Introduction

A leading constitutional historian called the Burr treason trial "the greatest criminal trial in American history and one of the notable trials in the annals of the law."[1] Edward Corwin did not explain why the trial was great and notable but several reasons come to mind. For one thing it involved a three-way legal, ideological, and personal contest among three prominent statesmen of the early republic. The clash between President Thomas Jefferson and his former vice president Aaron Burr set the case in motion, gave it a highly personalized and emotional cast, and defined many of the legal issues that emerged during the trial. President Jefferson's extensive and unprecedented involvement in the trial proceedings, in turn, brought him into conflict with his old enemy Chief Justice John Marshall, who was sitting as a trial judge in the federal circuit court in Richmond, Virginia. Given the three-way battle that raged in Marshall's courtroom, it is not surprising that historians have found the trial irresistible – and this is not to mention the mysterious intentions of Burr himself which the trial never fully revealed.

In addition to the leading figures involved, the legal and constitutional issues in the trial – the definition of treason, the constitutional rights of criminal defendants, and the meaning of separation of powers in the Constitution – have attracted the attention of constitutional and legal historians. Major biographers of Burr, Jefferson, and Marshall have also felt obliged to address the role their subjects played in the trial. As for Burr, it is tempting to make the study of the trial a study, if not of Burr himself, then of the "Burr conspiracy"; two pioneering scholars who

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

chose this approach are Walter F. McCaleb (a revised edition of whose 1903 book appeared in 1936, followed by a further revision in 1966), and Thomas P. Abernathys (*The Burr Conspiracy*, 1954). Two outstanding biographies of Burr, by Milton Lomask (1982) and Nancy Isenberg (2007), also discuss the trial at some length. Jefferson's response to Burr's conspiracy and his involvement in the Richmond proceedings are treated at length in Volume 5 of Dumas Malone's biography of Jefferson (1962). Leonard Levy's *Jefferson and Civil Liberties* (1963) focuses critically on Jefferson's role in the events leading up to, and including, the trial.

Constitutional historians, especially those interested in Chief Justice John Marshall, have weighed in on the trial and on Marshall's role in it. Edward Corwin's short study of Marshall's jurisprudence (1919) argued that Marshall's performance in the trial was a blemish on his record, while Albert Beveridge's extensive discussion of the trial in his four-volume Marshall biography, which also appeared in 1919, was highly praiseful. Robert Faulkner's superb essay in the September 1966 issue of *The Journal of American History* is a successful critique of Corwin. Recent biographies of Marshall – those of Jean Edward Smith (1996) and R. Kent Newmyer (2001), for example – have, like Faulkner, viewed Marshall's performance in a favorable light. Further evidence of the continuing fascination with the trial are two recent book-length studies by Buckner F. Melton Jr., a historian and professor of law at the University of North Carolina, and Peter Charles Hoffer, Distinguished Research Professor of History at the University of Georgia. Hoffer's thorough bibliography of works about the trial (in his *The Treason Trials of Aaron Burr*, 2008) attests to this ongoing scholarly fascination with the trial.

While I have been greatly aided by the many fine scholars who have studied the trial, I have not presumed to sort out and resolve the interpretive differences among them. Rather, in order to get a fresh view, I have concentrated on contemporary accounts by trial participants and by the firsthand observers of those directly involved. My particular focus has been on the remarkable trial record itself as reported in two stenographic transcriptions of the proceedings, one by David Robertson (two volumes, 1808), the other by Thomas Carpenter (three volumes, 1808).

A word of clarification is in order concerning my use of Robertson and Carpenter. Both men were experienced stenographic reporters, and both appear to have been in competition to get their reports of the trial before the public. Robertson seems to be the favorite among historians of the trial, perhaps because it was his account that appeared in serial

form in the Richmond *Enquirer,* the paper that in turn was cited by other newspapers around the country. Carpenter was an equally competent reporter, however, and more to the point, he is the only source for the legal proceedings after the main treason trial ended. (Robertson stopped reporting on September 9, 1807; Carpenter's Volume Three, which covers the final stage of the proceedings, contains some of the most revealing material of the long trial.) Accordingly, for the principal treason trial I cite Robertson, while for the misdemeanor trial and the commitment hearings after the main trial, I have used Carpenter. Marshall's numerous opinions during the trial have been published in Volume Seven of the *Papers of John Marshall*, edited with scholarly head-notes by Charles F. Hobson.

To understand the principal treason trial of Burr in Richmond – the focus of the present book – I have found it necessary to discuss the other legal proceedings growing out of the conspiracy. The most relevant of these was the habeas corpus litigation involving Burr's associates, Erick Bollman and Samuel Swartwout in early 1807 in the federal circuit court for the Distinct of Columbia, and then on appeal to the Supreme Court, where Chief Justice Marshall wrote the majority opinion. Marshall's definition of treason in *Ex parte Bollman* and *Ex parte Swartwout* turned out to be a central point of dispute in the Richmond trial. As we shall see, Marshall as the trial judge in Richmond was forced to clarify what he said as Chief Justice in his Bollman and Swartwout opinion.

At roughly the same time that the Bollman and Swartwout case was taking shape, Burr himself faced two federal grand juries regarding his activities in the West: the first in Kentucky, in early November 1806, and the second in the Mississippi Territory, in early February 1807. While Burr was not indicted in either proceeding, this experience, I argue, shaped his defense strategy in the principal treason trial. To avoid confusion, readers should note that I have included a brief discussion of Burr's encounters with the two western grand juries in Chapter 3, the chapter that deals mainly with the grand jury phase of the principal trial in Richmond.

Readers should also keep in mind that there were three distinct phases in the Richmond proceedings. Burr was initially indicted for two crimes: treason and high misdemeanor. The government tried the treason charge first and after Burr was acquitted on that charge on September 1, 1807, he was tried on the misdemeanor charge, and again acquitted on September 15. The third phase of the Richmond trial, reported only by Thomas Carpenter as mentioned above, came when Jefferson

instructed the prosecution in Richmond to charge Burr for misdemeanor and treason again – this time for actions that occurred subsequent to those that formed the basis of the original indictment. Marshall's ruling to commit Burr for trial in Ohio in late October 1807 ended the trial.

In approaching the Burr treason trials I have followed the path laid out by the late Professor Kathryn "Kitty" Preyer. What Kitty aimed to do in her remarkable life of scholarship and teaching was to capture the lawmakers of the new nation in the act of making law. Lawmaking in the Burr trial fits Kitty's scenario – which is to say it involved a collision between the inherited law of monarchical England concerning treason with the perceived needs of the new republic, as those needs were filtered through the ideological convictions, character traits, and personal quirks of the lawmakers and the political framework created by the new Constitution. Not surprisingly, given the complex factors involved, the law-making process was tedious, convoluted, and full of ironic twists and turns. The legal doctrines that emerged from the trial may have been less than perfect, but they were, I argue, remarkably suited to the aspirations of the new nation.

The challenge has been to capture the dynamics of the trial. Keeping all the plates in the air at the same time meant tracking the complex interaction of old law and new circumstances, while at the same time assessing the impact of political ideology and character on this process. In referring to "old law" I mean English treason law as it developed during the four centuries following the great treason statute of 25 Edward III, passed in 1351. Conflicting interpretations of treason during this long period meant that lawyers in the Burr trial could cherry-pick English case law to suit their own purposes. The lawyers, and of course Marshall, too, also had to weigh the intent of those who framed the treason provisions in the Constitution and the judicial rulings from the 1790s as to what the Framers intended.

Just as important as the legal arguments in my account, however, are the reasons that the parties involved in the proceedings chose to act as they did. Certainly legal reasoning has to be taken seriously in ascribing motivation, but hardly less determinative were the personality and character, and indeed temperament, of those involved. Concerning the matter of character, the reader should note that there are no separate chapters dealing with Jefferson, Marshall, and Burr. My approach has been to let their intertangled actions regarding the trial speak to the matter of their character and personality. What is revealed, I hasten to say, does not constitute a full portrait of these multifaceted and complex men; much

less does it constitute an assessment of their places in history. That said, the Burr trial – because of its length, the intense public scrutiny, and the fact that trial procedure, especially when employed by gifted lawyers such as those in Richmond – brought to light the values, personalities, and character of the leading players. Not surprisingly, contemporaries such as John Adams came to see Jefferson, Marshall, and Burr as iconic figures in the cultural battles over republican truth.

A special word is merited regarding the way in which the contest between Jefferson and Marshall in Richmond bears on the lifelong constitutional battle between the two men – a struggle that pitted President Jefferson's states rights ideology against Chief Justice Marshall's constitutional nationalism. The important point to keep in mind is that the confrontation between the president and the chief justice in the Burr trial was not overtly about states rights and nationalism. Rather, the underlying constitutional issue concerned a struggle between two competing branches of the national government. In this contest, Marshall's performance as a trial judge was critical because it spoke to the credibility of the federal judiciary as an independent branch of the federal government – this at a time when judicial authority and independence had yet to be established, at both the state and national levels.

What makes the Burr trial unique in this struggle for judicial independence, and uniquely revealing for purposes of understanding Marshall, is the fact that the Chief Justice of the Supreme Court was sitting as a trial judge on circuit. Circuit court duties were a distinctive and vastly important feature of the federal court system from the outset and indeed for much of the nineteenth century. Supreme Court justices on circuit sat with the federal district court judges in their respective circuits, which in Marshall's case included Virginia and North Carolina. While federal district court judges sometimes had a real impact on circuit court decisions, such was not the case with district judge Cyrus Griffin, who sat with Marshall in the Burr trial. In fact, rarely in the extensive transcriptions of the proceedings do we see Griffin's name, and never in regard to any item of interest or importance. Jefferson was probably correct to think of him as a "cypher."

As the de facto sole trial judge, Marshall faced a daunting number of questions about law and about trial procedure that had not yet been settled. He did at one point attempt to consult his colleagues on the Supreme Court about the constitutional issues involved, but there is no evidence that they responded. As it turned out Marshall's main assistance came from the lawyers who argued before him.

The lawyers figure prominently in my account because, as Marshall himself took pains to recognize, they figured prominently in the law-making process. Doing justice to the lawyers is not easy, however, since – like Marshall himself – they rarely bothered to explain what they were about. It is nevertheless possible to determine what it was they said that Marshall considered useful. And although neither side left a blueprint of their battle plan, I indicate how their litigation strategies can be inferred from a close reading of their arguments. Additionally, by giving the lawyers their due, I hope to capture some of the excitement and confusion generated by the "Melo-drama" as witnessed by those who watched the trial firsthand.

A final point about the lawyers concerns my suggestion that their arguments and litigation strategies constitute a transitional moment in the emergence of a distinctly American adversarial tradition. For example, the unrestrained attack of Burr's lawyers on the government – and on the president personally – was certainly unprecedented. Also, the lawyers themselves, along with Marshall, embody a mixture of the old and the new in their approach to lawyering. To speak confidently about a transitional moment, however, historians need to know a lot more about the way American lawyers argued than we presently do; my heuristic remarks are meant to prompt others to study this important subject in depth. My guess is that when a full history of courtroom advocacy in America finally appears, the Burr treason trial will occupy a prominent place.

Finally, a brief comment must be made concerning the legal and constitutional principles that resulted from the trial: the meaning of treason ("levying war") in Article III of the Constitution; the rule of law in general and the concept of due process, especially as it applied to the rights of criminal defendants; and finally the separation of powers between the federal judiciary and the executive branch. These legal and constitutional principles, as I try to make clear, were not Marshall's creations alone, and neither were they settled conclusively for all time. I do insist that Marshall's decisions, coupled with his example of judicial independence, left an enduring legacy. How that legacy figures in our own time is an important subject I touch on only briefly, in the hope that readers will ponder the issue and come to their own conclusions.

Chronology of the Conspiracy and Associated Trial Proceedings

1805

*March 2, 1805: Burr's Farewell Address to the U.S. Senate

*April–October 1805: Burr travels down the Ohio and Mississippi Rivers to New Orleans and back, visiting leading politicians along the way in order to gauge popular attachment to the Union and popular support for a military operation against Spanish territory.

*Late November 1805: Burr meets privately with Jefferson. No record of their conversation, but Jefferson knew of Burr's western trip and the rumors surrounding it. Jefferson apparently does not warn Burr about his activities in the West.

1806

*Late March 1806: Burr meets again with Jefferson, seemingly in a futile effort to extract a political appointment. Again no warning to Burr.

*Winter–Spring 1806: Burr's plans take shape for a military expedition against Spanish possessions, presumably in case of a war with Spain. Burr moves to acquire land on the Washita River to be settled by his men as a contingency plan in case there is no war.

*Summer 1806: Burr contacts friends in the East to raise money for his expedition, which now seems likely because of apparent Spanish military movements against American territory in the Southwest.

*July 22–29, 1806: Jonathan Dayton drafts the cipher letter, which is delivered to Wilkinson in Natchitoches in Louisiana by Samuel Swartwout on October 8, 1806. The purpose of the letter, which depicts

Burr's army as poised to move downriver, is to keep Wilkinson involved in the conspiracy; the letter had the opposite effect.

*Fall 1806: Jefferson receives more letters from various quarters warning of Burr's conspiracy.

*October 22, 1806: First of three Cabinet meetings discussing the reliability of Wilkinson's letters to Jefferson warning him of Burr's activities.

*November 4, 1806: Federalist district attorney Joseph Hamilton Daveiss, independently of President Jefferson, instigates grand jury proceedings against Burr in Kentucky, charging him with high misdemeanor for preparing a military action against Spanish territory in violation of the Neutrality Act of 1794. The grand jury refuses to indict.

*November 25, 1806: Wilkinson takes military control of New Orleans, nominally in order to resist Burr's invading "army," but in reality to silence those who knew of Wilkinson's own involvement in the conspiracy.

*December 1–5, 1806: Daveiss tries for another grand jury indictment in Kentucky and fails again.

*December 10, 1806: Harman Blennerhassett and a small band of Burr's men rendezvous on Blennerhassett's island in the Ohio River, only to make a hasty retreat downriver to avoid arrest.

1807

*January 18, 1807: Jefferson receives Wilkinson's decoded (and altered) copy of the cipher letter, written by Jonathan Dayton and purporting to describe Burr's military movements. In decoding the letter, Wilkinson altered its content in order to implicate Burr in treason and to cover his own involvement in the conspiracy.

*January 22, 1807: Largely on the basis of Wilkinson's cipher letter, President Jefferson addresses Congress declaring Burr guilty of treason.

*January 30, 1807: Federal circuit court for the District of Columbia rules by a vote of 2 to 1 to confine Burr's friends Bollman and Swartwout on the charge of treason.

*February 4, 1807: Burr faces another grand jury on the charge of treason, this time in the Mississippi Territory. The grand jury refuses to indict, but thanks to Jefferson's proclamation of January 22, 1807, Burr is now a wanted man.

February 13, 1807: Back in Washington, the U.S. Supreme Court in *Ex parte Bollman* and *Ex parte Swartwout* overrules the federal circuit

court decision, freeing the two men on writs of habeas corpus. Marshall writes the majority opinion, in which he defines the meaning of treason in Article III of the Constitution.

*February 19, 1807: Burr is arrested in the village of Wakefield in the Mississippi Territory and sent under military guard to Richmond, Virginia to await trial in Marshall's federal circuit court.

*March 30, 1807: Burr is charged with treason and high misdemeanor before a special session of Marshall's circuit court.

*April 1, 1807: Marshall finds sufficient evidence to hold Burr on the misdemeanor charge but not the treason charge. Burr is bailed at $10,000.

*May 22, 1807: Grand jury sworn for Burr's treason trial; Marshall delivers the charge.

*June 13, 1807: Marshall issues subpoena *duces tecum* to President Jefferson, ordering him to produce certain documents requested by Burr's lawyers to be used in preparing his defense.

*June 24, 1807: Grand jury indicts Burr for treason and high misdemeanor.

*August 3, 1807: Principal treason trial against Burr begins.

*August 17, 1807: Trial jury sworn and treason charge read; prosecution opens the case against Burr.

*August 31, 1807: Marshall hands down the major decision of the trial, ruling in favor of Burr's motion of August 20 to exclude all further testimony by the government's witnesses not relating specifically to the events of December 10, 1806 on Blennerhassett's island, the matter charged in the formal indictment. Marshall clarifies his definition of treason in his opinion for the Supreme Court in *Ex parte Bollman*.

*September 1, 1807: The jury returns an unusually worded verdict, declaring Burr "not proved to be guilty under this indictment by any evidence submitted to us."

*September 9, 1807: Burr's trial on the misdemeanor charge begins.

*September 15, 1807: Marshall's ruling on evidence leads the jury to acquit Burr on the misdemeanor charge.

*September 18, 1807: At Jefferson's urging, federal attorney George Hay asks Marshall, now sitting as a committing magistrate, to hold Burr for trial for treasonable activities committed outside Virginia.

*October 20, 1807: Marshall rules that there is sufficient evidence to bring Burr to trial in Ohio on the misdemeanor charge or on the charge of treason should the grand jury in Ohio so determine. Burr is never brought to trial in Ohio.

Prologue

A Mind-Jostling Trial

> "There never was such a trial from the beginning of the world to this day!"
>
> George Hay[1]

> "The far famed trial of Aaron Burr…has jostled the public mind from one end of the Union to the other…"
>
> Richard Bates, September 20, 1807[2]

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

[1] Hay is quoted in Richard B. Morris, *Fair Trial: Fourteen Who Stood Accused from Anne Hutchinson to Alger Hiss* (Rev. ed., New York, Evanston, and London, 1967), 121.

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