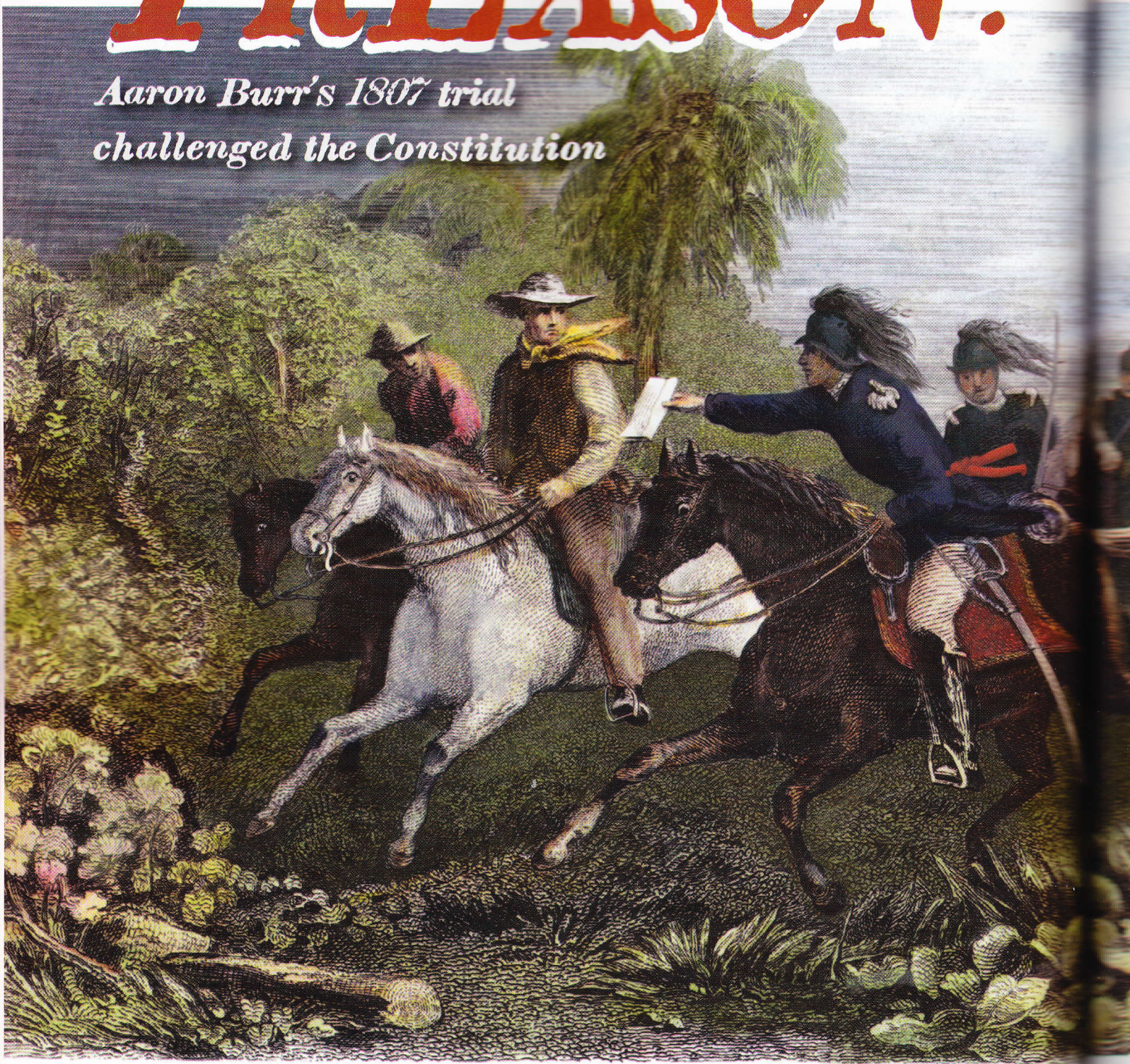


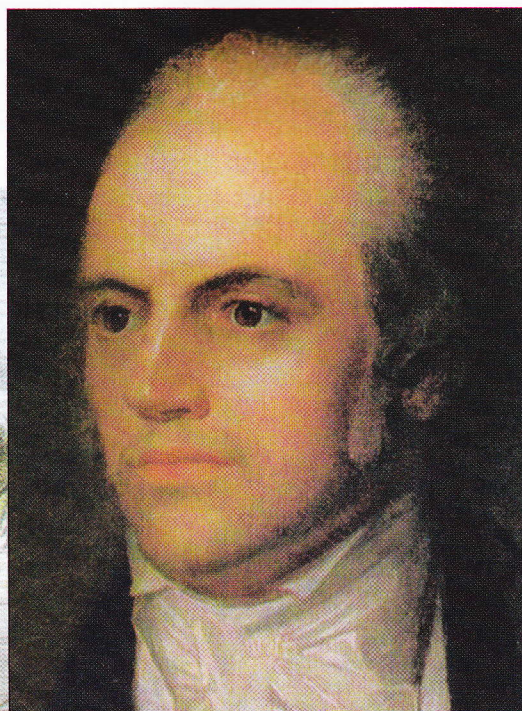
TREASON!

*Aaron Burr's 1807 trial
challenged the Constitution*



By David O. Stewart

On February 19, 1807, deep in the woods of the Mississippi Territory, an Army lieutenant and county official apprehended a fleeing Aaron Burr, above, a former vice president wanted on charges of treason. (The artist of this 1850 engraving mistakenly gave the officers jack boots



IN LATE MARCH 1807 Aaron Burr arrived in Richmond, Virginia, in a vile mood, filthy and stinking. He had just endured a month of hard travel under heavy guard through the dense forests of the Southeast. "It is not easy for one who has been robbed and plundered till he had not a second shirt," he complained to a friend, "to contend with a Govt having millions at command and active and vindictive agents in every quarter."

Only two years after finishing his term as America's third vice president, Burr was entering the shadow of the gallows. Nine rough-looking federal deputies had escorted him more than a thousand miles from near Mobile, Alabama, to Richmond. Not only did Burr face murder

indictments in two states for killing Alexander Hamilton in their famous duel, but he now expected to be charged with treason. No high American official has ever faced such profound legal peril.

When the government did charge the small, slender, and charismatic lawyer with raising an insurrection against the government, the resulting trial would become one of the splashiest proceedings the nation has ever seen. Despite persuasive proof to the contrary, Burr would protest his innocence, cunningly conceal evidence, and run rings around his accusers, who were led by an extremely angry President Thomas Jefferson.

BURR'S DREAM

WHEN BURR LEFT OFFICE as vice president in early March 1805, his public career lay in tatters, largely the result of a frosty relationship with fellow Republican Thomas Jefferson. Jefferson had relied on Burr in the 1800 election to win New York for their Republican ticket, and Burr had delivered. New York's electoral votes were essential to the Republican victory that year. But Jefferson and Burr, ostensibly running mates, finished in a tie in the electoral vote. Federalists in the House of Representatives supported Burr, blocking Jefferson's election for 35 ballots. The relationship between Jefferson and Burr, never close, did not survive the constitutional ordeal. For the 1804 election, the president dropped Burr as his running mate.

In the spring of 1804 Burr ran for governor of New York. The attempt to revive his political prospects failed miserably when his opponent, tacitly supported by Jefferson, thrashed him at the polls. Burr discovered that his longtime rival Alexander Hamilton had made a scurrilous remark about him during the race. He promptly challenged Hamilton and killed him in a duel on July 11, 1804.

Burr's political opponents engineered his indictment on murder charges in both New York and New Jersey, which ensured the end of his political career. In response, he charted a course that was unconventional, to say the

and a cavalry helmet with a horse-hair crest, when they would have been more likely to have worn shorter boots and a bearskin hat.)

least. First he sent an emissary to Anthony Merry, the British minister to the United States, offering to assist Great Britain in separating the lands west of the Appalachian Mountains from the rest of the nation. Months later, Burr himself advised the British diplomat that the residents of Louisiana, who had recently joined the Union when France sold the territory, would join westerners in seceding. Burr promised he could make that happen.

destine reports about America's political and military intentions and capabilities.

Selectively disclosing aspects of his plans, Burr enlisted support from leading U.S. officials, including three senators, a former Speaker of the House of Representatives, and Andrew Jackson, a Tennessee militia general and future president. Burr ordered construction of riverboats capable of carrying more than a thousand men down the Ohio and Mississippi rivers.

Mississippi River with a threadbare contingent of barely one hundred men.

When he reached Mississippi Territory, crushing news awaited him. Not only had General Wilkinson betrayed him, but that double agent was rousing Jefferson and New Orleans against him. Burr was arrested, then released on bail. He fled into the Mississippi forest, only to be arrested again above Mobile. Federal agents took him to Richmond for trial.

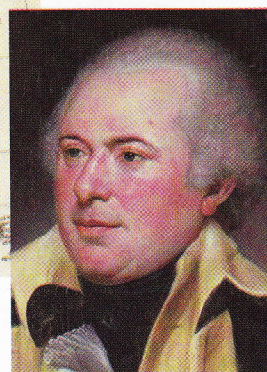


As commanding general of the United States Army and the first governor of the Louisiana Territory, Gen. James Wilkinson, right, conspired in 1804 and 1805 with Vice President Aaron Burr to carve out an independent nation in the lands west of the Mississippi, a region little explored then, as indicated by the 1806 Cary map of North America, above.

In a subsequent six-month journey through the west in 1805, Burr trolled for supporters for this audacious project, which also included a private invasion to liberate Spanish Florida, Texas, and Mexico. At its most ambitious, the plan would have created a new empire that would circle the Gulf of Mexico from the Florida Keys to Central America and stretch deeply into the North American continent. No one had to ask who would lead it.

Burr's most critical ally—Gen. James Wilkinson, the U.S. Army's top officer—was a thoroughgoing scoundrel. For more than a decade, Wilkinson had accepted bribes from Spain in exchange for clan-

In late 1806 Burr traveled west again, this time to bring his bold plan to life. Instead, it crumbled around him. A Kentucky prosecutor hauled him into court on charges of making war on Spain, a nation with which the United States was at peace, in violation of the Neutrality Act of 1794. An Army veteran recruited for the expedition, William Eaton of Massachusetts, revealed some of Burr's most outrageous proposals. Jefferson, finally crediting the numerous reports of Burr's nefarious plans, issued a proclamation warning citizens to guard against secessionist schemes. Volunteers abandoned the expedition in droves. Burr floated down the Missis-



UPON REACHING Richmond, Burr swiftly assembled a formidable defense team. He hired Richmond's finest lawyer, John Wickham, retaining him only hours before the federal govern-

ment asked Wickham to lead the prosecution. The defense phalanx included two former U.S. attorneys general, Edmund Randolph and Charles Lee of Virginia, as well as the bibulous Luther Martin of Maryland, a delegate to the Constitutional Convention of 1787.

The government relied on George Hay, Virginia's U.S. attorney, as lead prosecutor, assisted by Virginia's lieutenant governor, Alexander McRae. Mostly outgunned, the prosecutors fought on close to even terms only when its youngest lawyer, William Wirt, rose to address the court. With a flair for metaphor and an actor's sense of timing, the large, sandy-haired Wirt was said to wield his snuffbox as an oratorical weapon.

Even though the assembled lawyers represented some of the finest legal minds in the nation, they couldn't hold a candle to the defendant and the presiding judge, John Marshall, who would serve as the nation's greatest chief justice

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Burr's ciphered letter of July 29, 1806, to fellow conspirator Wilkinson, left, exulted that their long-planned scheme had come "to the point so long desired" and was ready to implement. Wilkinson grew nervous, promptly altered the letter to disguise his involvement in the plot, and sent it to President Jefferson.

of the Supreme Court, presiding for the first three and a half decades of the 19th century. Marshall entirely eclipsed Cyrus Griffin, the Richmond circuit judge who presided alongside him.

From the pretrial stages through the trial proceedings, Burr attacked the government on matters large and small. The defense accused the prosecution of misrepresentation, foot-dragging, political posturing, and pandering to public opinion. Burr demanded access to President Jefferson's correspondence with General Wilkinson. He insisted that Marshall throw Wilkinson in jail for contempt of court. Neither logic nor consistency hampered the energetic defense. They argued that a key witness could not accept a presidential pardon because the witness had committed no crimes, then objected that he could not testify without incriminating himself.

Hay complained to Jefferson, who directly managed the prosecutors throughout the case, that Burr "takes every advantage, denies every position advanced in the prosecution, acquiesces in no decision . . . and while he boldly asserts his innocence, adopts every measure within his power to bar the door to an inquiry."

Ironically, both Burr and his chief accuser, General Wilkinson, withheld their correspondence with each other, protesting that no man of honor could reveal communications intended to be confidential. In that more innocent time, neither the prosecution nor Chief Justice Marshall attempted to compel disclosure of those letters, which have never seen the light of day.

THREE PROCEEDINGS

THE PROSECUTION and defense summoned more than 100 witnesses who overran Richmond, a city of only 5,000. Also flocking to the city were newspaper writers, sensation seekers, and many of Burr's legion of creditors. America's 200 newspapers splashed the courtroom drama across their pages, reprinting transcripts from the Richmond newspapers. Future novelist Washington Irving, drawn to the spectacle, complained of "red hot strolls in the middle of the day," with the mercury approaching 100 degrees, and wilting under the "perspiring horrors" of the town's social scene.

Burr's case proceeded in three separate stages. Goaded by President Jefferson, the prosecutors began with treason charges but quickly snarled themselves in their own strategizing. The men who wrote the Constitution in 1787 feared

the misuse of treason prosecutions, which British kings often deployed to cripple their opponents. Accordingly, the Constitution defined treason narrowly as either "levying war" against the United States or giving "aid and comfort" to the nation's enemies. In 1807 the United States had no official enemies to aid and comfort, so Burr could face charges only of levying war against his own country. The Constitution includes another important limitation on treason prosecutions: a conviction must be based upon a confession or the testimony of two witnesses to an "overt act" of treason.

In developing their case against Burr, the prosecutors worked carefully to avoid western courtrooms. Earlier attempts to prosecute the former vice president in Kentucky and Mississippi had foundered when western grand

Burr's bold plot attracted few followers, so the western riverboats (not canoes as romanticized in the 1882 engraving, below), carried few men down the Ohio toward the Mississippi and New Orleans.





jurors refused to charge him with any crimes. They agreed with Burr that the national government abused westerners and that Spanish lands should be seized as soon as possible.

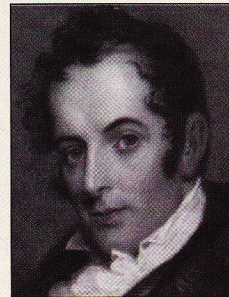
The prosecutors therefore resolved to press the treason case in front of more sympathetic Richmond jurors, who had strong political loyalties to President Jefferson. To keep the case in Virginia, the indictment charged that Burr's treason had occurred in the state. Fortunately for the prosecutors, Burr's expedition had included an early December stop at Blennerhassett Island in the Ohio River, which was then in Virginia (it is now in West Virginia). Less fortunately for the prosecutors, he had not been part of the company at that point. He joined the expedition two weeks later, near the confluence of the Ohio and Cumberland rivers.

One of the early republic's most sensational courtroom dramas, the Burr treason trial, took place inside Richmond's Palladian statehouse, perched on the bluffs overlooking the James River, above.

Writer **Washington Irving**, the soon-to-be famous author of *The Legend of Sleepy Hollow* and *Rip Van Winkle*, attended the trial and wrote this letter to James K. Paulding on June 22, 1807:

The lawyers are continually entangling each other in law points, motions, and authentics, and have been so crusty to each other that there is a constant sparring going on. [Gen. James] Wilkinson is now before the grand jury, and has such a mighty mass of words to deliver himself of, that he claims at least two more days to discharge the wondrous cargo. The jury are tired enough of his verbosity. The first interview between him and Burr was highly interesting, and I secured a good place to witness it.

Burr was seated with his back to the entrance, facing the judge, and conversing with one of his counsel. Wilkinson strutted into court, and took his stand in a parallel line with Burr . . . Here he stood for a moment swelling like a turkey-cock, and bracing himself up for the encounter of



Burr's eyes. The latter did not take any notice of him until the judge directed the clerk to swear Gen. Wilkinson; at the mention of the name Burr

turned his head, looked him full in the face with one of his piercing regards, swept his eye over his whole person from head to foot, as if to scan its dimensions, and then coolly resumed his former position, and went on conversing with his counsel as tranquilly as ever.

The whole look was over in an instant; but it was an admirable one. There was no appearance of study or constraint in it; no affectation of disdain or defiance; a slight expression of contempt played over his countenance, such as you would show on regarding any person to whom you were indifferent but whom you considered mean and contemptible. Wilkinson did not remain in court many minutes.

Awash in cascades of overblown oratory—Luther Martin delivered a 14-hour, two-day speech—the prosecution foundered on the simple fact that Burr had been absent when his adventurers assembled in Virginia. The government could never prove he had committed “overt acts” of treason in that state.

The treason phase of the case nevertheless produced two extraordinary moments. On the witness stand, William Eaton recounted that the former vice president had proposed “revolutionizing the territory west of the Allegheny; establishing an independent empire there; New Orleans to be the capital; and he himself to be the chief.” Though Eaton described only conversation, not an overt act of treason, his description of Burr’s plans was electrifying.

And William Wirt, the junior prosecutor, delivered an address that would be memorized and delivered by later generations of schoolchildren, irredeemably befouling Burr’s reputation. After colorfully portraying the Blennerhassett family as living in a modern, island-bound Eden, Wirt painted Burr as the serpent entering the garden: “The destroyer comes; he comes to change this paradise into a hell; . . . he soon finds his way to their hearts. . . . The conquest was not difficult. Innocence is ever simple and credulous. . . . By degrees he infuses into [Blennerhassett] the fire of his own courage; a daring and desperate thirst for glory; and ardor panting for great enterprises, for all the storm and bustle and hurricane of life.”

Chief Justice Marshall, however, did not fall for such passionate oratory. In the longest judicial opinion of his career, he insisted that the prosecution could proceed only with evidence that related directly to the charge that Burr had levied war against the government on Blennerhassett Island. With no such evidence, the prosecution rested. The jurors who reluctantly acquitted Burr refused to proclaim him “not guilty” of treason. Instead their grudging verdict read that Burr “is not proved to be guilty

under the indictment by any evidence submitted to us.” President Jefferson denounced the verdict, calling it “a proclamation of impunity to every traitorous combination which may be formed to destroy the union.” “Marshall,” wrote prosecutor Wirt, “has stepped between Burr and death.”

A furious Jefferson insisted that the prosecution resume, this time on misdemeanor charges that Burr’s planned invasion of Spanish lands had violated the Neutrality Act. If that prosecution failed, Jefferson assured Hay, it “will heap coals of fire on the heads of the judges.”

Fail it did, for largely the same reason as the first trial. In order to preserve the jurisdiction of the Virginia court, the prosecutors again alleged that the illegal actions had occurred on Blennerhassett Island. Although Burr plainly had intended an invasion of Spanish territory, no witnesses could place him on Blennerhassett Island. A second jury delivered a verdict of acquittal.

In both criminal trials, the prosecutors lacked the most powerful evidence against Burr: His traitorous proposals to the British minister would lie concealed in that nation’s archives for generations, while the prosecutors could acquire no testimony from Burr’s confidants. Many of them, as prosecutor Hay grumbled in a letter to Jefferson, “will never utter a word injurious to Burr.” Six of them faced the same criminal charges pending against Burr, so they had no interest in giving testimony for the prosecution.

One of Burr’s closest confederates, a

mercurial German expatriate named Erich Bollman, had been arrested by General Wilkinson in New Orleans and shipped to Washington, D.C., to face treason charges. The prisoner insisted



Chief Justice John Marshall, above, traveled from Washington to preside over the *United States v. Aaron Burr*, probably with his pocket watch, left, and the early 19th-century equivalent of a lawyer’s briefcase, an accordion-file-sized traveling box, below.

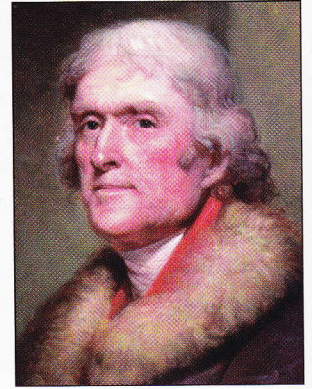
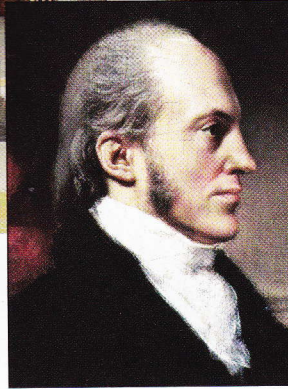


on meeting privately with Jefferson to explain Burr’s true intentions.

In a February 1807 meeting with Jefferson and Secretary of State James Madison, Bollman disclosed that Burr had intended to bring 6,000 men to New Orleans. (The U.S. Army numbered barely 3,000 at the time.) They were to seize the ships in the harbor as well as artillery abandoned by the French when they sold Louisiana. When General



Although President Jefferson, below right, never set foot in the Richmond courtroom, left, during the Burr treason trial, he threw his considerable influence against his former vice president, below left, through a flurry of letters and directions to the prosecution.



Wilkinson brought in U.S. Army troops, Bollman reported, the "corps of Burr" would invade Mexico via Veracruz, as Hernán Cortés had done almost 300 years earlier (and Winfield Scott would do 40 years later).

Jefferson briefed prosecutor Hay about Bollman's disclosures, sending him an essay by Bollman describing Burr's plans. To ensure that Bollman would testify against Burr, Jefferson enclosed a presidential pardon for Bollman plus several blank pardons that Hay could deliver to all but "the grossest offenders," thus securing their testimony. Jefferson then revised his instructions: Hay could grant the pardons even to the grossest offenders if "the principal [Burr] will otherwise escape."

Jefferson's stratagem failed. Bollman refused the pardon, steadfastly proclaiming his innocence. Yet he also refused to testify, asserting his constitutional right against self-incrimination. Disheartened, Hay never offered pardons to Burr's other intimates.

A DRAWN BATTLE

DESPITE TWO FAILED attempts to convict Burr, Jefferson still would not let his prosecutors retire from the field of battle. "We had supposed we possessed fixed laws to guard us equally against treason and oppression," he wrote angrily, "but it now appears we have no law but the will of the judge."

The government therefore assembled a new treason indictment that charged the former vice president with levying war against the United States when he had joined his adventurers on the Ohio River and then sailed all the way down the Mississippi. Chief Justice Marshall now needed to rule on whether probable cause existed for believing that Burr had committed that crime. Presiding over that preliminary issue without a jury, the judge's attitude shifted dramatically. After five weeks of helping the defense tie the prosecution in knots, Marshall began to rule in favor the government.

Burr and his lawyers argued that another trial on treason charges, just after his acquittal on the same, amounted to double jeopardy. "This is the sixth trial which I have had to encounter," Burr complained, "and it seems really desirous that I should know how many trials a man may undergo for the same thing."

Burr's arithmetic was superficially flawless, although not every court proceeding had been a full-fledged trial: he had survived two attempted grand jury investigations in Kentucky, one in Mississippi, and had won two full trials in Virginia. But Burr could not press his double jeopardy objection until a grand jury actually indicted him. The current proceeding before the chief justice was merely a preliminary arraignment.

Marshall therefore allowed the government to proceed.

The prosecutors paraded three dozen witnesses through the courtroom, including many of Burr's adventurers. They described an expedition with a distinctly military character. By the time the expedition had reached the mouth of the Cumberland River, its 100 crew members had acquired weapons such as muskets, bayonets, and tomahawks. They performed drills on their boats. Burr recognized that he was losing ground in the courtroom. "It is impossible to predict when this business may terminate," he wrote his daughter, "as the chief justice has gradually relaxed from former rules of evidence, and will now hear anything."

A moment of high drama arose when General Wilkinson—Burr's chief accuser (and leading accomplice)—took the stand in public for the first time. One observer thought that the stout, florid military man "exhibited the manner of a sergeant under court martial rather than the demeanor of an accusing officer confronted with his culprit." Wilkinson first addressed the principal documentary evidence, a letter in cipher from Burr, two copies of which had been delivered to Wilkinson by trusted couriers. When he first released the cipher

letter publicly, Wilkinson had altered it in subtle yet critical ways to minimize his prior involvement with Burr.

Salivating at the sight of the duplicitous general, the defense lawyers took turns cross-examining him. John Wickham's hours-long grilling made Wilkinson squirm and decline to answer many questions.

Indeed, Wilkinson was not a credible witness. When the grand jury had heard his secret testimony, they nearly indicted him as part of Burr's scheme. The grand jury foreman, Congressman John Randolph of Virginia, called Wilkinson "the only man that I ever saw who was from the bark to the very core a villain." Randolph added that "the mammoth of iniquity escaped—not that any man pretended to think him innocent."

Despite the fireworks surrounding Wilkinson's appearance, Marshall refused to sustain the new treason charges. He did find probable cause that Burr had violated the Neutrality Act by planning an invasion of Mexico. After posting bail, Burr walked free, seven months after the marshals first brought him to Richmond. The case was transferred to the federal court in Ohio, where it languished for months and was finally dropped.

Aaron Burr, the fallen angel of America's founding generation, had escaped the hangman, thwarted the president who hated and feared him, and skirted the evidence of his own misdeeds. It marked a signal achievement by a brilliant lawyer who had utterly failed to realize his dream of creating a new empire on the American continent.

THEREAFTER

ALTHOUGH RUINED, Burr would not slip quietly into oblivion. In 1808 he traveled to Europe, where he spent three years unsuccessfully trying to inveigle Great Britain or France into underwriting a new expedition to liberate Spain's American colonies—with him at the head. By 1813 he was back in New York, where he

practiced law into his late 70s, dying on Staten Island in 1836 at the age of 80.

Burr's trial had profound implications beyond the fate of the defendant.

above the law when it comes to providing evidence for court cases.

One final principle shone through the verbiage of the long courtroom

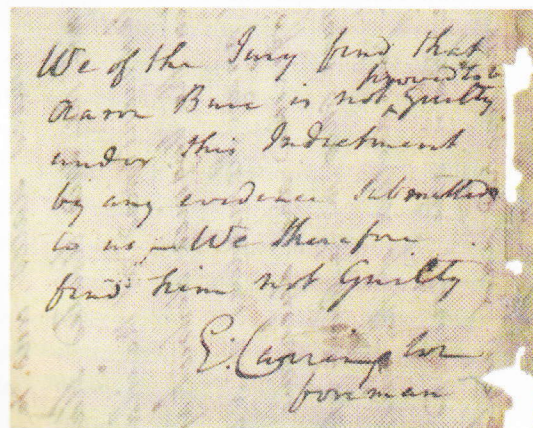


Prosecutors built their case around Burr's activities on Blennerhassett Island in the Ohio River, above, claiming that he had conspired there with Irish expatriate lawyer Harman Blennerhassett, whose recently rebuilt mansion is visible in the trees. No definitive evidence placed Burr on the island during the raising of the treasonous militia, so the jury reluctantly acquitted him, but not before the foreman inserted the words "proved to be" into their statement to the judge, below.

As former president John Adams wrote during the case, "something must come out on the trial, which will strengthen or weaken our confidence in the general union." The case framed a central historical irony. Marshall, the last great figure of the aristocratic Federalist Party, shut down a national security prosecution by his tenacious protection of Burr's rights. Jefferson, the supposed advocate of individual liberty, proclaimed Burr's guilt publicly and avidly pursued his conviction through deeply flawed prosecutions.

The case proved a landmark, with Marshall's rulings establishing central principles of our legal system. The writ of habeas corpus survives even when national security is at stake. Prosecutions for treason must meet the exacting requirements set out in the Constitution. And the president is not

struggle. After the trial was over, Marshall confided that he had found the trial "deplorably serious." By vigilantly protecting Burr's rights, the chief justice



revealed his view that constitutional rights mean nothing unless they were available to even such a reviled defendant as Aaron Burr in 1807. And the principle that even the most controversial defendants are entitled to a fair trial remains intact today. 🐾