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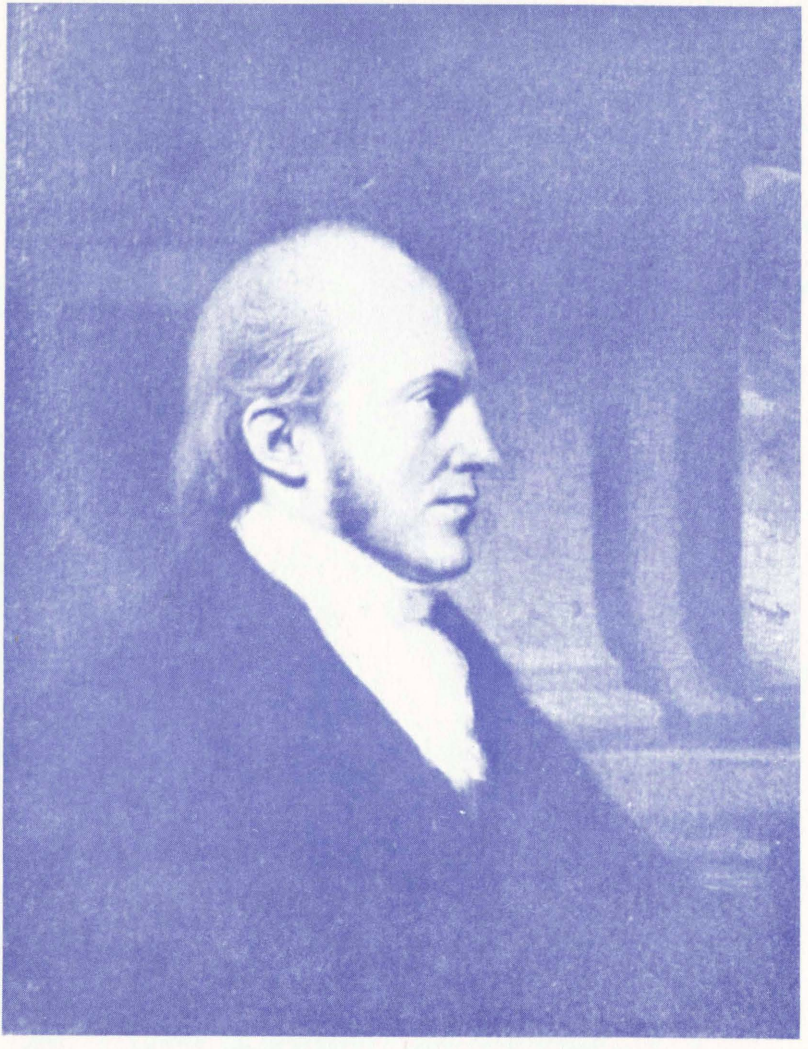
A Piece of Epic Action: The Trial of Aaron Burr

Suzanne B. Geissler



Aaron Burr
From the original portrait by Vanderlyn now in the possession of the New-York Historical Society.

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Aaron Burr
From the original miniature by Inman in *Aaron Burr* by Samuel H. Wandell and Meade Minnigerode. (G.P. Putnam's, Sons, 1925)

A Piece of Epic Action: The Trial of Aaron Burr

by Suzanne B. Geissler

> "If the gentleman pleases, he is at liberty to consider the whole trial as a piece of epic action, and to look forward to the appropriate catastrophe."[1]

These words were spoken, not in connection with recent goings-on, but during a trial which shook the Washington, D.C. of 1807 to its none-too-stable foundations. The reverberations persisted into the Watergate era when lawyers for both sides frantically searched for suitable precedents. The trial of the former vice-president Aaron Burr for treason established such usable precedents, bringing to the fore the now-familiar issues of "pre-trial publicity," "leaks to the press," and "executive privilege." The drama inherent in the occasion was not lost on government prosecutor William Wirt when he taunted the defense with the above-quoted words. Wirt did not have the last word, however, since the "appropriate catastrophe" – the hanging of Aaron Burr – never took place.

The trial was, nonetheless, a "piece of epic action," inspiring some of the most colorful courtroom histrionics ever seen in America. Masters of the rhetorical flourish, such as Wirt and Luther Martin, played to packed houses throughout the six-month trial. Thanks to David Robertson, a Petersburg,

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[1]David Robertson, *Reports of the Trials of Colonel Aaron Burr.* 2 Vols. Philadelphia: Hopkins and Earle, 1808. Vol. I, p. 58. (Robertson's *Reports,* the major source for this paper, can be found in the George Arents Research Library at Syracuse University.)

Virginia lawyer, who took down the entire proceeding in shorthand, a record of the trial was made available to the public. It amounted to over 1100 pages and constituted, according to its compiler, "a valuable treatise on criminal law, and especially high treason."[2] It is the only reliable account of the trial and while it does not conclusively demonstrate the innocence of Aaron Burr, it clearly points up the lack of evidence against him and the government's zeal in prosecuting a charge of treason on the flimsiest grounds, suggesting that President Thomas Jefferson was, indeed, trying to commit judicial murder.

Burr, who had served under Jefferson as vice-president from 1801 to 1805, was arrested on February 19, 1807 in the Mississippi Territory in consequence of Jefferson's message to Congress on January 22 stating that Burr was the "principal actor" in "an illegal combination of private individuals against the peace and safety of the Union."[3] Specifically, Burr was accused of organizing the secession from the Union of the states west of the Alleghenies, including the seizure of New Orleans by force, and of preparing a military expedition "against the dominions [Mexico] of the king of Spain, with whom the United States then were and still are at peace."[4] It is important to note that since none of these events actually took place, Burr was only charged with attempting treason against the United States and a high misdemeanor in levying war on Mexico. The government's case rested on the assumption that conspiracy to commit treason was equal to the act itself. The defense took the opposite position: if no treasonable acts took place the defendant could not be charged with treason.

What, in fact, had Burr done? The charge claimed that Burr had levied war against the United States by being the leader of a military force assembled at Blennerhassett's Island (just below what is now Marietta, Ohio) in Wood County, Virginia on December 10, 1806. In the wording of the charge the prosecution severely miscalculated, since by its own admission Burr was nowhere near the scene of the alleged crime on the night in question. He was two hundred miles away in Kentucky. The government's attack hinged on Burr's being responsible for the actions on the island even though he was not present himself.

Since Blennerhassett's Island fell within the boundaries of Virginia, Burr was taken by his captor, Major Nicholas Perkins, to Richmond for trial. Ironically, the presiding judge was Chief Justice John Marshall, Jefferson's Federalist foe. At the time the Supreme Court justices also served as circuit appeals judges, and the Virginia district lay within Marshall's assigned circuit. So it was that the trial took on the added element of a power struggle, not

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[2]*Ibid.*, Vol. I, Preface.

[3]Paul L. Ford, ed., *The Writings of Thomas Jefferson.* 10 Vols. New York: G.P. Putnam's Sons, 1892-99. Vol. IX, p. 14-20.

[4]Robertson, Vol. I, p. 1.

only between the executive and the judiciary, but between the party standard-bearers, the Republican Jefferson and the Federalist Marshall.

Lawyers for both sides constituted an impressive array of legal talent. The prosecution was headed by George Hay, District Attorney for Virginia; William Wirt, a member of the Richmond bar and future Attorney General – personally summoned by Jefferson to this task; Caesar Rodney, Attorney General of the United States; and Alexander MacRae, Lieutenant Governor of Virginia. The defense included former Attorney General Edmund Randolph; John Wickham, the recognized leader of the Virginia bar; Benjamin Botts, a rising young Virginia lawyer; and Luther Martin, noted Federalist politician, lawyer, and orator. They were assisted by Charles Lee, former Attorney General and brother of "Light Horse" Harry, the famous Revolutionary War hero; and John Baker, popular Richmond attorney. Not the least member of the defense was Burr himself.

Not surprisingly, this outstanding cast of characters, the anticipated dramatics and personality clashes, and the high stakes – Burr's life – attracted a huge audience. On the first day of the preliminary hearings the crowd in the courtroom was so large that Marshall ordered the proceedings transferred to the hall of the House of Delegates in the state capitol. The curious crowds of the summer included Commodore Stephen Decatur the elder, Washington Irving, future general Winfield Scott, and General Andrew Jackson. The social triumph of the season occurred with the arrival of Burr's twenty-five year old daughter Theodosia with her husband Joseph Alston and their five year old son Aaron. Theodosia captivated all she met, particularly Luther Martin (who referred, in court, to her "tears of filial piety") and contributed in no small way to garnering sympathy for her father.[5]

The first order of business was a grand jury hearing to determine if Burr should be indicted. The government's chief piece of evidence consisted of a letter written in cypher by Burr to General James Wilkinson, commanding general of the United States Army. Burr, not knowing that General Wilkinson was secretly in the pay of Spain had assumed that Wilkinson was his chief ally in his (Burr's) plan to invade Mexico in the event of a war with Spain which had seemed imminent in the fall of 1805.[6]

The other mainstay of the prosecution's case was the affadavit of "General" William Eaton, former U.S. consul at Tunis and a hero of the American naval struggle against the Barbary pirates. Eaton claimed that Burr

> laid open his project of revolutionizing the Western country, separating it from the Union, establishing a monarchy there, of

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[5]*Ibid.*, p. 3.

[6]Matthew L. Davis, ed., *Memoirs of Aaron Burr.* 2 Vols. New York: Harper and Bros., 1837. Vol. II, p. 375.

> which he was to be the sovereign. . . He said if he could gain over the Marine Corps and secure the naval commanders . . . he would turn Congress neck and heel out of doors, assassinate the President, seize on the treasury and navy, and declare himself the protector of an energetic government.[7]

Burr had to overcome, not the evidence against him, but the determination of the president to hang him. This determination was clearly evident from the moment Jefferson issued his proclamation of January 22, 1807. The president concluded his message to Congress by declaring that Burr's "guilt is placed beyond question."[8] He had committed a legal faux pas as John Adams bluntly pointed out, "if [Burr's] guilt is as clear as the Noon day Sun, the first Magistrate ought not to have pronounced it so before a Jury had tryed him."[9]

Given the nature of the trial and the people involved, publicity was inevitable. Newspapers reported Jefferson's and Wilkinson's version of Burr's letter. Added to Jefferson's declaration of Burr's guilt, these articles excited popular feeling against Burr. The problem first manifested itself when it came time to choose grand jurors. The local marshal, Major Joseph Scott, had summoned twenty-four men. Of these candidates Burr objected to only two, though with good cause. One was Senator William B. Giles who had advocated suspending the writ of habeas corpus in Burr's case. Though Giles protested his impartiality, he confessed his reluctance to be on the jury and Marshall advised him to withdraw. The other was Colonel Wilson Cary Nicholas, a former senator and political rival of Burr. Nicholas, too, had not wanted to serve on the grand jury. His testimony on this point suggests that the selection of both himself and Giles by the marshal was made under influence of White House pressure. Said Nicholas,

> I doubted the propriety of my being put on the jury. . . . The marshal assured me, that he felt the strongest disposition to oblige me, but that he thought he could not do it, consistently with his duty. He supposed there was scarcely a man to be found, who had not formed and expressed opinions about colonel Burr. That he too was in a position of great delicacy and responsibility, and that, without the utmost circumspection on his part, he

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[7]William Eaton, *The Life of the Late General William Eaton.* Brookfield: E. Merriam, 1813. p. 399. (William Eaton deposition, January 26, 1807)

[8]Ford, p. 14-20.

[9]Albert J. Beveridge, *Life of John Marshall.* New York: Houghton Mifflin, 1916. 4 Vols. Vol. III, p. 338. (John Adams to Benjamin Rush, February 2, 1807)

would be exposed to censure. I renewed my application to the marshal several times and always received the same answer.[10]

Four candidates voluntarily requested to be excused on the grounds of having formed an unfavorable opinion of the prisoner. Burr remarked in exasperation, "Really I am afraid that we shall not be able to find any man without this prepossession."[11] Hay retorted "that there was not a man in the United States, who probably had not formed an opinion on the subject: and if such objections as these were to prevail Mr. Burr might as well be acquitted at once."[12] Marshall ruled that a prospective juror, in order to be dismissed, must have declared, not merely formed, an opinion. This eased the situation and sixteen jurymen were selected. John Randolph of Roanoke, who had unsuccessfully requested to be excused from the jury, was named foreman by Marshall. It might be noted that Randolph, a foe of Jefferson, was not one of the original twenty-four chosen by the marshal. His name was added only when a sufficient number of jurors failed to answer their summonses.

The problem of pre-trial publicity presented itself again when in August, after an indictment had been handed down, the petit jury was being selected. The prosecution again took the position that the defense's challenges were unreasonable. Said Hay,

> The transactions in the west had excited universal curiosity; and there was no man who had not seen and decided on the documents relative to them. Do gentlemen contend, that in a case so peculiarly interesting to all, the mere declaration of an opinion is sufficient to disqualify a juryman?[13]

Botts replied that he

> considered it as a misfortune ever to be deplored that in this country, and in this case, there had been too general an expression of the public sentiment, and that this generality of opinion would disqualify many; but he had never entertained a doubt, until the gentleman for the prosecution had avowed it, that twelve men might be found in Virginia, capable of deciding this question, with strictest impartiality. He still trusted that the

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[10]Robertson, Vol. I, p. 42.

[11]*Ibid.*, p. 44.

[12]*Ibid.*, p. 45.

[13]*Ibid.*, p. 368.

attorney for the United States was mistaken; that the catastrophe was not completely fixed; and that every man in the state had not pledged himself to convict colonel Burr, whether right or wrong.[14]

Burr was entitled to thirty-five peremptory challenges which he could use if the Chief Justice did not reject the questionable juror himself. The marshal summoned a panel of forty-eight. The entire group was examined with only four deemed suitable. A second panel of forty-eight was chosen out of which the remaining eight were selected. A typical cross-examination went as follows:

> Mr. Botts. – Have you said that colonel Burr was guilty of treason?
> Mr. Bucky. – No. I only declared that the man who acted as colonel Burr was said to have done, deserved to be hung.
> Question. Did you believe, that colonel Burr was that man?
> Answer. I did, from what I heard . . .
> Mr. Wirt. – Did I understand you to say, that you concluded upon certain rumours you had heard, that colonel Burr deserved to be hung?
> Mr. Bucky. – I did.
> Question. Did you believe these rumours?
> Answer. I did.
> Question. Would you, if you were a juryman, form your opinion upon such rumours?
> Answer. Certainly not.[15]

Mr. Bucky was rejected by Marshall.

Burr used his first peremptory challenge against Hamilton Morrison, who after being accepted as a juror, remarked, "I am surprised why they [the defense] should be in so much terror of me. Perhaps my *name* may be a terror, for my first name is *Hamilton.*"[16] Robertson reported, "Colonel Burr then observed, that *that* remark was a sufficient cause for objecting to him, and challenged him."[17]

On the sixth day of jury selection, after the second panel of forty-eight

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[14] *loc. cit.*

[15] *Ibid.*, p. 370-71.

[16] *Ibid.*, p. 383. (*italics Robertson's).*

[17] *loc. cit. (italics Robertson's).*

had been summoned, Burr, anxious to save time (and perhaps to convince the court of his good intentions) offered a new plan.

> Mr. Burr then addressed the court, and observed . . . as it would be exceedingly disagreeable for him to exercise the privilege of making peremptory challenges, to which he was entitled, he would lay a proposition before the opposite counsel, which would prevent this necessity, and would save one or two hours, that might be otherwise unpleasantly spent. He would select eight out of the whole venire, and they might be immediately sworn, and impaneled on the jury.[18]

The Chief Justice and prosecution agreed, and the remaining eight were speedily chosen and sworn in.

This jury acquitted Burr of both treason and a misdemeanor, so we can say that Burr chose well. The frustrating and time-consuming process of picking the jury indicates that pre-trial publicity provided a serious, though not insuperable, obstacle to Burr's freedom. The powers of suggestion emanating from the White House reached every juror. Those chosen were merely the ones who had not expressed an opinion in public.

The key pieces of evidence were the cypher letter and the letter of Wilkinson to the president warning him of a treason plot. The latter letter became a *cause célèbre* because of Burr's audacity in calling for a subpoena. On June 9, still during grand jury proceedings, Burr addressed the court:

> In the president's communication to congress he speaks of a letter and other papers which he had received from Mr. Wilkinson, under date of 21st October. Circumstances had now rendered it material, that the whole of this letter should be produced in court; and further, it has already appeared to the court, in the course of different examinations, that the government have attempted to infer certain intentions on my part, from certain transactions. It becomes necessary therefore that these transactions should be accurately stated. [Burr then described his unsuccessful attempts to see these documents.] . . . Hence I feel it necessary to resort to the authority of this court, to call upon them to issue a subpoena to the president of the United States, with a clause, requiring him to produce certain papers; or in other words, to issue the subpoena *duces tecum.*[19]

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[18] *Ibid.*, p. 423.

[19] *Ibid.*, p. 114.

Theodosia Burr
From the original portrait by Stuart in *Aaron Burr* by Samuel H. Wandell and Meade Minnigerode. (G.P. Putnam's, Sons, 1925)

The purpose, the defense insisted, was not to disconcert the president, but merely to secure the documents. Wickham noted,

> that Mr. Hay had promised the appearance of these papers; and that was all they wanted. The object was not to bring the president here, but to obtain certain papers which he had in his possession.[20]

Hay protested that Burr's motion was premature, because an indictment had not yet been issued. He also maintained that the president could not take time out from his duties to appear in court.

> But let us suppose . . . that this subpoena has been issued, and that the president is here; that he has been called to this court from Washington, where national concerns of such deep weight and importance are entrusted to his guidance; what then?[21]

Wickham interrupted at this point to remind Hay that "It was not, in fact a subpoena for the president, but only for certain papers."[22] After hearing three days of arguments on Burr's motion, Marshall ruled in Burr's favor.

> The court is of the opinion, that any person, charged with a crime in the courts of the United States, has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. . .it remains to inquire whether a subpoena *duces tecum* can be directed to the president of the United States. . . . If, then, as is admitted by the counsel for the United States, a subpoena may issue to the president, the accused is entitled to it. . . . A subpoena *duces tecum,* then may issue to any person to whom an ordinary subpoena may issue.[23]

Jefferson answered the subpoena readily enough – though he no longer had the papers in his possession. On June 12 the president wrote to Hay,

> Reserving the necessary right of the president of the United States, to decide, independently of all other authority, what papers coming to him as president, the public interest permits to

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[20] *Ibid.*, p. 121.

[21] *Ibid.*, p. 122.

[22] *loc. cit.*

[23] *Ibid.*, p. 180-82.

be communicated, and to whom, I assure you of my readiness, under that restriction, voluntarily to furnish, on all occasions whatever the purposes of justice may require. But the letter of general Wilkinson of October 21st, requested for the defense of colonel Burr, with every other paper relating to the charges against him, which were in my possession when the attorney general went on to Richmond in March, I then delivered to him; and I have always taken for granted he left the whole with you.[24]

Jefferson accomplished three things by this letter. He upheld the president's ultimate authority to keep his communications secret. He appeared cooperative and magnanimous in expressing his willingness to provide the papers. And he extricated himself from a difficult situation by shifting the responsibility back to Rodney and Hay.

Jefferson wrote again on June 17, forwarding copies of orders issued by the War and Navy Departments for the arrest of Burr. He maintained more forcefully that he could neither attend the trial nor relinquish his right to be final arbiter in choosing documents to be released.

> As to our personal attendance at Richmond, I am persuaded the court is sensible, that paramount duties to the nation at large, control the obligation of compliance with its summons in this case. . . . To comply with such calls would leave the nation without an executive branch. . . . All nations have found it necessary, that, for the advantageous conduct of their affairs, some of these proceedings at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication.[25]

As for the letter of October 21, Hay could not find it among the papers Rodney had turned over to him. Undoubtedly the mysterious dissappearance of this letter strengthened Burr's position. This may explain why the defense dropped the issue for the moment, though it would be brought up again.

The trial opened with the prosecution's first witness, William Eaton, who was to elaborate on his deposition submitted in January. He was less than convincing. Eaton had held a grudge against the federal government, feeling that he had been insufficiently rewarded for his work in North Africa. He made no secret of how meanly he had been treated. The defense was thus able to use Eaton's bombast to its own advantage.

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[24] *Ibid.*, p. 210.

[25] *Ibid.*, p. 255.

The only proof Eaton could offer against Burr was his own recollection of conversations with Burr during the winter of 1805-1806. The first thing he did when he took the stand was request permission to refer to notes. He admitted the notes were not made at the time of the conversations, and the Chief Justice disallowed them. Eaton then asked if he could "make some explanation about the motives of my own conduct." Marshall judged that this would be improper. Eaton then announced, "Concerning any overt act, which goes to prove Aaron Burr guilty of treason, I know nothing."[26] What he did know, he said, was Burr's intent to commit treason. He reiterated what he had declared in his deposition. Eaton then told how he had called on the president to warn him of Burr's treasonable designs – and to recommend Burr for an ambassadorship!

> I took the liberty of suggesting to the president, that I thought colonel Burr ought to be removed from the country, because I considered him dangerous in it. The president asked where we should send him? Other places might have been mentioned, but I believe that Paris, London, and Madrid, were the places which were particularly named. The president, without positive expression (in such a matter of delicacy) signified that the trust was too important, and expressed something like a doubt about the integrity of Mr. Burr. I frankly told the president that perhaps no person had stronger grounds to suspect that integrity than I had; but that I believed his pride of ambition had so predominated over his other passions that when placed on an eminence, and put on his honor a respect to himself would secure his fidelity.[27]

Jefferson, needless to say, did not take this suggestion, but neither did he take Eaton's warnings seriously. Luther Martin objected to Eaton's relating the conversations of other persons. Marshall replied, "More time was wasted by stopping the witness, than by letting him tell his story in his own way, yet if it were required, he must be stopped when he gave improper testimony."[28]

Martin and Burr conducted the cross-examination which brought out the fact that the federal government had suddenly paid Eaton the money that they had been refusing him for three years. After returning from Tunis, Eaton had presented claims for reimbursement to the Treasury Department. Treasury officers told him to go to Congress, where a committee told him to go back to Treasury. Eaton mentioned that his account had since been settled.

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[26] *Ibid.*, p. 473.

[27] *Ibid.*, p. 478.

[28] *Ibid.*, p. 479.

Mr. Martin. – What balance did you receive?
Answer. That is *my* concern, sir.
Mr. Burr. – What was the balance against you?
Mr. Eaton (to the court). – Is that a proper question?
Mr. Burr. – My object is manifest; I wish to shew the bias which has existed on the mind of the witness.
Chief Justice saw no objections to the question.
Mr. Eaton. – I cannot say to a cent or a dollar: but I have received about 10,000 dollars.
Mr. Burr. – When was the money received?
Answer. About March last.[29]

Burr's trial had begun in March. Eaton's testimony suggested that the Jefferson administration which had consistently ignored him suddenly found it convenient to honor Eaton's claim when it appeared he could offer damaging testimony against Burr. This disclosure and his own behaviour discredited Eaton. Harman Blennerhassett, one of Burr's alleged co-conspirators, left a colorful, if perhaps subjective, description of Eaton in Richmond.

> The once redoubted Eaton has dwindled down in the eyes of this sarcastic town into a ridiculous mountebank, strutting about the streets under a tremendous hat, with a Turkish sash over coloured clothes when he is not tippling in the taverns.[30]

Eaton's testimony was disallowed by Marshall since it did not relate to events on Blennerhassett's Island.

Wilkinson, too, had submitted a deposition which had been used (though discredited by Marshall) in the habeas corpus hearing of Burr's cohorts, Erich Bollman and Samuel Swartwout, the previous February. The affadavit included Wilkinson's translation of Burr's cypher letter, dated from Philadelphia, July 29, 1806. The most incriminating passages, according to what Wilkinson told Jefferson, read:

> At length I have obtained funds, and have actually commenced. The eastern detachments from different points, and under different pretences, will rendezvous on the Ohio, 1st of November. Everything internal and external favors our views. Naval protection of England is secured. [Commodore Thomas] Truxton is going to Jamaica to arrange with the admiral on that

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[29] *Ibid.*, p. 484-85.

[30] William H. Safford, ed., *Blennerhassett Papers.* Cincinnati: Moore, Wilstack & Baldwin, 1864. p. 316.

station. It will meet us at the Mississippi. England, a navy of the United States, are ready to join, and final orders are given to my friends and followers.

It will be a host of choice spirits. Wilkinson shall be second to Burr only. . . . Burr will proceed westward 1st of August, never to return. . . . Burr's plan of operation is to move down rapidly from the falls on the 15th of November, with the first five hundred or one thousand men, in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December, there to meet you, there to determine whether it will be expedient, in the first instance, to seize on, or pass by, Baton Rouge [held by Spain].[31]

This letter formed the basis for Wilkinson's message of October 21 to President Jefferson warning the latter of Burr's plot to dismember the Union. (These letters, along with several others, became the focus of a struggle, already alluded to, with the White House over the confidentiality of presidential correspondence.) In February Marshall had declared, "There certainly is not in the letter delivered to general Wilkinson, so far as that letter is laid before the court, one syllable which has a necessary or a natural reference to an enterprize against any territory of the United States."[32] During Burr's trial the prosecution attempted to use this affadavit again. Wickham protested that the accused had a right to confront Wilkinson in person and cross-examine him. The defense also demanded to see the mysterious letter.

General Wilkinson speaks of a cyphered letter, and of its contents, as well as he can make them out. Now, sir, where is this letter; and where is the key to it? Why are they not here? Why are they not produced before you?[33]

The Chief Justice reiterated his opinion in the Bollman and Swartwout case: Wilkinson's affadavit was irrelevant.

Wilkinson had, in fact, been summoned to appear before the grand jury. The order had been dispatched on March 31 and it was assumed that Wilkinson must have received it by April 20. The general did not show up until June 15, much to the defense's disgust (though the delay worked to their advantage in that it reflected poorly on the general). The prosecution

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[31]Robertson, Vol. I, p. 25-26.

[32]*Ibid.*, Vol. I, p. 26.

[33]*Ibid.*, p. 92-93.

cited Wilkinson's "official duties" as the reason for his prolonged absence. The defense continually taunted Hay about the absence of his star witness.

Wilkinson finally arrived and was immediately sent to the grand jury. Robertson reported on the confrontation between accuser and accused. "On the appearance of the general in court, it was said that his countenance was calm, dignified and commanding, while that of colonel Burr was marked by a haughty contempt."[34] Wilkinson brought with him the cypher letter which foreman John Randolph decoded, to the surprise of his less clever fellow jurymen. After close examination Randolph also determined that parts of the letter had been scratched out with a penknife and altered by Wilkinson – a fact which the general reluctantly admitted.[35] Wilkinson performed so poorly in front of the grand jury that they thought of indicting him for misprision of treason, so Wilkinson frantically reported to Jefferson.[36]

Despite the Wilkinson debacle the prosecution persisted, but in vain. In addition to Eaton, four witnesses were questioned relating to Burr's treasonous declarations. One was Commodore Thomas Truxton whom Burr had tried to interest in a Mexican expedition. Truxton declared, "I know nothing of overt acts, treasonable designs or conversations, on the part of colonel Burr."[37] Truxton went on to say that Burr

> contemplated an expedition to Mexico, in the event of a war with Spain, which he thought inevitable. . . . I told him that there would be no war. He said, however, that if he was disappointed as to the event of war, he was about to complete a contract for a large quantity of land on the Washita; that he intended to invite his friends to settle it.[38]

The other witnesses were Colonel George Morgan and his sons, John and Thomas, who testified that on a visit to their estate near Pittsburgh in August 1806, Burr had said,

> that the union of the states could not possibly last . . . that with 200 men, he could drive the president and congress into the

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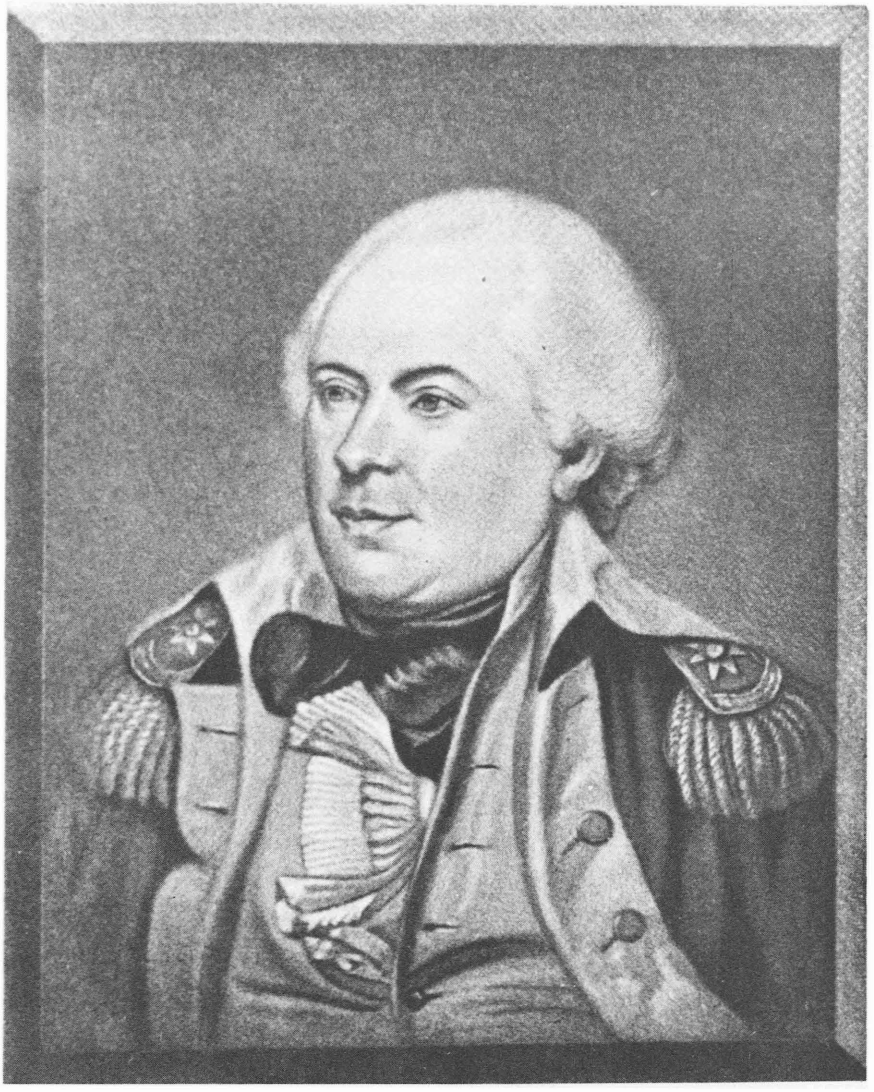
[34] *Ibid.*, p. 197.

[35] John Randolph to Joseph Nicholson,, June 25, June 28, 1807, Nicholson MSS., Library of Congress.

[36] Wilkinson to Jefferson, June 17, 1807, Letters in Relation to Burr's Conspiracy, Library of Congress.

[37] Robertson, Vol. I, p. 485.

[38] *Ibid.*, p. 486.



James Wilkinson
After the painting by C.W. Peale in *Aaron Burr* by Samuel H. Wandell and Meade Minnigerode. (G.P. Putnam's Sons, 1925)

Potowmac; and with four or five hundred he could take possession of the city of New-York.[39]

Cross-examination brought out that during the same dinner conversation Colonel Morgan had advocated moving the Congress to Pittsburgh. Burr asked him if this had been a jocular suggestion and the colonel replied, "My manner might have been jocular, but not my meaning."[40] Morgan also volunteered the information that "We were allowed to sport these things [speculations on the future of the West in relation to the Union] over a glass of wine."[41] John Morgan also admitted that after his father had gone to a Judge Tilghman to report Burr's shocking conversation, he (John) apologized to the judge stating "that my father was old and infirm; and like other old men, told long stories and was apt to forget his repetitions."[42] The Morgans' testimony amounted to nothing more than a tale of after-dinner boasting and idle speculations.

Nine witnesses who had been on Blennerhassett's Island on the night of December 10, were also questioned. None saw Burr there, as the prosecution admitted. The prosecution hoped these witnesses would give evidence of a military force assembling on the island. The force did not amount to much. One witness put the number of men at twenty to twenty-five, another at thirty-two. Only a few of this small group were armed. Other witnesses testified that there was little security on the island and strangers could come and go at will—odd conditions for a secret expedition.

At this point, August 20, Wickham introduced a motion against the introduction of any new testimony on the grounds that the prosecution had already gone through its evidence relating to the acts specified in the indictment, and had admitted that Burr was not present. Wickham's motion was argued for ten days, these arguments constituting the summations of both sides. The prosecution contended (1) that treason, i.e., levying war, had been committed on Blennerhassett's Island on December 10, 1806, and (2) that Burr, though not actually present, was, in fact, the leader of the rebellious forces. The defense rested their case on four points: (1) there was no treason because there was no employment of force; (2) Burr, if guilty of anything, was only an accessory, not a principal; (3) since the indictment charged Burr personally with the crime, evidence not relating to the crime specified in the indictment could not be admitted; (4) if evidence proving

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[39]*Ibid.*, p. 497.

[40]*Ibid.*, p. 503.

[41]*Ibid.*, p. 501.

[42]*Ibid.*, p. 504.

Burr was an accessory was admitted, his trial could not properly continue until the conviction of the principal was secured.

The issue hinged on the definition of treason given in the U.S. Constitution: "it shall consist only of levying war against the United States, or in adhering to their enemies giving them aid and comfort." The crime must consist of an overt act proved by two witnesses or by confession in open court. Much of the trial time was taken up with lengthy orations on the exact meaning of "levying war."

It was apparent that, whatever else had transpired on Blennerhassett's Island, there had been no war. Though obviously self-serving, Burr's mocking of the presidential proclamation highlighted the flimsiness of the government's position.

> Our president is a lawyer, and a great one, too. He certainly ought to know what it is, that constitutes war. Six months ago, he proclaimed that there was a civil war. And yet, for six months have they been hunting for it, and still cannot find one spot where it existed. There was, to be sure, a most terrible war in the newspapers; but no where else. . . . if there was a war certainly no man can pretend to say, that the government is unable to find it out.[43]

The Chief Justice agreed with Burr's assessment, for when he delivered his opinion on August 31, it was in favor of the accused.

> It is then the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's Island. . . . It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage took place; indeed the contrary is most apparent . . . the overt act is not proved by a single witness; and of consequence all other testimony must be irrelevant. . . . The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct.[44]

The jury consulted "a short time" and returned with their verdict: "Aaron Burr is not proved to be guilty under this indictment by any evidence

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[43] *Ibid.*, p. 78.

[44] *Ibid.*, Vol. II, p. 444-445.

submitted to us."[45] Burr objected to this irregular wording and asked for a simple "not guilty." The foreman, Colonel Edward Carrington, said that the verdict was one of acquittal. The Chief Justice ordered the entry to read "not guilty."

There followed an anti-climactic trial for misdemeanor, the high point of which was the re-opening of the "executive privilege" issue. Burr renewed his application for the production of the letter of October 21. Since the letter had never appeared, Burr claimed

> that the president was in contempt, and that he [Burr] had a right to demand process of contempt against him; but as it would be unpleasant to resort to such process, and it would produce delay, he hoped the letter would be produced.[46]

Hay announced that he had a copy of the letter. To prove its accuracy he called on a Mr. Duncan who swore that "it was a true copy of the letter spoken of; (the original of which had been shewn to him by general Wilkinson) that it was all in the handwriting of captain Walter Burling, who was an aid [sic] of general Wilkinson."[47] Botts inquired of Hay if that were the extent of his proof. Hay said that it was and that he felt it was enough. He also said that he was willing to make an oath that he had searched for and could not find the original. Wickham asked him if he had lost it. Hay replied that he had no reason to believe he had, but that he simply could not find it. The Chief Justice asked if the defense would be satisfied with the copy. Botts replied,

> We cannot be. The president has drawn inferences and deductions from certain parts of this letter injurious to colonel Burr; but which we say are incorrect. This renders indispensable the production of the original or an exact copy.[48]

The defense never accepted the authenticity of the copy and the issue of this letter was dropped in favor of pursuit of a new letter, one written on November 12, 1806 from Wilkinson to Jefferson. Hay had the letter in his possession, but declined to make it public on the grounds that it contained secret information. This disclosure set off a new round of arguments over

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[45] *Ibid.*, p. 446.

[46] *Ibid.*, p. 504.

[47] *Ibid.*, p. 505.

[48] *Ibid.*, p. 506.

"state secrecy." Hay refused to hand over the letter. Botts threatened him with a subpoena, which was accordingly issued. Hay offered to submit a copy of all relevant passages of the letter, "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defense of the accused, or pertinent to the issue now about to be joined: the parts excepted being confidentially communicated to the president.[49] The defense rejected this proposal. When Marshall delivered his opinion on this point, he also offered a compromise of sorts. He upheld the president's right to keep certain information confidential. "I admit, that in such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold from the accused the power of making use of it. It is a very serious thing to proceed to trial under such circumstances." He went from the general to the particular and noted that "In this case, however, the president has assigned no reason whatever for withholding the paper called for. . . . It does not even appear to the court that the president does object to the production of any part of this letter. The objection and the reasons in support of the objection proceed from the attorney."[50] Marshall ordered Hay to make the letter available to Burr, but said he would order that no copy be made public. Hay consented but said he would ask Wilkinson's permission first. It is not clear from Robertson's transcript whether the letter was introduced into testimony, but on September 9 Marshall ruled that "the declarations of third persons not forming a part of the transaction and not made in the presence of the accused cannot be received in evidence in this case."[51] Use of the letter was thus ruled out.

Though this evidence never amounted to anything, the spirited debate over these letters and the subpoenas raised the issues of executive privilege and confidential information. Marshall's rulings in favor of the rights of the accused established a precedent of judicial supremacy in a judicial proceeding. Marshall supported the declaration of Burr that "the character of the president of the United States cannot divest him of the character of an individual. There are certain claims which can be rightly requested of every citizen, and certain duties which he is bound to perform. These apply to the individual who is president as well as to all others."[52]

Burr was acquitted of a misdemeanor on September 15, 1807. His political career was all but over, however, although this was not fully realized at the time. One could say that, in the long run, Jefferson did succeed in

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[49] *Ibid.*, p. 513-14.

[50] *Ibid.*, p. 536.

[51] *Ibid.*, p. 539.

[52] *Ibid.*, p. 523.

eliminating his one-time running mate. Unfortunately for the president he emerged from the affair looking rather foolish. Certainly the president had legitimate concerns about the political futures of himself and his chosen Virginia successors, Madison and Monroe, which Burr, popular in both West and Northeast, could easily disrupt. He also had legitimate concerns about national security, though it is ironic that he was forced to go to an acknowledged Spanish agent for help. In his zeal, however, Jefferson overlooked basic legal principles. Fortunately for Burr, and thanks to Marshall, the court upheld what the president had forgotten. The trials did not prove conclusively the innocence of Aaron Burr (an issue still hotly debated). They did, however, show that the government badly bungled in its attempt to put a political rival out of circulation by judicial means. Perhaps most significantly, they also demonstrated that a well-known person in a well-publicized situation could still obtain a fair trial.

William Eaton
In *Aaron Burr* by Samuel H. Wandell and Meade Minnigerode. (G.P. Putnam's Sons, 1925)