonel Charles Lynch subsequently obtained an interest in it and from him Burr purchased nearly four hundred thousand acres.³

³ Matthew L. Davis, op.cit., 2:379.

To these two objectives mentioned by Burr himself, there is, of course, the third that may have entered into his plans: the separation of the western states from the Union, which became the focal point in his treason trial.

Most of the year 1805 Burr spent in a survey of the western country and as he stated in a letter to his daughter on March 29, 1805, the object of his journey was "not mere curiosity, or pour passer le temps". [sic]⁴

⁴ Ibid., 2:366.

This excursion brought him into contact with many prominent men of the day with whom he conferred to obtain aid for his expedition: Senator John Smith of Ohio, Jonathan Dayton, General Adair, Andrew Jackson, Daniel Clarke of New Orleans and General James Wilkinson, Commander in Chief of the Army and Governor of Louisiana. There

is no doubt but that he had conferences before and after this journey, with both the British and Spanish ambassadors to the United States,⁵ but whether these

⁵ James Madison, Letters and Other Writings, 3:398-399.

conferences were impostures "in order to secure money from Great Britain and Spain for his plans" or whether they must be accepted at their face value (which would convict him of treason)⁶ is impossible to determine.

⁶ Walter F. McCaleb, op.cit., xiii.

The first week in August, 1806, saw Burr begin his fateful journey to the west from which he was to return accused of treason against the United States. He visited Harman Blennerhassett at his island in the Ohio and enlisted his financial aid for his expedition. He then continued on down the river with the supplies and boats he had gathered. On July 20 and 29 he had written to Wilkinson in cipher, telling him of his plans and schedule. Both letters were practically identical and were delivered to Wilkinson at New Orleans early in October, 1806, by Samuel Swartwout and Dr. Erick Bollman

respectively.⁷ These letters, together with the verbal

⁷ Annals, 9th Congress, 2nd Session, 1011-1014.

messages carried by these two men were later used against them and Burr in the attempt to obtain a treason conviction. In the meantime, however, the threat of war with Spain was appreciably diminished when, on September 27, 1806, her forces withdrew from the disputed territory along the Louisiana border.⁸ It was at

⁸ Annals, 10th Congress, 1st Session, 570-571.

this time that Wilkinson decided to turn against Burr and his plans, because the western press was viciously assailing both of them as traitors, and because Burr's plans may have depended upon hostilities between the United States and Spain.⁹ Here, again, it is difficult

⁹ Walter F. McCaleb, op.cit., 145-146.

to determine, from conflicting testimony and opinions, the exact facts. On October 20, and November 12 Wilkinson wrote Jefferson the information he had concerning the expedition of Burr, always careful not only not to implicate himself but also to place himself in as favorable a light as possible.¹⁰ He gave the impression that

¹⁰ Ibid., 132, 139, 140.

he had in mind only service to his country: he did not tell Jefferson that he had conferred with Burr concerning these plans as far back as 1805 when Burr first surveyed the west, and that he had been in communication with Burr since that time . He gained Jefferson's sympathy as a hero who was trying to save his country from a revolt by the west when he himself had long been a pensioner of Spain and would have joined Burr's plans if he thought that they would succeed.

Until this time Jefferson had not taken a serious view of the situation but on November 27, 1806, he issued a proclamation concerning the preparations "for a military expedition against the territories of Spain" warning "all faithful citizens who had been led . . . to participate . . . to withdraw" and enjoining "all officers . . . to be vigilant . . . in searching out and bringing to condign punishment all persons engaged or concerned in such enterprises."¹¹

¹¹ James D. Richardson, ed., Messages and Papers of the Presidents, 1:392.

This proclamation immediately aroused the west to the supposed danger and although Burr's travels made it possible for him to precede the news of the proclamation, he was arrested on January 17, 1807 at Coles Creek, Mississippi, by Cowles Meade,

Secretary of the Mississippi Territory and turned over to civil authorities for trial.¹³

¹³ Annals, 9th Congress, 2nd Session, 1019.

Meanwhile, in New Orleans, on December 14, Wilkinson had arrested Erick Bollman and Samuel Swartwout, messengers of Burr, and had them sent to Washington D.C. by boat,¹⁴ stating that he would take the responsibility

¹⁴ Ibid., 1009.

for sending them off without allowing them to obtain a writ of habeas corpus.¹⁵ Little did Wilkinson realize

¹⁵ Ibid., 1011.

that these very actions of his were to be one of the chief causes of the animosities aroused over the Burr conspiracy. Not only did he himself narrowly escape an indictment but because party feeling was so high, his actions caused political repercussions in Congress a short time later. This phase will be treated fully in the succeeding pages.

Burr himself was brought before a grand jury in Washington, Mississippi shortly after his surrender and it freed him ". . . of any crime or misdemeanor

against the laws of the United States or of this territory"¹⁶ However, Judge Rodney, who pre-

¹⁶ Walter P. McCaleb, op.cit., 228.

sided, bound him over to appear before the court from day to day and because of this procedure Burr went into hiding. After an appeal to Governor Williams who upheld the Judge,¹⁷ he attempted to flee and was arrested.

¹⁷ Ibid., 230-233.

in Washington County, Alabama, after he had been recognized by a person of whom he had asked directions.¹⁸

¹⁸ William H. Safford, Bleenerhassett Papers, 214-217.

On the very day that Burr was being apprehended at Coles Creek there occurred in the House of Representatives an event that was to serve as a mild preview of the party strife that would result from Burr's actions. John Randolph of Virginia, the Quid, who bitterly opposed Jefferson, found in the President's actions a source of complaint against the administration. In his annual message to Congress on December 2, 1803, Jefferson had only briefly mentioned any disturbance in the

west.¹⁹ Randolph stated in rather vigorous terms on

¹⁹ James D. Richardson, op.cit., 1:394.

the floor of the House that he was dissatisfied with the meager information communicated to Congress on this topic and could no longer reconcile silence with his duty as a representative "of an independent people".²⁰

²⁰ Annals, 9th Congress, 2nd Session, 334.

He proposed a resolution that the president be requested to inform the House of the activities of private individuals "against the peace and safety of the Union . . . together with the measures the Executive had pursued . . . for suppressing or defeating" them.²¹ After a heated

²¹ Ibid., 336.

debate, the resolution was passed²² and Randolph had

²² Ibid., 357-358.

succeeded in forcing the President to declare himself officially concerning Burr. It was Randolph's opinion that Burr's movements had some connection with the Spanish

intrigues that had been going on for some time on the frontier. He realized that any reconciliation between himself and Jefferson was impossible so his purpose was to disgrace Jefferson in the eyes of the public, for if the President had not taken strong action on Burr he could also be accused of inactivity concerning the Spanish question, which was a vital one for the welfare of the west.²³

²³ Walter P. McCaleb, op.cit., 243-244.

Randolph's opinion on this matter was a mistaken one but he brought a message from the President on January 22, in which he tells of the plans of Burr as far as he knew them, admitting that his information was "such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts"; in the message he gives the first clue as to his opinion of the principal actor, Burr, whose guilt he declared to be "placed beyond question"²⁴ This

²⁴ James D. Richardson, op.cit., 1:400-405.

judgement concerning Burr and the open declaration of it was to be a maddening burden on the administration for some time to come; it gave his political enemies a rallying point from which they made many bitter attacks

on the Executive, and Jefferson, having committed himself, was forced to work for the conviction of Burr or admit that his proclamation of November 27, 1806, which aroused the west, and his message to Congress were errors of policy.

Having been aroused by the President's message of January 22, 1807, the Senate, behind closed doors, the next day passed a bill "suspending for three months the privilege of the writ of habeas corpus, in certain cases," which it was to communicate to the House "in confidence".²⁵ When, on January 26, the House was

²⁵ Annals, 9th Congress, 2nd Session, 44.

informed of the Senate action, these "certain cases" were found to be "treason, misprision of treason, or other high crime or misdemeanor, endangering the peace, safety, or neutrality of the United States".²⁶

²⁶ Ibid., 402.

On the same day, January 26, the President informed Congress that Erick Bollman and Samuel Swartwout, the men denied a writ of habeas corpus by Wilkinson in New Orleans, had arrived in Washington.²⁷ The connection

²⁷ Ibid., 45.

between this event and the bill to suspend the writ was certainly clear to Jefferson's enemies in the House. Before November 27, Jefferson had been the acme of inactivity concerning the conspiracy but now that the danger was over ²⁸ he had suddenly sprung into action

²⁸ This by his own admission on January 22 when he said in his message to Congress that the conspirators could not ". . . threaten serious danger to the city of New Orleans". Ibid., 42.

and had obtained in the Senate the suspension of the only writ guaranteed by the Constitution. The Federalists together with John Randolph and other enemies within the Republican ranks were alert to the opportunity afforded them.²⁹ They condemned the bill from every

²⁹ Edward S. Corwin, John Marshall and the Constitution, 90.

angle and then defeated it decisively by a one hundred and thirteen to nineteen vote.³⁰

³⁰ Annals, 9th Congress, 2nd Session, 424.

But the Federalists and Randolph's followers were not satisfied merely to block the attempted legislation of Jefferson but were willing and prepared to take the offensive so that no stone would be left unturned to

embarrass the administration in this situation. Jefferson, himself, as if he had a premonition of what was to happen, wrote to Governor Claiborne at New Orleans on February 3, 1807, that "the Feds and the little band of Quids . . . will try to make something of the infringement of liberty by the military arrest and deportation of citizens" ³¹ And that is exactly

³¹ H.A. Washington, ed., The Writings of Thomas Jefferson, 5:41.

what happened. Four days later Representative Broom, a Federalist from Delaware, introduced a resolution on the floor of the House "to make further provision for securing the writ of habeas corpus to persons in custody . . . of the United States". ³² When the resolu-

³² Annals, 9th Congress, 2nd Session, 472.

tion was brought up for consideration on February 17, it touched off a bitter debate between Federalists and Republicans which lasted for three days. Broom, in a speech on the floor, referred to the provisions of the Constitution concerning the writ and implied that the recent attempt to suspend it proved that, if it were left to the will of Congress, it would be a "convenient means to accomplish the purposes of party

persecution, or to gratify political or personal rancor or animosity³³.

³³ Ibid., 503.

There could be no doubt that the object of the resolution was General James Wilkinson, who had denied the writ to Bollman and Swartwout in New Orleans and what was more important, who had been defended by the administration when an attempt was made to suspend the writ just three weeks before. The opposing sides in the political struggle precipitated by the Burr conspiracy had now taken definite shape and with each succeeding event the strife became more bitter. The administration battling to justify its stand and the Federalists determined to disprove it and disgrace the Republicans in the eyes of the public. At this point there was no turning back for Jefferson; he had committed himself irrevocably and loss of prestige for himself and his party was the penalty for disavowing his previous actions. There were other possible considerations that may have occurred to Jefferson that determined his course of action. These will be treated in the discussion of Burr's trial.

The debate in the House of Representatives on Broom's resolution assumed a bitter tone. Representative Eppes of Virginia, a Republican, congratulated Broom on his "conversion to democracy" and said that the

resolution was designed merely "to afford an opportunity to gentlemen who care not much about personal rights, to make some noise about them". He blasted the Federalists:

"The greatest monster in human shape is, a tyrant in principle, with the Rights of Man in his mouth. A wretch sunk to the last step of the political ladder and willing again to mount by principles he never felt The real secret in this business is that the termination of this affair in the Western country does not suit the Federal palate." ³⁴

³⁴ Ibid., 512.

There was much reference to the Alien and Sedition Laws which had been passed and enforced so harshly by the Federalists not many years before; the "seeming anxiety" for the "rights of the citizen . . . among gentlemen of a certain political description" made Representative Holland wonder that they had now become "the exclusive guardians" of these rights when they could not effect them "when clothed with power". ³⁵ Certainly, consistency meant little

³⁵ Ibid., 547.

when political advantage was at stake. It was little wonder then that one man, Representative Alston, could sum it up in the assertion that the proposition presented "a strange appearance": men who were formerly the

"vehement advocates of energetic measures" were now "converted into their opponents".³⁶ The Federal-

³⁶ Ibid., 548.

ists, who had been so fearful in the late 1790's that subversive activities were at work in the country and who, therefore, passed the Alien and Sedition Laws, had now become the most bitter enemies of forceful action to preserve the Union; and the Republicans, who had previously railed against "energetic measures" were now their most "vehement advocates", in the form of suspension of the writ of habeas corpus. But political prestige had entered the case and former principles and policies had little place in such a situation. Representative Alston was a keen analyst when he said that the events were "not strange to an accurate observer of human nature".³⁷

³⁷ Ibid., 548.

The Federalists were not to be outdone in the exchange: Representative Elliot of Vermont attacked Wilkinson's actions regarding Bollman and Swartwout as the denial of Constitutional privileges "at the point of the bayonet and under circumstances of

peculiar violence";³⁸ John Randolph claimed that

³⁸ Ibid., 531.

there was as much right to shoot Bellman and Swartwout "as to do what has been done"; he accused the government of perpetrating the same violence on its citizens as the British had done on the colonies.³⁹

³⁹ Ibid., 536-538.

However badly the Republican cause had been battered by the Federalist arguments, the supporters of Jefferson still held the voting majority in the House and succeeded in obtaining the indefinite postponement of the resolution by a vote of sixty to fifty-eight.⁴⁰ Jefferson's

⁴⁰ Ibid., 489.

cause and that of Wilkinson had been saved by the slim margin of two votes but this was only the beginning. The Federalists would continue to hammer at the political bastions of the administration using as a wedge the President's defense of Wilkinson and the almost fanatic devotion of Jefferson to obtain a conviction of Aaron Burr on the charge of treason.

Although he had successfully countered the Federalist attack in the form of Bross's resolution, Jefferson, at the same time suffered a defeat which could not be assuaged by his momentary victory. As the debate raged at its height in the House, a motion came before the Supreme Court in Washington for writs of habeas corpus for Bollman and Swartwout. The question to be decided by the court was "whether the accused shall be discharged or held to trial", and if there was sufficient evidence to commit them for the crime of treason with which they were charged, "whether they shall be confined or admitted to bail".⁴¹

⁴¹ Ex parte Bollman and ex parte Swartwout, 4 Cranch 125 (1807)

The opinion of the Court which was handed down by Chief Justice John Marshall on February 13 stated that any conspiracy to levy war against the country had to be brought "into open action by the assemblage of men for a purpose treasonable in itself". He said that "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 . . . are to be considered as traitors".⁴² This was the statement that was to

⁴² Ibid., 126.

plague him through-out the trial of Aaron Burr and from which he extricated himself only at the expense of severe criticism of his legal opinions. It was the opinion of the Court in this case, however, that there was not sufficient evidence against either Bollman or Swartwout to justify a commitment on a charge of treason as interpreted by the Court.⁴³ In addition,

⁴³ Ibid., 135.

Marshall directed a rebuke at the administration: he remarked that if these men had been guilty of any lesser crimes than treason they should be punished under the general laws "formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate" than "under the influence of those passions which the occasion seldom fails to excite"⁴⁴

⁴⁴ Ibid., 137.

Marshall was referring here to the recent attempt of the administration to suspend the writ of habeas corpus.

To President Jefferson the freeing of Bollman and Swartwout seemed to be another deliberate attack on the executive by the Court.⁴⁵ He linked it with the

⁴⁵ Charles Warren, The Supreme Court in United States History, 1:307.

Judiciary Act of 1801, Madison v. Marbury and the attacks of Justice Chase. The struggle between the executive and the judiciary was to be resumed with as much acrimony as in 1803 and 1804 when impeachment was the order of the day. The subsequent trial of Aaron Burr was to furnish the battle ground for the Federalists and Republicans to win and to maintain public favor. Up to this time, in matters concerning the conspiracy, each had maintained its position. The Federalists, not realizing that as a party they had already sealed their doom, and the Republicans, anxious to wipe out the last vestiges of their political enemies and possible "to heal the breaches" within the party which had been "permitted by a state of security" ⁴⁶

⁴⁶ James Madison, op.cit., 3:224.

scrupled at little to uphold what they believed the proper course of action. It was not merely against Aaron Burr, the traitor, that Jefferson took up the sword but against Aaron Burr, the symbol and the rallying cry for all the opposition to his administration. And the Federalists, seeing a glimmer of hope that they might put a serious blot on administration policies made the acquittal of Burr the focal point of all their efforts. What chance

had abstract justice in such a situation?⁴⁷

⁴⁷

Nathan Schachner, Aaron Burr, 397-398.

Burr had thought, in 1805, when he left the Vice-presidency and was wanted for murder in two states that his fortunes had reached a low level. Little did he dream that a lower point could be reached; that he would one day become the pawn of party politics when his life was at stake.

Chief Justice Marshall stated that as "treason is the most atrocious offence which can be committed against the political body" so it is also a charge "which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties for power".⁴⁸

⁴⁸

David Robertson, Burr Trials, 1: footnote to 11, quoted in Albert J. Beveridge, op.cit., 3:377.

That it was used for this purpose there can be little doubt as we shall presently see.

CHAPTER IV

THE TRIAL OF AARON BURR

The trial of Aaron Burr has been called "the greatest criminal trial in American history and one of the notable trials in the annals of the law."¹ In

¹ Edward S. Corwin, op.cit., 86.

addition to this it contained one of the most bitter political battles in the history of our country, for woven through the mass of testimony, the speeches of the attorneys and the correspondence concerning the trial is the ever present thread of political maneuver. Before discussing the political implications of the trial itself it will be necessary to show how the hearing on Burr's commitment and the subsequent grand jury inquest contributed to the bitterness and animosity that was so rife at that time.

On March 30, 1807, Burr was brought for examination before Chief Justice Marshall in the Circuit Court of Richmond, Virginia, in which territory Burr was said to have committed his crimes. George Hay, district attorney for the United States, moved for a commitment on charges of misdemeanor and treason and after two days of arguments Marshall delivered his opinion that

not sufficient evidence was put forth to justify the charge of treason. He stated that from November, 1806, when Burr's activities were noticed officially by the government, until March 1807, was ample time to obtain affidavits and necessary evidence from the west, and since such was not shown, he committed him to appear on May 23 before the grand jury to answer only the charge of high misdemeanor.²

² Walter P. McCaleb, op.cit., 258-259.

This initial setback for the government enraged Jefferson and from his correspondence at the time it is evident in what manner he linked Marshall's actions with some of the burning political issues of the day. On April 2, the President wrote to James Bowdoin that Marshall had demanded "conclusive evidence of guilt" before he would commit Burr and claimed that four months time was insufficient to obtain the evidence. He accused the Federalists of making "Burr's cause their own" and expressed his regret that "federalism" was still dominant in our judiciary department.³ In

³ Thomas Jefferson Randolph, ed., Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson, 4:71-72.

a letter to William Giles on April 20, he accused Marshall of perverting the "principles of the law" but declared that the "nation will judge both the offender and judges for themselves" and will see the "error in our Constitution, which makes any branch independent of the nation". Although members of the executive or legislative branch are subject to removal for wrong-doing, Jefferson said, the third branch of the government is exempt and protected by the very Constitution it seeks to overthrow; if the Federalist protection of Burr produces an amendment to remedy this situation "it will do more good than his Burr's condemnation would have done".⁴

⁴ H.A. Washington, op.cit., 5:67-68.

It is evident that Jefferson casts aspersions on Marshall and his conduct, (merely a preview of what was to happen during most of the trial) and that he intended to arouse the nation against the errors of the Constitution which allowed for an independent judiciary.⁵ Senator

⁵ "Thomas Jefferson", American Whig Review, 12:371.

Giles, to whom Jefferson had written, had been a leader in the previous struggle against the Court and would

probably lead the next which was threatened at this time by the President. It was plain that he implied Marshall's removal if Burr was acquitted and this constituted a challenge between Jefferson and Marshall that was to continue for some time.⁶

⁶ Henry Adams, op.cit., 3:447-448.

On May 22, Burr appeared before a grand jury under a commitment for high misdemeanor, and the entire scene was charged with political dynamite. We have but to look at the external surroundings of this court to conclude that here was the politician's paradise. The judge was Chief Justice Marshall, as ardent a Federalist as had ever held public office, the same Marshall who wrote to Hamilton during the election crisis of 1801 that Jefferson appeared to him to be a man who would use the presidency to increase his personal power and who would "sap the fundamental principles of government"⁷ Marshall and Jefferson had collided

⁷ Wilfred E. Binkley, President and Congress, 51.

before in Marbury v. Madison and more recently in the hearing on Aaron Burr, and now he was to sit on a case

for which the reputation of the Republican administration seemed to demand a conviction. In contrast to Jefferson, Marshall was of the opinion that "the greatest scourge . . . was a dependent judiciary".⁸

⁸ John P. Dillon, ed., John Marshall, Life, Character and Judicial Services, 2:36.

The attorneys for the prosecution were George Hey, William Wirt and Alexander MacRae, all Republicans and supporters of Jefferson; the counsel for the defense included Benjamin Botts, John Wickham, Edmund Randolph and Luther Martin, all Federalists who hated Jefferson.⁹

⁹ Claude G. Bowers, Jefferson In Power, 404.

especially Martin who has been described as a "mad genius of the Maryland bar, who stoked himself with brandy and emitted volcanic fumes of eloquence, erudition and derision".¹⁰ He had defended Judge Chase in 1804

¹⁰ Alexander Holmes, Aaron Burr, the Proud Pretender, 281.

and his only purpose in this trial was to damn Jefferson, not to save Burr.¹¹

¹¹ James Parton, Life of Thomas Jefferson, 669.

The public feeling was extremely hostile to Burr, so much so that Marshall said "it would be difficult or dangerous for a jury to venture to acquit Burr, however innocent they might think him".¹² It was

¹² William H. Safford, op.cit., 465.

little wonder then that Winfield Scott, who was a spectator could say that "party spirit . . . had taken possession of the case".¹³

¹³ Winfield Scott, Memoirs of Lieutenant General Scott, 1:13.

In such a setting the defendant was an anomalous figure: the man who had made it possible for a Republican administration to come to power, through his party organization of 1800 in New York, was damned by the self same party, the leader of which clamored for his conviction and life; but in support of Burr had come his former enemies, the Federalists, whom he had ousted from state and national power and whom he had opposed from the beginning, the slayer of their hero and leader and now engaged in a scheme which was at least unlawful.¹⁴

¹⁴ James Parton, op.cit., 665.

Such incongruities make it evident that there was more at stake than the life of Aaron Burr: the executive and the judiciary, Jefferson and Marshall, Republican and Federalist were on trial also. Both would have to prove their mettle before the trial was over.

When the court convened on May 22, 1807, the first difficulty was the selection of a grand jury that was not prejudiced against Burr. The majority of the jurors summoned were supporters of the administration and had prejudged the case on the strength of Jefferson's proclamation to the Westerners.¹⁵ Burr first challenged

¹⁵ Walter F. McCaleb, op.cit., 267.

William B. Giles who had supported the suspension of the writ of habeas corpus in the Senate. Giles withdrew without argument. Then Colonel Wilson C. Nicholas was challenged; he was a Republican candidate for Congress and, next to Giles, Jefferson's main political agent in Virginia. He stated that it was against his wishes to serve but that he had been threatened "with the most severe pieces" if he did, so he decided to serve to defy his enemies. Burr denounced this "attempt to intimidate" Nicholas as a "contrivance of some of his [Burr's] enemies for the purpose of irritating

the hot-blooded Republican politician and increasing the public prejudice against him". He said that neither he nor his friends had ever sanctioned the act.¹⁶

¹⁶ David Robertson, Burr Trials, 1:43, quoted in Albert J. Beveridge, op.cit., 3:409-412.

Thus before the trial had gotten underway there were political charges hurled between the defense and the proposed jurors in the trial; this web of intrigue was soon to enmesh not only jurors but judge, prosecution, defense, witnesses and President.

John Randolph, the Quid, was then appointed foreman of the jury by Marshall. He hated Jefferson and loathed Wilkinson whom Jefferson was supporting, but he was also convinced of the guilt of Burr: a curious admixture under the circumstances; he asked to be excused but his request was denied because, as Burr said, it was almost impossible "to find any man without this prepossession". The jury as finally constituted consisted of fourteen Republicans and two Federalists.¹⁷

¹⁷ David Robertson, Burr Trials, 1:45, quoted in Nathan Schachner, op.cit., 410.

Hardly had the trial begun when Aaron Burr himself

threw a bombshell into it by making a motion to the court to issue a subpoena duces tecum¹⁸ to the Presi-

¹⁸ "A subpoena duces tecum varies from an ordinary subpoena only in this, that a witness is summoned for the purpose of bringing with him a paper in his custody." Annals, 10th Congress, 1st Session, 698. Words of Marshall in his opinion on the motion concerning the issuance of the subpoena to Jefferson.

dent who, Burr claimed, had papers from Wilkinson deemed necessary to the defense.¹⁹ This was, indeed, a rather

¹⁹ Walter P. McCaleb, op.cit., 269.

unusual procedure and it set off a chain of invective from both sides seldom heard in court.

The question to be decided by the judge was whether the court could issue a subpoena to the President under any circumstances but this abstract issue was soon lost in the implications both defense and prosecution were willing to see in it, and the question became a personal and political one.²⁰

²⁰ Edward S. Corwin, op.cit., 96.

Luther Martin, the violent Federalist, in arguing for the motion said:

"The President has undertaken to prejudice my client by declaring that 'of his guilt there can be no doubt'. He has assumed

to himself the knowledge of the Supreme Being Himself, and pretended to search the heart of my highly respected friend. 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 clamor, pretend to keep back the papers which were wanted for this trial, where life itself is at stake?"²¹

²¹ David Robertson, Burr Trials, 1:115, quoted in Henry S. Randall, The Life of Thomas Jefferson, 3:206.

After this blast at Jefferson by the defense, Marshall's error, whether intended or not, was to remain silent and to refrain from any rebuke to Martin for his attack. William Wirt of the prosecution took up the challenge and rebuked Marshall, stating that Martin's attack on the administration before the federal judiciary was a mark of disrespect to the court itself and that "no man . . . who hears this language addressed to the court, and received with all complacency, at least which silence can imply, can make any inferences from it very honorable to the court". He implied that Marshall was taking pleasure in these attacks; that the "gross invectives against the administration . . . were furnishing the joys of a Mahometan paradise to the court" and expressed the hope "that the court . . . will compel a decent respect to that government of

which they themselves form a branch." ²² Then he

²² David Robertson, Burr Trials, 1:115, quoted in Henry S. Randall, op.cit., 3:207.

accused the counsel for the defense of thinking that "political prejudices" on the part of the court would "supply the place of argument and innocence on the part of the prisoner". ²³

²³ David Robertson, Burr Trials, 1:137-145, quoted in Albert J. Beveridge, op.cit., 3:439.

Although Marshall said that both sides had acted improperly in their remarks and "expressed a wish that counsel . . . would confine themselves . . . to the point really before the court", ²⁴ he could not prevent

²⁴ David Robertson, Burr Trials, 1:147, quoted in Albert J. Beveridge, op.cit., 3:439.

Martin from leveling a further and more vicious attack on Wirt and the administration. He stated that he had formerly always acted with the highest respect toward officers of the government but if he had changed his opinion he owed it "to the gentleman himself [Wirt] and the party he is connected with;" that this party

"so loudly and incessantly clamored against the officers of the government, that they contributed to effect a change in the administration, and are now, in consequence, basking in the sunshine of office; and therefore wish to inculcate and receive that respect which they formerly denied to others in the same position"²⁵

²⁵ David Robertson, Burr Trials, quoted in Henry S. Randall, op.cit., 3:207.

There is little wonder then, that Jefferson, too, took up the cudgel against Martin. He threatened to have his attorney move to commit him "as particeps criminis with Burr" and to attempt to "put down this unprincipled and impudent federal bull-dog" to "add another proof that the most clamorous defenders of Burr are all his accomplices".²⁶

²⁶ H.A. Washington, op.cit., 5:99.

Chief Justice Marshall, after these personal charges against himself and Jefferson, was in a difficult position because it was now necessary for him to deliver an opinion on the issuance of the subpoena to the President. Whatever his decision he would be attacked: on one side by the defense who could accuse him of being

intimidated by the prosecution and on the other by the prosecution for allowing his personal and political prejudices to enter into his decision. In delivering his opinion he made reference to what had been said "about the disrespect to the Chief Magistrate, which is implied in this motion, and by such a decision of it as the law is believed to require"

"The court would not lend its aid to motions obviously designed to manifest disrespect to the Government, but the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence."²⁷

²⁷ Annals, 10th Congress, 1st Session, 698-699.

He issued the subpoena saying that if the case should "terminate as is expected on the part of the United States" those who withheld any evidence might regret their actions and further that the reputation of the court which sanctioned these acts would be tarnished".²⁸

²⁸ Ibid., 702-703.

The "as expected" phrase in Marshall's opinion was considered as a rebuke to the administration and was denounced by Hay and MacRae. Hay later wrote to Jefferson that Marshall had apologized for it saying

that he had not read the opinion after he had written it because of lack of time.²⁹

²⁹ Albert J. Beveridge, op.cit., 3:448-449.

It has never been determined conclusively whether or not Marshall was technically justified in issuing a subpoena to Jefferson³⁰ but nevertheless, it

³⁰ Andrew C. McLaughlin, A Constitutional History of the United States, 327.

"angered the President and seemed to deepen his conviction that the Chief Justice was intending to enhance the powers of the judiciary at the expense of the executive".³¹

³¹ Charles Warren, op.cit., 1:311-312.

In his correspondence with Hay Jefferson emphasizes the "independence of the Legislative, Executive and Judiciary of each other" and asked whether the executive would be "independent of the Judiciary if he were subject to the commands of the letter" and if the courts could "bandy him from pillar to post . . . and withdraw him entirely from his constitutional duties".³²

³² H. A. Washington, op.cit., 5:103.

Jefferson, to show his disdain for this ruling of his political enemy of the judiciary, ignored the subpoena, although he did send some of the papers that were demanded.

This question of the subpoena to the President was intimately connected with another which may hold the whole clue to the purposes of the continued prosecution of Burr. The papers that were demanded of Jefferson were letters which Wilkinson had written to the President concerning Burr's plans; it was the plan of the defense to implicate Wilkinson, through these letters, as an accomplice of Burr and even as a pensioner of Spain.³³ It must be remembered that

³³ Henry Adams, op.cit., 3:454.

Wilkinson, who has been called "perhaps the most successful crook and liar in American history,"³⁴

³⁴ William O. Lynch, op.cit., 180.

and a man "from the bark to the very core a villain",³⁵

³⁵ Letter of John Randolph to Nicholson, June 25, 1807 quoted in Henry Adams, John Randolph, 219.

was the star witness for the prosecution. It is true that he was "hugged to the bosom of the government" ³⁶

³⁶ Henry Adams, History of the United States, 3:457.

and necessarily so as was shown by the testimony in the trial. When the question of having Wilkinson testify first came before the court, Wickham (for the defense) claimed that the prosecution, the press and the government were all seeking to ruin Burr. Wirt retaliated by accusing the defense of converting "this judicial inquiry into a political question . . . between Thomas Jefferson and Aaron Burr".³⁷ But from the testimony

³⁷ David Robertson, Burr Trials, 1:57-58, quoted in Albert J. Beveridge, op.cit., 3:417.

presented in the trial it seems that the government was the party that had made it a political question in the first place and not the defense.³⁸

³⁸ Some of the testimony alluded to in the following pages was presented much later in Burr's trial for misdemeanor but will be brought in here because it has bearing on this phase of the grand jury investigation.

Major James Bruff who had been associated with

Wilkinson on the frontier testified that early in 1807 he had come to Washington, D.C., to appeal from a court martial sentence against himself. He claimed that he had been court martialed by Wilkinson because he would not join in some of Wilkinson's schemes and because Wilkinson feared he would spy on him. The Secretary of War, Henry Dearborn, and the Attorney General, Caesar Rodney, reminded Bruff that the General stood high in the estimation of the Executive and he would support him. Bruff tried to break this down by revealing all of the connections of Burr and Wilkinson even back to Burr's first trip west in 1805. The Attorney General then asked Bruff "what would be the result if all this should be proven?" He answered the question himself: "Why, just what the Federalists and the enemies of the Administration wish; it would turn the indignation of the people from Burr on Wilkinson; Burr would escape and Wilkinson take his place."³⁹

³⁹ Annals, 10th Congress, 1st Session, 590.

Throughout his testimony Bruff emphasized that the government would not relinquish its support of Wilkinson under any circumstances. The results of

this support precipitated the party struggle in Congress which has already been treated: the attempt of the Federalists, led by Representative Broom, to make provisions to further strengthen the issuance of writs of habeas corpus and the bitter opposition and defeat of this resolution by the Republicans. This attempt in Congress was not the only one made by the Federalists to implicate Wilkinson. The counsel for the defense at Burr's trial moved to commit the General on charges of league with Spain and contempt of court, but the grand jury failed to return an indictment on either of the charges by a vote of seven to nine. Fourteen of these grand jurors were Republicans.⁴⁰

⁴⁰ Albert J. Beveridge, op.cit., 3:464.

John Randolph, who had sought an indictment, was exasperated, and expressed the prevalent opinion of the day when he said: "Politics have usurped the place of law, and the scenes of 1798 are again revived. Men now see and hear, and feel and think politically."⁴¹

⁴¹ Letter of John Randolph to Nicholson, June 25, 1807, quoted in Henry Adams, John Randolph, 219-220.

While the grand jury trial on the commitment of

Burr for misdemeanor was in progress, George Hay, of the prosecution, made a motion to commit Burr for treason also, on the ground that the expected arrival of Wilkinson might cause Burr to abscond unless he were imprisoned on a new charge.⁴² The defense fought

⁴² Nathan Schachner, op.cit., 411.

It will be recalled that Marshall had denied a motion for a treason commitment once before for lack of evidence. See above, 38-39.

against the motion but Marshall granted it, saying, incidentally, that "the result of this motion may be publications unfavorable to the justice, and to the right decision of the case" but that no one who felt the importance of a fair trial would be unsolicitous of "any attempt. . . to try any person . . . by public feelings, which may be, and often are, artificially excited against the innocent as well as the guilty".⁴³

⁴³ Annals, 10th Congress, 1st Session, 688.

On June 24, 1807, the grand jury returned bills of indictment against Burr for both treason and misdemeanor: the bill for treason charged that he had levied war on the United States at Blennerhassett's Island on December 13, 1806 and the one for misdemeanor that

he had set on foot an armed expedition against the territory of Charles IV of Spain.⁴⁴ And as if to

⁴⁴ Ibid., 393-394.

make this whole affair as fantastic as it was incongruous in certain aspects, it was later reported by two members of the grand jury that they had mistaken the meaning of Chief Justice Marshall's opinion as to what constituted treason in the case of Bollman and Swartwout and if it had not been for this mistaken notion the bill against Burr for treason would have been ignored.⁴⁵

⁴⁵ William H. Safford, op.cit., 314.

It was evident from the preliminary hearings, especially that of Bollman and Swartwout, that the trial of Burr would center on the interpretation of the clause in the Constitution which states 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 confession in open court".⁴⁶ Thus it was necessary for the

⁴⁶ Walter F. McCaleb, op.cit., 283.

prosecution to prove, on the testimony of two witnesses, that an overt act of levying war had been committed by Burr; and when all the government witnesses had been called, the defense claimed that nothing had been proved and moved to arrest the evidence on these grounds.

At this point Marshall resorted to an unusual procedure in order to placate somewhat the criticism that he knew would be heaped upon him. He ruled to give the prosecution four days to prepare an answer to the motion made to the court by the defense. When asked if this suspension of a criminal prosecution was not without precedent he stated that he realized it but if he should decide against the prosecution on the motion he would be taken to task for not giving them an opportunity to answer.⁴⁷

⁴⁷ William H. Safford, op.cit., 364.

The arguments on both sides concerning this motion were lengthy and brilliant. The defense claimed that "constructive" treason, whereby a person could be said to be present at a place by "construction of law", although in reality he was hundreds of miles away, was specifically outlawed by the Constitution. This, they said, would have to be applied in Burr's case, to prove

him guilty, and since the prosecution had not proven the first requisite of treason according to the Constitution, an overt act, it would be illegal to proceed further. ⁴⁸

⁴⁸ Albert J. Beveridge, op.cit., 3:491.

The prosecution hammered at Chief Justice Marshall's opinion in the Bollman-Swartwout case when he had said that "all those who perform any part however minute, or however remote from the scene of action . . . are to be considered traitors".⁴⁹ They claimed that

⁴⁹ 4 Cranch, 126.

Burr had advised and procured the treason therefore he had made himself liable under the law as interpreted by Marshall himself.

During the arguments on this motion, George Hay, chief counsel for the prosecution, gave the impression of threatening the court when, in referring to a statement of the defense concerning Judge Chase and one of his decisions, he said that Chase was impeached because "he attempted to wrest the decision from the jury, and prejudge the case before hearing all the evidence in it, the identical thing which this court is now called

on . . . to do".⁵⁰ The Federalists were quick to

⁵⁰ Henry Adams, History of the United States, 3:466.

retaliate and tell Hay that "it was kind" of him to remind the court of the "danger of a decision of the motion in favor of the prisoner".⁵¹ It is doubtful that Hay

⁵¹ Ibid., 3:466.

intended his statement to be interpreted in such a way but it did not add any harmony to the proceedings and only served to convince those concerned that "if Aaron Burr should be acquitted it will be the severest satire on the government".⁵²

⁵² David Robertson, Burr Trials, 2:168, quoted in Albert J. Beveridge, op.cit., 3:499.

The opinion Marshall handed down on this motion was lengthy and intricate,⁵³ which fact has been ascribed

⁵³ United States v. Aaron Burr, 4 Cranch, 469-508.

to his caution not to seem "dogmatic and peremptory".⁵⁴

⁵⁴ Andrew C. McLaughlin, op.cit., 328.

A discussion of the important legal distinctions and technicalities explained in the opinion is unnecessary. It will suffice here to show the general tone of the opinion.

He stated, referring to the Constitution, that war must actually be levied against the country to fulfill the definition of treason; that a person convicted of treason must "truly and in fact levy war" and "perform a part in the prosecution of war".⁵⁵ All would agree

⁵⁵ 4 Cranch, 472.

"that war could not be levied without employment and exhibition of force Intention to go to war may be proved by words", the actual going to war must "be proved by open deed".⁵⁶ The indictment against

⁵⁶ Ibid., 476.

Burr had charged him with levying war on the United States at Blennerhassett's Island on December 13, 1806,⁵⁷

⁵⁷ Annals, 10th Congress, 1st Session, 393.

but the prosecution admitted that Burr was not there at that time. They had insisted he was legally present

and therefore "present in fact", but Marshall denied this doctrine of "constructive presence" and hence also the doctrine of "constructive treason". The only manner of proving that Burr was guilty of treason would be to prove that he had procured the men to levy war against the United States; and this would have to be proved by two witnesses. To the reasonable objection that might be raised here "that the advising or procurement of treason is a secret transaction which can scarcely ever be proved in the manner required by this opinion" Marshall answered "that the difficulty of proving a fact will not justify conviction without proof".⁵⁸ He referred to his opinion

⁵⁸ 4 Cranch, 500.

in the case of Bollman and Swartwout in which he had said that "all those who perform any part however minute, or however remote from the scene of action . . . are to be considered as traitors";⁵⁹ this did not "touch the

⁵⁹ Ibid., 126.

case of a person who advises or procures an assemblage, and does nothing further"; the person must "perform a part" in the conspiracy, "that part is the act of levying

war" and "constitutes the overt act on which alone the person who performs it can be convicted".⁶⁰

⁶⁰ Ibid., 502.

It was clear from this that Marshall would demand proof first, that someone had levied war at Blennerhassett's Island and then that Burr had taken part in it; each of these events would have to be proved by two witnesses. Naturally, the guilt of those who levied war at Blennerhassett's Island could not be established in a prosecution against Burr.⁶¹ The Chief Justice had

⁶¹ Ibid., 504.

set up conditions for proof that the government would find impossible to fulfill. - He took the heart out of the prosecution with one short statement:

"The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of Congress, by two witnesses. It is not proved by a single witness."⁶²

⁶² Ibid., 506.

The motion of the defense was carried, the evidence was arrested and Burr's trial for treason was over.

Marshall was extremely conscious that his opinion meant more than merely freeing Aaron Burr from treason charges: he answered the implied threat of Hay that a decision in favor of Burr might bring impeachment when he said that the court did not dare to usurp power but that, on the other hand, neither did it dare to shrink from its duty.

"No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty, or the opprobrium [sic] of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."⁶³

⁶³ Ibid., 507.

Immediately after the verdict on the charge of treason had been returned, Jefferson wrote to Hay that the plan of the defense was "not only to clear Burr but to prevent the evidence from ever going before the world". He revealed his plans to lay all the proceedings in the case before 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".⁶⁴ The question of judicial independence

⁶⁴ H.A. Washington, op.cit., 4:187-188.

of the executive and legislative continually rankled in Jefferson's mind and he was determined to take any legal action to correct what he called the "original error of establishing a judiciary independent of the nation".⁶⁵ For this reason and to "heap coals of

⁶⁵ Paul L. Ford, ed., The Writings of Thomas Jefferson, 9:68.

fire on the head of the Judge",⁶⁶ Jefferson advised

⁶⁶ Thomas Jefferson Randolph, op.cit., 4:103.

Hay to prosecute the charge of misdemeanor against Burr.

The trial was short lived for when Hay offered evidence of acts committed outside the jurisdiction of the judge, Marshall rejected it, and the opinion on this evidence given September 14, 1807, was sufficient to force Hay to give up the fight.⁶⁷ When Burr had

⁶⁷ Annals, 10th Congress, 1st Session, 755-766.

been freed on the misdemeanor charge, Hay, to compel the judicial recording of all the evidence, as Jefferson

had demanded, moved to commit him on a new charge of treason which would bring with it a trial in Ohio, Kentucky, or Mississippi. Concerning this hearing Burr wrote to his daughter, Theodosia, that Marshall "relaxed the rules of evidence" and heard "anything without regard to distance of time or place".⁶⁸ It

⁶⁸ Mark Van Doren, ed., Correspondence of Aaron Burr and his daughter, Theodosia, 224.

appears that the Chief Justice, with an "eye to the political effect" was doubly cautious about giving the appearance of cutting off the government case entirely so he permitted a complete airing of the evidence.⁶⁹ On October 20, Marshall gave his final

⁶⁹ Nathan Schachner, op.cit., 441.

opinion on the case of Aaron Burr; he refused to commit him for treason but only for misdemeanor in another state.⁷⁰

⁷⁰ Annals, 10th Congress, 1st Session, 766-778.

The charge was never pressed and Burr was free.

The effect left by the Burr trial on the reputations of both Marshall and Jefferson has been various. Authorities have attacked as well as defended Marshall's legal opinions expressed during the course of the trial; historians have called his conduct "the one serious

blemish in his judicial record"⁷¹ while others have

⁷¹ Edward S. Corwin, op.cit., 111.

called this trial sufficient basis in itself for
 "Marshall's reputation as a great judge".⁷² Nevertheless,

⁷² John P. Dillon, op.cit., 1:333.

there may be some justification for the statement that
 Marshall's rulings show that he was influenced by per-
 sonal and partisan feelings during the trial; this is
 true especially when it is recalled that on June 22,
 1807, five days before the Court was adjourned in order
 to prepare for the trial, the British man-of-war Leopard
 had attacked the Chesapeake in the home waters of the
 United States. The Federalists in New England were
 out-spoken in their defense of England and had published
 sentiments as disloyal as those of which Burr was
 accused. It was then that Marshall, realizing that
 they too might be brought to court on a charge of treason
 wrote to the other Supreme Court Justices for their
 opinion on the law of treason as presented in Burr's
 case.⁷³ He wished to seem impartial but it is evident

⁷³ Albert J. Beveridge, op.cit., 3:475-480.

that the interpretation that was finally handed down would protect his fellow party members in New England quite as effectively as it did Aaron Burr.

"It is a remarkable tribute to his integrity, however, that criticism of this nature was never leveled against Marshall in any other case, either during his lifetime or in the years immediately succeeding his death."⁷⁴

⁷⁴ Charles Warren, op.cit., 1:315.

In regard to Jefferson, too, opinions are conflicting: the general consensus seems to favor the statement of John Adams that if Burr's guilt was "as clear as the Noon-day Sun, the first Magistrate ought not to have pronounced it so before a jury had tried him".⁷⁵

⁷⁵ Letter of John Adams to Benjamin Rush, February 2, 1807, quoted in Nathan Schachner, op.cit., 390.

Although it would have been more prudent for Jefferson to remain neutral, it is a mistaken notion that he did something illegal in prosecuting Burr. His constitutional duty is to properly execute the laws and since his representative in this regard, the Attorney General, was absent because of illness, Jefferson certainly acted legally, if not wisely.⁷⁶

⁷⁶ Henry S. Randall, op.cit., 2:219.

The president seemed to be sincerely convinced that Burr was guilty of the charges brought against him for he wrote to Hay shortly before the trial ended that "before an impartial jury Burr's conduct would convict himself" even if not "one word of testimony" were offered against him; but he feared "to what a state our law would be reduced by party feelings in those that administer it".⁷⁷

⁷⁷ Thomas Jefferson Randolph, op.cit., 4:101.

Considering Jefferson's background and his previous policies, his attitude in this case does seem a bit inconsistent and incongruous. He had always been a foe of tyranny and oppressive action in the government and had decried the Federalist use of the Alien and Sedition Laws as opposed to individual rights. Chief Justice Marshall, whether intentionally or not, had given the Republicans an opportunity to stand behind the liberal ideas that had led them to criticize so severely Justice Chase for his oppressive application of these laws.⁷⁸ Actually, the Federalist

⁷⁸ Edward S. Corwin, op.cit., 112.

was the party with the reputation for vehement action, not Jefferson and the Republicans, but now the tables were turned. Marshall's decision in this case was one "in favor of the individual as against the government";⁷⁹ it did not partake of Justice Chase's "oppressive"

⁷⁹ Walter F. McCaleb, op.cit., 292.

application of the laws in the least, but rather of "Jeffersonian liberalism", yet Jefferson condemned him for it.⁸⁰

⁸⁰ Andrew C. McLaughlin, op.cit., 330.

It is true that during Jefferson's terms of office the traditional Jeffersonian doctrine of strict construction had been reversed, especially in regard to foreign affairs; the power of the executive had been increased considerably but this had never been applied to individual rights. As far as any external evidence would prove, Jefferson was still the apostle of liberalism in this regard, and it would seem that he should applaud Marshall's liberal interpretation of the Constitution in the case of Aaron Burr. However, practical application of these Jeffersonian principles would not have been conducive to good politics: whether Jefferson and Marshall realized it or not, consistency of prin-

ciple, on the part of both men, had no place if the prestige of the party was to suffer through it. It seems an impartial conclusion that both men had been influenced by partisan feelings; to be fair both would have to be chastised by historians.

CHAPTER V

POLITICAL AFTERMATH

Thomas Jefferson was true to his word to George Hay that he would lay all the proceedings in the case before Congress.¹ With his message of October 27, 1807

¹ H.A. Washington, op.cit., 5:187-188.

to that body he sent the testimony which would enable them "to judge whether the defect was in the testimony, in the law or in the administration of the law; and wherever it shall be found, the Legislative alone can apply or originate the remedy."² This hardly

² American State Papers, 1:71.

expressed Jefferson's true feelings concerning Marshall and the Burr case. The first draft of his message to Congress shows more clearly his sentiments: he wrote that "wherever laws were appealed to in the aid of the public safety" they worked to the benefit of those "against whom they were invoked; the framers of our constitution certainly supposed they had guarded . . . their government against treason" but if the "wonderful refractoriness" of the law "as construed" in the case

of Aaron Burr shows that this end had not been attained, then Congress ought to inquire how it can better be secured.³

³ Paul L. Ford, op.cit., 9:163-164.

The Republicans in the Senate took the cue from the President and on November 5, 1807, a bill was introduced by Senator Tiffin. It provided for an amendment to the Constitution which would have limited the term of office for justices of the Supreme Court and made them removable by the President with the consent of two-thirds of Congress.⁴ The passage and approval of such an amend-

⁴ Annals, 10th Congress, 1st Session, 21.

ment by the states would have been to the liking of President Jefferson but the salient features of the bill were lost in committees and the final version had no such provisions as the original.⁵

⁵ Ibid., 2337.

A second attempt at legislation was made on February 11, 1808, when William B. Giles introduced a bill in the Senate that would have charged with treason any person who

would aid or assist a traitorous act "although not personally present when such act is . . . committed".⁶

⁶ Ibid., 108-109.

The President's message had given the Senate sufficient latitude for action: it had suggested impeachment, an amendment or merely a bill; it was no compliment to Jefferson that the latter was resorted to after an amendment had failed. The implication was that "the defect" had been in the law, not in the testimony or in the administration of the law as Jefferson would have wished. However, Giles, in his explanation of his bill, followed a clever line of argument which would agree with Jefferson's ideas concerning the departments of government. Jefferson had long decried the independence of the judiciary; Giles went on to prove that the judiciary was merely a branch of the executive: since the latter was instituted to carry the laws into effect and because the laws are not always definitely understood, the judiciary "is introduced to explain the meaning of the laws prescribed by the Legislative -- to aid the Executive in carrying those laws into effect. Hence it is obvious that the Judiciary is a

branch of the Executive." ⁷ This was a very abstract

⁷ Ibid., 114.

argument, however, and not the real purpose of the bill; the more personal attack was soon in coming: Giles spoke of a judge who was "aspiring not only to render his department absolutely independent, but to render it supreme above all the other departments of the government". He threatened to renew the violent political accusations of six months earlier when, by implication, he referred to Marshall as a "miserable political intriguer, scrambling for power". ⁸ This bill was passed by the Senate on

⁸ Ibid., 126.

April 6, 1808⁹ but the House of Representatives, taken

⁹ Ibid., 207.

up with more important matters, neglected to act on it.

As a final Congressional action, on November 27, 1807, a resolution was adopted in the Senate to appoint a committee to inquire into the conduct of Senator John Smith of Ohio "in relation to any connexion he may be

supposed to have had with the conspiracy . . . of Aaron Burr".¹⁰ When the report of the committee,

¹⁰ Ibid., 42.

headed by Senator Adams, was made on December 31, it stated that the conspiracy of Burr was so well established and of such a character that "any person engaged in it" should not hold a seat in the United States Senate.¹¹

¹¹ Ibid., 56.

It did not stop at an a priori condemnation of Burr but went on to attack the court which had tried him, ridiculing the fine legal distinctions made by the court in the course of the trial.¹² During the debate on

¹² Ibid., 58.

the resolution to expel Smith, most of the speakers presupposed the guilt of Burr and even openly accused him of attempting to sever the Union.¹³ When a vote

¹³ Ibid., 68-72.

was taken, the resolution was defeated, lacking the

necessary two-thirds by one vote,¹⁴ but it was

¹⁴ Ibid., 324.

evident that Smith was allowed to keep his seat only because he himself was believed to be innocent of taking an active part in the conspiracy, not because Burr had been acquitted at Richmond.

These few cases that constituted the aftermath of Burr's conspiracy and trial did not seriously affect national politics, in fact, it may be doubtful whether the whole affair, considered in itself, influenced the political parties to a marked degree. But when the previous party struggles, especially over the judiciary, are taken into account, it is evident that the actions of Burr presented occasion to renew and increase the acrimony that had developed between the two parties. That it did not develop further is due mainly to the state of foreign affairs in which the country found itself from 1807 to 1813. Relations with England were at the breaking point and it was necessary for Jefferson to give too much time and thought to proper action in this direction to concern himself wholeheartedly with retaliatory measures against the Federalists. The Burr conspiracy and the political battle it precipitated took the background and was finally crowded

out of mind when more vital questions arose. Any conclusion concerning what would have taken place in domestic affairs as a result of the Burr conspiracy if England and Spain had not provoked the United States at this time would be mere conjecture and not a proper field for the historian.

The death knell of the Federalist party had sounded long before, in fact as early as 1800, but in its death struggle it seized on the Burr conspiracy to harrass an already burdened administration; and the Republicans, determined to insure and hasten the demise of the dreaded "monarchism", used Burr in an attempt to pry the Federalists loose from the last vestige of their power - the judiciary. The attempts of both parties to disgrace and embarrass each other resulted only in increased bitterness, for the political course of United States history had been determined by events far more serious than the Burr conspiracy.

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