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CHIEF JUSTICE JOHN MARSHALL'S JUDICIAL STATESMANSHIP AMID *IN RE BURR*: A PRAGMATIC POLITICAL BALANCING AGAINST PRESIDENT JEFFERSON OVER TREASON

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Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered.[1]

-Chief Justice John Marshall
In Re Burr (1807)

It is emphatically the duty of the Judicial Department to say what the law is . . . If courts are to regard the Constitution . . . [as] superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.[2]

-Chief Justice John Marshall
Marbury v. Madison (1803)

While Burr's case is depending before the court, I will trouble you, from time to time, with what occurs to me . . . the case of Marbury v. Madison has been cited, and I think it material to stop . . . citing that case as authority, and to have it denied to be law . . . I have long wished for a proper occasion to have the gratuitous opinion in Marbury v. Madison brought before the public, & denounced as not law; & I think the present a fortunate one, because it occupies such a place in the public attention . . . [its] reverse will be the rule of action with the executive.[3]

-President Thomas Jefferson

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1. *In re Burr*, 8 U.S. 470 (1807) (hereinafter) *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807).

2. Marbury v. Madison, 5 U.S. 137, 137 (1803).

3. Letter from Thomas Jefferson to George Hay (June 2, 1907), *in* 10 THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES 396 (Paul Leicester Ford ed., Federal ed. 1905).

I. INTRODUCTION

The effects of Chief Justice John Marshall's tenure on the Supreme Court from 1801-1835 are still visible today.[4] Marshall's written opinions instruct on American governance, history, law, and politics. The nuances and historical context of those opinions demonstrate that his role on the Court was far more than merely presiding thereover. Marshall shaped modern judicial review.[5] As Chief Justice, he quintessentially brought the authority of a political branch, the dignity of statesmanship, and the appearance of total impartiality to the Supreme Court.[6] His efforts have been continually minimized, enlarged, and misunderstood by scholars, and yet, there are aspects of his career still to be revealed.[7]

This Article focuses upon John Marshall's judicial statesmanship within the case of *In Re Burr*. Aaron Burr's treason trial has its notable place in history due to the political climate during the case and the figures involved in the case both in and outside of the courtroom.[8] Chief Justice Marshall and the Court felt immense political pressure from President Thomas Jefferson and the public. Marshall's diplomacy as a judicial statesman, driven by forces facing the Judiciary in *Burr*, however, necessitate the scrupulous analysis given to other cases in which the Marshall Court averted disabling political pressure.[9] At the time of *Burr*,

4. G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 790 (2000) (noting that Chief Justice Marshall wrote 547 opinions of the Court's total 574).

5. *See* Samuel R. Olken, *The Ironies of* Marbury v. Madison *and John Marshall's Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 403 (2004) (writing that Marshall is incorrectly attributed to have created judicial review. In reality, Marshall enhanced constitutional powers already present).

6. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 12, 15 (3d ed. 2007) ("Consequently[,] under Marshall's guidance[,] the Court became not only an increasingly important force in national politics but also a source of pride and inspiration to the men appointed to its bench.").

7. Olken, *supra* note 5, at 403.

8. CHARLES F. HOBSON, THE AARON BURR TREASON TRIAL 1 (2006), www.fjc.gov/sites/default/files/trials/burrtrial.pdf [perma.cc/XXU5-ALVK].

9. *See Id.* ("Momentous legal issues were involved, including the scope of executive privilege and the constitutional and common law definitions of treason. The trial's political dimensions were equally significant: at stake was the reach of Thomas Jefferson's influence over the federal courts and the power of John Marshall to limit Jefferson's influence."); G. EDWARD WHITE, THE MARSHALL COURT & CULTURAL CHANGE: 1815-1835, at 232 (1991) (writing that *In Re Burr* "was the *cause célébre* of the early Marshall Court years"); *see also* Olken, *supra* note 5, at 403 (writing of judicial statesmanship in *Marbury v. Madison*). *See generally* GARY SCHMITT & REBECCA BURGESS, MCCULLOCH V.

Jefferson's hostility towards the Judiciary was as potent as when *Marbury v. Madison* initially pitted the two branches against one another.[10] It was exacerbated by that baggage.[11] Many aspects of Aaron Burr's treason trial require a full analysis.[12] This Article's background is purposed to aid in understanding the great variety of issues, strategy, personalities, and sincerity (or lack thereof) that Marshall faced when presiding. Its deliberate attention is provided to aid in a full understanding of the forces that Marshall balanced. Taking in a historical analysis, under the lens of constitutional theory, it will demonstrate the tact with which Marshall guided both country and Court through a difficult and undervalued moment in history. One must initially view the case of *Burr* through a historical analysis of several relationships and consider the forces at play between those relationships. First, Chief Justice John Marshall's relationship with President Thomas Jefferson, which was continually complicated by the soured flesh and blood that Marshall shared with his cousin, Jefferson.[13] Second, the baggage-ridden relationship between the Marshall's Judiciary and Jefferson's Executive Branch. Third, the public's political relationship with the Judiciary, a decision-making body that Marshall knew derives its supreme power from the People and

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MARYLAND AT 200: DEBATING JOHN MARSHALL'S JURISPRUDENCE 135 (2020) (featuring Adam White, John Marshall's Judicial Statesmanship in McCulloch v. Maryland (June 26, 2019) (unpublished manuscript)); *id.* (offering that Marshall's judicial restraint in *McCulloch* is an overlooked example of his judicial statesmanship).

10. *See* HOBSON, *supra* note 8, at 5 (writing that in *In re Burr* arose the "fundamental question of whether the federal judiciary could issue such a subpoena to the President without violating the constitutional principle of separation of powers . . . follow[ing] an earlier contest between the Jefferson administration and the Supreme Court concerning the delivery of a commission to a justice of the peace" in *Marbury v. Madison*, in which "the Supreme Court . . . rebuked the executive branch for not doing its legal duty").

11. *See* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 686 (2008) ("The memory of Marshall's lecture to Jefferson about the latter's assertion of a version of executive privilege in *Marbury v. Madison* was only four years old.").

12. *See* 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 247-48, 52 (1981) ("[I]t is no easy task concisely to place [*Burr*] within its political and legal setting, or to explain its significance as one of the greatest criminal trials, and its relevant to the development of American law and of the Supreme Court as an American institution . . . [t]o cut through, without detailed description, the tangled web of rumors, allegations, self-serving declarations, and the tissues of lies that beset the path of Burr's ambitions is an almost hopeless task.").

13. JOEL R. PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 13 (2018).

subsists on their faith therein.[14] Fourth, the rivalrous relationship between Jefferson and Aaron Burr, who faced accusations of treason, both conceived of and fueled by Jefferson and his administration. Fifth, and finally, Marshall's relationship with the Court, which found its success in a duality: the diplomacy of politics and a keen application of shrewd legalism.[15]

This Article turns then to a legal analysis of Burr's trial. It begins with the notable and problematic Marshall Court treason case that preceded *Burr*, *Ex Parte Bollman*, a case that no less involved fellow conspirators in Burr's scheme. Finally, it will explain the pragmatic constitutional approach that the Chief Justice utilized in deftly surmounting a potential undoing of Marshall himself or the New Republic's Judiciary. Marshall knew that *Burr*'s trial placed the Court in a difficult position. If Burr was acquitted, the Jeffersonians would accuse Marshall and the Judiciary of practicing politics from the bench.[16] Burr was indeed acquitted, nevertheless, Marshall and the Judiciary surmounted the political mires leveled by Jefferson, demonstrating the determined mind of a consummate judicial statesman.[17] Marshall's statesmanship and his judicial statesmanship in *Marbury* are well-settled.[18] However, in many respects, *In Re Burr* is the stronger exemplar of Marshall's statesmanship.[19]

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14. THE FEDERALIST NO. 78 (Alexander Hamilton).

15. *See generally* Olken, *supra* note 5, at 415 ("Marshall honed his political instincts and later demonstrated considerable tact as a diplomatic envoy during delicate and ultimately unsuccessful negotiations with the French over issues of American neutrality. Modest in bearing and moderate in politics, Marshall came to the Court with a remarkable set of skills that he employed to great benefit during his tenure.")

16. *See* interview by Rich Kelley with Charles F. Hobson, The Library of America (January 2010), www.loa-shared.s3.amazonaws.com/static/pdf/LOA_Hobson_on_Marshall.pdf [perma.cc/8X43-5ECP] [*hereinafter* Hobson Interview] ("It was essentially a 'no win' situation for Marshall. If Burr was convicted, Marshall and the judiciary would be denounced for cravenly submitting to the majority political party. If Burr was acquitted, Republicans (as actually happened) would censure Marshall as a partisan judge, culpable of allowing a traitor to escape the noose and of aiding his project to overturn the government."); *see also* Halliday & White, *supra* note 11, at 686 ("Marshall's approach to judging was his interest in promoting the role of the Supreme Court as an institution that would intervene in deeply contested political issues and resolve them through extended analysis of provisions of the Constitution . . . proceed[ing] very cautiously in resolving issues which had acquired a strongly partisan cast.").

17. Hobson Interview, *supra* note 16, at 2.

18. See Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1423 (2006) ("Already a statesman of great renown, Marshall raised the Court's prestige from the moment he donned the robe.").

19. *See* ALLAN BOWIE MAGRUDER, JOHN MARSHALL 227 (1885) ("The duty of holding the scales of justice even at this trial was the most difficult that

A. Premise

In crafting two decisions on treason in 1807, Chief Justice John Marshall had more to consider than merely the fate of former Vice President Aaron Burr who stood accused of betraying his country. Moreover, Marshall had more to analyze than even the Constitution's Treason Clause. Consequentially, he was forced to balance the Supreme Court's constitutional power and posterity.[20]

In retrospect, Chief Justice Morrison Waite noted that Marshall took the bench when "the nation, the Constitution, and the laws were in their infancy."[21] Thus, the constitutional discourse on checks and balances, judicial power, central banks, and treason were concepts as young and rousing as American politics itself. In Marshall's eyes, constitutional discourse and American politics were both at stake in order to preserve the independent Judiciary.[22] Moreover, both were inseparable.[23] Marshall's influence on the

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Marshall had to encounter during his incumbency on the bench. Jefferson succeeded in importing so much personal feeling and partisanship into the proceedings that the trial wore a very peculiar aspect . . . open antagonism between the President of the United States and the chief justice . . . . But the fairer judgment of posterity has given [Marshall] credit for perfect impartiality, and for sound even-handed, and courageous administration of the law.").

20. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962). Alexander M. Bickel noted that the fundamental difficulty that America's judicial system must surmount is what he characterized as the "counter-majoritarian force." *Id.* at 16. Marshall's belief in enforcing an advocation on behalf of "the People," was consistent Hamilton's Federalist Paper #78, in which Hamilton disputed claims of a superior Judiciary. *Id.* Rather, in Hamilton's vision, within which Marshall operated, the Judiciary stands against the will of an errant legislature or majority populous. *Id.* That is to say, a Hamiltonian mindset suggests that the Court stands among a government of, by, and for the People, functioning when necessary against a prevailing majority of People. *Id.* at 16-17. The Court stands for the People insofar as it may maintain the principles of constitutionality that it continually enforces and do so while insulated from the accountability of polls. *Id.* at 17. Likewise, it stands against the People when the majority of the People act against the Constitution. *Id.* at 16-17.

21. MORRISON R. WAITE, THE ORATIONS OF CHIEF JUSTICE WAITE AND OF WILLIAM HENRY RAWLE ON CHIEF JUSTICE MARSHALL 15 (1900) (Waite's commemorative speech on May 10, 1884).

22. HASKINS & JOHNSON, *supra* note 12, at 286 (stating that Marshall continually "endeavor[ed] to build a rule of law that stood apart and was distinct from the vagaries of changing politics and the expediencies of the moment").

23. *Id.* at 246. *Burr* evinces "Marshall's efforts to define and separate the spheres of politics and of law, to secure more permanently the continued existence of the rule of law." *Id.*; *Burr* "provides further illustration [in addition to *Marbury*] of the continuing personal clashes between Marshall and Jefferson" from the positions of their authority, and reveals "'the darker side' of Thomas

Court and American History is well-settled. United States Court of Appeals Judge Richard Posner stated, historically, "influential judges tend to be pragmatic judges" and this attribute is "a somewhat neglected theme in the voluminous literature about" Marshall.[24] Moreover, Judge Posner explained that "an influential judge," such as Marshall, can "change the law or . . . make new law where there was none before" by developing "legal formalism" when it has reached an impasse to invoke change or innovation.[25] After Marshall's death, the Court had demonstrated the apt capability to address any constitutional issue with political implications.[26] Because of Marshall, if the Court faced an issue involving the Constitution, it declared its interpretation of the Constitution with supreme authority over that provision.[27] The Constitution's Treason Clause would be no exception.

Unfortunately, criminal and constitutional law textbooks are devoid of discourse on treason.[28] So too is instructive federal case law, for, while the Constitution defined treason, the only way it could find its American foundation therebeyond was via judicial construction.[29] Contemporaneously with the decision, *Burr* was minimized as a partisan product with disdain by Jeffersonian-Republicans and favor by Federalists who hated Jefferson.[30] In retrospect, while it has become viewed as the landmark case on treason and a notable moment in the eyes of historians, *In Re Burr* lacks the sexiness of Marshall's other precedential counterparts.[31]

Jefferson and his political supporters," something with which Marshall was forced to contend. *Id.*

24. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 86 (2003).

25. *Id.*

26. *See* G. EDWARD WHITE, FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 193 (2012) (writing that the Court had asserted its power to act as arbiter over issues of slavery, Amerindian tribal status, taxation, piracy, admiralty, Federalism, and the rights of public versus private colleges).

27. *Id.*

28. George P. Fletcher, *The Case for Treason*, 41 MD. L. REV. 193, 194 (1982).

29. *See* HOBSON, *supra* note 8, at 2 (noting *In Re Burr* is the landmark Marshall Court case on treason).

30. *See* Charles Hobson, *Mr. Burr's Trial*, RICHMOND TIMES-DISPATCH, July 08, 2007, richmond.com/news/mr-burrs-trial/article_b28166e9-3755-5c94-bbab-524ed79f5a5e.html ("To contemporaries, Burr's case was less about constitutional law than about partisan politics. Jefferson and his Republican Party were resolutely determined to punish Burr as a traitor. The opposition Federalists championed Burr's cause not so much from a belief in his innocence as from a desire to embarrass the Jefferson administration.").

31. *See generally*, George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1619 (2004) ("In the literature of criminal law, treason was always considered something of an 'outlier.'" *Id.* at 1619. "Casebooks ignore the offense. Treatise writers show little interest" and "[t]he tendency to ignore treason in theorizing about criminal law testifies to its atavistic character." *Id.* Today, treason "is a feudal crime surviving in a post-Enlightenment criminal law based

Marshall's efforts are thus overlooked in comparison to his major opinions such as *McCulloch v. Maryland*,[32] *Barron v. Baltimore*,[33] *Gibbons v. Ogden*,[34] and *Marbury v. Madison*.[35] Moreover, *Burr* (following *Marbury*) came within an early, jeopardizing period of crisis for the Court.[36] This is not to say, however, that *Burr* became shrouded in constitutional obscurity, as it remained relevant to the subject of treason, especially in 1945. Justice Robert H. Jackson noted the callow follow-through of America towards its principle of treason, writing, "[i]n the century and a half of our national existence not one execution on a federal treason conviction has taken place."[37] Jackson highlighted that "[i]n the few cases that have been prosecuted[,] the treason clause has had its only judicial construction by individual Justices of this Court presiding at trials on circuit or by district or circuit judges."[38] Nevertheless, Marshall's opinion on treason came only two decades after the ink of the Constitution's treason clause dried. *In Re Burr*, however, is characterized as "the last great battle during the Jefferson presidency between President Jefferson and Chief Justice Marshall . . . by far, the most open and active role taken by President Jefferson in his battles with the judiciary" with Jefferson's uncharacteristic conspicuous and visible involvement.[39]

In order to grasp fully Marshall's role on the Court and the foundation of American treason, one must take into account: Marshall's judicial statesmanship in *Burr*, his pragmatic approach to the Constitution, and the forces of political factions requiring his balance at that time in history.[40] As Marshall himself stressed in *Burr*, "[e]very opinion, to be correctly understood, ought to be

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on liberal principles of harm, privacy of the internal sphere, and universality." *Id.*

32. McCulloch v. Maryland, 17 U.S. 316 (1819).

33. Barron v. Baltimore, 32 U.S. 243 (1833).

34. Gibbons v. Ogden, 22 U.S. 1 (1824).

35. Marbury v. Madison, 5 U.S. 137 (1803).

36. *See* Hobson, *supra* note 18, at 1422 (characterizing the Marshall Court's "first decade [as] 'crisis' followed by gradual accommodation").

37. Cramer v. United States, 325 U.S. 1, 24 (1945).

38. *Id.* at 25.

39. *See* RONALD CRAIG ZELLAR, A BRAVE MAN STANDS FIRM: THE HISTORIC BATTLES BETWEEN CHIEF JUSTICE JOHN MARSHALL AND PRESIDENT THOMAS JEFFERSON 6 (2011) ("In earlier battles, although President Jefferson provided direction to supporters, his fingerprints cannot be directly identified. In contrast, [he] publicly charged and denounced Aaron Burr as a traitor before Burr was ever charged with a crime.").

40. Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743 (2000) ("Through the influence of its Chief Justice the Marshall Court imbued its interpretation of the Constitution with a measure of pragmatism"); *see also* Posner, *supra* note 23, at 85-86.

considered with a view to the case in which it was delivered."[41] This Article provides in-depth analysis of the historical catalyst that laid way to Chief Justice John Marshall's seminal opinions on the American understanding of treason, while dually examining the calculated judicial statesmanship that Marshall evoked in reaching his decision. It propounds the argument that *In Re Burr* is as notable to Marshall's legacy as the likes of his other landmark opinions *McCulloch*, *Barron*, *Gibbon,* and *Marbury*. To understand Marshall, moreover, requires an understanding of *Burr*; and likewise, to understand *Burr* is to grasp the power struggle between Jefferson's Executive and Marshall's Judiciary.[42]

B. Judicial Statesmanship

1. Defined

This Article first analyzes Marshall's judicial statesmanship. It conceives of a functional axis of law and politics in which a jurist acknowledges the Constitution as "both a legal and political document" and the Supreme Court as an institution in which constitutional adjudication must balance the public policy interests of both law and politics.[43] Additionally, socio-historical factors may also be considered at issue.[44] However, the political goals of judicial statesmanship are most favorably accomplished when the paramount objective is not the political endeavor itself.[45] Moreover, Marshall's judicial statesmanship is purposefully *not* to be minimized and conceived as a judge merely practicing politics from the bench.[46] Similarly, it should not be inflated, as some of the success of judicial statesmanship benefits from the right place and

41. United States v. Burr, 25 F. Cas. 55, 165 (C.C.D. Va. 1807).

42. *See generally* Charles F. Hobson, *The Trial of a Young Nation*, 24 WM & MARY HUMAN. 1, 1 (2003) ("*Marbury* can scarcely be understood without anchoring it in the political context of Thomas Jefferson's first administration.").

43. Olken, *supra* note 5, at 401.

44. *See generally* G. Edward White, *Neglected Justices: Discounting for History*, 62 VAND. L. REV. 319, 347 (2019) ("[T]he more general relationship between law and its social and historical contexts-those are issues that [Thurgood] Marshall, [Oliver Wendell] Holmes, and [Benjamin] Cardozo had occasion to address in the course of their careers. . . issues [that] are still with us, still central concerns of American jurisprudence.").

45. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 1000 (2008).

46. *See* White, *supra* note 4, at 817 ("The evidence about those features may reinforce a sense that Marshall was liked and respected by his colleagues, but it does not aid any claim that the Marshall Court became 'Federalist,' 'nationalist,' or 'property-conscious' because Marshall was all those things."). White suggests that such sweeping labels are anachronistic and inaccurate. *Id.*

time.[47] Just the same, some of its failures coincide with the Court's facing of a resurgence of fundamental flaws from the Founding, such as slavery, a besmirching decision that it would not begin to rectify until a century later.[48]

To an extent, the significance of judicial statesmanship has been muffled as many insist that the Supreme Court was meant to operate, and should continue to operate, separate and apart from the arena of American politics.[49] Indeed, the Court is insulated from some political pressure by constitutional safeguards such as life tenure and a non-decreasable salary.[50] However, judicial statesmanship suggests that the functional realities of the Judiciary are more nuanced with layers of historical context, which propound the reality of the Court. Thus, the Court is forced to consider continuously the balancing factors of public policy. This characteristic is greater in some judges and periods of the Court, regardless of whether its reasoning is transparently communicated.

Due to the United State's status as a young republic, the initial Justices by necessity needed to act and think strategically like one holding elected office.[51] That need continued for the successors and contemporaries of the Court. Thus, judicial statesmanship is attributable to many Justices who served on the United States Supreme Court. This Article will not attempt to serve as a canon of

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47. *See* Hobson, *supra* note 18, at 1421 ("Marshall, in short, was the right man in the right place at the right time.").

48. Siegel, *supra* note 45, at 1000; *see also* MELVIN I. UROFSKY, THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 79 (2014) (noting, for instance, Chief Justice Warren, responsible for many landmark decisions, made deliberate choices to ensure a unanimous opinion in *Brown v. Board of Education*).

49. Joseph J. Ellis, *The Supreme Court Was Never Meant to Be Political*, WALL S. J. (Sept. 14, 2018), www.wsj.com/articles/stop-pretending-the-supreme-court-is-above-politics-1536852330 [perma.cc/KX48-VF6A]; *see also* Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View*, N.Y. TIMES (Sept. 16, 2019), www.nytimes.com/2019/09/16/us/politics/supreme-court-judges-partisanship.html [perma.cc/5J6L-6ZA4]; Jonathan R. Nash, *Judges must be politically impartial, period*, HILL (Aug. 14, 2016), www.thehill.com/blogs/pundits-blog/the-judiciary/291330-judges-have-to-be-politically-impartial-period [perma.cc/R4NX-D6S9].

50. Kathleen Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 743, 748 (1998); *see also* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . .The Judges, both of the supreme and inferior Courts, *shall hold their Offices during good Behaviour*, and shall . . . *receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office*.").

51. *See* White, *supra* note 4, at 810 ("The difficulty is with 'Federalist' in the stronger sense of an American Supreme Court Justice, in Marshall's time, *necessarily being, thinking, and acting like an elected official*, a Federalist member of the Executive branch or Congress." (emphasis added)).

historical examples; rather, a relevant and more recent brief few are provided for relative context. For instance, Chief Justice Earl Warren, whose recognition is not surprising when one considers the manner in which he rose to the position of Chief Justice, bore great political acumen and lacked preceding judicial experience.[52] Like Marshall, Warren's political power was greatly evident and formidable to his fellow statesmen.[53] In a short time at the Court's helm, Warren quickly became comfortable rendering revolutionary decisions with the careful, deliberate hand of a judicial statesman reaching those decisions.[54] Most contemporarily, judicial statesmanship has been attributed to Chief Justice John G. Roberts' in his mission continually to render narrow unanimous decisions that bolster the public's faith in the Court, rather than broad

52. AKHIL REED AMAR, THE LAW OF THE LAND 66 (2015).

53. *See* JOHN C. SKIPPER, THE 1964 REPUBLICAN CONVENTION BARRY GOLDWATER AND THE BEGINNING OF THE CONSERVATIVE MOVEMENT 43 (2016) (noting that in 1951, Earl Warren was a potential presidential candidate against whom Nixon worked to pull delegates away from Warren to General Dwight D. Eisenhower); *see also*, PAUL MOKE, EARL WARREN AND THE STRUGGLE FOR JUSTICE 99 (2015) (supporting a brief word about the formidable statesman Chief Justice Earl Warren and his path to the Supreme Court and writing that, in 1953, President Dwight D. Eisenhower had promised Warren the next vacancy on the court. *Id.* at 99. Chief Justice Fred Vinson's death created such a vacancy. *Id.* However, Eisenhower meant the next vacancy of Associate Justice, as opposed to Chief Justice. *Id.* Moreover, Eisenhower wanted Warren to nevertheless gain more experience for an Associate Justice position, let alone the helm of the Supreme Court. *Id.* Nevertheless, Warren, having declined a fourth term as Governor of California, insisted literally on Eisenhower's follow-through for his promise of "the next vacancy," which — as fortune had it — happened to be Chief Justice. *Id.*)

54. A. E. Dick Howard*, The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 257 (2015) (Chief Justice Warren, responsible for many landmark decisions, pursued deliberate efforts in *Brown v. Board of Education* "ma[king] unanimity a prime goal. Framing the issue as a moral matter, Warren delayed the vote until he had achieved consensus. His efforts included lobbying Justice Jackson while the latter was hospitalized following a heart attack and persuading Justice Reed to abandon his planned lone dissent--all, as Warren put it, for the sake of the Court's legitimacy." *Id.* at 257. Moreover, Warren's "people skills" and judicial diplomacy "were not limited to lobbying justices behind the scenes; he also used them effectively to guide conference."); *see also*, KLAUS P. FISCHER, AMERICA IN WHITE, BLACK, AND GRAY: A HISTORY OF THE STORMY 1960S 159 (2006) (Warren suffered much public outcry to "Impeach Earl Warren" as a result of that decision); *and* Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court Earl Warren: A Public Life. by G. Edward White. New York: Oxford University Press. 1982. Pp. x, 429. $25. Super Chief: Earl Warren and His Supreme Court-A Judicial Bio*, 81 MICH. L. REV. 922, 925 (1983) (Warren's duties to ensure unanimity was two-fold, as *Brown* reappeared before the Court, addressing the timeliness of enforcing the remedy under the first case. *Id.* at 925 (citing 349 U.S. 294 (1955))). For Warren, "[h]aving been unanimous once, the justices felt that they had to be unanimous again or risk undermining the moral force of their first decision." *Id.* Thus, "Warren again wrote [purposefully] for a unanimous Court." *Id.*)

sweeping decisions with fractured support that could undermine its longevity.[55]

Judicial statesmanship is not limited to Chief Justices. Associate Justice Sandra Day O'Connor is considered a judicial statesman, which is not surprising when one considers her political skills, having monumentally served in the Arizona State Senate as the first ever elected female leader in the upper house of a state legislature.[56] Thus, in a manner of speaking, judicial statesmanship may be expected to emerge from Supreme Court Justices who have held political office regardless of whether they are Associate or Chief.[57] Writing on behalf of the Court, Justice O'Connor acknowledged the constitutional metes and bounds of the Judiciary are with the People and constitute national balancing factors that the Court must consider.[58] O'Connor acknowledged a premise that Marshall knew, stating, "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the

55. *See* Neil S. Siegel, *More Law Than Politics: The Chief, the "Mandate," Legality, and Statesmanship*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 208 (Nathaniel Persily, Gillan E. Metzger, & Trevor W. Morrison eds., 2013) (noting Roberts' judicial statesmanship in *National Federation of Independent Business v. Sebelius*, in which Roberts invoked the U.S. Constitution's Taxation Clause as a means to uphold the Affordable Care Act. *Id.* Siegel criticized Chief Justice Roberts' reasoning of the commerce clause as well as the necessary and proper clause, suggesting that Roberts' statesmanship demonstrates a reason as to "why he needlessly decided these questions."); *see also* Christian Ketter, *A Second Amendment In Jeopardy Of Article V Repeal, And "AMFIT," A Legislative Proposal Ensuring The 2nd Amendment Into The 22nd Century: Affordable Mandatory Firearms Insurance And Tax (AMFIT), A Solution To Maintaining The Right To Bear Arms And Promoting The General Welfare*, 64 WAYNE L. REV. 431, 473-74 [hereinafter Ketter, *Second Amendment in Jeopardy*]; Christian Ketter, *"Making Administrative Law Strict Again" in the Era of Trump: The Future of the Chevron Doctrine, According to the Judicial Conference for the United States Court of Appeals for the Federal Circuit*, 19 FL. COASTAL L. REV. 201, 207 (noting that Roberts' opinions in *Sebelius* and *King v. Burwell* were a factional balancing act over ObamaCare that carried the Court through a political mix of praise and criticism for the Court).

56. EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR 72 (2019).

57. *See* Sullivan, *supra* note 50, at 750 (asserting that in the case of *Planned Parenthood v. Casey*, Justice O'Connor a conservative-appointee who was long anticipated to be a guaranteed vote in to overturn *Roe v. Wade*, declined to do so in *Casey* for reasons that she believed the Court would appear as though it was practicing politics instead of law).

58. *See* Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) ("The Court' s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands.").

Nation."[59] That delicate balance is a consideration that heavily pervaded the Judiciary from Marshall's time to today, and the common thread among judicial statesman is a fervent guard against political faction.[60]

2. The Risks of Judicial Statesmanship: Marshall's Successor Roger B. Taney.

While judicial statesmanship is present in some of America's most treasured opinions, such as *Marbury v. Madison* or *Brown v. Board of Education*, it is also present in its most disdained.[61] With

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59. *Id.*

60. Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and The Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 270 (2002).

61. Siegel, *supra* note 45, at 1000; *see also* HASKINS & JOHNSON, *supra* note 12, at 256-57 (noting that Marshall was careful to note that unlike *Marbury*, Bollmann and Swartwout were not seeking the Court's original jurisdiction; rather, this was an appellate review of an inferior court, as Marshal noted, "the revision of a decision"). *See generally* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006). Ironically, both Marshall and Taney attempted to settle issues with massive implications of constitutional law. Even more so, under a theory of judicial minimalism (or "Burkean Minimalism") neither should have decided the greater issue before the Court. In *Marbury*, Marshall established that the Court lacked the original jurisdiction to hear the case. *See Marbury*, 5 U.S. at 138 (opening the opinion with a sweeping declaration that the Court's power to issue mandamus is "an exercise of original jurisdiction not warranted by the constitution"). Theoretically, however, Marshall's rationale that there was no original jurisdiction to hear the matter likely should have led to the conclusion that the case itself was incapable of being ruled upon by the Court. *See* U.S. CONST. art. III, §2 ("In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."). Without a controversy appropriate for the Court, upon which it may render an opinion, it had no power to render such an opinion. Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 370 (1993) ("the decision on this constitutional question (which is to be avoided whenever possible) would have become unnecessary if the Court had found, on the merits, that the writ of mandamus could not or should not be issued."); *see also*, Louise Weinberg, Our Marbury, 89 VA. L. REV. 1235, 1315 (2003) ("*Marbury* also holds that the jurisdiction in Marbury's case could not be appellate, either, since Marbury did not seek appellate review of a case below."). Likewise, Tawney's declaration that Dred Scott was not a person should have led to the conclusion that Scott lacked standing and therefore the Court could not rule upon the case. *See Dred Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 691 (1857), superseded (1868) ("[a] free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States. When the Constitution was adopted, they were not regarded in any of the States as members of the

regard to Marshall's immediate successor, Chief Justice Roger Brooke Taney's opinion in *Dred Scott v. Sandford* (1857) is considered a negative example of judicial statesmanship.[62] Chief Justice Taney's attempted to evoke judicial statesmanship when he absurdly tried to settle the national issue of slavery in his own way.[63] This is not to say Taney was without any successful statesmanship, as Chief Justice Taney previously rallied against corporate factions in *Charles River Bridge v. Warren Bridge* in 1837,[64] balancing public policy and refusing to grant a charter.[65] Taney fits similarly with the trend of political office among judicial

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community which constituted the State, and were not numbered among its 'people or citizens.' Consequently, the special rights and immunities [guaranteed] to citizens do not apply to them. *And not being 'citizens' within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit*." (emphasis in italics)). However, in both *Marbury* and *Dred Scott*, that was not the case. Both Chief Justices chose to evoke judicial statesmanship and venture towards solving a looming issue. Marshall wished to solve the issue of establishing and maintaining a check and balance among all branches of the Court, as opposed to just the political branches. Similarly, Taney wished to settle the issue of slavery, by using the Court as a mouthpiece of morality to attempt to maintain the American institution of human bondage by declaring slaves as property, not people. *See* Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1105 (1988) (Marshall's "judicial review fits within the notion of checks and balances—even though not expressly articulated in the Constitution's text—is now commonly understood under the force of *Marbury*."); *see also* Paul Finkelman, *Coming to Terms with Dred Scott: A Response to Daniel A. Farber*, 39 PEPP. L. REV. 49, 70 (2011) (Taney overreached in striking down the Missouri Compromise, "[i]t was unnecessary for the decision and surely suspect since he had already determined that the Court lacked jurisdiction to hear the case because Dred Scott had no standing to sue."). This thus leads to the conclusion that an effective judicial statesman likely looks as to how the future will perceive this action. Simply put, an effective statesman wants to be on the right side of history. *See* Siegel, *supra* note 45, at 961–62 ("Some of America's most important judges have embraced the thing that Brandeis, Frankfurter, and others called judicial statesmanship . . . Justice Frankfurter, for example, was perhaps the foremost advocate of statesmanship on the Supreme Court, yet he tended to champion [among] the practice . . . the need for law to keep up with the times; the responsibility to imagine the needs of the future; the related necessity of possessing a vision of the future and of finding ways to achieve it."). Thus, in many respects of hindsight, the contemporaneous comfort with modern judicial review and inherent discomfort with slavery is what largely sets Marshall and Taney apart as judicial statesmen.

62. Siegel, *supra* note 45, at 1000.

63. Id.

64. Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).

65. Samuel R. Olken, *The Decline of Legal Classicism and the Evolution of New Deal Constitutionalism*, 89 NOTRE DAME L. REV. 2051, 2055-2056 (2014).

statesman.[66] Marshall's death in July of 1835 created a vacancy in the position of Chief Justice that President Andrew Jackson filled in an act of gratitude for Taney's political support.[67] Proper analysis in judicial statesmanship leads a court to the metes and bounds of its public authority. Taney demonstrates the obloquy that may be earned by a Court or a member thereof.[68] As the Court that followed the Marshall Court in stark contrast therefrom, the Taney Court is a quintessential example of the repugnancy that a Court may acquire by crossing the threshold of political balance. Neil Siegel, a Duke University Professor of law and political science, suggested that "[t]he Taney Court also would have been wise to contemplate the limits on its authority to settle the slavery question," as "courts that do not work at maintaining their own legitimacy, at least to some extent, are likely over the long run to possess less of it."[69] Marshall, in contrast from his successor Taney, understood the delicate balance of law and politics, the necessary analysis that must buttress the court opinion, and the limitations of the Court's power. Across a career in which Marshall surmounted many controversial decisions,[70] *Burr* reflects the sound continuation of Marshall's keen judicial-political acumen.

C. John Marshall as a Judicial Statesman

Marshall held political office prior to his tenure on the Supreme Court. In 1782, he served on the Virginia Colony's Council of State and later that year on the Executive Council.[71] Marshall served in the House of Representatives when President John Adams selected him to replace Charles Pickering as Secretary of State.[72] Marshall's place in the Adams Administration came after Adams

66. DAVID M. SILVER, LINCOLN'S SUPREME COURT 14 (1998) (stating that in 1816, Taney was elected as a Maryland Senator and advocated for bank reform and a "just treatment of Negroes").

67. *See id.* at 15 (noting that the Senate indefinitely postponed confirmation hearings when President Andrew Jackson first nominated Taney to a vacancy on the Supreme Court under then-living Chief Justice Marshall, allowing for Jackson's withdrawal and resubmittal); *see also* KENNETH JANDA, JEFFREY M. BERRY, JERRY GOLDMAN, & DEBORAH DEBORAH, THE CHALLENGE OF DEMOCRACY: AMERICAN GOVERNMENT IN GLOBAL POLITICS 408 (2016) (demonstrating a similar result to the aforementioned occurred after President George W. Bush had nominated John G. Roberts as Associate Justice to replace Justice O'Connor under Chief Justice William H. Rehnquist).

68. PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 34 (2018).

69. Siegel, *supra* note 45, at 1000.

70. Joseph H. Smith, 24 CATH. U. L. REV. 394, 394 (1975) (reviewing LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW (1974).

71. WAITE, *supra* note 21, at 28.

72. DAVID MCCULLOUGH, JOHN ADAMS 529 (2001).

fired Pickering and James McHenry in response to their efforts with Alexander Hamilton to undermine the Administration.[73] Adams' suspicion was not without basis, however. Hamilton – upon learning of the dismissal of Pickering and McHenry – advised Pickering to rummage through the Department of State files before departing and search for "copies of extracts of all such documents as will enable you to *explain both Jefferson and Adams*," for it was the time for "men of real integrity" to take control of the government.[74] Of course, Hamilton's goals would be limited by an early demise in a duel with Aaron Burr.[75] Much like Burr's lack of popularity among Republicans and Federalists, Marshall faced universal political pressure.[76]

Chief Justice Marshall's judicial statesmanship shaped the modern function of the Judiciary, Article III powers, and the present day Supreme Court.[77] Marshall took the Court from a then-weak branch of government to a co-equal branch with constitutional power readily capable of being wielded by the Justices thereupon.[78] In fact, Marshall believed that a Chief Justice was duty-bound to serve as a statesman to his Court.[79] Nevertheless, it is error to conclude that Marshall's power that flowed from the Court was merely a mythological domination of personality and legal genius.[80] Rather, Marshall wielded a brilliant capacity for leadership.[81]

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73. *Id.* at 538-39.

74. *Id* at 539.

75. *See* 1 THE ENCYCLOPEDIA OF THE WARS OF THE EARLY AMERICAN REPUBLIC 1783-1812: A POLITICAL, SOCIAL, AND MILITARY HISTORY: A-K 66 (2014) (featuring Paul G. Pierpaoli Jr. writing that while Burr was never convicted, the duel effectively terminated Burr's political career, led to a nationwide movement for dueling-bans, and deprived the Federalist Party of a strong leader such as Hamilton).

76. *See* MAGRUDER, *supra* note 19, at 201 ("Federalists hated [Burr] for slaying their great leader, and the Republicans could not approve the manner of it, while they were further suspicious ad incensed against him by reason of warm and unfair competition with Mr. Jefferson for the presidency.").

77. WHITE, *supra* note 6, at 11; *see also* Olken, *supra* note 5, at 392.

78. Olken, *supra* note 5, at 392.

79. *See* Hobson, *supra* note 18, at 1453 ("Marshall believed that as Chief Justice he had a broader responsibility to act as a statesman: to be the representative, advocate, and defender of the federal judiciary.").

80. *See id.* at 1421. Hobson wrote that scholarship faults in perpetuating the "myth of a heroic Marshall . . . dominat[ing] the Supreme Court by the sheer force of his individual genius and will." *Id.* at 1421. However, "[s]uch a myth ignores the historical reality . . .[of] interplay between his exceptional leadership abilities and the peculiar circumstances of time and place that allowed those abilities to flourish and have effect." *Id.* at 1421.

81. *See* White, *supra* note 4, at 810 (writing that "in Marshall's time," a Supreme Court Justice had to "necessarily be[], think[], and act[] like an elected official . . . of the Executive branch or Congress").

Moreover, as this essay demonstrates, he did so at the continual dismay of President Thomas Jefferson.

While Posner described Marshall's pragmatism as neglected scholarship, Senator Albert Jeremiah Beveridge, Marshall's second major biographer, stressed the significance of Marshall's American treason-doctrine and noted that Chief Justice Marshall "was a greater statesman than he was a lawyer."[82] Another proponent, historian G. Edward White, University of Virginia Professor of constitutional law and legal history, identified Marshall's constant mission to strike the "balance of moderation" that lay inherently between the potentials of tyrannical government versus the chaotic obstreperousness of the People's popular sovereignty.[83] Of Marshall's handling in *Burr*, legal historian Dr. Charles F. Hobson asserted that "[n]o one was more fully attuned to the awkward [political] dilemma he faced in conducting this high profile case . . . in the highly charged political atmosphere."[84] Professor Samuel R. Olken of Chicago's UIC John Marshall Law School, a scholar on the subjects of Chief Justice Marshall's jurisprudence, constitutional history, and the broader related concepts of constitutional theory, wrote that Marshall's judicial statesmanship, once well-settled in *Marbury*, quickly became controversial fodder among constitutionalists in the latter part of the Twentieth Century.[85] At the opposite end of scholars who undermine Marshall's

82. *See* ALBERT JEREMIAH BEVERIDGE, THE STATE OF THE NATION 55, 64 (1924) (writing that Marshall's decision in Burr "forever overthrew the brutal and unreasonable European doctrine of constructive treason, and forever established . . . the humane and reasonable American doctrine of personal and actual treason"); *see also* James W. Ely Jr., *Review,* 2 THE INDEPENDENT REVIEW 450, 450-55 1998) (reviewing CHARLES HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1996). Ely also notes that Albert J. Beveridge's biography [of Marshall] suffers from accusation of inaccuracy and "undue partisanship."

83. *See* WHITE, *supra* note 6, at 18. White asserted that Marshall's strength was insofar as the Chief Justice saw the extremity of "orderly government led to tyranny, oppression, and a frozen status," while "popular sovereignty" at its extreme "led to violence, chaos, and mob rule." *Id.* at 18. For Marshall, a Chief Justice's "ultimate search of statecraft was therefore a search for balance and moderation.") *Id.*

84. HOBSON, *supra* note 8, at 20; *see also* Hobson, *supra* note 42, at 1 (writing "to read [*Marbury v. Madison*] solely in the light of the raging party battles of the day, or to read it only as a landmark that established the doctrine of judicial review, is to miss its full significance.").

85. Olken, supra note 5, at 395-97; see also Miller McDonald, *John Marshall Law School Professor Samuel Olken has been named The Edward T. and Noble W. Lee Chair in Constitutional Law for the 2016-2017 academic year.*, GLOBE NEWSWIRE (Oct. 10, 2016), www.globenewswire.com/news-release/2016/10/10/878312/10165541/en/Professor-Samuel-Olken-Named-2016-2017-Lee-Chair.html [perma.cc/FB9Y-GKBH].

constitutional reasoning are those who obsess in error that *Marbury* is an opinion in which Marshall singlehandedly created judicial review via judicial politics.[86] Like *Marbury*, *Burr* is misunderstood by historians.[87] The realities of Marshall's jurisprudence overall, rather, are a more complex and more interesting combination thereof. Despite such scrutiny, *Marbury* is ironically overlooked for its true exemplification of judicial statesmanship.[88] Similarly, *Burr* exemplifies Marshall's pragmatic statesmanship in the same vein, but for reasons that run even deeper as a direct result of *Marbury*.[89] As an academic landmark of jurisprudence, *Burr* is however largely overlooked for its juridical statesmanship. Still, Marshall's treason cases nevertheless interrupted a resultantly successful period of moderation between the Jeffersonian-era's political branches and the Judiciary post-*Marbury*.[90] However, in *Burr*, more was at stake for Marshall than in his other decisions and his statesmanship was severely tested.[91]

Marshall's first major biographer, Senator Albert J. Beveridge, noted Marshall's immense persuasiveness was a product of sound judgement and an engaging "strange power of personality," which continually "determine[ed] an influence on the destiny of the country."[92] Marshall had the blended skills of a consummate politician with the logical honed skills of the finest common

86. Olken, *supra* note 5, at 397.

87. *See* HASKINS & JOHNSON, *supra* note 12, at 260. Haskins argues that historians are haphazard in asserting that Marshall reversed *Bollman* in *Burr* and did so merely "to spite Jefferson." *Id.* at 260. Such short sightedness disregards Marshall's subtle but powerful judicial statesmanship and his preeminent jurisprudence "overlook[ing] the careful way in which Marshall was attempting (aside from the unfortunate dictum) to define treason so that the rights of individuals would be secured by the rule of law, and not be at the mercy of the passions of men . . . in an ex post facto fashion to fit" certain actions) *Id.* at 260.

88. Olken, *supra* note 5, at 399.

89. *See* HASKINS & JOHNSON, *supra* note, 12, at 247 (writing that Burr "reaffirms the long-held conviction that Marshall was more than a great judicial statesman; he was an exceedingly able and perceptive judge of enormous understanding, competence, and learning, who set for himself the task of removing the judiciary from politics, so far as feasible, and of building a general 'rule of law'").

90. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 156 (1996).

91. *See* HOBSON, *supra* note 8, at 20 ("Burr's case, troublesome in itself for raising perplexing questions concerning the law of treason, was the more vexatious to Marshall for reopening the quarrel between the Jefferson administration and the federal judiciary, as played out earlier in the controversy over *Marbury v. Madison* in 1803.").

92. ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: VOLUME ONE 203, 208-09 (2005).

practitioner of the law, tools he used to implement his visions of the Judiciary and constitutional law.[93] Chief Justice Waite noted that Marshall "kept himself at the front on all questions of constitutional law" with "his master hand seen in every case [involving] that subject."[94] Waite elaborated that Marshall utilized "irresistible logic" and "developed the hidden treasures of the Constitution, demonstrated its capacities, and showed beyond all possibility of doubt, that a government rightfully administered under its authority could protect itself against itself[,] and against the world."[95] However, the Court needed more than Marshall's charisma and logic to weather the storm that laid ahead. It needed an anchor as free as possible from all charges political.

G. Edward White noted that Marshall strove to remove the Court and its Justices from the visible mires of politics and preserve the sanctity of the Court through seeking unanimous opinions.[96] As this Article demonstrates, while the political roots of Marshall's jurisprudence ran deep, they were deeply trenched out of sight from the branch of government that was the Judiciary.[97] Moreover, Professor White asserted that Marshall's leadership as a judicial statesman was a "distinctive blend of independence, sensitivity to political currents, and appearance of impartiality that has since constituted the challenge of excellence in appellate judging in America."[98] Thus, it makes sense that among Marshall's endowments was showmanship within statesmanship. Professor Joel Richard Paul of University of California Hastings Law School wrote that Marshall "was a master actor" with a "gift for illusion," one that allowed him to transform himself, to the Constitution, to the country.[99] As a regular attendee of the theater, Marshall studied stage acting and bore rather strong opinions on an actor's craft.[100] A gifted actor has the ability to communicate an intended perception to an audience, for an actor understands that perception becomes reality.[101] That which is perceived by the audience is the reality created by the actor.[102] Marshall's understanding of this

93. Olken, *supra* note 5, at 401.

94. WAITE, *supra* note 21, at 16.

95. *Id.* at 15-16.

96. WHITE, *supra* note 6, at 11.

97. *See generally* D. A. Jeremy Telman, *Originalism and Second-Order Ipse Dixit Reasoning in* Chisholm V. Georgia, 67 CLEV. ST. L. REV. 559 (2019) (arguing a subtlety in which Marshall's constitutional "approach . . . was grounded in political commitments and assumptions about the nature of the Constitution that were [often] asserted rather than reasoned").

98. WHITE, *supra* note 6, at 11-12.

99. PAUL, *supra* note 13, at 2.

100. *Id.* at 2.

101. JONOTHAN NEELANDS, BEGINNING DRAMA 11-14, 26 (2d ed. 2013).

102. *Id.* at 26.

aided greatly in his masterful persuasiveness. Marshall's political acumen gave him a keen awareness of public relations and the public's perception, in part why Marshall defended his decision in *McCulloch v. Maryland* via an essay that he published under the pseudonym, "A Friend of the Constitution."[103] Professor White remarked that there were indeed "a number of practices, conventions, and professional conceptions . . . that were subscribed to, and sometimes initiated, by Marshall and his fellow Justices, but which are no longer considered appropriate dimensions of Supreme Court judging."[104] Professor Randy Barnett argued to understand the public relations concerns of Marshall's judicial statesmanship in a contemporary-sense, "[i]magine if former Chief Justice Rehnquist had been so vilified for a judicial opinion he had written that he published anonymous op-eds in the *Wall Street Journal* defending the opinion . . . that is exactly what John Marshall did."[105] For the burgeoning republic that was the United States of America with an even younger Constitution, the optics of the Judiciary were significant.

The Marshall Court's jurisprudence finds its meaningful genesis at the same time as that of the Jeffersonian-era. Marshall and those Justices who became known as the "Marshall Court" understood opportunity, knowing that political conflict breeds constitutional issues and that the Court could tactfully enforce constitutional law while simultaneously enhancing the Court's prestige and its purpose in the history of a growing nation.[106] The parallels between *Marbury* and *Burr* are notable and highlighted throughout this essay. In both cases Marshall downplayed his role and the consequential reasons that the cases appeared before the Court. In *Marbury*, it was Secretary of State Marshall's duty to deliver the Adams Administration appointment.[107] In *Burr*, Marshall dazzled and stunned those who expected the previous *Bollman* opinion to govern, offering instead a treatise on the English-American doctrine of treason and culminating with a careful explanation of his position. Redirection was essential.

II. BACKGROUND

Legal historian, Professor George Lee Haskins, aptly described the forces that Marshall faced as a "tangled web of rumors,

103. ORIGINALISM: A QUARTER-CENTURY OF DEBATE 269 (Steven G. Calabresi, ed., 2007).

104. White, *supra* note 4, at 783-84.

105. ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 105, at 269.

106. Olken, *supra* note 5, at 401.

107. *Id.* at 399.

allegations, self-serving declarations, and . . . tissues of lies that beset the path of Burr's ambitions."[108] To uncover Marshall's pragmatic judicial statesmanship in *Burr*, one must understand these factors.

A. Relationships at play in In Re Burr

1. Thomas Jefferson vs. John Marshall: Bitter Cousins and American Rivals

Jefferson's relationship with Marshall, when viewed pejoratively through the sole lens of Marshall's experiences, is that of a villain to protagonist.[109] This is especially true in *Burr*. However, Jefferson's relationship is layered with multiple factors in nature both political and personal.[110] Their feud was a combination of bad blood, political battle, and constitutional belligerence.[111]

On a personal level, their mutual contempt grew from family strife.[112] Jefferson and Marshall's mothers were first cousins, making their sons second cousins to one another.[113] Jefferson's father acquainted himself into a family fortune meant in-part for Marshall.[114]Marshall and Jefferson's financial situations remained

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108. *See* HASKINS & JOHNSON, *supra* note 12, at 247-48, 252 ("[I]t is no easy task concisely to place [*Burr*] within its political and legal setting, or to explain its significance as one of the greatest criminal trials, and its relevant to the development of American law and of the Supreme Court as an American institution . . . [t]o cut through, without detailed description, the tangled web of rumors, allegations, self-serving declarations, and the tissues of lies that beset the path of Burr's ambitions is an almost hopeless task.").

109. Smith, *supra* note 70, at 402.

110.*See* ALF J. MAPP, JR., THOMAS JEFFERSON: PASSIONATE PILGRIM 139 (1991) (noting that, to the President's chagrin, Burr's trial would be presided over by Jefferson's cousin and arch rival, [who was then] already locked with him in a struggle between the judicial and executive branches of the government.").

111. *See* DAVID M. KENNEDY, LIZABETH COHEN, MEL PIEHL, THE BRIEF AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 153 (Eighth ed. 2012) (writing that while the Federalist party, which made John Marshall Chief Justice of the Supreme Court, died out, Marshall lived on, writing decisions in which "the wily Marshall snatched [a constitutional] victory from the jaws of . . . judicial defeat" in *Marbury*, "greatly magni[fying] the authority of the Court– and slapp[ing] at the Jeffersonians.").

112. PAUL, *supra* note 13, at 13.

113. *See* JOHN EDWARD OSTER, THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL 17 (1914) (featuring a detailed family tree that indicates Mary Marshall (née Randolph Keith) and Jane Jefferson (née Randolph) were first cousins, with respective offspring John Marshall and Thomas Jefferson, rendering the two offspring second cousins to one another).

114. *See* NEW AGE MAGAZINE, VOL. 7, SUPREME COUNCIL, 31 (Ancient and Accepted Scottish rite of Freemasonry, Southern jurisdiction, U.S. A., 1907) (containing Catherine Frances Cavanagh, *The Youth of Jefferson*) ("One of the

disparate even as late as Valley Forge. [115] Marshall lacked fortune, while Jefferson had the luxury of wealth that Professor Paul suggests should have belonged, at least in part, to Marshall by right of birth; instead, he "gr[ew] up bearing the shame of an ancestor" with the "knowledge that [his] family's wealth was irrevocably in the hands of a distant cousin."[116] Marshall, however, grew from these experiences. He developed an uncanny ability to lead others with charismatic "inoffensiveness . . . informality and lack of pretention," as well as an amiable nonconforming disposition with self-aware "unpretentiousness" that allowed him shrewdly to climb society's ladder.[117] Nevertheless, while Marshall reportedly did not resent Jefferson for the family estate dispute, Marshall, as a former member of the Continental Army, did develop a resentment towards Jefferson as a leader. [118] In 1718, Jefferson suffered disrepute as Virginia's Governor for colossal preoccupation with designing Washington D.C. as the new federal capital.[119] As the British

dear friends of young Peter Jefferson was William Randolph." *Id.* Once Thomas was born, the Jeffersons moved into William Randolph's estate, at which time a dying Randolph entrusted the Jefferson's to care for his son. *Id.* at 35.); *see also*, SUSAN KERN, THE JEFFERSONS AT SHADWELL 161(Yale University Press, 2010) (Peter Jefferson, having married Jane Randolph, "appeared in other Randolph family wills, too."); *see also* PAUL, *supra* note 13, at 13. Peter Jefferson, Thomas' father, advantageously acquainted himself with a non-relative William Randolph, Marshall's great-uncle. *Id.* at 13. In 1746, Randolph died, leaving Peter Jefferson his estate, *not any relative*, explicitly disinheriting Marshall's mother and his sister, Marshall's grandmother. *Id*. Consequently, an estate that might have passed to Marshall's family by blood became a Jefferson family asset by association. *Id.* Jefferson aptly grew up and grew rich with an estate entailing five hundred slaves, while Marshall, the eldest of fifteen children, grew up on the frontier tending to a small family farm. *Id*. at 13, 15, and 436.

115. BEVERIDGE, *supra* note 92, at 127.

116. *See* PAUL, *supra* note 13 at 13 (Marshall "gr[ew] up bearing the shame of an ancestor" with the "knowledge that [his] family's wealth was irrevocably in the hands of a distant cousin.") at 13; see also, BEVERIDGE, *supra* note 92, at 127 (While Marshall lacked fortune, "Jefferson was rich" and proudly so).

117. *See* WHITE, *supra* note 6, at 12, 15; *see also* PAUL, *supra* note 13, at 24 ("Marshall responded to these circumstances without resentment," experiencing an "upbringing [that allowed him to identify with the common man and . . . the aplomb to associate with his social superiors," moving with "fluid[ity] between classes.").

118. *See* THOMAS JEFFERSON MEMORIAL FOUNDATION, THOMAS JEFFERSON: AN OUTLINE OF HIS LIFE AND SERVICE, WITH THE STORY OF MONTICELLO, THE HOME HE REARED AND LOVED 8 (Thomas Jefferson Memorial Foundation 1924) ("When [Jefferson] saw the British in sight . . . sprang to his horse and rode to safety," and was subsequently "attacked by his enemies as an incapable and weak coward," but as Governor "made a dignified defense before the legislature which won from them a unanimous vote of confidence in his 'ability, rectitude, and integrity as [governor]"); *see also* Paul, supra note 13, at 24.

119. *See* THOMAS JEFFERSON MEMORIAL FOUNDATION, THOMAS JEFFERSON:

approached the State, Jefferson failed to prepare for military defense.[120] Then-Governor Jefferson put aside Virginia's undeveloped military plans and fled Virginia, but not before he secured the safety of his family and slaves, as well as his horses, personal papers, and silver stored at his property Monticello.[121] Beveridge wrote that Jefferson "was not a man of arms[; he] dreaded the duties of a soldier, [and] had no stomach for physical combat," as "[h]e was a philosopher, not a warrior."[122] By contrast, Marshall was a Revolutionary War veteran who happened to have a keen legal mind and a great capacity for leadership.[123] Long after Marshall had served in the Continental Army, Jefferson learned that Alexander Hamilton (another rival) made strong recommendations to Marshall that he run for United States Congress in 1792, something that Jefferson feared.[124] At that time, Jefferson was Secretary of State under President George Washington.[125] Even though Jefferson held administrative office while Marshall merely had a law practice, Jefferson nevertheless feared Marshall as an eventual rival, due to Marshall's acclaim as

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AN OUTLINE OF HIS LIFE AND SERVICE 8 (1924) ("When [Jefferson] saw the British in sight . . . sprang to his horse and rode to safety," and was subsequently "attacked by his enemies as an incapable and weak coward," but as Governor "made a dignified defense before the legislature which won from them a unanimous vote of confidence in his 'ability, rectitude, and integrity as [governor]"); *see also* PAUL, *supra* note 13, at 24. (charging that as British forces raged through Virginia, "Jefferson procrastinated. Jefferson was too distracted, perhaps still sketching plans for his classical new capital, to worry about a foreign invasion . . . When the British reached the undefended provisional capital, Jefferson took off." *Id.* at 24. As a result, "Jefferson's reputation was badly damaged by neglecting the defense of the commonwealth." *Id.* Accordingly, "Jefferson never again sought state office." *Id.*).

120. PAUL, *supra* note 13, at 24.

121. *Id.* (noting that Jefferson did not seek state-level office after this incident).

122. BEVERIDGE, *supra* note 92, at 129.

123. *See* Hobson, *supra* note 18, at 1422 "The war also marked [Marshall] for life as a member of the special fraternity of Revolutionary veterans, to which many of his fellow Justices also belonged." *Id.* at 1422. "The camaraderie of a 'band of brothers' formed no small part of the bond uniting the Chief Justice and his associate." *Id.*

124. *See* letter from Thomas Jefferson to James Madison (June 29, 1792), www.founders.archives.gov/documents/Jefferson/01-24-02-0134 [perma.cc/T9UD-EAYG] ("I learn that [Hamilton] has expressed the strongest desire that Marshall should come into Congress from Richmond, declaring there is no man in Virginia whom he wishes so much to see there, and I am told that Marshall has expressed half a mind to come. Hence I conclude that Hamilton has played him well with flattery and solicitation, and I think nothing better could be done than to make him a judge.").

125. JOHN FERLING, JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION 243 (2013).

a lawyer and his general popularity.[126] Marshall, who had a reputation for purposeful friendliness, even with adverse colleagues and opponents, not only disliked Jefferson but distrusted him as well.[127] Jefferson confessed to James Madison, "I think nothing better could be done than to make [Marshall] a judge," a presumptive removal from politics.[128] At least, so thought Jefferson. However, once Adams made Marshall a federal judge, Jefferson conspired ferociously with fellow Republicans to impeach the newly appointed Chief Justice, whose law license, in irony, then-Governor Jefferson had previously signed.[129]

For Jefferson, wherever he had been, Marshall followed not far behind. For instance, Marshall acquired Jefferson's former law practice from Edmund Randolph to whom Jefferson had sold it.[130] Curiously, Randolph would go on to represent Burr in *In Re Burr*.[131] From Jefferson's perspective, Marshall's success had unfairly risen up to his level.[132] Such was the case when Marshall wedded Polly Ambler, the daughter of Jefferson's first sweetheart.[133] In other competitive ways, at the Constitutional Convention, Marshall campaigned alongside James Madison for the Constitution's passage.[134] What Marshall took from watching Virginia suffer

126. PAUL, *supra* note 13, at 45.

127. *See* Ely, *supra* note 82, at 454 ("The convivial Marshall usually maintained friendly ties even with political opponents, but he disliked and distrusted Jefferson . . . animosity [that] was certainly mutual.").

128. Letter from Thomas Jefferson to James Madison, *supra* note 129.

129. VIRGINIA LAW BOOKS: ESSAYS AND BIBLIOGRAPHIES 327 (2000); *see also* PAUL, *supra* note 13, at 3, 23.

130. PAUL, *supra* note 13, at 27.

131. *Burr*, 25 F. Cas. 55.

132. See interview by Heather Stephenson with Joel Richard Paul, *A Champion of Pragmatic Compromise*, Tufts Now (Feb. 20, 2018) www.now.tufts.edu/articles/champion-pragmatic-compromise [perma.cc/PKK2-PF9C] (Paul stated, "Jefferson was deeply jealous of Marshall. He felt that Marshall was undeserving, that he had risen too far too fast, that he wasn't really one of the elite. Jefferson was also somewhat paranoid, secretive, and conspiratorial.")

133. *See* FAWN MCKAY BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 64-66 (1974). Jefferson met Rebecca Burwell in 1762 at nineteen when Burwell, an orphan, was sixteen. *Id.* at 64. Jefferson named his sailboat "Rebecca" and suffered much anguish and an admitted "violent head ache" upon learning of Rebecca's marriage to Jacquelin Ambler. *Id.* at 65-66. "Jefferson was by nature so thin-skinned that the merest hint of [Rebecca] . . . would have brought mortification and withdrawal." *Id.* at 66. *See* ALLAN C. HUTCHINSON, LAUGHING AT THE GODS: GREAT JUDGES AND HOW THEY MADE THE COMMON LAW 57 (2012) (noting twenty-seven-year-old Marshall "because the very hurricane of a lover" during his courtship with sixteen-year-old Polly Amber and developed into "an attentive and concern[ed] partner" while caring her when she often became ill).

134. *See* GEORGE HENRY WILLIAMS & HORACE GARVIN PLATT, EULOGIES ON JOHN MARSHALL 12 (1901) ("To Marshall more than to any other man is due the

under Governor Jefferson's lack of military preparedness was that the independent sovereignty of thirteen states would not effectively defend and preserve a union; rather, its survival necessitated a unified federal government.[135] And so, while Marshall secured an acclaimed place in constitutional history advocating to adopt the Constitution in place of the Articles of Confederation, Jefferson vacillated between claims that he bore no opinion on America's need for a Constitution and that he would have pledged his support should it have merely borne a Bill of Rights from the start.[136] Their politics were different outcomes of similar influence. Both Jefferson and Marshall spent diplomatically formative time in France.[137] However, the results of the Virginians' experiences differed. In fact,

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decision to hold a convention to determine whether or not she would accept the Constitution . . . John Marshall, James Madison[,] and Edmund Randolph were the leaders of those who favored its ratification."); *see also* Hobson, *supra* note 18, at 1422 (noting his "indelible mark" at the 1788 Virginia Ratification).

135. PAUL, *supra* note 13, at 24.

136. *See id.* at 39, 44 (stating "[i]f Marshall had quit public life" after the Constitutional Convention and done nothing more, "he would still deserve to be remembered as a champion of the federal Constitution." With regard to the lack of a Bill of Rights upon passage, Marshall and Madison feared that demand for specific amendments could defeat the chance to pass the Constitution altogether. Rather, the best course was ensuring its passage in whatever form possible and amend it later).

137. JEFF BROADWATER, JAMES MADISON: A SON OF VIRGINIA AND A FOUNDER OF THE NATION 106 (2012) (After the Washington Administration's controversial Jay Treaty, (negotiated by Chief Justice Thomas Jay), angered France, President John Adams dispatched John Marshall to France on a diplomatic mission with Charles Pinckney and Elbridge Gerry. *Id.* The diplomatic group met unsuccessfully with French foreign minister Charles Maurice de Talleyrand-Périgord. Talleyrand demanded a bribe of $250,000. *Id.* While bribes were not uncommon in European diplomacy, the cost was too high for America. *Id.*); *see also*, CONOR CRUISE O'BRIEN, THE LONG AFFAIR THOMAS JEFFERSON AND THE FRENCH REVOLUTION, 1785-1800 36 (University of Chicago Press, 1998) ("The fact that Thomas Jefferson could spend more than five years in France –August 1784 to October 1789– without learning to speak French is in itself not least of the oddities affecting his relationship with France . . . If Thomas Jefferson had wanted to speak French, he would have learned to speak it . . . One has to conclude that . . . he wanted to stay American. More precisely . . . Virginian." *Id.* Jefferson wanted to see France evolve in an "American model" of liberty, thus, he was conscious of a looming "fear of anything that would undermine French military and naval strength, . . . and so make Britain a far more formidable potential threat to the young United States." *Id.* at 38. That "fear ma[de] Jefferson" see the French Monarchy as "essential to the maintenance of [France's] military strength." *Id.*); SAMUEL FLAGG BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY 267 (1923), Jay's Treaty "was helpful to England and harmful to France, [an American] ally, who could with some show of reason" have accused the United States "of being in collusion with the hostile purposes of her enemy." *Id.* Jay's Treaty was described by an early-Twentieth Century French scholar as "so injurious" to France, it could be described as "almost equivalent to a treaty of alliance" between Britain and the United States).

French relations polarized many American politicians.[138] For instance, as a result of his experiences, Marshall felt a strong central federal government was essential for the young United States to be a viable national power.[139] By contrast, Jeffersonian advocacy for states' rights, produced partisan contempt for Marshall's federally centered Constitutionalism.[140]

Eventually, Jefferson's fear of Marshall grew to bitter resentment. In 1795, Marshall was victorious over Jefferson's inheritance in an estate battle on behalf of Richard Randolph.[141] Evidenced by Jefferson's personal letters, his bitterness towards Marshall stemmed specifically from Marshall's capitalized opportunities to minimize Jefferson's role in history. Jefferson and Adams eventually corresponded regarding John Marshall's biography of President George Washington, entitled, *Life of George Washington*.[142] As was typical, Adams would give his opinions to Jefferson on whatever he was reading at the time.[143] Adams chided that at five-volumes, "Marshall's [biography] is a Mausolæum, 100 feet square at the base . . . 200 feet high," and merely "written to make money; and fashioned and finished to sell high in the London market."[144] In contrast, the work actually was a financial and critical disaster for Marshall.[145] In spite of its critical failure, Jefferson was nevertheless greatly irked at how Marshall had minimized his historical presence in that grand "mausolæum."[146]

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138. *See* NORMAN K. RISJORD, JEFFERSON'S AMERICA, 1760–1815 at 267 (2010). Risjord wrote that, generally, Americans were initially sympathetic with "the French Revolution as a step toward constitutional government." *Id.* Most Federalists, however, became alienated. *Id.* Jefferson feared that, if France fell to the coalition of monarchs, the American republic would also be in danger. *Id.* "Thus[,] the ideological conflict between monarchy and republicanism in Europe provided the symbols that polarized American public opinion as well." *See also* PAUL, *supra* note 13, at 55. ("To understand how Marshall became the lion of the Supreme Court, it is necessary to understand how the French Revolution polarized the United States and defined our political parties . . . also set[ing] Marshall on a collision course with his cousin Jefferson.").

139. Smith, *supra* note 70, at 402.

140. *See* DAVID M. KENNEDY, LIZABETH COHEN, & MEL PIEHL, THE BRIEF AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 161 (Cengage Learning Ninth Ed., 2017) (characterizing Marshall "[a]s a lifelong Federalist and a fervant advocate of a powerful central government, Marshall was virgorously condemned by the states' rights Jeffersonians.").

141. PAUL, *supra* note 13, at 52-53.

142. THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 300-01(1905).

143. GORDON S. WOOD, FRIENDS DIVIDED: JOHN ADAMS AND THOMAS JEFFERSON 366 (2017).

144. JEFFERSON, *supra* note 147, at 366-67.

145. Smith, *supra* note 70, at 403.

146. WOOD, *supra* note 148, at 391.

Marshall reduced Jefferson's writing of the Declaration of Independence into a mere footnote, which stated fleetingly that "the draft reported by the committee has been generally attributed to Mr. Jefferson."[147] Historian Gordon S. Wood characterized this as "a remarkable playing down of Jefferson's actual contribution."[148] Nevertheless, by consequence of this massive publication, what Jefferson may have astutely feared was the authority with which Marshall began to speak as a historian, specifically on the subject of Founder's intent.[149] After all, Marshall had a unique ability among only few Justices to say that he was at the ratification.[150] Moreover, Ratifiers' intent overtime has achieved a prickly synonymity with Founders' Intent.[151] Still, Jefferson was ear to conduct that could leave one skeptical of Marshall's veracity on the bench.[152] Thus, Jefferson's fears of Marshall as an authority of politics, history and constitutional power were realized when Marshall spoke authoritatively on treason, a subject that was obscured by the President's political animus towards Burr.[153]

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147. *Id.*

148. *Id.*

149. *See* Smith, *supra* note 70, at 403 (noting it reportedly was a partial purpose for Marshall's undertaking).

150. *See* 1 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING 393 (2005) (noting that preceding Supreme Court Justice James Wilson had been there also).

151. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. LAW REV. 353, 375 (1981) (footnote 130) (Boston University Law Professor Henry P. Monaghan, an originalist, noted the discrete provenances of constitutional intent and the inherent difficulty of distinguishing therebetween, writing that "the intention of the ratifiers, not the Framers, is in principle decisive, the difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it." *Id.* at 353, 375); *see also* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 19 (2011) (*citing* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 157-88 (1969); WILLIAM E. NELSON & JOHN PHILLIP REID, THE LITERATURE OF AMERICAN LEGAL HISTORY 146-47 (1985) (analyzing constitutional analysis of intent and noting the naïveté that nonlawyers use on occasion in analyzing the historical aspects of the Constitution, "Charles A. Miller . . . who is not a lawyer, shows the occasional signs of legal naivete . . . eschew[ing] the [legal] jargon . . . in discussing constitutional and legislative construction"). The Challenge of Originalism notes that a variation of original intent emphasizes "the understandings or intentions of the ratifies…who attended the ratifying conventions and voted in favor of ratification." *Id.* Still, "all of the problems that attended the equation of constitutional meaning with Framer's intent seem to attach to ratifiers' intent." *Id.*

152. *See* WHITE, *supra* note 26, at 224 (stating that Jefferson corresponded with Marshall Court Justice William Johnson, who wrote that Marshall's delivery of various Court opinions was at times contrary to the opinions he expressed to the other Justices over cases upon which he sat and ruled alongside Marshall).

153. *See generally* HASKINS & JOHNSON *supra* note 12, at 266 ("[Jefferson's] letters make unpleasant reading for those who are offended by the assertion

2. Judiciary vs. Executive

In *Bollman*, the case preceding *Burr*, Marshall noted the unique position in which the Court found itself in facing a case of treason and a potential political tirade with Jefferson, writing, "[i]f this court possessed no powers but those given by statute, it could not protect itself from insult and outrage," nor could it "enforce obedience to its immediate orders."[154] The Court's "powers are not given by the constitution, nor by statute, but flow from the common law."[155] Marshall had previously considered, and acknowledged in *Marbury v. Madison,* the lack of formal enforcement powers.[156] In *Burr*, he noted the compounded position the Court faced, writing, "[t]hat this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation;" however, the Court "has no choice in the case" with "no alternative presented . . . but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."[157] Due to procedural technicalities, *Burr* did not reach the Supreme Court. Rather, it came before the district court, over which Marshall presided, and it came before him bearing the full weight of his own flawed *Bollman* opinion.[158] While not a Supreme Court case, the Court's posterity hinged with *Burr*.

Although Marshall did not favor Aaron Burr, *Bollman* and *Burr* remain significant in Marshall's career.[159] *Bollman*'s

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that Jefferson's personal antagonisms could or did become [his] public policies . . . there is much truth in the charge against the President that, with regard to [Burr] . . . his view of the legal doctrine was obscured by what may be called his political purposes.").

154. *Ex parte* Bollman, 8 U.S. 75, 93 (1807).

155. *Id.*

156. *See Marbury* 5 U.S. at 162, 180. The Court asserts that President Jefferson's administration's denial of Marbury's appointment was wrong, but nevertheless left a thinly veiled reality in which it was the inevitable prerogative of the Executive to choose to bind itself when the Court says the law is. *Id.* at 162. "It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state . . . Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void; and that courts, *as well as other departments, are bound by that instrument*." *Id.* at 162, 180 (emphasis added).

157. *Burr*, 25 F. Cas. at 179.

158. HASKINS & JOHNSON, *supra* note 12, at 246

159. RICHARD BROOKHISER, JOHN MARSHALL: THE MAN WHO MADE THE SUPREME COURT 119 (2018).

prominence stems from being the first United States Supreme Court case to address treason.[160] Moreover, *Bollman* expounded authoritatively upon the jurisprudence of writs of habeas corpus.[161] *Burr*, however, reflects Marshall's judicial statesmanship, as exercised deftly to safeguard constitutional powers against Jefferson's attempt to circumvent law to Burr's detriment.[162] Jefferson and the Republicans resented Marshall and the Federalists for their entrenched power in the Judiciary.[163] In late 1801, after defeating Federalist John Adams for the presidency, Jefferson wrote about the Federalists acquiring power in the Judiciary, characterizing it as a "stronghold" that would eradicate the Republican Party.[164] The outgoing Adams administration had notoriously made a last-ditch effort to maintain Federalist principles by drafting appointments in the last-hours before the office was turned over to Jefferson, an act that was coined as "the

160. R. KENT NEWMYER, THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION 107 (2012); *see also* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 201 (2004) (writing that if one draws a parallel between the impeached Justice Samuel Chase and John Marshall, "if [Marshall] intervened at all, [in *Burr*,] [he] did so against the force of the state mobilized by a president bent on conviction").

161. Halliday & White, *supra* note 11, at 683 ("*Bollman* is significant . . . because of some categorical language by Marshall that has been understood by some commentators to mean that the source of the habeas privilege in America is exclusively statutory.").

162. BROOKHISER, *supra* note 164, at 119.

163. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 107 (1987).

164. *See id.* ("On their part, they have retired into the judiciary as a stronghold. There the remains of Federalism are to be preserved and fed from the Treasury . . . [meanwhile] all the works of republicanism are to be beaten down and erased.").

Midnight Judges Act."[165] Adams, a lame-duck president,[166] filled vacancies with Federalists, passing legislation to create six new circuit courts and sixteen judicial appointments.[167] These actions became the basis of the issues in *Marbury*. Among those vacancies filled was Chief Justice of the United States Supreme Court.[168] Adams appointed his own Secretary of State, John Marshall, to

165. *See id.*; *see also*, KERMIT L. HALL, JAMES W. ELY, JR., & JOEL B. GROSSMAN, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 546 (Oxford University Press, Second Ed. 2005) (Unsuccessful in his 1800 pursuit of a second term, lame-duck President John Adams worked quickly with the Federalist party to increase the effects of the Federalist party on the young nation before Jefferson and the Republicans took office in 1801. *Id.* The Federalist-controlled Congress passed the 1801 Judiciary Act prior to Adams' departure. *Id.* That Act sought to quell Federalist party desires to increase the power of a centralized national government. *Id.* Moreover, it changed the Judiciary's construction by reducing the size of the Supreme Court over which Jefferson would have control from six Justices to five. *Id.* Most importantly, it created six new U.S. Circuits, across which the departing Adams Administration would appoint sixteen judges. *Id.* This partisan court-packing scheme to increase federal power became known as the "Midnight Judges Act."); *see* CLIFF SLOAN & DAVID MCKEAN, THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT 91-92 (Public Affairs, 2009) (noting that Jefferson's Republican desire for State's Rights fundamentally contrasted the Federalist-minded powerful central government. *Id.* at 91. In light of the Midnight Judges Act, Jefferson quickly began to gather evidence to press Congress to amend the Act, arguing that the lighter workload of the additional judges likely demonstrated a lack of need for these appointments. *Id.* at 91-92.

166. Ed Quillen, *The origin of "lame duck"*, THE DENVER POST (Jan, 01, 2009), www.denverpost.com/2009/01/01/the-origin-of-lame-duck [perma.cc/2GTQ-9AC2] (citing *Brewer's Dictionary of Phrase and Fable*). The political idiom "lame-duck," which dates back to the Eighteenth Century, in fact did not find its genesis in politics. *Id.* Instead, it was a phrase from the finance sector, referring to "a stock-jobber or dealer who will not, or cannot, pay his losses," thus forced to "waddle out of the alley like a lame duck." *Id.* The American political advent of lame-duck came in 1863, when President Calvin Coolidge came to be called a lame duck after losing a second term election to Herbert Hoover and forced to face the proverbial waddle out of the White House. *Id.*; *see also*, JORDAN ALMOND, DICTIONARY OF WORD ORIGINS: A HISTORY OF THE WORDS, EXPRESSIONS AND CLICHES WE USE, 148 (Citadel Press 1995) (The political idiom is derived from the phrase: "*Wild ducks in flight fly together- their heads out-stretched in front, their legs outstretched behind. A 'lame duck' can't keep up with the flock*." *Id.* (emphasis added in italics) It is from there that the concept of the lame duck is attributed to politicians who fail at seeking reelection and cannot maintain step with the change of political office. *Id.*) For this reason, there is a lack of accuracy in characterizing two-term Presidents in the autumn of their administration as lame-ducks.

167. WOOD, *supra* note 148, at 323.

168. *Id.*; *see also* HOWARD A. DEWITT, ALAN M. KIRSHNER, IN THE COURSE OF HUMAN EVENTS: AMERICAN GOVERNMENT 62 (1983, Kendall/Hunt Publishing Company) ("Jefferson was angered by the packing of the judiciary.")

preside over the Court, angering Jefferson.[169]

Long after Burr's trial, Jefferson wrote on September 6, 1819, to fellow Republican Spencer Roane, a judge whom some believe Jefferson was deprived of appointing as Chief Justice when Adams appointed Marshall.[170] In that letter to Roane, Jefferson reflected, "we find the judiciary on every occasion, still driving us into consolidation" as a nation, not of states, but a strong federally centered nation.[171] Roughly sixteen years after *Marbury*, Marshall's judici-political victory still irked Jefferson.[172] Curiously, Roane experienced his own conflict with Marshall, which stemmed from *Martin v. Hunter's Lessee*, a landmark Marshall Court case from which the Chief Justice recused himself.[173] Jefferson complained to

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169. WOOD, *supra* note 148, at 323*; see also* JOHN ARTHUR GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES: VOLUME 1 219 (Harper & Row, 1971) (Adams had "appointed John Marshall of Virginia, whom Jefferson particularly disliked."); *see* JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 208 (Knopf Doubleday Publishing Group, 2003) (Jefferson confided that he found Adams' actions to be "personally unkind." *Id.* Ellis notes that Jefferson and Marshall's utter hatred for one another was mutual. *Id.*).

170. Thomas Jefferson to Spencer Roane (Sep. 06, 1819), www.press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html [perma.cc/N64M-Y9YQ]; *see* JOHN V. DENSON, REASSESSING THE PRESIDENCY: THE RISE OF THE EXECUTIVE STATE AND THE DECLINE OF FREEDOM 73 (2001); *see also* Hobson Interview, *supra* note 16, at 8 ("There is a persistent myth that Jefferson, given the opportunity, would have nominated Spencer Roane, a member of the Virginia Court of Appeals, as Chief Justice. Although he later praised Roane for his attacks on Marshall's opinions in *McCulloch v. Maryland* (1819) and *Cohens v. Virginia* (1821), there is no evidence that Jefferson had more than a passing acquaintance with Roane in 1801.").

171. *Id.*

172. *See id.* ("In the case of Marbury and Madison, the federal judges declared that commissions, signed and sealed by the President, were valid, although not delivered. I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is as yet no deed.").

173. F. Thornton Miller, *John Marshall versus Spencer Roane: A Reevaluation of Martin v. Hunter's Lessee*, 96 VA. MAG. HIST. & BIOGRAPHY 297, 297-314 (1988). The litigation in *Martin* pitted the Court against republicanism and advocates of states' rights. *Id.* at 298. At the appellate level, Roane ruled against the Marshall family interests at stake. *Id.* The Supreme Court and the Court of Appeals volleyed the case back and forth arguing a proper decisional means. *Id.* On behalf of the Court, Justice Story wrote in response to Judge Roane that constitutionally the Supremacy Clause necessitated that appellate jurisdiction bring about uniformity via one ultimate appellate court. *Id.* at 207. Without uniformity of the Judiciary, there would be no supreme law of the land, as every state could independently interpret the Constitution, federal law and treaties in their own self-serving manner. *Id.* at 311. Declaring the final authority of the Supreme Court in *Martin* deprived the Court of Appeal from a further opportunity to volley the case and gave the Supreme Court the final word. *Id.* It functioned much in the same way that *Marbury* prevented the Court from facing its lack of enforcement power. *Id.* at 312. The Marshall Court's lineage of cases advanced a constitutional theory that the Court enforced the

Roane of a disruption of constitutional power dynamics that, by will of the People, the Constitution granted political power to the political branches, not the unelected Judiciary.[174] Jefferson continued his criticism of the Court, stating that the Constitution established three branches, "co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation."[175] He further believed that the Judiciary "usurp[ed]" the right "of exclusively explaining the constitution . . . If this opinion be sound, then indeed is our constitution a complete *felo de se*."[176]

Jefferson feared big-government, which Marshall's opinions helped to facilitate.[177] He viewed it as a violation of the Constitution and a deprivation of self-government.[178] In Jefferson's mind, each state had the "exclusive right" and the constitutional prerogative thereof to regulate rights such as slavery.[179] Because of Marshall's constitutionalism, Jefferson alleged that the Constitution had become "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."[180] Jefferson wrote, "[m]y construction of the constitution is very different" from the Court's self-announced authority to say what the law is.[181] In contrast to *Marbury*, Jefferson's conceptualized "that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal."[182] Thus, Marshall's reservation of

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uniform law of the land, from *Marbury* to *McCulloch v. Maryland*, *Cohens v. Virginia*, *Martin v. Hunter's Lessee*, and *Burr* collectively served to continually reignite a battle for state's rights. *Id.*

174. Letter from Thomas Jefferson, *supra* note 175 ("The nation declared its will by dismissing functionaries of one principle, and electing those of another, in the two branches, executive and legislative, submitted to their election. Over the judiciary department, the constitution had deprived them of their control.").

175. *Id.*

176. *Id.*

177. WOOD, *supra* note 148, at 416-17 (noting that although, Jefferson hated slavery, in a larger sense, he distrusted the federal government's growing power and the potential northern use of such power to restrict the States' right of the people to own slaves).

178. *Id.*

179. *Id.*; *see also* Ely, *supra* note 82, at 452 (noting that John Marshall's concerns for public policy were such that the Marshall Court carefully avoided the dangerous question of slavery, deferring to the legislature).

180. Letter from Thomas Jefferson, *supra* note 175.

181. *Id.*

182. *Id.*

the last word for the Court violated Jefferson's views for government. Marshall's Federalist opinions bolstering the federal power disrupted that mission, from *Marbury* and *McCulloch* to *Bollman* and *Burr*. Moreover, the battle of branches was strongest between Marshall and Jefferson in *Burr*, the sole Supreme Case in which Jefferson took the greatest interest during his two-term presidency. Jefferson, to his son-in-law John W. Eppes, wrote about Burr's trial that "[t]he favor of the marshal and the judge promises Burr all which can depend on them."[183] Jefferson's disdain for the Judiciary went deeper than *Marbury*, it was with the Constitution's Article III, writing, "this [case] will show the original error of establishing a judiciary independent of the nation, and which, from the citadel of the law can turn its guns on those they were meant to defend, and control and fashion their proceedings to its own will."[184] To act as if *Marbury* was Marshall's final word on the Court's power or even the greatest dispute with Jefferson is to miss the stature of the Marshall Court, the statesmanship of the Chief Justice, and the continual political pressure under which Marshall presided. Jeffersonian pressure, however, had an opposite effect of uniting the Justices.[185] This pressure continued through *Bollman*, to *Burr*, and onward, jeopardizing public faith in the Court.

B. Judiciary and the People

John Marshall took the Supreme Court from an uncouth circuit-riding group on horseback, in what was then the perceivably lowest branch of government to a robed ensemble with the preeminent power to "to say what the law is."[186] It was a branch formerly perceived as undignified and without any real authority.[187] In the evolving period of the judiciary, the existing laws required that Supreme Court justices report to various respective geographic locations, sitting there as trial judges.[188] Marshall instilled that the Supreme Court would not deliver its opinions *seriatim*, the old-English manner of each judge delivering his individual opinion orally.[189] To Framers like Marshall, this appeared as "an act of

183. Thomas Jefferson, *To John W. Eppes May 1807*, *in* JEFFERSONIAN CYCLOPEDIA 116, 116 (1900).

184. *Id.*

185. *See* Newmyer, R. Kent, *Getting Right with the Great Chief Justice*, 8 MASS. LEGAL HIST. 49, 59-60 (2002) (writing of the "unyielding hostility of the Jeffersonians to the Court which Marshall used to unite his colleagues").

186. *Marbury*, 5 U.S. at 137.

187. PAUL, *supra* note 13, at 3.

188. REHNQUIST, *supra* note 168, at 107.

189. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137, 140 (1999) (There was an antiquated method of "delivering opinions seriatim," a "practice . . . patterned

audacity."[190] Rather, as a result of Marshall, the Court would speak through the written word of one Justice, who would speak on behalf thereof, another choice of Marshall with which Jefferson took great exception and wished undone.[191]

In *Marbury*, Marshall wrote that the Constitution's Treason Clause "is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?"[192] However, the

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after that of the English common-law courts. In the seriatim style, each Justice prepared and read his own opinion." *Id.* at 140. Kelsh noted that "the pre-Marshall Court used the *per curiam* and seriatim styles most frequently." *Id.* at 141. The seriatim cases that followed Marshall's tenure on the Court "demonstrate the importance of Marshall himself to the development of the practice whereby an individual Justice spoke for the whole Court. The other Justices clearly preferred the seriatim system and employed it when [Marshall] was not present." *Id.* at 144. Marshall's persistence on this new element of American jurisprudence became a fixture by 1808, at which time Marshall's fellow Justices "began to abandon the practice of delivering opinions seriatim." *Id.*)

190. *Id.* at 120.

191. WHITE, *supra* note 6, at 10 (noting the power that Marshall's judicial statesmanship brought to the Court was largely a large product of sensing a need to eradicate the scattered confusion of Court Justices who ruled in separate opinions with confusion as to how much power the Court had over Congress and the Constitution; *see also*, letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), www.founders.archives.gov/documents/Jefferson/98-01-02-1702 [perma.cc/EW6L-PWRL] ("[The] pen should go on, lay bare these wounds of our constitution, expose these decisions [in a method] seriatim, and [arouse], as it is able, the attention of the nation to these bold speculators on [its] patience. having found from experience that [impeachment] is an impracticable thing, a mere scare-crow, they consider themselves secure for life; they sculk from responsibility to public opinion the only remaining hold on them, under a practice, first introduced into England." *Id.* Otherwise, Jefferson warned that as Chief Justice, Marshall had an advantage over the lazier associates, writing that the Court's "opinion is huddled up in Conclave, perhaps by a majority of one, delivered as a craft, Chief judge, as if unanimous, and, with the silent acquiescence of lazy or timid associates, he sophisticates the law to his mind by the turn of his own reasoning."); *and* letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), www.founders.archives.gov/documents/Jefferson/98-01-02-3118 [perma.cc/65TK-9W3R] ("I understand from others it is now the habit of the court, & I suppose it true from the cases sometimes reported in the newspapers, and others which I casually see, wherein I observe that the opinions were uniformly prepared in private." *Id.* Furthermore, "some of these cases too have been of such importance . . . [and] so grating to a portion of the public, as to have merited the fullest explanation from every judge seriatim, of the reasons which had produced such convictions on his mind.").

192. *Marbury*, 5 U.S. at 179.

Judiciary unintentionally affected the Treason Clause by giving way to constructive treason in *Bollman*. Thus, the Judiciary's power was unmistakable when acting intentionally or even accidentally. Once sold to the public as "the least dangerous branch," the Framers conceived of the Judiciary existing within a system of genuine checks and balances in which the Judiciary could parry the oversteps of the Executive and Legislative Branches.[193] Without the control of military, nor the power of taxation or the likes thereof, the Judiciary's lack of formal enforcement powers remained.[194] Nevertheless, from his inception on the Court, to *Marbury*, *Burr*, and onward, Marshall sought to preserve the role of the Court in the New Republic against Jefferson's attempts to obstruct. The same way that George Washington defined the presidency, Marshall molded the Court.[195]

1. Jefferson vs. Burr

Similar to the political undercurrent that pitted Chief Justice

193. THE FEDERALIST NO. 78 (Alexander Hamilton) ("Whoever attentively considers the different departments of power must perceive that, in a government in which [the departments] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." *Id.* In contrast from its sister branches,"[t]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." *Id.* Rather, its power is derived from the people, as "[i]t may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

194. *Id.*

195. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION THE PRECEDENTS AND PRINCIPLES WE LIVE BY 307-32 (2012) ("Of all the textual uncertainties confronting America's first president, none loomed larger than the indeterminacy shrouding his own role in the new constitutional order."). While the text made clear some of the President's powers, it failed to specify the limits of those powers and, according to Amar, his practices demonstrated a "lived" approach that served to provide rules for constitutional governance. *Id.* at 310, 132; *see also* Akhil Reed Amar, *Chief Justices and Chief Executives: Some Thoughts on Jim Simon's Books*, 57 N.Y.L. SCH. L. REV. 435, 436 (2012-2013) ("In contrast to the presidential term of four or eight years, the Constitution establishes life tenure for the Chief Justice of the United States. *Before John Marshall, this tradition was not entirely obvious.* Several early Justices stepped down after relatively short stints on the bench. John Jay left to become governor of New York . . . So before Marshall came along, the modern pattern was not so apparent, but, in retrospect, the typical pattern is that Presidents leave after four or eight years, while most Justices stay on for much longer. This simple fact creates an interesting structural tension."). Thus, while Marshall was not the first Chief Justice, his lived effect on the Branch of government and role on the Court mirror respective Washingtonian levels.

John Marshall against his distant cousin President Thomas Jefferson, this case involved Aaron Burr, whom Jefferson strongly disliked, due to Burr's rivalry in the 1800 presidential election.[196] Burr, once a close ally to Jefferson, became an opponent after only narrowly losing the Presidency to Jefferson.[197] Burr's political causticity was such that Jeffersonian-rival Alexander Hamilton vitally supported Jefferson over Burr.[198] Burr's loss started a career downfall that ended at forty-eight years old with his killing Hamilton in a duel.[199] Still, Jefferson feared that Burr would find a renaissance before the next election and defeat his political protégé, James Madison.[200] That fear was largely unfounded, however, as Burr had left Washington after the ugliness of politics proved too much for him.[201] In fact, at the substance of his treason case, Burr headed to America's Western Frontier, in order to start anew by capturing Spanish-held territory and settle in an area with resources of great fertility and silver mining.[202] Nevertheless, Jefferson distrusted Burr's exit from the frontline of politics, viewing it with great suspicion.[203] Burr merely wanted to reinvent himself after his political decline.[204] Burr's plan involved co-conspirator, General James Wilkinson, the Governor of Louisiana and a purported spy to Spain.[205] Wilkinson ultimately sacrificed Burr and concealed his own role in the plan to save face and perhaps

196. Olken, *supra* note 40, at 755-56; *see also* PAUL, *supra* note 13, at 282-283.

197. *See* MAGRUDER, *supra* note 19, at 200 (writing that Burr came "within one electoral vote of being chosen" as President over Jefferson); *see also* 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY 222 (3d ed. 2011); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 43-45 (2005).

198. FERLING, *supra* note 130, at 326. Ferling writes that, in spite of Hamilton's quarrels with Jefferson and the contempt that flowed therefrom, Hamilton eventually threw his political support behind Jefferson over Burr, viewing Jefferson as a "lesser of two evils." *Id.* Hamilton believed that Burr was "unprincipled . . . voluptuary" with "extreme & irregular ambition" to enact a "system . . . sufficient to serve his own ends." Likewise, Burr viewed Hamilton as the "most dangerous man of the [American] Community." *Id.*

199. UROFSKY & FINKELMAN, *supra* note 203, at 222.

200. PAUL, *supra* note 13, at 282-283.

201. UROFSKY & FINKELMAN, *supra* note 203, at 222.

202. *Id.;* BROOKHISER, *supra* note 164, at 111.

203. BROOKHISER, *supra* note 164, at 110.

204. *See* HOBSON, *supra* note 8, at 2 ("Aaron Burr clearly believed the West offered him a second chance after his fall from grace.").

205. UROFSKY & FINKELMAN, *supra* note 203, at 222; *see* HASKINS & JOHNSON, *supra* note 12, at 249-50 (noting that Wilkinson's intent to betray the United States is debated, but Wilkinson's pension from the Spanish government and his self-interest to protect the publication of this information).

earn his place in history as a war-hero, neither of which manifested.[206] Wilkinson and Burr had served together with prestige in the Revolutionary War and had maintained a close friendship.[207] The plan also included Samuel Swartwout and Dr. Erick Bollmann (note that Bollmann's name was misspelled by the Court in *Bollman*).[208] Jefferson wanted to eradicate any risk of Burr's revival and thus strongly wanted him hanged, a punishment appropriate under treason.[209] Some scholars believe that Burr wished to make a comeback by conquering Mexico amid the provoked war under Jefferson's presidency.[210] The treason cases before the Marshall Court were borne out a political battle that had entangled Jefferson, Burr, and Marshall, one that left the President of the United States and the Chief Justice of its Supreme Court to battle for the helm.

2. The Chief Justice and the Marshall Court

Marshall knew the public pressure under which the Court found itself, something that he explicitly acknowledged in *Ex Parte Bollman*.[211] Prior to addressing the issues in *In Re Burr*, Marshall had previously written the *Bollman* majority opinion, in which he wrote that "our property, our lives, and our reputations depend [and rest] solely on the decisions of courts."[212] He elaborated upon the significance of *stare decisis*, one of the Court's most "favourite and most fundamental maxims," a maxim moreover that is "wise and salutary."[213] Marshall, however, went on that year in *Burr* to

206. *See* HOBSON, *supra* note 8, at 27 ("Wilkinson hoped to protect himself while winning glory as a national hero. Instead, he emerged from the Burr trial with his dubious reputation badly if not irretrievably damaged. Wilkinson, indeed, proved to be a disappointment to the prosecution, his credibility tarnished by suspicion that in revealing Burr's plot he was merely trying to save his own neck. His testimony before the grand jury was undermined by indications that he had altered the famous cipher letter in ways to conceal his own relationship with Burr.).

207. MAGRUDER, *supra* note 19 at 204; *see also* HASKINS & JOHNSON, *supra* note 12, at 248 (noting that Burr's efforts in the Revolutionary War established his place in history as a war-hero and a brilliant military strategist).

208. PAUL, *supra* note 13, at 283-285.

209. BROOKHISER, *supra* note 164, at 118.

210. *See* HASKINS & JOHNSON, *supra* note 12, at 249 (the plausibility of such designs is supported by the Hero's welcome that Burr received in 1805. *Id.* The greeting was led by Andrew Jackson, a great admirer of Burr. *Id.* In the alternative of Burr's purported desires for a heroic comeback, another goal may have been that Burr merely wished to settle west of the Mississippi and become a land tycoon. *Id.*).

211. *Ex parte* Bollman, 8 U.S. 75, 79 (1807) (noting that, in this publicized case, the Court "could not protect itself from insult and outrage").

212. *Id.* at 87.

213. *Id.*

overrule part of this very opinion.

Marshall indeed acknowledged that *Ex Parte Bollman* "certainly adopt[ed] the doctrine of constructive treason" but feared the extent to which the doctrine reached.[214] Most telling, Marshall wrote to fellow Justice William Cushing, asking, "[o]ught the expressions in that opinion be revised?"[215] The Justices' respective responses to Marshall did not survive, but in a fashion of statesmanship, Smith surmised that Marshall took their opinions into account in crafting his *Burr* opinion, seeking essential unanimity.[216] Thus, Marshall knew what lay ahead for the Court. Moreover, he knew that the opinion must be unanimous or risk disdain because contradictory opinions in the case could undermine the Court amid controversy.[217]

Curiously, Henry Brockholst Livingston, a fixture of the Marshall Court who had been appointed by Jefferson saw three things in common with Burr. In 1798, Livingston, a fellow Republican, killed a notable Federalist in a duel.[218] Nevertheless, Livingston succumbed to Marshall's charisma and disappointed Jefferson who, reeling from the deprival of appointing a Chief Justice, hoped to establish a Republican-minded majority.[219] Additionally, Thomas Todd sat on the Court.[220] Todd was also a

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214. JOHN MARSHALL, *To William Cushing*, *in* THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS, APRIL 1807-DECEMBER 1813, AT 60, 60 (Herbert A. Johnson et al. eds., 1974) ("How far does that case carry this doctrine?").

215. *Id.*

216. JEAN EDWARD SMITH, JOHN MARSHALL DEFINER OF A NATION 640 n.108 (1996).

217. *See* 2 DAVID G. SAVAGE & JOAN BISKUPIC, GUIDE TO THE U.S. SUPREME COURT 856 (4th ed. 2004), (Marshall's "aspiration toward unanimity became the norm."); *see also* HOBSON, *supra* note 90, at 116 ("In all the great cases affirming a nationalist interpretation of the Constitution, [Marshall] had the unanimous or nearly unanimous concurrence of his brethren."); WHITE, *supra* note 6, at 10 (noting Marshall sensed a need to eradicate the scattered confusion of Court Justices who ruled in separate opinions with confusion as to how much power the Court had over Congress and the Constitution).

218. JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 329 n.38 (2001) (noting that Federalists charged Brockholst Livingston for killing James Jones, a Federalist, in a duel); *see also* SMITH, *supra* note 222, at 350 (Noting, however, that Livingston was said to have acted honorably, while Burr faced murder charges for shooting Alexander Hamilton).

219. JOHN V. DENSON, REASSESSING THE PRESIDENCY: THE RISE OF THE EXECUTIVE STATE AND THE DECLINE OF FREEDOM 73 (2001). Denson writes that Livingston greatly disappointed Jefferson by falling under Marshall's influence and characterizing Livingston as "a non-entity, a mere rubber stamp for Marshall and [Joseph] Story." *Id.* He also states that Jefferson had reportedly planned to appoint Spencer Roane as Chief Justice before Adams appointed Marshall. *Id.*

220. NEWMYER, *supra* note 165, at 79.

Jefferson appointee, the former Chief Justice of the Kentucky Supreme Court and a dedicated Republican that Jefferson hoped would change the Marshall Court.[221] However, Todd's kindred spirit with Marshall proved to be a disappointment for Jefferson.[222] A later Marshall Court member, Justice (then Judge) Joseph Story wrote in Todd's obituary notice, "though bread in a different political school from that of [Marshall], [Todd] never failed to sustain those great principles of constitutional law on which the security of the Union depends. He never gave up to party what he thought belonged to the country."[223]

As Chief Justice, Marshall knew the power that a communal bottle of wine could play in corralling his fellow Justices towards a particular outcome.[224] He knew too, the benefit that drawing upon the intellect of fellow Justices in a genuine manner aided in reaching a learned decision and the fellowship of the Justices.[225] The potent energy of Marshall and Livingston made the Court "a band of brothers."[226] Livingston did not participate in the decision

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221. *See* TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 60-61 (2001) (noting that when Jefferson sought the advice of Congress for as to whom he should appoint to the Supreme Court, Todd's name was suggested prominently for his expertise. Hall describes Todd's role on the Court as importantly aiding Marshall's strengthening of power for the Judiciary).

222. *See* NEWMYER, *supra* note 165, at 79 (writing that Jefferson hoped to "undo the stranglehold that Marshall was reputed to have on his colleagues"). *But see id.* ("Todd, as it turned out, was neither equipped nor inclined to challenge the chief justice and became instead . . . a steadfast supporter of" Marshall's constitutionalism).

223. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 301 (1926).

224. Samuel R. Olken, *Chief Justice John Marshall in Historical Perspective*, 31 J. MARSHALL L. REV. 137, 157 (1997); *see also* Herbert A. Johnson, *Bushrod Washingto*n, 62 VANDERBILT L. REV. 447, 448 (2019) (exhibiting a letter from William Johnson to Thomas Jefferson that Justice William "Cushing was incompetent, [Samuel] Chase could not be got to think or write, [William] Paterson was a slow man and willingly declined [to be] trouble[d with writing opinions]"); *id*. ("[T]he other two judges," referring to John Marshall and Bushrod Washington, "are commonly estimated as one judge.").

225. Hobson, *supra* note 18, at 1422. Marshall "earned their trust and respect not by flattery or cajolery but by a genuine desire to draw on their particular expertise. *Id.* at 1424. "This had the desired effect of making each associate feel as if his views mattered, as if he were an integral part of a common enterprise." *Id.* at 1424 Hobson also stated that "we can reasonably speculate that Marshall acted somewhat like a committee chair who collected the views of his associates and fashioned a report that reflected the sense of the whole." *Id.* at 1447.

226. *See* SMITH, *supra* note 222, at 350-51 (noting Livingston's role in this fellowship); *see also* Hobson, *supra* note 18, at 1422 ("The war also marked him for life as a member of the special fraternity of Revolutionary veterans, to which many of his fellow Justices also belonged. The camaraderie of a 'band of brothers' formed no small part of the bond uniting the Chief Justice and his

of *Bollman*, the Marshall Court, or "band of brothers," as it were, together faced the treason cases with the Revolution in their experiences.[227] As a statesman, Marshall's goals for a respected judiciary and unanimous decisions often meant stifling his personal opinions and remaining open to the opinions of his colleagues.[228] Nevertheless, well-known and problematic to Jefferson was Marshall's reputation for dominating his fellow Justices with charismatic influence.[229]

C. Bollman/Burr Cases

1. The Incident: Treason?

Burr's schemed to justify invading Mexico by first provoking war with Spain.[230] Burr had purchased four hundred thousand acres along the Wichita River banks in Texas.[231] The government alleged a scheme by Burr that paralleled America's eventual Civil War, plans that Burr would create a separate confederate sovereign, consisting of Western states and territories.[232] Most of the evidence brought against Burr at his trial was first revealed to the Court during *Ex Parte Bollman*. For instance, General William Eaton characterized the plan as "[an organized] secret expedition against the Spanish provinces on our south-western borders" that was specifically led by Burr.[233] Nevertheless, this plan was not novel. Jefferson had previously explored provoking war with Spain as a political tactic to destabilize when he served as Secretary of State to George Washington.[234] This scheme proved to be a recurring, "ardent desire of the Americans to drive Spain from all

associate.").

227. WARREN, *supra* note 229, at 306.

228. *See* Hobson Interview, *supra* note 16, at 9 ("Marshall was more than willing to subordinate his private opinions and preferences in order to gain consensus.").

229. *See* White, *supra* note 4, at 815 ("Marshall's contemporaries, most notably Jefferson, repeatedly suggested that Marshall was a dominating, even irresistible, influence among his fellow Justices.").

230. *Ex parte Bollman*, 8 U.S. at 93; *see also* PAUL, *supra* note 13, at 283-85.

231. MAGRUDER, *supra* note 19, at 204.

232. *See* HOBSON, *supra* note 8, at 2 (explaining that Western separation "from the union was a real possibility in the early nineteenth century, when many doubted whether a republican form of government centered on the Atlantic coast could effectively extend its jurisdiction" westward); *id.* (Eager westerners' "settlement into territories still belonging to Spain, caus[ed] endless friction that threatened to embroil the United States in a war with that nation." Thus, "[t]he West remained a highly unstable region.").

233. *Ex parte Bollman*, 8 U.S. at 93.

234. PAUL, *supra* note 13, at 285.

foothold on this continent, and to get possession of the rich and attractive provinces of Mexico."[235] Historians Dr. Paul Finkelman and Melvin I. Urofsky characterized Swartwout (a twenty-two year old) and Bollmann as "minor cogs in the alleged conspiracy" to provoke war.[236] Swartwout and Bollmann served as couriers to Burr, in what historian Richard Brookhiser regarded as "the greatest conspiracy in American history since Benedict Arnold's."[237] When crafting the treason clause, fresh in the Framers' minds was General Benedict Arnold's defection after conspiring with the British to give them the fortress at West Point.[238] Moreover, treasonous acts are unlike atrocities from foreign actors, due to what has been called the "element of personal betrayal" by one citizen upon his own country.[239] Jefferson tactically structured his rallying against Burr to excite such feelings.

Wilkinson, a coconspirator, notified Jefferson of Burr's pattern of using ciphered letters.[240] However, Wilkinson destroyed the originals, thus limiting his exposure and maintaining his ability to manipulate the narrative to minimize his role therein.[241] Nevertheless, Wilkinson had sent a letter via messenger to Burr, in which he reportedly acknowledged his own cooperation.[242] However, Wilkinson is believed to have tracked down the messenger with the inculpatory letter, overtaken him, and destroyed the intercepted letter.[243] The letters that were introduced at Bollmann's trial revealed that Wilkinson's role in the scheme was one "second to Burr only."[244] Wilkinson, angered by the letter, reportedly became bitter about his subsidiary role.[245] Historian Charles Hobson characterized Wilkinson's turn to Jefferson as an act of "cold feet."[246] In Wilkinson's affidavit produced during *Bollman*, he claimed that Swartwout "slipt into my hand a letter of formal introduction from

235. MAGRUDER, *supra* note 19, at 202.

236. UROFSKY & FINKELMAN, *supra* note 203, at 224; *see* HASKINS & JOHNSON, *supra* note 12, at 250-52 (noting that Burr had a grander vision in which he attempted to finance his plans by pitting the French and English against one another but was unsuccessful in pursuit of such underwriting).

237. BROOKHISER, *supra* note 165, at 109-12.

238. MCCULLOUGH, *supra* note 72, at 250.

239. Fletcher, *supra* note 28, at 195.

240. PAUL, *supra* note 13, at 285.

241. *Id.*

242. MAGRUDER, *supra* note 19, at 205.

243. *Id.*

244. *Ex parte Bollman*, 8 U.S. at 93.

245. *See* MAGRUDER, *supra* note 19, at 205 ("Wilkinson was greatly agitated by this letter, and seemed at first to hesitate as to his line of conduct."); *see also* HASKINS & JOHNSON, *supra* note 12, at 251 (noting that Wilkinson wanted to lead the expedition).

246. HOBSON, *supra* note 8, at 3.

colonel Burr."[247] Moreover, Wilkinson insisted that the version he provided was "a correct copy," in spite of the odd shifts between identifying Burr via first-person and third-person.[248] At trial, it actually became evident Wilkinson had altered some of Burr's writings that he forwarded to Jefferson, showing that Wilkinson magnified Burr's role and concealed his own role in the scheme.[249] Wilkinson admitted to striking the first sentence regarding his conduct.[250] Moreover, the writings reflected more of Wilkinson's ostentatious writing, rather than Burr's reputation for a terse approach, erring on oral transmissions only.[251] This was not surprising to Jefferson, however, who knew Wilkinson to be a traitor, spying for Spain.[252] Knowing that all, Jefferson had nevertheless promoted Wilkinson as commander of the army, Governor to the Louisiana Territory, and Indian Affairs Commissioner.[253] Marshall believed, however, that government could be used to assert tyranny and oppression.[254] Treason was no exception. Jefferson defended Wilkinson while accusing Burr in January 1807 of treason before Congress, an accusation that carried a penalty of hanging.[255]

As Burr sought to execute his scheme, his excited militiamen set forth from Blennerhassett Island in the Ohio River toward New Orleans.[256] Burr's ensemble had largely abandoned course, but the assembly prior thereto served a significant part in the accusation of

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247. *Ex parte Bollman*, 8 U.S. at 93.

248. *Id.*

249. UROFSKY & FINKELMAN, *supra* note 203, at 225; *see* HASKINS & JOHNSON, *supra* note 12, at 252 (noting that the letter was the prosecution's chief piece of evidence and Wilkinson's edits were detrimental to the case).

250. *See* HOBSON, *supra* note 8, at 40 ("To historians, the cipher letter presents a documentary puzzle that will likely never be fully resolved. Although the letter was long thought to have been written by Burr, no copy exists in his hand. . . . The best informed scholarly opinion now holds that [former Speaker of the House Jonathan] Dayton wrote the cipher letter that Wilkinson received, substituting it for one that Burr had written.").

251. *See* BROOKHISER, *supra* note 164, at 110,115 (writing that Burr, reputably an excellent trial lawyer, instructed his law clerks of his personal practice to not put anything in writing, cautioning that "[t]hings written . . . remain").

252. PAUL, *supra* note 13, at 285.

253. *Id.*

254. WHITE, *supra* note 6, at 18.

255. *See* HOBSON, *supra* note 8, at 1 ("Jefferson responded by issuing a proclamation of conspiracy."); *see also* PAUL, *supra* note 13, at 286.

256. *See* RUPERT SARGENT HOLLAND, HISTORIC ADVENTURES: TALES FROM AMERICAN HISTORY 62-63, 67 (1913) (noting Andrew Jackson greeted Burr with a hero's welcome along Burr's journey); *see also*, HASKINS & JOHNSON, *supra* note 12, at 251 (noting that Burr corralled support from young men by promising land tracts in exchange for their participation).

treason.[257] Unbeknownst to Burr, Jefferson and Wilkinson ordered that Burr be caught and brought to justice.[258] Wilkinson had notified Jefferson of Burr's intent to invade with seven thousand men; however, Burr was arrested with a mere sixty, after having previously surrendered on January 17, 1807.[259] Burr, while acting intentionally, albeit likely did not intend to act treasonously against the United States.[260] Wilkinson wrote again to Jefferson in confidence to distance himself from accusations of spying for Spain and conspiring with Burr, a letter that would become the substance of Burr's subpoena at trial.[261]

At the Jefferson Administration's behest, General Wilkinson arrested Samuel Swartwout and Dr. Justus Erick Bollmann for treason, conveniently timed to conceal Wilkinson's role in Burr's scheme.[262] Jefferson ordered that Bollmann and Swartwout be prevented from access to an attorney.[263] Consistently with Jefferson's desire, to prevent this, two Republican judges on the Circuit Court for the District of Columbia ruled as such.[264] Jefferson and his political apprentice, Secretary of State James Madison, together interrogated Bollmann in a marine barracks at which he was held.[265] Ironically, the Treason Clause resulted in part from James Madison's careful structure of language to prevent tyranny by perverse application of treason prosecution.[266] Madison initially expressed concern that the definition was too narrow.[267] Here, however, Jefferson wanted Bollmann to implicate Burr as levying war, and flipping Bollmann was essential.[268] Bollmann provided

257. PAUL, *supra* note 13, at 286.

258. JAMES PARTON, THE LIFE AND TIMES OF AARON BURR 438 (1858).

259. BROOKHISER, *supra* note 164, at 115; *see* HASKINS & JOHNSON, *supra* note 12, at 263-64 (noting that Burr had previously surrendered and allowed authorities to search his boats). After his arrest, Burr voluntarily went to court. *Id.* Wilkinson executed Burr's arrest, using men who worked in disguises. *Id*.

260. Halliday & White, *supra* note 11, at 683 ("Burr probably had no treasonous intent.").

261. HASKINS & JOHNSON, *supra* note 12, at 253-54.

262. *See* HOBSON, *supra* note 8, at 1 ("Wilkinson himself took action in New Orleans, declaring martial law and rounding up suspects and potential witnesses. . . . Erick Bollman and Samuel Swartwout, [among others] who had carried messages, including the cipher letter, from Burr . . . [sending] them under military guard to Washington, where they were held in custody."); *see also* PAUL, *supra* note 12, at 283-85.

263. Halliday & White, *supra* note 11, at 684 ("Burr probably had no treasonous intent.").

264. UROFSKY & FINKELMAN, *supra* note 203, at 223.

265. PAUL, *supra* note 13, at 287.

266. *Historical Concept of Treason: English, American*, 35 IND. L. J. 70, 78 (1959).

267. Cramer v. United States, 325 U.S. 1, 22 (1945).

268. PAUL, *supra* note 13, at 287.

that Burr's intent was merely to liberate Mexico.[269] However, on the secret promise that no one would see it if Bollmann testified, Jefferson procured a written account from Bollmann detailing his version of the events.[270] Jefferson, however, broke the promise by nevertheless seeing to its introduction later at Burr's treason trial.[271] Probable cause had been found to support the charge that Swartwout and Bollmann had committed treason, based in part on the testimony of Wilkinson himself.[272]

In one of several of relations to *Marbury v. Madison*, Charles Lee, a friend of John Marshall and former attorney to William Marbury, intervened to appeal to the United States Supreme Court on behalf of the two defendants.[273] Lee represented the two along with attorneys Robert Goodloe Harper and Francis Scott Key.[274] *In Re Bollman* took way as Burr coursed down the Mississippi River with sixty men assembled among nine riverboats, unaware of the charges brought upon his couriers, their trial, and *Bollman*'s Supreme Court decision.[275] The impending case of *Bollman* was significant with major political implications.[276]

2. Ex Parte Bollman: Marshall's first step

In anticipation of *Ex Parte Bollman*, Marshall wanted to minimize the politicization facing the Court.[277] Taking on *Bollman*, Marshall noted that "[t]he whole subject will be taken up de novo."[278] President Jefferson had widely publicized his opinion on January 22, 1807, that the chief conspirator Burr was guilty of treason.[279] Jefferson named Burr as the "prime mover" and stated

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269. *Id.*

270. WILLIAM R. NESTER, THE JEFFERSONIAN VISION, 1801-1815 THE ART OF AMERICAN POWER DURING THE EARLY REPUBLIC 19 (2013).

271. *Id.*

272. *Ex parte Bollman*, 8 U.S. at 76 n.2.

273. PAUL, *supra* note 13, at 287.

274. *Id.*; *see also* Christian Ketter, *The NFL Player, the Schoolchild, and the Entertainer: When the Term "Free Speech" Is Too Freely Spoken, Exactly "Who's on First?"*, 68 CLEV. ST. L. REV. 421, 478 (2020) (noting that Key is best known for composing the Star-Spangled Banner).

275. BROOKHISER, *supra* note 164, at 113.

276. Halliday & White, *supra* note 11, at 686 ("To say that the case of Bollman's and Swartwout's incarceration and prospective trial for treason was a controversial matter of early nineteenth-century national politics would be to understate matters significantly.").

277. UROFSKY & FINKELMAN, *supra* note 203, at 223.

278. *Ex parte Bollman*, 8 U.S. at 75 n.1.

279. PAUL, *supra* note 13, at 291; *see* HOBSON, *supra* note 8, at 21. A tunnel-visioned Jefferson "believed Burr was guilty of treason." *Id.* Jefferson's determination to try Burr for treason instead of the "lesser offense of provoking a war with Spain," however, "has led critics to attribute personal and partisan

his "guilt is placed beyond question."[280] Jefferson sent prosecutorial directives and pre-signed presidential pardons to be offered for incentivizing testimony against Burr.[281] Marshall stated that "there is no crime which can more excite and agitate the passions of men than treason."[282] However, Marshall's effort to downplay politicization would prove futile because he had publicly criticized the Jefferson administration for its attack on Burr.[283] Marshall complicated his predicament after the preliminary hearing, however, by inadvertently attending an event honoring Burr, which was hosted by Burr's counsel, John Wickham, an old friend of Marshall.[284] Marshall apologized to the lead prosecutor George Hay after the Chief Justice publicly stated that the government simply "expected" a guilty verdict for Burr.[285] Well-settled procedural requirements prohibit a tribunal's prejudgments of cases.[286] Albeit somewhat accordingly, Jefferson accused Marshall of coddling treasonists.[287] Nevertheless, Marshall tried to focus narrowly on two issues: first, whether the Court could issue a writ of habeas corpus, and second – relevant to this essay – what was meant in the Constitution's definition of "treason."[288]

On behalf of the Court, the Chief Justice wrote, "[t]o constitute a levying of war," under the definition of treason, "there must be an assemblage of persons for the purpose of effecting by force a treasonable purpose."[289] He noted that "conspir[ing] to levy war, and actually [levying] war, are distinct offences."[290] Thus, the question of what constituted "levying war" was a delicate and specific analysis that the Court needed to undertake.

In *Bollman*, Marshall established that overt acts of treason in which war is levied *may* consist of "warlike array," but such array

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animus to the prosecution of Burr." *Id.* Jefferson's numerous, lengthy letters to U.S. Attorney Hays reflects his "nearly obsessive interest in the case. *Id.*; *see also* HASKINS & JOHNSON, *supra* note 12, at 254 (noting that Jefferson had issued a November 27, 1806, proclamation among news sources in which he strongly indicated Burr without naming him).

280. HASKINS & JOHNSON, *supra* note 12, at 254; *see also* BRODIE, *supra* note 138, at 406 (quoting John Adams' immediate acknowledgment of Jefferson's error to Benjamin Rush with, "if [Burr's] guilt is as clear as the Noon day Sun, [Jefferson] . . . ought not to have pronounced it so before a Jury had tryed him").

281. PAUL, *supra* note 12, at 291.

282. *Ex parte Bollman*, 8 U.S. at 125.

283. UROFSKY & FINKELMAN, *supra* note 203, at 223; HOBSON, *supra* note 8, at 30.

284. UROFSKY & FINKELMAN, *supra* note 203, at 223; HOBSON, *supra* note 8, at 30.

285. BROOKHISER, *supra* note 164, at 117.

286. *Id.*

287. UROFSKY & FINKELMAN, *supra* note 203, at 223.

288. *Id.*

289. *Ex parte Bollman*, 8 U.S. at 126.

290. *Id.*

is not an essential circumstance.[291] An act of war levied in treason is committed with a treasonable intent and is executed with armament or equipment.[292] The Court stated that the requirement remained, "war must be actually levied."[293] Marshall explained that a levying of war included any acts purposed to "revolutionize[] by force."[294] Moreover, treason included also "[a]ny thing which amounts to setting on foot a military expedition, with intent to levy war against the United States."[295] Marshall noted, however, that treason is not a crime in which an individual among a group of actors is limited in guilt as to the level in which he participates; rather, "[i]n treason, all are principals."[296] Here, however, "[t]he mere enlisting of men," is not treason "without assembling them" in the constitutional sense of levying war. According to the Court, neither Swartwout nor Bollmann could have the crime "consummate[d] . . . to him," as there was not enough "evidence prov[ing] Col. Burr . . . advanced so far in levying an army as actually to have assembled them . . . . Therefore, there is no evidence to support a charge of [t]reason."[297] Balancing the decision, Marshall left it possible for the government to prosecute Bollmann and Swartwout before a military tribunal.[298] He seemingly hoped that this opinion would settle the whole matter from Bollmann and Swartwout to Burr, but the Court would have to review the incident in *Burr* because of Marshall's surplusage that follows italicized below.

Marshall attempted to limit the purview of *Bollman*, stating that "[i]t is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country."[299] By contrast, when war is "actually levied," by "a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, *or however remote from the scene of action,* and who are actually leagued in the general conspiracy, are to be considered as traitors," so long as there is "an actual assembling of men for the treasonable purpose, to constitute a levying of war."[300] And so, Marshall inadvertently conceived a decidedly unamerican concept of constructive treason, "however remote from the scene of

291. *Id.* at 118-19
292. *Id.* at 118.
293. *Id.* at 126.
294. *Id.* at 133.
295. *Id.* at 119.
296. *Id.*
297. *Id.* at 133-35.
298. Halliday & White, *supra* note 11, at 688.
299. *Ex parte Bollman*, 8 U.S. at 126.
300. *Id.* (emphasis added).

action."[301] Moreover, he erred conspicuously, after noting that "the framers of our constitution . . . defined and limited" treason "with jealous circumspection" in order "to protect [continually] their limitation [of treason] by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court."[302] The Framers, he wrote, intended for the constitutional principle "that the crime of treason should not be extended by construction to doubtful cases" and "crimes not clearly within the constitutional definition."[303] Still, in spite of Marshall's disclaimer, *Bollman* created an impression that such minute remoteness could constructively place Burr at the scene. Marshall had successfully dismissed *Bollman* on grounds that no indictable offense had been committed in the jurisdiction of Washington D.C.[304] Unwisely, however, Marshall felt that he had bested Jefferson and used the opinion as an opportunity to chide the Administration, instructing it to try again and "institute fresh proceedings against" the conspirators.[305] Jefferson did just that, but this time, against Burr.[306] Marshall's venomous surplusages had thus endangered himself and the Court.

3. Burr's Treason Trial

Jefferson saw that Burr was prosecuted and threatened that if Burr went free, the whole of the Supreme Court should face impeachment.[307] In light of *Bollman*, Republicans pursued an

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301. *Id.* at 127.

302. *Id.* at 127.

303. *Id.*

304. G. EDWARD WHITE, THE MARSHALL COURT & CULTURAL CHANGE: 1815-1835, at 233 (1991).

305. *Ex parte Bollman*, 8 U. S. at 127 ("[T]hose who have been charged with treason to be proper objects for punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offence has been [committed], institute fresh proceedings against them."); *see also* G. EDWARD WHITE, *supra* note 310, at 233.

306. *See* ISAAC JENKINSON, AARON BURR: HIS PERSONAL AND POLITICAL RELATIONS WITH THOMAS JEFFERSON AND ALEXANDER HAMILTON 266 (1902) (addressing the "charges upon which Burr was brought to trial" by the Jefferson Administration, in spite of "hundreds of other charges, . . . rumors, and surmises floating through the land"); *id.* ("[I]t was upon these wild and reckless rumors that Burr was condemned by the public voice.") However, "in spite of all this prejudice, when the government came to prosecute Burr, the only charge they then were able to make was the ridiculous one that he with sixty unarmed followers was about to capture a city of nine thousand people, protected by an armed fleet of vessels and one thousand trained soldiers. And this absurdity has been believed for nearly a hundred years and may still be cherished a hundred years hence." *Id.*

307. UROFSKY & FINKELMAN, *supra* note 203, at 223 (noting that federal circuit courts had original jurisdiction over treason cases at that time in

amendment to excise criminal cases from the Court's federal jurisdiction.[308] The Jefferson administration, conscious of the flaws in attempting to prosecute Burr under treason, nevertheless proceeded in attempt.[309] By default, this placed great political pressure on John Marshall as both Chief Justice and a presiding circuit judge for Burr's Virginia Trial.[310] In a forum shopping of sorts, Jefferson saw to Burr's trial being held in Richmond, Virginia, seeking the goal of a sympathetic jury.[311] This forum was procedurally justified because Burr's conduct tacitly took place on the Virginia side of the Ohio River, upon which Burr's armada set forth.[312] To Jefferson's dismay, and coincidentally to the Supreme Court justices riding circuit, Chief Justice John Marshall presided over Burr's trial.[313] Thus, Marshall, "Jefferson's [Federalist] archival in Virginia[,] [sat] in judgment on Jefferson's archrival in the Republican Party."[314] Visitors from across the country flooded the Richmond courtroom and surroundings with public attention.[315] Marshall presided over the trial alongside Judge Cyrus Griffin for the District Court of Virginia.[316] Burr's defense team consisted of: John Baker, Benjamin Botts, Luther Martin, Edmund Randolph, and John Wickham, as well as Burr who intended to serve upon and direct his defense.[317] The Prosecution consisted of District Attorney George Hay, William Wirt, and Alexander MacRae.[318] Jefferson expressly instructed prosecutor Hay to cite Marshall's *Marbury*

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history).

308. *See* HASKINS & JOHNSON, *supra* note 12, at 256-57 (noting the desire to impeach every Justice on the Supreme Court).

309. *See* HOBSON, *supra* note 8, at 1 ("The government was fully aware of the difficulty of securing a conviction for treason.").

310. UROFSKY & FINKELMAN, *supra* note 203, at 223.

311. PAUL, *supra* note 13, at 287; *see* HASKINS & JOHNSON, *supra* note 12, at 261-62 (noting that Senator John Randolph of Virginia was quick to criticize Jefferson's actions for the hypocritical irony of including selective transport for remote trials among the tyrannical grievances that Jefferson included in the Declaration of Independence).

312. BROOKHISER, *supra* note 164, at 113.

313. *See generally* Olken, *supra* note 230, at 154 (noting that Marshall was "the circuit court justice presiding over the 1807 treason trial of Aaron Burr"); *id.* at 152 n.71 (noting also the requirement that Supreme Court justices ride on circuit).

314. PAUL, *supra* note 13, at 287.

315. *See* MAGRUDER, *supra* note 19, at 208-09 ("Richmond, then a town of six thousand inhabitants, was crowded with visitors" and "[t]hrongs of citizens, not only from Virginia, but from other States, . . . drawn thither by the celebrity of the occasion . . . of the most noteworthy trial which had yet marked the history of the republic.").

316. MAGRUDER, *supra* note 19, at 209

317. *Burr*, 25 F. Cas. at 55; *see also* HOBSON, *supra* note 8, at 24.

318. *Burr*, 25 F. Cas. at 55.

opinion and immediately "denounce it 'as not law.'"[319] Nevertheless, by this time, and due in part to the impact of *Marbury*, Marshall's role on the Supreme Court and the constitutional significance of that Court were well-secured. Thus, *In Re Burr* came before the court with celebrities, a vast audience, and a great deal at stake for the posterity of the Court going forth.

a. The Grand Jury is Sworn: May 22, 1807

On May 22, 1807, the grand jury was sworn in.[320] Burr requested "the court instruct the grand jury on certain leading points, as to the admissibility of certain evidence" that he anticipated the prosecution might present.[321] Hay "objected to [Burr's] proposition as unprecedented."[322] Political pressure was increasing upon the Court from all sides.[323] So too did it mount on the parties in play. For instance, Hay, who was mourning the loss of his wife on the night before the prosecution commenced, was directed by the President of the paramount priority that this prosecution was to him.[324] Consequently, Marshall's strictly adhered to procedure, with regard to whether Major Scot, the marshal, could excuse certain grand jurors, stating, "it was not in the power of the marshal to summon more than twenty-four, as the act of assembly authorized only that number."[325] Marshall gave an unpublished oration on the testimony needed to prove treason effectively.[326] Marshall, perhaps sensitive to previous allegations of prejudice, addressed the issue of prejudgment and advised the jury, "if any gentleman has made up and declared his mind it would be best to withdraw."[327] Marshall advised the jury that it was proper to "dwel[l] upon the nature of treason, and the testimony requisite to prove it."[328] Marshall stated that the court was unprepared to say

319. UROFSKY & FINKELMAN, *supra* note 203, at 225.

320. *Burr*, 25 F. Cas. at 145.

321. *Id.* at 59.

322. *Id.* at 7

323. *See* HOBSON, *supra* note 8, at 5 ("Burr's case by now had become deeply embroiled in politics, with Republicans supporting President Jefferson's measures to bring the accused traitor to justice and Federalists rallying to defend Burr against the charges.").

324. *Id.* at 31.

325. *Burr*, 25 F. Cas. at 56; *see* HASKINS & JOHNSON, *supra* note 12, at 266 (writing also that Marshall's "legal exactitude" is greatly evidence and "[t]hroughout the opinion Marshall paid scrupulous to appropriate procedures often reiterating the grounds for his reasoning, and bolstering those grounds with quotations from the [*Bollman*] opinion, lest local prejudices be more inflamed than they were").

326. HOBSON, *supra* note 8, at 5.

327. *Burr*, 25 F. Cas. at 57.

328. *Id.* at 59.

at that time, "whether the same evidence was necessary before the grand jury as before the petit jury; whether two witnesses to an overt act were required to satisfy a grand jury."[329] Rather, it "was a point he would have to consider" later because Marshall was undecided as to "the evidence of facts said to be done in different districts."[330] Marshall's "present impression was, that facts done without the district may be brought in to prove the material fact said to be done within the district, when that fact was charged."[331] Marshall knew the problematic nature of *Bollman*, and a proper ruling on admissibility evidence to prove the facts as charged would likely require careful deliberation.[332] The issue was postponed "for further discussion," so long as Hay pledged "no evidence should be laid before the grand jury without notice being first given to Mr. Burr and his counsel."[333]

On Saturday, May 23, Marshall informed the grand jury of General Wilkinson's absence as a witness and the uncertainty as to when Wilkinson would ever arrive.[334] Forced to proceed without Wilkinson, Marshall excused the grand jury until the following Monday.[335] On Monday, May 25, 1807, Hay motioned that Burr should be committed to government custody on treason, as Burr's

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329. *Id.*

330. *Id.*

331. *Id.*

332. Isaac J. Colunga, Ex Parte Bollman*: Revisiting A Federalist's Commitment to Civil Liberty*, 23 T.M. COOLEY L. REV. 429, 439 (2006) ("Marshall's decision in *Bollman* infuriated Burr's accusers. *Bollman* left prosecutors with little to work with, and they knew their evidence was now weak, if not frivolous. Even worse, Burr's prosecutors were well aware that Marshall's decision in *Bollman* forecasted the eventual decision in the pending Burr trial."); *see* Colin William Masters, *On Proper Role of Federal Habeas Corpus in the War on Terrorism: An Argument from History*, 34 J. LEGIS. 190, 199 (2008) ("Chief Justice Marshall [wrote] that '[i]t is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court[.]' As many scholars have noted, however, the assertion that the Court had ever explained why the outcome in *Bollman* was necessary is simply false."); *see also* Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 628 (1970) ("The other problems presented in *Bollman* were, with a single exception, disposed of [by Marshall] in the same unargued, assertive, and summary fashion. Evidence of the haste with which" Marshall prepared the opinion "is everywhere. . . . Marshall curtly rejoined that there was a distinction between courts originating in the common law and courts created by statute, and that 'as the reasoning has been repeatedly given by this court,' the matter would not be pursued further. Where this reasoning had been given Marshall was not able to say, not because he had no time to collect the citations, but because there were none to collect.").

333. *Burr*, 25 F. Cas. at 59.

334. *Id.*

335. *Id.*

custody was premised on previous misdemeanor charges.[336] On Wednesday, May 27, 1807, Defense counsel Wickham demanded that the prosecution "prove by strict legal evidence" that Burr had even committed an overt act of treason and called for an alternative order of the prosecution's witnesses.[337] Prosecutor Hay retorted that it was not a defendant's right to dictate prosecutorial strategy, nor was it feasible to demand delineating the evidence to the defense's demands.[338] After more debate on the issue, Marshall settled that "it would certainly be better, if the evidence was produced to prove the fact first, and" then "show their coloring afterwards; for no evidence certainly has any bearing on the present case unless an overt act be proved," yet Marshall addressed the defense's demand for witness sequencing, stating, "if the attorney for the United States thinks the chronological order the best, he may pursue his own course; but the court trusts to him, that he will produce nothing which does not bear upon the case."[339]

Hay attempted to produce General Wilkinson's affidavit, to which defense counsel Botts objected, on the grounds that the evidence lacked competence.[340] Botts asserted that the Supreme Court was divided on the issue of competency of an *ex parte* affidavit.[341] Marshall stated, however, that the Court "had already decided, that the affidavit might be admitted under certain circumstances" and determined that "Wilkinson's affidavit did not contain any proof of [Burr's] overt act."[342] Marshall acknowledged that, even though he dissented from the Court's opinion on this matter, he was still judicially bound by it.[343] Nevertheless Marshall asked, "[i]f there [is] no other evidence to prove the overt act, General Wilkinson's affidavit goes for nothing, for so the supreme court have already decided . . . Why, then, introduce this affidavit?"[344] Ultimately, he stated, "unless there was a fact to be proved . . . no testimony ought to be produced" because "[t]he question before the court was not whether there had been a treasonable intent, but an overt act."[345] Ultimately, Marshall acknowledged the Court's power and its desire to exercise such power were very different.[346]

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336. *Id.*
337. *Id.* at 60.
338. *Id.*
339. *Id.*
340. *Id.* at 60-61.
341. *Id.*
342. *Id.*
343. *Id.* at 61.
344. *Id.*
345. *Id.*
346. *Burr*, 25 F. Cas. at 25 (A "remedy . . . is not to be obtained by suppressing motions which either party may have a legal right to make.").

From Friday, May 29 until June 3, Wilkinson did not arrive, forcing the court to adjourn each day.[347] As late as Tuesday June 9, Wilkinson remained unavailable.[348] Hay sought leave to inform the grand jury that it was fatigue preventing Wilkinson from appearing, but he promised Wilkinson could be expected for the following Monday.[349] Burr motioned for supplemental charge to the grand jury, citing several authorities.[350] Marshall had drawn up a supplemental charge, having provided it to the prosecution.[351] Hay declared, on behalf of the prosecution, that he had not reviewed it because it "he had been too much occupied to inspect the charge with attention, and deliver it to" the defense; however, "another reason was, that there was one point in the charge [of] which he did not fully approve."[352] On this day, Dr. Erick Bollmann also appeared before the court.[353] Before Bollmann was sworn in, however, Hay announced, "I must inform the court of a particular, and not an immaterial circumstance. [Dr. Bollmann] . . . has made a full communication to the government of the plans, the designs, and views of Aaron Burr."[354] The court transcript provided that Hay acknowledged Bollmann's fear that "these communications might criminate [him] before the grand jury, [but] the president . . . has communicated to me this pardon (holding it in his hands) which I have already offered to Dr. Bollman[n]."[355] President Jefferson's "pardon will completely exonerate [Bollmann] from all the penalties of the law. I believe [Bollmann's] evidence to be extremely material. In the presence of this court I offer this pardon to him, and if he refuses, I shall deposit it with the clerk for his use."[356] It was at this moment that Jefferson broke his promise that no one would see Bollmann's written account.[357] Before the presence of the court, Hay asked Bollmann if he accepted Jefferson's pardon.[358] Bollmann formally refused.[359] Hay stated, "My own opinion is that Dr. Bollmann, under these circumstances, cannot possibly criminate himself."[360] Defense counsel Luther Martin expressed his belief that

347. *Id.* at 63.
348. *Id.*
349. *Id.* at 64.
350. *Id.* at 63.
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. PAUL, *supra* note 13, at 287.
358. *Burr*, 25 F. Cas. at 63.
359. *Id.*
360. *Id.*

the pardon could not ultimately act as a prophylactic measure to a grand jury indictment unless Bollmann pled "in open court" to that indictment.[361] Marshall suggested that the issue of pardon validity should be best settled prior to Bollmann's appearance before the grand jury.[362] Martin declared "Bollman[n] is not pardoned, and no man is bound to criminate himself," an assertion for which Marshall demanded authorities in support thereof.[363] Marshall declared, "[t]here can be no question but Dr. Bollman[n] can go up to the jury; but the question is, whether he is pardoned or not? If the executive should refuse to pardon him, he is certainly not pardoned."[364] Martin decried that if Bollmann refuses Jefferson's "pardon . . . he stands in the same situation with every other witness, who cannot be forced to criminate himself."[365] Marshall again refused to rule on the validity of the pardon, indicating that the court would deliberate on the issue.[366] Hay pressed Bollmann who again categorically refused.[367]

b. The District Court vs. The Executive

Defense counsel strategically pursued papers in the government's possession.[368] On June 9, Burr filed a motion "for a subpoena duces tecum directed to the president of the United States," seeking specific documents from the Jefferson Administration that they declared essential to Burr's defense.[369] The team argued that a subpoena and court order would not be necessary if Hay would simply tender the documents.[370] Hay, who did not anticipate the defense's tactic, offered to tender accordingly, "if the court thinks them material."[371] Marshall declared that the court actually could not ascertain relevancy without seeing the documents, nevertheless, suggesting that the prosecution and defense resolve this matter amongst themselves.[372] In heated oral arguments lasting over two days, the defense team heavily criticized the Jefferson Administration for prejudging Burr and then depriving him of the very evidence that could exonerate him.[373]

361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.* at 64.
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.* at 63.
369. *Id.*
370. SMITH, *supra* note 222, at 362.
371. *Burr*, 25 F. Cas. at 63; *see also* SMITH, *supra* note 222, at 362.
372. SMITH, *supra* note 222, at 362.
373. *Burr*, 25 F. Cas. at 63-64

Bitter exchanges at the bench between the two sides made it clear that the opposing parties would not agree.[374] The defense contended that if the papers are admitted, it allows Wilkinson to exonerate himself of the conduct while securing Burr's conviction for the same conduct.[375] Accordingly, Marshall stated that the court would issue a subpoena, provided that Hay acknowledge on behalf of the government that the court had such authority to do so.[376] At that point, Hay, knew well of Jefferson's strong feelings against *Marbury*, and Jefferson's desires to "have it denied to be law" because of the controversial place it "occupie[d] . . . in the public attention."[377] Thus, Hay could not concede powers of the Court. Accordingly, Hay refused to concede authority, and Marshall ordered an oral argument held to resolve this issue.[378] Assistant Prosecutor Alexander MacRae, however, conceded the court's authority against the president but advocated even so that executive confidentiality was paramount.[379] Luther Martin, counsel to Burr, fueled the political charges, levying accusations at the Executive Branch, arguing that President Jefferson "has undertaken to prejudge my client by [Jefferson's] declaring that . . . 'there can be no doubt'" about Burr's guilt.[380] Jefferson did not want to make a personal appearance to defend these actions before a jury and the press.[381] Martin's attack on Jefferson timely coincided with a critical stage of the trial.[382] Martin asked why Jefferson, who "has let slip the dogs of war [and] the hell hounds of persecution, to hunt down my friend" had "raised all this absurd clamor," but nevertheless "pretend[ed] to keep back the papers which are wanted for this trial, where life itself is at stake?"[383] Jefferson, paranoid by Martin's words, wrote again to Hay, "Burr was engaged in some criminal enterprise . . . [and] Luther Martin knew all about it . . .

374. SMITH, *supra* note 222, at 362.

375. NEWMYER, *supra* note 165, at 103.

376. SMITH, at 362.

377. Jefferson, *supra* note 3.

378. SMITH, *supra* note 222, at 362.

379. *Id.*at 363.

380. *See* WALTER FLAVIUS MCCALEB, THE AARON BURR CONSPIRACY: A HISTORY LARGELY FROM ORIGINAL AND HITHERTO UNUSED SOURCES 234 (1903) (quoting Luther Martin, who said, "All that we want is the copies of some papers . . . and the original of another . . . . The President has undertaken to prejudge my client by declaring that 'of his guilt there can be no doubt.' . . . [Jefferson] has let slip the dogs of war, the hell hounds of persecution, to hunt down my friend.").

381. NEWMYER, *supra* note 165, at 104.

382. *See* HOBSON, *supra* note 8, at 5 ("[Luther] Martin's outburst came in the midst of the most important argument at this stage of the proceedings, prompted by Burr's motion for a subpoena duces tecum to President Jefferson.").

383. McCaleb, *supra* note 386, at 324.

Shall we move to commit [him], as *particeps criminis* with Burr?"[384] Jefferson elaborated that an appropriate prosecution would "put down this unprincipled [and] impudent federal bull-dog, and add another proof that the most clamorous defenders of Burr are all his accomplices."[385] Jefferson assured Hay that Martin's criminal participation helped to "explain why [Martin] flew so hastily to the aid of his 'honorable friend,' abandoning his clients [and] their property during" active cases in Maryland courts, to the "ruin of his clients."[386] Hay beseeched Jefferson privately in writing to tender the documents.[387] Evidently, Hay sensed the public attention focused upon the Court's power, for which Jefferson held disdain and the risk that it could be leveraged against the executive.[388]

On Saturday June 13, after the lengthy days of argument, on behalf of the court, Marshall ruled reluctantly upon Burr's motion under Case No. 14,692d.[389] He knew the antagonizing effect this would have and chose to pick his battles with the Jefferson administration.[390] Marshall's reluctance stemmed from the fear that this would reopen the power battles with Jefferson that had manifested in *Marbury* and continued through *Bollman*.[391] Marshall ruled that one in Burr's position "should be entitled to the process of the court to procure the attendance of his witnesses."[392] Thus, similar to *Marbury*, Marshall established that the President is not above the law, but this time, at the district court level.[393] He wrote that when "summoned to . . . testify, the law does not discriminate between the president and a private citizen."[394] Marshall declared that there was no foundation for an opinion that the political character or medium of testimony somehow changed

384. Jefferson, *supra* note 3 ; LEWIS HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE 16 (1897)(A *particeps criminis* is one who takes part in a criminal act; or, put otherwise, an accomplice); *see also* HOBSON, *supra* note 8, at 5 ("Jefferson had unwittingly and unwisely made himself vulnerable to such censure by publicly declaring that Burr's guilt was 'beyond question.'").

385. Jefferson, *supra* note 3.

386. *Id.*

387. SMITH, *supra* note 222, at 362.

388. *Id.*

389. *Burr*, 25 F. Cas. at 63; *see also* HOBSON, *supra* note 8, at 42 ("Marshall had hoped in vain that the parties would come to an agreement to produce the requested documents without the necessity of issuing a subpoena.").

390. *See* James W. Ely Jr., *Review,* 2 INDEP. REV. 450-55 (1998) ("Marshall was careful to steer clear of needless confrontations with the incoming Jefferson administration[.]").

391. *See* NEWMYER, *supra* note 165, at 96 ("Jefferson no doubt read [Marshall's] words as a challenge (and a reprise of *Bollman* and *Marbury*), but Marshall avoided a direct confrontation by recognizing Hay's right to make his motion.").

392. *Burr*, 25 F. Cas. at 32.

393. *Id.* at 34.

394. *Id.*

the power of the court.[395] He exclaimed, that "[t]he propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it."[396] Marshall reasoned with careful attention to the Sixth Amendment underlying the court's power, writing that "[t]he genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial."[397]

Marshall addressed the issue of the competing executive and judicial branches, establishing that the posterity of the court in adjudicating the case fairly outweighed the concerns of presidential respect. He wrote, "[m]uch has been said about the disrespect to the chief magistrate . . . and by such a decision of it as the law is believed to require."[398] Marshall stated that what the district court offered was "a respect for the chief magistrate of the Union as is compatible with its official duties."[399] He cautioned deftly, however, "[t]o go beyond" that level of respect "would exhibit a conduct which would deserve some other appellation than the term respect. It is not for the court to anticipate the event of the present prosecution."[400] Marshall, intending to preserve the sanctity of both court and Constitution, wrote that a guilty verdict could not fairly result if Burr was deprived of the purportedly vital documents from Jefferson. Marshall stated, "I will not say, that this circumstance would, in any degree, tarnish the reputation of the government; but I will say, that it would justly tarnish the reputation of the court which had given its sanction to its being withheld."[401] Marshall's granting of Burr's subpoena indicates a willingness to challenge and embarrass Jefferson.[402] For Jefferson to get his way, he would have to concede to Marshall and the Court.

Marshall acknowledged the position in which the Court found itself by consequence of Burr's request and Jefferson's refusal. He wrote, if he was "permitted to utter one sentiment, with respect to

395. *Id.*
396. *Id.*
397. *Id.* at 32, 33.
398. *Id.* at 37.
399. *Id.*
400. *Id.*
401. *Id.*
402. *See* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 195 (2001) ("Homing in on the Wilkinson letter was brilliant strategy . . . [the subpoena] put Marshall on the hot seat [and] [t]he fact he actually issued the subpoena seems to confirm that he was out to embarrass Jefferson. The president and his supporters saw it that way, and some historians have as well.").

myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct . . . could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him."[403] Marshall presented the Court as an apolitical branch of government.

With this district court opinion, Marshall had begun a categorical redirect of Jefferson's political energy. Jefferson's attempt to eradicate Burr from America became a discourse on executive power and the judiciary's oversight thereof.[404] Marshall seized the opportunity to deflect Jefferson's executive ferocity into the ability for the court to once again say what the law is.[405] Temporarily, that district court decision stalled the negative press against John Marshall.[406] Jefferson felt that Marshall's order was nothing more than an unnecessary political power tactic, due to both his willingness to supply the papers and due to the fact that he had in fact provided the papers without a subpoena.[407]

On August 7, Jefferson drafted a letter that presently the Library of Congress and Jeffersonian-editor Paul Leicester Ford are uncertain if Hay ever received.[408] In that letter, Jefferson expressed his feelings to Hay regarding Burr's trial, charging "[t]hat Burr [and] his counsel should wish to . . . divert the public attention from him to this battle of giants . . . [and] convert his Trial into a contest between the judiciary & [Executive] Authorities was to be expected."[409] Jefferson admitted to Hay that he did not predict "the

403. *Burr*, 25 F. Cas. at 37.

404. *See* HOBSON, *supra* note 8, at 22-23 ("Privately irritated with the Chief Justice for playing along with Burr's obvious attempt to embarrass the administration and provoke a contest between the executive branch and judiciary, Jefferson substantially complied . . . on his own terms . . . defending the executive's prerogative to refuse personal attendance and to decide which papers could be made public.").

405. *See generally Marbury*, 5 U.S. at 137 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

406. SMITH, *supra* note 222, at 365.

407 *See* HOBSON, *supra* note 8, at 1 ("Whether or not the papers sought by Burr were material to his defense, the . . . subpoena did provide an opportunity for his lawyers to score points against the administration.").

408. Jefferson, *supra* note 3. The Library of Congress and editor Paul Leicester Ford are uncertain if this letter was actually sent by Jefferson, or if he merely sent, "[t]he most interesting of this series, however, is a mere draft of a letter to Hay, which may never have been sent, but which is of the utmost importance." *Id.* at 13.

409. *Id.* ("That Burr & his counsel should wish to [struck out "divert the public attention from him to this battle of giants was to be"] convert his Trial into a contest between the judiciary & Exve Authorities was to be expected.").

[Chief] Justice should lend himself to it and take the first step to bring it on . . . Nor can it be now believed that his prudence or good sense will permit him to press it."[410] Indeed, for Jefferson, the embers of *Marbury* had again become aglow, and he wanted advance warning from Hay if Marshall compelled his presence.[411] Jefferson wrote, "I must desire you to give me instant notice, [and] by express if you find that can be quicker done than by post."[412]

On Monday, June 15, as expected, Wilkinson finally appeared before the grand jury.[413] Wilkinson came in a full, elaborate military uniform that he purportedly designed himself.[414] Later, defense counsel, John Wickham, reminded the court of Hay's pledge not to produce evidence without prior tendering to Burr.[415] In response to much debate that ensued on this issue, Marshall finally settled the issue, declaring, the court "was not satisfied that a court ought to inspect the papers which form a part of a witness's testimony before he is sent to the grand jury."[416] Marshall wrote instructions for the jury "not to inspect any papers, but such as formed a part of the narrative of the witness, and proved to be the papers of the person against whom an indictment was exhibited."[417]

On Tuesday, June 16, Hay read to the court a letter from Jefferson dated June 12.[418] Jefferson wrote to Hay, stating that it was the "necessary right of the President . . . to decide, independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated," a public "to whom, I assure you of my readiness under that restriction, voluntarily to furnish on all occasions, whatever the purposes of justice may require."[419] Jefferson explained, "the [Wilkinson] letter . . . of Oct 21, requested for the defence of Colonel Burr, with every other paper relating to the charges against him, which were in my possession . . . [were] delivered to him."[420] Nevertheless Jefferson

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There were signs of an attempt to strike that language, but it was nevertheless significantly legible.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Burr*, 25 F. Cas. at 64; *see* HASKINS & JOHNSON, *supra* note 12, at 270 (noting that the government had largely refused to proceed without Wilkinson, its star witness).

414. *See* NEWMYER, *supra* note 165, at 100 ("The general made his grand entrance . . . dressed to the nines in an ornate uniform, reputedly of his own design.").

415. *Burr*, 25 F. Cas. at 59, 64.

416. *Id.* at 64.

417. *Id.*

418. *Id.* at 65.

419. Jefferson, *supra* note 3; *see also Burr*, 25 F. Cas. at 65.

420. Jefferson, *supra* note 3.

wrote, "I have always taken for granted he left the whole with you."[421] Jefferson gainsaid, "[b]ut, as I do not recollect the whole contents of that letter, I must beg leave to devolve on you the exercise of that discretion which it would be my right [and] duty to exercise."[422] Jefferson had asked Hay to "withhold[] the communication of any parts of the letter, which are not directly material for the purposes of justice."[423] Jefferson passed along communication through Hay that he was not even sure which papers Burr actually wanted.[424] Nevertheless, Jefferson cautioned that a request such as Burr's, if honored, "would amount to the laying open the whole executive books."[425]

Following this, Hay again pressed the court for Bollmann's testimony, insisting that Bollmann's pardon was effectual and therefore Bollmann should "communicate all he knew to the grand jury."[426] Marshall attempted to mitigate the ensuing debate, asking if there was any objection to Bollmann merely deciphering the German letter.[427] While defense counsel Martin suggested that the letter could be discussed at a later date, MacRae and the prosecution asserted that the ciphered letter "could not be criminal if" it was not understood.[428] The prosecution wanted "the part which is written in German now to be explained, to show . . . there is nothing criminal in it."[429] Marshall carefully reframed the issue, stating that he "would prefer to proceed with the other point;" that is, "how far a witness may refuse to answer a question which [that witness] thinks would criminate himself."[430]

On Wednesday, June 17, Hay addressed allegations from the defense that the ciphered letter had been stolen from the post office, "evidently done to affect the character of Gen. Wilkinson."[431] Marshall inquired how this incident affected testimony and how the defense intended to introduce the testimony.[432] Burr asserted that a post-office's plundering resulted in the prosecution possessing fraudfully obtained of letters, and a felonious scheme that involved: General Wilkinson; Congressman John G. Jackson; and Mississippi

421. *Id.*
422. *Id.*
423. *Id.*
424. *Burr*, 25 F. Cas. at 65.
425. Jefferson, *supra* note 3.
426. *Burr*, 25 F. Cas. at 66.
427. *Id.*
428. *Id.*
429. *Id.*
430. *Id.*
431. *Id.*; *see generally* HOBSON, *supra* note 8, at 28 ("Burr's lawyers put Wilkinson on the defensive, forcing him to make damaging admissions that revealed his attempt to conceal his relationship with Burr. By then the exasperated U.S. attorney had lost all confidence in Wilkinson.").
432. *Burr*, 25 F. Cas. at 66.

Territory Judge Harry Toulmin, a Jefferson-appointee.[433] Marshall terminated debate on the issue, stating that it may be true, but under the procedural limits of judicial notice, "this court cannot take cognizance of any act which has not been committed within this district. That mark is not necessarily a post mark. The court can only know the fact, in a case to which it applies, except to commit and send for trial."[434] Hay claimed that this stunt was nothing more than "calculated to interrupt the course of the prosecution, and . . . [target] General Wilkinson alone."[435] Defense counsel Wickham retorted that "Wilkinson had brought witnesses with him from New Orleans by military force" and "[took] their depositions entirely ex parte at the point of the bayonet, for the purpose of keeping their testimony straight."[436] Thus, these witnesses are "bound hand and foot, thus tongue-tied, because their depositions had been [previously] taken" and effectively fixed in medium.[437] Burr's counsel, however, declared that this proceeding against the acquisition of such testimony was essential for the court to rule upon "to prevent the repetition of such practices during the progress of the trial."[438] Marshall said that the prosecution has "no objection to hearing the motion."[439] However, he furthered, it was a different question entirely "whether there were any ground for it or not, and that the court would not say that a motion relating to the justice of the case ought not to be heard."[440]

Jefferson claimed through the mouthpiece of Hay that his administration "substantially fulfilled the object of a subpœna from the District Court of Richmond."[441] In Jefferson's less formal letter to Hay, which the Library of Congress remains unsure of Hay's receipt, Jefferson expressed on August 7 that he understood the forces Marshall balanced.[442] Jefferson wrote that his executive compliance was "in a spirit of conciliation [and] with the desire to avoid conflicts of authority between the high branches of the [government] which would discredit it equally at home [and] abroad."[443] Jefferson was surprised at Marshall's accommodation of Burr's arguments, but he sought Hay's opinion as to whether

433. *Id.*; *see also* JAMES DANIEL LYNCH, THE BENCH AND BAR OF MISSISSIPPI 21 (1881) (noting the appointment was in 1805).
434. *Burr*, 25 F. Cas. at 66.
435. *Id.* at 67.
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.* at 67, 68.
440. *Id.*
441. Jefferson, *supra* note 3.
442. *Id.*
443. *Id.*

"associate judge [Griffin] assume[d] to divide his court and procure a truce at least in so critical a conjuncture."[444] Still, Jefferson feared more pressure from the Judiciary, writing to Hay, "I learn by the newspapers that I am to have another subpœna duces tecum for Eaton's declaration."[445] Jefferson wrote that ideally "[t]he powers given to the [Executive] by the [Constitution] are sufficient to protect the other branches from judiciary usurpation of preeminence, [and] every individual also from judiciary vengeance, and the marshal may be assured of [its] effective exercise to cover him."[446] Nevertheless, wrote Jefferson, "I hope [that Marshall] . . . will suffer this question to lie over for the present, and at the ensuing session of the legislature he may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases, without breaking up the government."[447]

On Thursday, June 18, 1807, the issue of the ciphered letter resurfaced. Mr. Willie, Burr's former secretary, initially refused to answer Hay's questions.[448] Marshall declared that it was not enough simply to refuse, Willie must answer upon oath if he thought answering the question might incriminate him; if he does so he cannot then be compelled.[449] Willie's counsel noted that as alleged, the ciphered letter "was first written by Colonel Burr, and afterwards copied." Nevertheless, the current ciphered letter was merely a copy.[450] Prosecutor Hay stated broadly that, if "Burr wrote the ciphered part, he will be considered the author of the whole."[451] Marshall declared that the court "had in some measure anticipated this question, and had reflected upon it; his opinion was, that [for] a paper to go before the grand or petit jury must be relevant to the case, even if its materiality were not proved."[452] Marshall evaluated the issue, "[w]hy send this paper before the grand jury, if it cannot be deciphered? If it can be deciphered before the grand jury, why

444. *Id.*
445. *Id.*
446. *Id.*
447. *Id.*
448. United States v. Burr, 25 F. Cas. 38, 38 (C.C.D. Va. 1807).
449. *Id.* at 40-41 ("The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer.").
450. *Burr*, 25 F. Cas. at 68.
451. *Id.*
452. *Id.*

not before the court? Let it, then, be deciphered, and its relevancy may at once be established."[453]

On Saturday June 20, Hay read a letter from Jefferson, dated June 17, in which Jefferson wrote to him regarding two letters from the Secretary of War that were tendered to Burr. "The receipt of these papers has, I presume . . . substantially fulfilled the object of a subpoena from the district court . . . requiring that those officers and myself should attend . . . with the letter of General Wilkinson" and all related material.[454] Notably, through Hay's mouthpiece, Jefferson attempted to flex constitutional superiority over the court, a superiority with which Marshall would be forced to contend if it fully manifested. Jefferson, attempting an appeal to Marshall's notions of federal security, stated that "comply[ing] with such calls would leave the nation without an executive branch."[455] Similarly, Jefferson felt that compulsion gave the Judiciary inappropriate supremacy over the Executive.[456] Moreover, according to Jefferson, the Executive is understood to be so constantly necessary that it is the sole branch which the constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any co-ordinate authority."[457] Thus, Jefferson stated, the court ought to be "sensible that paramount duties to the nation at large," duties that are chiefly the role of the Executive.[458] Finally, asserting executive privilege, Jefferson wrote, "[w]ith respect to papers, there is certainly a public and private side to our offices . . . 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."[459] Hay then read

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453. *Id.*

454. *Id.* at 69; *see also* Jefferson, *supra* note 3, at 7 ("No answer to Genl Wilkinson's letter, other than a mere acknowledgment of it's receipt, [sic] in a letter written for a different purpose, was ever written by myself or any other.").

455. *See* HOBSON, *supra* note 8, at 18 ("The prosecution argued for a broad definition of 'levying war.' Hay urged common sense and considerations of national security in contending that an overt act of treason did not require the actual commission of hostilities or even that a body of men should appear in military 'array' (referring to attire and orderly arrangement)[.]"); *see also Burr* 25 F. Cas. at 69; Jefferson, *supra* note 3.

456. *See* HOBSON, *supra* note 8, at 43 ("Jefferson was perfectly willing to cooperate in seeing that the defendant obtain the information and testimony necessary for his defense. He would even testify, though by deposition rather than personal appearance . . . [but] his participation would be voluntary. To be compelled to answer legal process, he said, would admit the judiciary's right to interfere with executive matters–in effect making a coordinate department supreme over another.").

457. *Burr*, 25 F. Cas. at 69; *see also* Jefferson, *supra* note 3.

458. *Id.* at 69; *see also* Jefferson, *supra* note 3.

459. *Id.*; *see also* Jefferson, *supra* note 3; This argument would manifest under future Presidents Richard M. Nixon and Donald J. Trump, *see United*

into the record a letter from Secretary of the Navy, Robert Smith, dated December 20, 1806, in which Smith outlined details of Burr's military expedition.[460]

c. The Grand Jury Indicted Burr

On Wednesday, June 24, the forty-eight-member grand jury announced its intent to indict Burr for treason, an indictment to which Burr pled not guilty.[461] It was likely at this moment Marshall knew his *Bollman* opinion would prove problematic.[462] Furthermore, he likely knew that the grand jury's indictment may have been under the mistaken influence of Marshall's problematic definition of levying war in *Bollman*.[463] With that, the jury indicted Burr for his constructive presence on Blennerhassett's Island.[464] In light of this, Hay sought that Burr be held without bail.[465] The prosecution asserted that the issue of bail was not necessarily a discretionary prerogative of the court.[466] Marshall examined the bounds of his powers, and asked of Luther Martin if the defense intended to dispute the assertion that treason was non-bailable:

> Mr. Martin, have you any precedents where a court has bailed for treason, after the finding of a grand jury, on either of these grounds; that the testimony laid before the grand jury had been impeached for perjury, or that other testimony had been laid before the court, which had not been in possession of the grand jury?[467]

Martin admitted that he had "not anticipated" such a question "and had not, therefore, prepared . . . authorities; but . . . had no doubt that such existed."[468] Marshall, treating each issue carefully, stressed that whether Burr's offenses were bailable demanded "the necessity of producing adjudged cases to prove that the court could bail a party against whom [such] an indictment had been found."[469] Burr obliged the court of his "willing[ness] to be committed, but hoped that the court had not forestalled its opinion" on the issue of

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States v. Nixon, 418 U.S. 683, 702 (1974) and *Trump v. Vance*, 140 S. Ct. 2412, 2423, 207 L. Ed. 2d 907 (2020).

460. *Burr*, 25 F. Cas. at 69-70.

461. *Id.* at 70.

462. SMITH, *supra* note 222, at 366.

463. *See* HOBSON, *supra* note 8, at 4 ("The *Bollman* opinion, however, might have encouraged the President and his legal advisers that they could make a case against Burr."); *see also* SMITH, *supra* note 222, at 639 n.107.

464. SMITH, *supra* note 222, at 366.

465. *Burr*, 25 F. Cas. at 70.

466. *Id.*

467. *Id.* (emphasis added).

468. *Id.*

469. *Id.* at 71.

bail.[470] Marshall clarified, "I have only stated my present impression. This subject is open for argument hereafter."[471] At this point, Marshall ordered that Burr be taken into custody.[472]

On Thursday, June 25, the grand jury convened and requested that Burr tender to it a letter from Wilkinson dated May 13.[473] Nevertheless, the grand jury acknowledged that it had "no right to demand any evidence from [Burr] under prosecution which may tend to criminate."[474] Burr asked for the court's opinion on this request, to which Marshall responded, "the grand jury were perfectly right in the opinion, that no man can be forced to furnish evidence against himself."[475] Marshall qualified, however, his presumption "that the grand jury wished also to know whether the person under prosecution could be examined on other questions not criminating himself."[476] Ultimately, Burr stated that "it would be impossible . . . to expose any letter which had been communicated . . . confidentially;" as such, "this letter will not be produced."[477] Burr elaborated why the letter was not in his possession, "I did voluntarily, and in the presence of a witness, put the letter out of my hands, with the express view that it should not be used improperly against any one."[478] He stated to Marshall, "I wished, sir, to disable any person, even myself, from laying it before the grand jury. General Wilkinson knows this fact."[479] Burr immediately qualified his statement, "[l]et it be understood, that I did not put this letter out of my possession because I expected the grand jury would take up this subject but from a supposition that they might do so."[480]

On Friday, June 26, Burr's counsel moved to have him transferred from jail confinement to more hospitable conditions and "depicted, in very strong terms, the miserable state of the prison where [Burr] was then confined."[481] Counsel expressed concerned that the dangers might be detrimental to Burr's health and the conditions functionally deprived him of assistance from counsel.[482] After what the court transcript described as "a long and desultory

470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.*
478. *Id.* at 72.
479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.*

argument by Mr. Burr's counsel," the court ruled that Burr "should be removed to his former lodgings near the capitol, provided they could be made sufficiently strong for his safe keeping."[483] The court did so based on its belief that Congressional Act authorized his removal to alternative conditions.[484] The court ordered the requirements of an inspection report that had been generated by Benjamin H. Latrobe, Surveyor of the Public Buildings to Thomas Jefferson.[485] Latrobe's survey necessitated that the house in which Luther Martin resided (where Burr was to stay) must be fortified for Burr's safe confinement in its dining room, "securing the shutters to the windows of the said room by bars, and the door by a strong bar or padlock."[486] Based on this report, the court further required that Burr "employ a guard of seven men to be placed on the floor of the adjoining unfinished house . . . there to be by him safely kept."[487]

The court's clerk announced the indictment for treason, specifying Blennerhassett's Island as the location of the overt act occurring on December 10, 1806.[488] Burr pled not guilty.[489] The parties addressed the next issue, the number of jurors. Hay announced his doubts whether "the judicial act, was still in force, which required twelve jurors, at least, to be summoned from the county where the offence was committed," otherwise, "it would be necessary to summon twelve petit jurors from the county of Wood, which would render it impossible to have the trial at an early day."[490] Marshall stated there was "no doubt the law was still in force," and ordered forty-eight jurors, no less than twelve of whom were to be summoned from Wood County.[491]

d. Bollman versus Burr: A problem in precedent

On Saturday, June 27, the court ordered the trial postponed until August 3.[492] Marshall's loquaciousness in *Bollman* proved problematic, and he knew it.[493] On June 29, Marshall wrote to his fellow Supreme Court justices seeking their counsel as to what to

483. *Id.*
484. *Id.*
485. BENJAMIN H. LATROBE, REPORT, REPORT ON BUILDING OF CAPITOL (1803), www.loc.gov/item/mtjbib026189/ [perma.cc/NFK6-WTAJ].
486. *Burr*, 25 F. Cas. at 72-73.
487. *Id.*
488. *Id.* at 73.
489. *Id.*
490. *Id.*
491. *Id.*
492. *Id.*
493. UROFSKY & FINKELMAN, *supra* note 203, at 224.

do about the definitions he set forth in *Ex Parte Bollman*.[494] He wrote to each separately, of which only his letter to Justice William Cushing survived.[495] Marshall wrote, "[m]any points of difficulty will arise before the petit jury which cannot be foreseen and on which I must decide according to the best lights I possess."[496] Moreover, Marshall acknowledged to Cushing the factors that he and the Court would be forced to balance, writing, "[i]t has been my fate to be engaged in the trial of a person whose case presents many real intrinsic difficulties which are infinitely multiplied by extrinsic circumstances."[497] Beyond those intrinsic difficulties, Marshall's judicial statesmanship would be tested by what he characterized as "[t]he 'extrinsic circumstances,' if anything, [which] were more daunting than the legal ones, and not the least of these was the fact that the trial had turned into a public spectacle."[498] Marshall acknowledged he knew judges could not state their opinions on cases that are not before the court and asserted that he would not solicit their advice if Burr's case should proceed to the Supreme Court.[499] Coyly, however, Marshall expressed concern. "[T]here are some [difficulties] which will certainly occur, respecting which considerable doubts may be entertained, and on which I most anxiously desire the aid of all the Judges."[500] Marshall, concerned about his inadvertent creation of constructive treason and the grand jury's reliance thereupon, wrote "[h]ow far is this doctrine to be

494. *Id.*; *see also* SMITH, *supra* note 222, at 366, 640 n.108 (citing Marshall to Cushing on June 27, 1807).

495. *See* SMITH, *supra* note 222, at 366, 640 n.108 (citing Marshall to Cushing on June 27, 1807).

496. *Id.*

497. *See* NEWMYER, *supra* note 411, at 190 (noting that Marshall found the intrinsic difficulties to be centered on the Constitution's meaning behind treason).

498. *See id.* at 190-91 (noting the pressure from the uncertainty of constructive treason that Marshall gave way to in *Bollman* was amplified by *Burr*'s politicization and the press that came with a case involving former Vice President Burr, a celebrity in his own right; the Jefferson Administration; and, the great lawyers of that age).

499. JOHN MARSHALL, *To William Cushing*, *in* THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS, APRIL 1807-DECEMBER 1813, at 60, 62 (Herbert A. Johnson et al. eds., 1974) "Could this case be readily carried into the supreme court I would not ask an opinion in its present stage. But these questions must be decided by the Judges separately on their respective circuits, & I am sure there would be a strong & general repugnance to giving contradictory decisions on the same points.").

500. *See* THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS, APRIL 1807-DECEMBER 1813, *supra* note 220, at 62) (hinting at his decision and writing "I am aware of the unwillingness with which a Judge will commit himself by an opinion on a case not before him & on which he has heard no argument").

carried in the United States? If a body of men assemble for a treasonable purpose, does this [assemblage] implicate all of those who are concerned in the conspiracy whether acquainted with the assemblage or not?"[501] Marshall had no need to address that issue in *Bollman*.[502] Rather, he wished to chide the administration and establish that Bollmann and Swartwout likely conspired to commit treason but without war levied did not commit treason.[503]

From June 29 to June 30, the prosecution reopened the issue of Burr's custody, to which Marshall replied that he "had given the order for [Burr's] removal from the gaol to [Burr's] own lodgings, . . . under an expectation that the trial would be prosecuted immediately, and that the intercourse between the prisoner and his counsel would be necessarily incessant."[504] However, due to the trial's August postponement, Marshall directed that Burr be removed "to the penitentiary" with Burr's counsel "to have free and uninterrupted access to him" leading up to August.[505]

e. Burr's Trial: Public and Political Pressure

The court resumed on Monday, August 3, Burr's trial was a spectacle and had been widely publicized, forcing it to be held in the chamber of the Virginia House of Delegates in order to accommodate the crowds.[506] However, even that location ultimately proved insufficient, as the trial transcript reported that "[a]n immense concourse of citizens attended to witness the proceedings of this important trial."[507] News outlets covered the celebrity of the trial and its players. On April 14, 1807, the *Virginia Argus* of Richmond had published an issue in which it chastised Marshall for attending Wickham's party honoring Burr and "not perceiv[ing] the extreme indelicacy and impropriety of such respect being paid him by the Judge, who is to sit hereafter on his trial."[508] The *Richmond Enquirer* publicized Marshall's "grossly indecent" attendance as "a treason rejoicing dinner."[509] Still, the *Virginia Gazette*'s editor,

501. *Id.* at 60.

502. UROFSKY & FINKELMAN, *supra* note 203, at 224.

503. *Id.*

504. *Burr*, 25 F. Cas. at 74.

505. *Id.*

506. SMITH, *supra* note 222, at 367; *see also Burr*, 25 F. Cas. at 74 (discussing how the court record noted that "[a]n immense concourse of citizens attended to witness the proceedings of this important trial.").

507. *Id.*

508. OHIO STATE BAR ASSOCIATION, PROCEEDINGS OF THE ANNUAL MEETING OF THE ASSOCIATION HELD AT PUT-IN-BAY ON THE 11TH AND 12TH OF JULY, 1888 at 273 (1888).

509. BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 227 (2009).

Augustine Davis, defended Marshall's presence at the Burr event, stating that the disparagement was unwarranted, Marshall's conduct was gentlemanly and one could not expect him to have "kicked Col. Burr out of doors, nor ran away himself; but sat and ate his dinner as deliberately, and to all appearance with as little concern as though perfectly unconscious that the presence of Col. Burr."[510] Thus, in a time when few Supreme Court cases became circulated among the press, those across the nation had their eyes on Burr who faced penalty for the highest crime of all, and by consequence had John Marshall and the court in their line of vision.[511]

Shortly therein, Hay stated that the government could not proceed until he ensured that all of the prosecution's summoned witnesses "more than one hundred in number . . . were present."[512] Hay requested that each name be called aloud; and indeed, each witness was called.[513] Hay sought leave for more time to gather witnesses, as there were many witnesses of whom the prosecution lacked contact information.[514] Nevertheless, the prosecution's star witnesses had been in Richmond, Virginia since mid-June in anticipation of Burr's August trial.[515] Among those witnesses were General William Eaton and Commodore Thomas Truxtun, commander of the U.S.S. Constellation, neither of whom had direct knowledge of a treasonable design.[516] Accordingly, Marshall asked Hay as to when would be a proper date by which the prosecution would have its witnesses.[517] Hay replied, that he "could not possibly state by what day he should be able to prepare his lists."[518] Burr offered to waive his privilege to a prefurnishment of the witness list

510. HOBSON, *supra* note 8, at 35.

511. *See* SMITH, *supra* note 222, at 367 ("if the government pursued the issue [of *Bollman*], the question of constructive treason would come forward in the various circuits," which Marshall felt would be "disreputable to the Judges," and reflect poorly upon the greater American judicial system); HOBSON, *supra*, note 8, at 20 ("In ordinary circumstances, newspaper coverage of the early federal courts, even the Supreme Court, was infrequent . . . [but] [n]ewspaper publishers immediately recognized an opportunity to boost circulation. They eagerly tried to gratify the public's interest by filling their columns with every known fact or rumor relating to Burr's enterprise and with detailed accounts of the ensuing legal proceedings."); *see also* HASKINS & JOHNSON, *supra* note 12, at 253 (noting that several news sources had issued publications about Burr's western efforts).

512. *Burr*, 25 F. Cas. at 74.

513. *Id.*

514. *Id.*

515. SMITH, *supra* note 222, at 365.

516. *Id.* at 369.

517. *Burr*, 25 F. Cas. at 74.

518. *Id.*

in order to limit the existing delay.[519] The prosecution then moved to have all the jurors names read, out of forty-eight, only two of whom were absent.[520]

Burr tactically renewed his previous motion at this time and "reminded the court of the motion which he had made, on a former occasion, for a subpoena duces tecum, addressed to the president of the United States," which had only "been partly complied with."[521] Burr wanted Marshall to rule "whether it were not a matter of right for [Burr] to obtain a subpoena duces tecum. If it were not, he [would] then lay a specific motion before the court."[522] Marshall stated that it was not a renewal, so much as it was Burr's first formal request, insofar as Marshall "did not believe it to be the practice in Virginia to obtain such a subpoena upon a mere application to the clerk."[523] Rather, Marshall instructed that Burr's subpoena upon Jefferson "must be brought before the court itself."[524] In response to Hay's assurance that the prosecution would tender what it possessed, Burr replied, "I wish not . . . to derange the affairs of the government, or to demand the presence of the executive officers at this place. All that I want are certain papers."[525] Hay explained that "he could not consent to it . . . rather . . . a regular application should be made for [Jefferson's papers] to the court."[526]

On Wednesday, August 5, the court called for the prosecution's witnesses, many of whom were still absent.[527] Hay stated that the government could not proceed due to the lack of witnesses and he "presumed all of the witnesses would be present in a few days."[528] Hay then proposed to Marshall "an arrangement . . . of conducting the trial, in respect to the order in which counsel should speak."[529] Marshall replied with a logical procedure, "the best mode appeared to . . . be this: that the case should be opened fully by one of the gentlemen on the part of the United States; then opened fully by one of the counsel on the other side."[530] Next, "the evidence should be" presented, "and the whole commented upon by another of the

519. *Id.*
520. *Id.*
521. *See* HOBSON, *supra* note 8, at 20 ("Burr and his team of lawyers adhered to a strategy of attacking the [Administration's] motives and good faith of the government prosecuting him and particularly those of the government's chief witness, General James Wilkinson."); *see also Burr*, 25 F. Cas. at 74-75.
522. *Burr*, 25 F. Cas. at 74-75.
523. *Id.* at 75.
524. *Id.*
525. *Id.*
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.*
530. *Id.*

gentlemen employed by the United States, who should be answered by the rest of the counsel for Colonel Burr; and one only of the counsel for the United States should conclude the argument."[531]

Court resumed on Friday, August 7, when the prosecution's witnesses were recognized in attendance but quickly discharged because "[t]he counsel for the United States . . . [was] not . . . as well prepared to go into the trial as they expected to be . . . with many of their witnesses being still absent."[532] On Monday, August 10 until the next day, the court examined the venire.[533] Burr sought to uncover preconceptions and prejudgment against him.[534] Some members had made previous statements that Burr should be hanged based on rumors.[535] Others believed Burr was simply guilty based on what they had heard to date.[536] Accordingly, several jurors were excused for cause.[537] Marshall declared that "a trial of a man for life" requires a juryman bear "perfect freedom from previous impressions."[538] According to Marshall, such a freedom, is "clearly the duty of the court to obtain, if possible, [jurymen] free from such bias."[539] If such freedom not be guaranteed "from the very circumstances of the case -- if rumors . . . reached and prepossessed [a juror's] judgments . . . the court [must still] obtain as large a portion of impartiality as possible."[540] The predisposition of the jury was evident.[541] As Burr sought to exclude other jurors, Hay bemoaned, "I most seriously apprehend that we shall have no jury at all," for even as a prosecutor, "I myself could do justice to the accused," as could "any man can who is blessed with a sound judgment and integrity. We might as well enter at once a *nolle prosequi*, if any more witnesses are "to be rejected."[542]

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531. *Id.*
532. *Id.*
533. *Id.* at 76.
534. *Id.*
535. *Id.* a 77-78.
536. *Id.* at 78.
537. *Id.* at 76.
538. *Id.* at 77.
539. *Id.*
540. *Id.*
541. *See* NEWMYER, *supra* note 165, at 106 (Most "jurors thought [Burr] was guilty as charged.").
542. *Burr*, 25 F. Cas. at 78; *see generally* § 46:1. 11A Cyc. of Federal Proc. § 46:1 (3d ed.) (The latin term *nolle prosequi*, often referred in a shortened version as "nolle," pertains to a concept of "legal notice that a [case] has been abandoned or a docket entry showing that the plaintiff or the prosecutor has abandoned the action." *Id.* When utilizing the doctrine of *nolle prosequi*, criminal "prosecutors have the power to decide whether to proceed with the prosecution of a charged defendant, and absent a controlling statute or rule to the contrary, this power resides solely in the prosecutor's hands until" a jury is paneled and sworn. *Id.*).

Tuesday, August 11, prosecutor MacRae suggested that it would save the court time if the defense consolidated its "objections to all the jurors, and then [held] one general argument as to all, instead of having an argument on each particular case as it might occur."[543] In the interest of judicial economy, MacRae saw no point in "holding twelve arguments instead of one, where the cases were precisely similar" and "supposed that one argument would suffice for all the cases."[544] Marshall agreed.[545] Martin complained, "I have been repeatedly interrupted by the [prosecution] . . . They talk, sir of economy of time . . . I know what kind of economy they wish. They wish us to be silent. They would, if they could, deprive Colonel Burr's counsel of an opportunity of defending him, that they may hang him up as soon as possible, to gratify themselves and the government."[546]

Hay responded, "[w]e wish . . . to proceed without hearing ourselves grossly insulted" and "without . . . accusations against us that are malicious and groundless. We said nothing that could give offence to the feelings of any gentleman. The charge is unjust."[547] He elaborated, "I wish him to have a fair trial, and justice to be done . . . but I feel myself hurt, and grossly insulted, when the [defense] charges me with feelings that are disgraceful to humanity. I trust, therefore, that the arguments will no longer be conducted with such indecorum."[548] Marshall took control of the dissolving situation and expressed "[hope] that no such allusions would have been made," affirming "that the government ought to be treated with respect, and that there was a delicacy to be observed on that subject from which he hoped there would be no departure hereafter."[549]

Saturday, August 15, Marshall inquired as to whom of the jury had preconceived notions for or against Burr, as those prejudging should be rejected.[550] Burr challenged Marshall for removing jurors who presumed innocence insofar as "the law presumes every man to be innocent until he have been proved to be guilty . . . It is no disqualification, then, for a man to come forward and declare that he believes me to be innocent."[551] Marshall retorted to Burr, "[t]he law certainly presumes every man to be innocent till the contrary be proved; *but if a juryman give an opinion in favor of the prisoner he must be rejected.*"[552] After finalizing the jury, Marshall ordered

543. *Burr*, 25 F. Cas. at 84.
544. *Id.*
545. *Id.*
546. *Id.*
547. *Id.*
548. *Id.*
549. *Id.*
550. *Id.* at 86.
551. *Id.*
552. *Id.* (emphasis added)

that the jurymen have "no communication on this subject with any person."[553] Before the close of day, Burr returned to the issue of Jefferson's subpoena. Burr apologized if he seemed "importunate," but he sought the letter dated October 21, requesting notice whether the prosecution had located it, "or whether [Hay] could point to any other means of obtaining it."[554] Burr specifically conceived of this tactic to seek the motion over the Executive.[555] Hay explained that he could not find the letter, but he had "a copy of the original letter."[556] It should be noted that Burr did not seek the alleged original, nor did he seek to establish the authorship, as both of these would have been inculpatory.[557] Burr inquired as to who generated the copy.[558] Hay responded that Wilkinson had done so.[559] In response, Burr argued that Wilkinson's copy of the letter to Jefferson was insufficient and inquired if the prosecution cannot "find this letter by Monday, will he consent that I obtain a subpoena duces tecum?"[560] Hay did not object and Marshall accordingly advised Burr that such "an order may be made to issue a subpoena duces tecum addressed to the attorney general of the United States, in case the letter be not found" by Monday.[561]

Monday, August 17 came, and the trial finally began. Hay opened the government's case before the jury.[562] Hay cited Marshall's own words and invoked "the Cases of Bollman and Swartwout," quoting Marshall:

> It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, are to be considered as traitors; but there must be an actual assembling of men to constitute a levying of war.[563]

Hay elaborated that "this was the principle settled by the supreme court" in *Bollman*, under which "[a]ctual force is not

553. *Id.* at 87.
554. *Id.*
555. HOBSON, *supra* note 8, at 6, 24 (noting that it may have been strategically more purposed to "score points against the [Jefferson] administration" than actually to seek material evidence).
556. *Burr*, 25 F. Cas. at 87.
557. NEWMYER, *supra* note 165, at 99.
558. *Burr*, 25 F. Cas. at 87.
559. *Id.*
560. *Id.*
561. *Id.*
562. *Id.* at 89.
563. *Id.* (internal citations omitted).

necessary" for treason in which "[a]n assemblage of men [may convene] for the purpose of effecting by force a treasonable design . . . the persons engaged in it are traitors."[564] Hay explained that the U.S. Supreme Court, "in giving a definition of treason, had not said a single word about the necessity of arms," and if he had "read the decision right," instead "said that arms were not necessary."[565] He stated that Judge Samuel Chase, used some expressions in the 1799 treason trial of John "Fries from which it might be inferred force was necessary to make the treason."[566] Hay rallied that "the subject was not distinctly before the court, and therefore [Chase's] opinion was extra-judicial."[567] This may have planted the idea in Marshall's mind that problematic language in *Bollman* could be surmounted using the prosecution's own logic to characterize the problems as extra-judicial *obitur dictum*. Still, Marshall could not explicitly overrule the Supreme Court's *Bollman* opinion, due to the fact that in *Burr*, he found himself sitting on the inferior the Circuit Court of Richmond.[568]

Following a consuming argument on the order of witness examination, the court returned to the issue of copied notes arose again.[569] General William Eaton appeared and requested an opportunity to review his notes.[570] Marshall asked whether Eaton wrote these notes, to which Eaton replied "[t]hey were taken and copied by me from others, which are at my lodgings." The defense objected, as the prosecution attempted to lay a foundation to the notes.[571] Burr argued that Eaton's notes "are nothing but memoranda, taken from notes which I made of the conversations between you and myself at the times when they passed."[572] Accordingly, Marshall ruled that the notes were not admissible.[573]

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564. *Id.* (internal citations omitted).

565. *Id.*

566. *Id.* at 90. *See generally John Fries Trials: 1799*, L. LIBR.- AM. L. & LEGAL INFO., www.law.jrank.org/pages/2397/John-Fries-Trials-1799.html [perma.cc/ZT4L-F46Z] (last visited Apr. 08, 2020) (stating that Chase insisted that English common law was baseless as to treason's meaning in this American case); *id.* (writing that some functional quantum of force is necessary); *id.* ("Any insurrection . . . for the purpose *of resisting or preventing by force* . . . the execution of any statute of the United States . . . is levying war against the United States, within the … true meaning of the Constitution." (emphasis added)).

567. *Burr*, 25 F. Cas. at 90.

568. HASKINS & JOHNSON, *supra* note 12, at 246.

569. *Burr*, 25 F. Cas. at 90. ("The argument on the question consumed the balance of the day. The chief justice rendered an opinion on the following day (Tuesday August 18, 1807), which will be found reported as Case No. 14,692h." *Id.*)

570. *Id.*

571. *Id.*

572. *Id.*

573. *Id.*

Questioning continued, and the defense made numerous objections, Marshall announced, "though more time was wasted by stopping the witness than by letting him tell his story in his own way . . . he must be stopped when he [gives] improper testimony."[574] Marshall instructed Eaton, "[y]ou are at liberty to vindicate yourself, but [hearsay] declarations of other gentlemen are not to be mentioned, because that certainly would be improper."[575]

The prosecution called to the stand Peter Taylor, Blennerhassett's gardener; Colonel George Morgan; and, Jacob Allbright, a worker on the island.[576] Taylor testified that the boats at Blennerhassett's Island "contemplated to sail on the 6th of December, but . . . were not ready [and] did not come till [December] 10th. Mr. Knox and several other men were with him, and they sailed on the Wednesday night following."[577] Next, the prosecution called Colonel George Morgan, and he began to testify when Burr objected to the testimony because it "consist[ed] of conversations and previous declarations."[578] Burr claimed that he "did not mean to interrupt the inquiry, but to prevent the time of the court from being wasted."[579] Marshall quelled ensuing debate, stating that going forth, "the same objections would hereafter apply as well to the consideration as to the introduction of testimony; that these objections might be hereafter urged," but "it was impossible for the court to know the nature of the evidence before it was introduced."[580] Therefore, he directed Burr to refrain from interrupting proceedings.[581] Burr then interrupted the direct examination of Jacob Allbright, "I beg the court to call on the prosecution for the deposition of this witness, taken before John G. Jackson."[582] Hay countered that "Mr. Jackson might not have taken down the testimony of the witness in his language, but couched it in his own; hence there might be an apparent variation between the present evidence and the affidavit."[583] Hay asserted Jefferson's executive privilege, stating that the government "would not let gentlemen have access to [the President's] portfolio when they pleased;" rather, access "must be satisfied by reasons assigned or

574. *Id.* at 93.
575. *Id.*
576. McCaleb, *supra* note 386, at 344; *see also Burr*, 25 F. Cas. at 61 (noting that Albright "was hired on the island to help to build a kiln for drying corn"); *id.* at 104.
577. *Id.* at 100.
578. *Id.* at 101.
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id.* at 106.
583. *Id.*

required by the order of the court, before he produced it."[584] Marshall, however, "was not [necessarily] satisfied that the court had a right to call for the affidavit."[585]

After more examination, consisting of questions levied to witnesses by individual jurors, on Thursday, August 20, Burr and his counsel demanded that "counsel for the prosecution should produce all the evidence" that pertains "to the overt act, before they . . . offer any collateral testimony."[586] Burr reminded the court, "as soon all [of the prosecution's] testimony on that point [is] introduced," he had "certain propositions to submit to the court."[587] This significant tactical trial decision by the defense attempted to shift the case from the jury to the judge.[588] Nevertheless, the Court afforded the prosecution elasticity, as the prosecution claimed it had "more evidence to introduce on this point."[589] With that, Simeon Poole was sworn and stated, "I never was on the island at that time, but was opposite to it [and] I saw boats and men there . . . on the 10th of December."[590]

As the prosecution examined witness Edmund P. Dana, juror Henry E. Coleman asked, "[i]s it proper to ask any questions about the conversations which took place with those gentlemen?"[591] Marshall declared, the propriety of it "is left to the consent of the accused."[592] Burr, appearing magnanimous, offered "[i]f any of the jury think proper, I have no objection."[593] Though Burr quickly shifted into (what the transcript described as) "an interesting and animated discussion."[594] Burr stated "[b]efore the gentleman proceeds with his evidence, I will suggest that it has appeared to me that there would be great advantage and propriety in establishing a certain principle founded upon the facts which have been presented to the court."[595] Burr said facts had been taken for granted, which "failed to prove that any overt act of war had been committed."[596] Moreover, he was more than one hundred miles

584. *Id.*
585. *Id.*
586. *Id.* at 111.
587. *Id.*
588. *See* HOBSON, *supra* note 8, at 6, 50 (writing that this was a "key moment" of the Burr trial for the defense, who "believ[ed] that a Virginia jury would be unsympathetic with the accused, settled on a strategy of taking the case from the jury and placing the question of Burr's guilt in what it hoped would be the safer hands of the court").
589. *Burr*, 25 F. Cas. at 111-112.
590. *Id.*
591. *Id.* at 112-13.
592. *Id.* at 113.
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.*

away from the location in which the conduct at issue occurred.[597] Next, Burr cited *Bollman*, declaring that it was "totally misunderstood by the counsel for the prosecution," and the defense "had the right here to call upon the attorney for the United States to say whether an assemblage of men merely can be called, or in any way tortured into an act of 'levying war.'"[598] The case became circensian when the prosecution nevertheless called ten additional witnesses who were not present on Blennerhassett's Island and who could not establish thereon Burr levied war.[599] Burr declared a "right to require of the prosecutor to show that every witness will give testimony tending to prove an overt act of war, or his testimony would be irrelevant and immaterial."[600] Therefore, said Burr, it was unnecessary to examine one hundred and thirty five "because their testimony can have no bearing on the case."[601] He challenged that his conduct was continually being prosecuted as constructive at best with circumstantial evidence.[602] The government argued that the question of whether Burr levied war was a question of fact properly to be decided by the jury.[603] Burr, however, feared his fate before the jury.[604] Hay stated that he would have "no objection to any fair inquiry into these principles; but the motion was premature," and he believed that ultimately "testimony would be introduced . . . which would give a very different aspect to the transactions on Blennerhassett's Island [versus] what had appeared."[605]

Beneath the surface, the problem of prematurity found its genesis in the Jefferson Administration's desires, as the administration wanted chiefly to get the testimony out before the public.[606] If the legal prosecution would not manifest into a

597. *See id.* (offering that Burr was over "one hundred miles distant from the place where the overt act is charged to have been committed").

598. *Id.*

599. SMITH, *supra* note 222, at 369.

600. *Burr*, 25 F. Cas. at 113.

601. *Id.*

602. *Id.*

603. SMITH, *supra* note 222, at 369.

604. *See* NEWMYER, *supra* note 165, at 106 ("[J]urors thought [Burr] was guilty as charged. If the prosecution could tap this well of prejudice by hammering away at Burr's character, which they attempted to do, he could be in trouble. How much trouble . . . depend[ed] . . . on how much hammering John Marshall would allow.").

605. *Burr*, 25 F. Cas. at 113.

606. NANCY ISENBERG, FALLEN FOUNDER: THE LIFE OF AARON BURR 328 (2007) ("Jefferson was doing his utmost to shape public opinion . . . . [H]is public denunciation seriously undermined Burr's ability to receive a fair trial."); *id.* (containing a writing from Jefferson to Ohio Governor Edwin Tiffin that stated "the hand of the people has given the mortal blow to the conspiracy which, in other countries, would have called for an appeal to armies"); *id.* (stating that the President believed his efforts "will be supported by the public opinion").

successful conviction, the public discourse could effectively persecute Burr.[607] Burr lamented, the prosecution could not connect him with the act, "and no testimony can be brought to prove that there was war . . . surely the article war is of imperious necessity in the charge of treason . . . will the court go on week after week, discovering nothing that can affect me?"[608] Luther Martin interjected at length that the season had proven quite dangerous with rampant illness and the prosecution's laborious approach to trying its case in chief risked a greater "probability of sickness among some of the jury or the court, . . . which would prevent the case going on. If one of the jurors should die, however far the case may have progressed, the trial must [then] begin anew."[609] Burr announced, "I demand the opinion of the court on [my] points."[610] In a balance of principles, Marshall gave his opinion that the defense had the right to object to such evidence, but nevertheless suggested that it be best for the defense to postpone its motion, stating with "no doubt . . . court must hear the objections to the admissibility of the evidence; it [is] a right, and gentlemen might insist on it."[611] However, "some of the transactions on Blennerhassett's Island remained yet to be gone into," and Marshall suggested that the defense "postpone the motion till that evidence was gone through."[612] Marshall attempted to mitigate some of the political antagonization that he expected from Jefferson for granting Burr's subpoena by acknowledging the prosecution's right to make a motion.[613]

The court turned to the issue of witnesses. Defense counsel Botts requested that the indigent witnesses who were summoned should be financially assisted, stating that "when the United States [has] imprisoned witnesses to compel their attendance, those of the accused ought at least to be supplied with the means of subsistence."[614] However, the Jefferson Administration had wagered the witnesses' payment upon the value of their testimony. The marshal said that he "was cautioned by the attorney for the United States not to pay [these witnesses] till their materiality was

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Jefferson wrote to Hay, urging his prosecutor to publish the testimony before Congress, effectively "through them [to] the public." *Id.*

607. *Id.*

608. *Id.* at 114.

609. *Id.*

610. *Id.*

611. *Id.*

612. *Id.*; *see* HASKINS & JOHNSON, *supra* note 12, at 251 (noting that, at Blennerhassett's order, Blennerhassett's Island became a hub for the expedition's supply chain).

613. NEWMYER, *supra* note 165, at 96.

614. *Burr*, 25 F. Cas. at 114.

ascertained, or till the court ordered him."[615] Hay defended that position saying that court "expenses were so enormous, that they would be felt by the national treasury, though it was full."[616] Burr indicated that Hay's instruction was premised upon an earlier belief that "between two and three hundred witnesses" had been summoned "whereas the truth was that they did not exceed twenty; that they were material; that some of them were summoned to repel what might be said by the witnesses for the United States."[617] Burr highlighted to the court, "the United States had many advantages in commanding the attendance of their witnesses," an advantage that he lacked, and he "would not acquiesce in the establishment of a principle that might prove injurious to others."[618] Burr ended by stating that these witnesses should be paid, and he "hoped that there would be no more difficulty made on the subject."[619] Hay responded that he objected, but "had only one or two more witnesses on that point."[620] However, once again, Hay's witnesses on that part were absent, and Hay invited the defense's motion after these witnesses were heard.[621]

Hay offered that the prosecution had only two more witnesses, and the defense could make its motion after that time, if it wished.[622] In response, Burr's defense team led an impassioned attack against the prosecution's case and analyzed the definition of treason.[623] Randolph argued passionately that if the Court extends the Constitution's treason to include constructive treason, it allows the Executive to attack its enemies, stating "if the doctrine of treason [is not] kept within precise limits, but left vague and undefined, it gives the triumphant party the means of subjecting the other."[624] This strategy successfully deflected the government's case from prosecuting Burr conduct as treason to the Jefferson-administration's being forced to defend the concept of constructive treason as a nonpolitical weapon.[625]

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615. *Id.* at 114-15.
616. *Id.*
617. *Id.*
618. *Id.*
619. *Id.*
620. *Id.* at 115.
621. *Id.*
622. *See* SMITH, *supra* note 222, at 369 (noting that those two witnesses did not provide any substantial testimony).
623. *Id.*
624. *Id.*at 369-70.
625. *See* HOBSON, *supra* note 8, at 22 ("The President unwittingly made it possible for the Burr prosecution to become an indictment and trial of his own administration.").

f. Final Arguments: August 20-29, 1807

Finally, from Thursday, August 20 until Saturday August 29, over the course of eight days, the court heard arguments, "which finally put an end to the case."[626] However, this was not before defense counsel Wickham gave an opening argument.[627] Wickham's argument appeased Marshall's logic, invoking the absurdity doctrine and stating, "[t]he constitution is a new and original compact" and must be construed, "not by the rules of art belonging to a particular science or profession, but like a treaty or national compact, in which words are to be taken according to their natural import, unless such a construction would lead to a plain absurdity."[628] Moreover, Wickham sidestepped *Bollman*, stating, because "there is no general common law of the United States, the act of congress must be construed without any reference to any common law, and treason is to be considered as a newly created offence, against a newly created government."[629] He argued that Congress wrote what it intended, and constructive treason, was the very type of tyranny that the Framers wished to eradicate.[630] Wickham concluded his argument on Friday, August 21, by suggesting a side-step of *Bollman*, arguing that the expressions in *Bollman*, "which might seem to imply that force was not necessary . . . were obiter and extra-judicial.[631] Randolph continued from there.[632]

On the following Monday, August 24, MacRae argued on behalf of the prosecution.[633] Arguments continued to circle back to *Bollman*. The next day, William Wirt argued on behalf of the prosecution.[634] Wirt asserted that the issue before the court was "whether the presence at the overt act be necessary to make a man a traitor. The [defense claims] that it is necessary -- that he cannot be a principal in the treason without actual presence. What says the supreme court in the Case of Bollman and Swartwout?"[635] He highlighted the defense's conspicuous avoidance of defending against precedent under *Bollman*.[636] Wirt then chastised the defense's motion before the court, that it "marks the genius and hand

626. *Burr*, 25 F. Cas. at 115.

627. *See* HOBSON, *supra* note 8, at 6 (writing that the Court heard an "exhaustive hearing on this motion, [as] the lawyers rummaged through the whole course of English and American precedents on the law of treason"); *see also Burr*, 25 F. Cas. at 115-116.

628. *Burr*, 25 F. Cas. at 116.

629. *Id.* at 118.

630. *Id.*

631. *Id.* at 122.

632. *Id.* at 115-16.

633. *Id.*

634. *Id.*

635. *Id.* at 124.

636. HOBSON, *supra* note 8, at 53.

of a master . . . giv[ing] to the prisoner every possible advantage, . . . [with] full benefit of his legal defence: the sole defence which he would be able to make to the jury, if the evidence were all introduced before them."[637] Likewise, he chided, that masterful stroke robbed of "the prosecution all that evidence which goes to connect the prisoner with the assemblage on the island" and denied the opportunity for the prosecution "to explain the destination and objects of the assemblage, and to stamp beyond controversy the character of treason upon it."[638] Wirt rhetorically asked, "Who is Blennerhassett?" and drew a stark contrast of culpability between Blennerhassett and Burr.[639] According to Wirt, Blennerhassett had been unwittingly duped into literal action, while Burr committed treason within the interpretive definition of the Court's judicial construction.[640] Albeit disingenuously, for a prosecution executively directed to disavow the Marshall Court's authority, Wirt purported a certain reverence for the Supreme Court precedent of *Bollman*, rallying, "[w]e . . are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the supreme court of the United States."[641] Wirt selected a favorable quote from *Bollman*, stating:

> It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.[642]

Wirt insisted that *Bollman* "settled the principle that actual presence was not necessary," and while he obsessed on the defense's evasion of precedent, he perhaps revealed the prosecution's Achilles, a preoccupation with precedent.[643] Wirt pleaded that quote "was not a mere obiter dictum, and not extra judicial."[644] Rather, it "was a material question to be considered by the court."[645] According

637. *Burr*, 25 F. Cas. at 122-23.

638. *Id.*

639. *See* HOBSON, *supra* note 8, at 33 (writing that Wirt's rhetorical question "became a classic of American oratory"); *id.* ("With his ample literary gifts, the lawyer spun a riveting tale of corrupted innocence, of Blennerhassett's peaceful, tranquil life on his Eden in the Ohio River until the 'serpent entered its bowers.'").

640. *See id.* (writing that Wirt "presented a well-reasoned argument portraying Burr as the mastermind who set in motion the great treasonable enterprise, of which the assemblage on Blennerhassett's Island formed a part").

641. *Burr*, 25 F. Cas. at 124.

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.*

to Wirt, *Bollman* meant that Burr was guilty of treason.[646] He went on to say that Burr was "sufficiently and properly charged in the indictment . . . [of] treason, whether he be absent or present, he may be indicted generally," as a "principal in a treason of levying war, it is sufficient to charge that he did levy war."[647] Marshall countered, "[d]o you mean to say that it is not necessary to state in the indictment in what manner the accused, who it is admitted was absent, became connected with the acts on Blennerhassett's Island?"[648] Wirt asserted that under precedent (i.e., *Bollman*) it would be "sufficient to make this charge generally," in part "because it is authorized by the constitutional definition."[649]

On the remainder of that day, Botts began an argument that continued until Wednesday, August 26.[650] From there, Hay argued into August 27, over "whether the motion to arrest the evidence was one which, on principle and precedent, could be entertained by the court."[651] Hay warned Marshall and the court that it was "a most dangerous proposition" if a judge should usurp the jury's proper role to weigh the evidence of a trial.[652] Hay likely intimated the impeachment of Justice Samuel Chase, occurring two years prior, the only judicial impeachment in American history and one that Jefferson initiated in political revenge upon the Federalist Justice Chase who, while on the bench, had suggested that Jefferson was an Atheist.[653] Jefferson had tried to distance himself from Justice Chase's impeachment that temporally coincided with the Court's decision against the Jefferson-administration in *Marbury*.[654]

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646. *See id.* at 128 ("Burr, therefore, was not only legally but actually present on this theatre of action.").

647. *Id.* at 130.

648. *Id.*

649. *Id.*

650. *Id.* at 115-16.

651. *Id.* at 136.

652. HOBSON, *supra* note 8, at 32.

653. *See* JAMES F. SIMON, WHAT KIND OF NATION THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 197-98 (2003) ("There is no doubt that the idea of impeaching Chase was initiated by the president . . . . Chase, from the bench, [had taken] a thinly disguised swipe at Jefferson's suspected atheism."); *see also* HOBSON, *supra* note 8, at 32 (referring to an impeachment article against Justice Chase concerning his conduct in an earlier treason trial with, "Hay appeared to be warning Chief Justice Marshall of what might happen if he granted the motion to exclude evidence").

654. *See* Simon, *supra* note 663, at 197-98 ("Chief Justice Marshall's stern lecture to the president and his secretary of state on their duties in *Marbury v. Madison* may have grated, but at the time, Jefferson made no recorded criticism." *Id.* "Jefferson promptly backed away from taking responsibility for the suggestion [of impeachment]." *Id.* at 199. Backing away from his own suggestion after achieving its genesis in other's minds was "a familiar Jefferson stratagem when he anticipated a nasty political fight." *Id.* at 199.).

Curiously, Burr presided over Chase's impeachment.[655] Nevertheless, Jefferson had written on April 20 to Virginia Senator William B. Giles, "impeachment is a farce which will not be tried again" and arguing that an amendment "will do more good" to limit Marshall's power.[656] Still, it was a Republican tactic.[657] However, depending on the result of Burr's trial, a constitutional amendment on the Judiciary or a politically charged impeachment were a tangible risk to Marshall.

Hay pressed for a logical "suppos[ition] that Burr had never been at [Blennerhassett's Island] at all, but he kn[ew] that his troops [were] there."[658] If Burr commanded those men, said Hay, and "[t]housands fall in the battle. [Did] he not, then, levy war?"[659] With that, Hay turned back to *Bollman*, urging the court to "examine the subject and see whether it be extra-judicial or not."[660] Hay then perhaps gave a fatal opportunity for Marshall when he spoke, "I do not wish to be bewildered in this labyrinth of law. I have seen gentlemen, in merely attempting to argue, perfectly bewildered in a chaos which they themselves had created."[661] Hay advocated for a "practical construction of the constitution."[662] He said the Constitution should be "expound[ed] . . . by the rules of common sense, without the distinctions of the common law" in which "[t]here is too much subtility, too much refinement, too much complexity in [precedent] for a practical system."[663] Hay elaborated that scholars "may devote twenty or thirty years to its study, and not be able to comprehend it completely . . . [and] will misinterpret some parts of it, however learned he may be."[664] Attempting to assert the mission of the Jefferson administration, Hay stated, "[l]et us . . . have a system of our own, adapted to the situation, habits and feelings of the country, without the absurdities, the trash and

655. *See* 2 SAMUEL HARRISON SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, IMPEACHED BY THE HOUSE OF REPRESENTATIVES, FOR HIGH CRIMES AND MISDEMEANORS, BEFORE THE SENATE OF THE UNITED STATES 444 (1805) (noting Burr's role in presiding).

656. 4 THOMAS JEFFERSON, MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON LATE PRESIDENT OF THE UNITED STATES 75 (1829).

657. *See* Hobson, *supra* note 18, at 1430 ("[R]adical Republicans were bent on using impeachment as a means of removing federal judges.").

658. *Burr*, 25 F. Cas. at 137.

659. *Id.*

660. *Id.* at 138.

661. *Id.* at 140.

662. *Id.* at 141.

663. *Id.* at 140.

664. *Id.*

rubbish of the common law."[665] The common law of *Bollman* was indeed on Hay's side, for now. Nevertheless, Hay underestimated Marshall's ability to navigate that proverbial labyrinth and do so both practically and with common sense.

That same day, Charles Lee gave what the Court called a "brief but very lucid argument" for Burr.[666] Lee argued against *Bollman*'s potential for constructive treason, stating, "[t]his common law doctrine [was] cut up by the constitution. If one common law treason be cut up, all are cut up; *there is no common law treason*."[667] Lee offered a floodgates argument; "[i]t is only by construction and deduction that any common law treason can be admitted. If one constructive treason be admitted, all may enter."[668] He argued that the prosecution "forget[s] the distinction: that our constitution is in abridgment of the common law, and that it was intended to stand on its own feet independently of common law reasons."[669] Appealing to Marshall's textualistic leanings, Lee exclaimed, ["t]here are no words in the constitution which warrant their arguments."[670]

On Friday, August 28, Martin argued for fourteen hours, arguing the whole day into August 29.[671] The court transcript described that Martin's oration was "learned and searching, but ill-arranged and ungraceful" and effectively "obtained more celebrity than any other delivered in the case."[672] Martin bitingly stated, the grand jury "waited patiently from [May 22] to the 13th day of June, *before the primum mobile General Wilkinson thought proper to appear in obedience to the process of the court*, by which means our client . . . and a great number of witnesses have suffered still more inconvenience."[673] Martin reminded the court that constructive treason was not a doctrine in America and however revered some of Britain's legalism may be, it is "not binding authority in this country" and "thanked God that such [is] the case."[674] He argued that Britain's "rules of evidence with respect to treason" serve to "shock humane judges."[675] Martin stated that Britain's treason doctrine was the product of "judges [acting] in the most arbitrary manner . . . [executing] the most wicked wishes of the persons who

665. *Id.*
666. *Id.* at 115-16.
667. *Id.* a 144 (emphasis added).
668. *Id.*
669. *Id.*
670. *Id.*
671. *Id.* at 115-16; *see also* HOBSON, *supra* note 8 at, 29 (writing that Martin who had conceived of framing the treason trial as a political assassination levied by Jefferson for Jefferson, inciting "public prejudices").
672. *Burr*, 25 F. Cas. at 115-16.
673. *Id.* at 145 (emphasis added).
674. *Id.* at 147.
675. *Id.*

held the crown," perhaps attempting to subtly engender thoughts of President Jefferson over Burr.[676] G. Edward White stated that as Chief Justice, Marshall favored oral arguments that took generous liberty with time, as this aided his ability to deeply analyze a case's legal issues.[677] Marshall took the time here. Randolph closed out the last day of oral arguments defending Burr, leaving fate in Marshall's pen.[678]

III. IN RE BURR: A PRAGMATIC DECISION OF JUDICIAL STATESMANSHIP

On Saturday, August 29, Marshall had declared the Court's adjournment until Monday.[679] Similarly to *Marbury*, Marshall cited to English law.[680] In greater similarity, when writing the opinion, Marshall had time for only one draft.[681] Marshall spent that time writing a careful opinion in which he cited heavily to court precedent and learned treatises of great legal scholars.[682] At roughly 25,000 words, *Burr* was the longest opinion in Chief Justice Marshall's thirty-five year career.[683] Consequent to the opinion's

676. *Id.*

677. *See* WHITE, *supra* note 6, at 13 ("At the Supreme Court[,] it was said that [Marshall] encouraged lengthy oral arguments, using them to educate himself on the particulars of a case . . . . [T]here was no limit on the length of arguments, and lawyers sometimes spoke continuously for four or five days.").

678. *Burr*, 25 F. Cas. at 115-16.

679. SMITH, *supra* note 222, at 370.

680. Rehnquist, *supra* note 168, at 109; *see* HASKINS & JOHNSON, *supra* note 12, at 246 (writing that *Burr* demonstrates Marshall's "extraordinary legal talents . . . at the trial level, revealing not only the care and meticulousness of his scholarship and his keenly balanced judgment, but also his ability to reach out and formulate . . . [English doctrine into] new and revised concepts in American law, notably that of treason").

681. *See* SMITH, *supra* note 222, at 370; *see also* HOBSON, *supra* note 8, at 21(writing under these time constraints, Marshall "must have written at a furious pace or else begun his draft while the lawyers were still orating"); *see also* White, *supra* note 4, at 787 ("Despite the limited duration of its Terms, and the unlimited time accorded to arguments, the Marshall Court was, by today's standards, remarkably quick in rendering its decisions.").

682. *See* HOBSON, *supra* note 8, at 7. Marshall's "opinion was dense and complicated, full of qualifications and intricate legal distinctions." *Id.* He "appeared to shy away from making definitive pronouncements on such a difficult and sensitive constitutional issue as the law of treason." *Id.* However, "[t]he opinion was nonetheless clear and forthright in its essential holding that the Constitution required a strict definition of treason." *Id. See generally Burr*, 25 F. Cas. at 160 ("Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student.").

683 PIERPAOLI, *supra* note 75, at 64.

length and the time constraints under which he wrote, it is repetitive.[684] In the same way that the *Marbury* opinion is said to bear syllogistic reasoning, an odd sense of structure, and an excessive amount of dicta,[685] *Burr* reflects sharp political shrewdness and a clear concept of constitutionalism. Marshall used distancing language in the opinion to refer to Burr as "the accused" and "the individual," addressing Burr by name only three times in his record-length opinion, likely a tactical choice to lessen impending Jeffersonian backlash.[686]

On August 31, Marshall announced his opinion in toto.[687] He prefaced his ruling by praising both the prosecution and the defense for their utmost eloquence and a great "depth of research" that aided in his decision.[688] Moreover, he began by commending the parties for "argu[ing] in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side."[689]

Marshall, a pragmatist, grounded his analysis of "levying war" in treason within textualism, seeking to establish its meaning "within the letter and the plain meaning of the constitution."[690] Marshall was not limited to one approach, however, in accomplishing legal analysis. While Marshall used these approaches, it is anachronistic to apply the titles upon Marshall and not the purpose or intent of this section. Northwestern University Law Professor Steven G. Calabresi stated that Marshall used originalist, textualist, and structuralist approaches in his decisions.[691] University of California Hastings Law School Professor Joel Richard Paul stated that Marshall rejected "strict construction[alism]" and invoked a limited living constitutionalism by "insist[ing] on reading the Constitution broadly as a living document that responded to the needs and demands of a growing nation."[692] *In Re Burr* was no exception to Marshall's pragmatic use of these principles. These theories attributed to Marshall gained

684. SMITH, *supra*, note 222, at 370.

685. Olken, *supra* note 5, at 400.

686. *See Burr*, 25 F. Cas. at 175 ("The guilt of the accused, if there be any guilt, does not consist in the assemblage, for he was not a member of it." *Id.* at 175. Marshall presented this is so because "[t]he mind is not to be led to the conclusion that the individual was present by a train of conjectures, of inferences, or of reasoning." *Id.* at 176. Rather, the text of the Constitution is clear; "the fact must be proved by two witnesses." *Id.*).

687. *Id.* at 159.

688. *Id.* at 115.

689. *Id.* at 159.

690. *Id.* at 160.

691. *See* ORIGINALISM: A QUARTER-CENTURY OF DEBATE, supra note 105, at 202 (featuring Panel on Originalism and Precedent: Text vs. Precedent in Constitutional Law).

692. PAUL, *supra* note 13, at 3.

their titles long after Marshall's tenure on the Court. Moreover, while they bear seemingly disparate principles, that conflict is not an indication of error on the part of these scholars. Rather, it indicates a wide array of principles utilized by Marshall, a consummate pragmatic jurist. Judge Richard Posner noted that Marshall's pragmatism and talent for surmounting complex "legalisms . . . cutting through . . . to the practical considerations,"[693] a talent that shone brightly in *Burr*.

A. Marshall's Originalism and Historical Analysis

Originalism, the first of aforementioned constitutional theories, is a family of theories rather than one unified theory.[694] An originalist seeks to recover and apply the original meaning of a law's text.[695] In a manner of speaking, the contemporary originalist seeks also to present the reader with the appearance and "unmediated transfer of historical truth, embodied in the 'original intention' of the framers of constitutional provisions, from the past to present."[696] While acknowledging the neological nature of originalism, applied over Marshall's analysis, Marshall nevertheless undertook an characteristically originalist approach to whittle away *Bollman* and return to the original meaning of treason. In answering the question of what constituted war levied in an act of treason, Marshall stated that the term, "treason," was an artful adoption by the American Constitution and "must be understood in that sense in which it was universally received in this country when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term."[697]

Among the main forms of originalism are original intent and original meaning. While original intent seeks to gauge the original intent of the Framers, it takes in the Ratifiers, including Marshall, as well.[698] Original meaning contains two subsets with an original

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693. *See* Posner, *supra* note 23, at 86 (writing that Chief Justice John Marshall's pragmatism is "a somewhat neglected theme in the voluminous literature about him . . . influential judges tend to be pragmatic judges").

694. Lawrence B. Solum & Carmack Waterhouse, *Originalism 3.0 Symposium: Symposium Originalism Versus Living Constitutionalism: The Conceptual Structure of The Great Debate*, 113 NW. U. L. REV. 1243, 1247 (2018).

695. *Id.* at 1251.

696. G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 587-88 (2002).

697. *United States v. Burr*, 25 F. Cas. at 163.

698. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. L. FAC. PUBL'N & OTHER WORK 1, 6 (2011), www.scholarship.law.georgetown.edu/facpub/1353 [perma.cc/K55N-

public understanding and original public meaning.[699] The pursuit of original intent is said to suffer from certain foundational flaws as to the anachronistic difficulties of determining what the Framers understood as the given meaning of a constitutional concept or phrase.[700] Additionally, scholars criticize original intent for the varying issues of how specific or broad the Framers and Ratifiers wished to be in their drafting and the troubles in applying the intent of the Founding to contemporary issues.[701] Lawrence B. Solum noted that the shift towards seeking original Ratifiers' intent is in and of itself a form of popular sovereignty.[702] While original public meaning is said to ensure a more objective rule of law, when it finds its limit in application of a doctrine or case, originalists must turn elsewhere.[703] For instance, Georgetown University legal theory Professor Randy E. Barnett, noted that while Justice Antonin Scalia was revered as an "originalist," Scalia demonstrated the limits by avoiding absurd results that could flow from strict adherence to text, he uses precedent, and finally, history in justification of a legal outcome.[704]

Marshall used various aspects of both original meaning and intent. Marshall addressed the question of what constituted treason's original meaning with a historical analysis of the model upon which America followed. Unlike *Bollman*, Marshall buttressed this opinion with a myriad of historical sources. He explained that

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699. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 379-80 (2013) ("Alternative ways of framing the theory appealed to 'original public understanding' or 'original public meaning'" and noting that original public meaning has become the dominant approach among contemporary originalists).

700. Solum, *supra* note 708, at 8.

701. *Id.* at 9.

702. *See id.* at 11 ("The move to ratifiers' understanding or intent is best understood in conjunction with popular sovereignty as a justification for originalism. The ratifiers, rather than the Framers, could plausibly be viewed as expressing the political will of 'We the People.'").

703. *See* Whittington, *supra* note 709, at 379 (writing, "original meaning better captures the search for the public meaning of an objective legal rule"); *see also*, Solum, *supra* note 708, at 16 (writing that "the original meaning of the text does not fully determine constitutional doctrine or its application to particular cases" and "when the original public meaning of the text "runs out," application of the linguistic meaning of the constitutional text to a particular dispute must be guided by something other than original meaning."); *see also* Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 CONST. COMMENT. 1, 49 (2009) (Originalism's objectivity is a point of scholarly debate. "Originalism elevates subjective beliefs over objective meaning.") *Id.* at 49.

704. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7,13-14 (2006) (noting however that Barnett believes Scalia was not in actuality a bona-fide originalist by practice).

the Framers of the United States Constitution had provided to Americans a Treason Clause that stated: "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[705] The Framers established limitations on the extent to which it functions, establishing that "[t]he Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."[706] As a preliminary matter of analysis, Marshall offered, "[i]ndependent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification," as a tenet of treason, "war could not be levied without the employment and exhibition of force."[707] Marshall gave the etymology for treason, writing that "the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws."[708] America's Treason Clause greatly "differed from all historical models."[709] Thus, Marshall turned to the concept of levying war, asserting himself as a historian, writing, that its use in the Constitution, was "in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edward III, from which it was borrowed."[710] America's concept of treason found its meaningful genesis in the English Statute of 1351, which categorized treason respectively into two broad forms, high treason and petty treason.[711] America's concept of treason notably differed from England's insofar as the United States did not exist in the idolatrous form of an oath to the personal leader, such as the figurehead of the royal family.[712] America's treason was new and established alongside a Republic in which the Founders constitutionally declared the People

705. U.S. CONST. ART. III, §3

706. *Id.*

707. *Burr*, 25 F. Cas. at 162.

708. *Id.* at 159.

709. Cramer v. United States, 325 U.S. 1, 20 (1945).

710. *Burr*, 25 F. Cas. at 159.

711. *See* Fletcher, *supra* note 28, at 194 (citing Statute of Treasons, 1351 25 Edw. 2, ch. 2 and asserting that disloyalty to the throne constituted high treason, while petty treason was the historic equivalent to homicide).

712. *See id.* at 196, 199 ("We do not regard the president as the embodiment of the state or as the object of our allegiance;" it is "The People" of the United States of America. Thus, this is why an assassination attempt on the president does not constitute treason).

supreme.[713] Thus, in the United States, an act of treason was conceived to be an act against the American people.

Marshall operated in *Burr* with a pursuit of Founders Intent by invoking the authority of Ratifiers intent, a constitutional lineage of sorts that at that time now manifested before the Judiciary. In the words of Chief Justice Marshall, "force and violence were in the mind of the court, and . . . there was no idea of extending the crime of treason . . . beyond the constitutional definition which had been given to it."[714] Based upon his presence as a Ratifier at the Constitutional Convention, Marshall could speak authoritatively that the Framers wished to prevent Congress from inventing additional treasons and due to the limited manner in which they structured the Treason Clause, effecting one of many checks and balances on the executive and legislative branches in the constitutional system.[715] The need for a treason clause in the United States Constitution grew from Shays' Rebellion of 1786,[716] an act that greatly disturbed Marshall, in which American Revolutionary War Veteran Daniel Shays attempted to overthrow the government by force and seize Springfield Amory.[717] The Framers thusly treated treason as a "genuine breach of allegiance" holding no reluctance to punish the offense with great severity.[718] The Rebellion demonstrated the dire need to reform the ineffective Articles of Confederation, causing in part the very need to reform the Articles

713. U.S. CONST. preamble; *see also* Christian Ketter, *A Jury of Citizens Both Free and Imprisoned: If Voter Rights are Ensured for the Incarcerated, is a Prisoner's Right to Serve on a Jury Far-Fetched?*, 51 U. TOLEDO L. REV. 37, 50 (2019); THE FEDERALIST NO. 78 (Alexander Hamilton).

714. *See Cramer*, 325 U.S. at 32 (noting Anti-Federalist George Mason wished for a broad treason clause at the Constitutional Convention); *see also Historical Concept of Treason: English, American*, *supra* note 272, at 78 (noting, however, the limited clause resulted in part from James Wilson's strong concerns voiced to limit the potential for misuse); *Burr*, 25 F. Cas. at 166.

715. *Ex parte Bollman*, 8 U.S. at 127 ("[T]he framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court."); *see also Historical Concept of Treason: English, American*, *supra* note 272, at 78.; Stewart Harris, *Barron, Baltimore, and the Bill of Rights, Part II.,* YOUR WEEKLY CONSTITUTIONAL (May 17, 2017), www.beta.prx.org/stories/317245 [perma.cc/QE4X-C8MV] (remarking at 34:00 by William Davenport Mercer of University of Tennessee that Marshall's authority over original intent comes from having attended the Constitutional Convention).

716. *Historical Concept of Treason: English*, American, *supra* note 272, at 77.

717. SEAN CONDON, SHAYS'S REBELLION: AUTHORITY AND DISTRESS IN POST-REVOLUTIONARY AMERICA 81 (2015).

718. *See Cramer*, 325 U.S. at 8, (noting the Framers, as products of the American Revolution, also had Benedict Arnold's treason of 1780 in mind).

into a new form of governance.[719] The Rebellion was present in the minds of the Framers at the Convention who feared future insurrections.[720] For instance, Marshall once wrote, "[t]hese violent . . . bloody dissentions . . . cast a deep shade over that bright prospect which the revolution in America and the establishment of our free governments had opened to the votaries of liberty throughout the globe."[721] Thus, for Marshall treason was significant.

Marshall's authority as a progenitor of the Founding allowed him to largely surmount the contemporary criticisms of originalism's difficulty in determining original meaning.[722] Jefferson's presence in the early Founding, as a drafter of the Declaration of Independence (in comparison to Marshall's role as a constitutional Ratifier) nevertheless supports his characterization as a strong contender on that subject.[723] Still, Marshall's use of original meaning could be said to suffer from Professor Barnett's criticisms of the contemporary Scalia by invoking history to justify in part the case's outcome, this constituted a deviation of the aforementioned intent that varied among Founders and Ratifiers.[724] Nevertheless, judicial statesmanship is characterized by a pragmatic approach, and selective use of originalism fits within that model.[725]

Ultimately, Marshall used an originalist's attention to Founder's intent, piece by piece, surmounting *Bollman*'s purported confusion and its problematic aspects, and stating that "an assemblage to constitute an actual levying of war, should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose."[726] He characterized this reinterpretation as one in which he "believed to be the natural, certainly not a strained, explanation of the words . . . obviat[ing] an inference which might otherwise have been drawn;" assemblages

719. *See* LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 131 (2014) (writing, George Washington "[u]ndoubtedly . . . saw Shays' Rebellion as inextricably tied to the inadequacies of the Articles of Confederation").

720. *Historical Concept of Treason: English,* American, *supra* note 272, at 77.

721. PAUL, *supra* note 13 ,at 34.

722. Solum, *supra* note 708, at 8. Nevertheless, Marshall's judicial voice on behalf of the Ratifiers could be said to inappropriately minimize his contemporaries who spoke in the alternative or contrast.

723. *See generally* WOOD, *supra* note 148, at 391.

724. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13-14 (2006) (noting however that Barnett believes Scalia was not in actuality a bona-fide originalist by practice).

725. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 85 (2003).

726. *Burr*, 25 F. Cas. at 166.

require arms.[727] Marshall's systematic constitutional analysis, specifically arguing each clause, was an invaluable approach that he had taken when he argued for ratification at the Constitutional Convention.[728]

B. Marshall's Textualism: English Jurists and American Judges

A textualist, at the theory's foundation, draws from written sources only, giving no consideration to non-textual authorities.[729] In *Marbury*, Chief Justice Marshall had acknowledged the textual command of the Treason Clause over the Judiciary.[730] In *Burr*, he adopted a strict adherence to the text and its construction.[731] He pointedly asked the question in *In Re Burr*, "What is the natural import of the words 'levying war?' And who may be said to levy it?"[732] Marshall explained "[t]aken most literally," the words "levying war . . . are, perhaps, of the same import with the words raising or creating war, but as those who join after the commencement are equally the object of punishment, there would probably be a general admission, that the term also comprehended making war, or carrying on war."[733] Marshall, reviewed a broad swath of textual authorities in depth.[734] However, Marshall tacitly acknowledged that a treasonous act requires some act of force.[735] He wrote, "it is difficult to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force."[736] The Marshall Court understood that the Framers anticipated the international conflict of laws and that decisions of constitutional law would be made without the benefit of

727. *Id.*

728. PAUL, *supra* note 13, at 40.

729. Leah M. Litman, *New Textualism and The Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE 138, 139 (2019).

730. *See Marbury*, 5 U.S. at 179 (writing that the Constitution's Treason Clause "is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act").

731. *See* HASKINS & JOHNSON, *supra* note 12, at 261 (political weaponization of the treason clause, "opportunism disguised by a veil of supposed national security" could be prevented by Marshall's "[s]trict construction, and adherence to the law enunciated by the Constitution.").

732. *Burr*, 25 F. Cas. at 159.

733. *Id.*

734. Litman, *supra* note 739, at 139.

735. *See Burr*, 25 F. Cas. at 162 ("[W]e should probably all concur in the declaration that war could not be levied without the employment and exhibition of force.").

736. *Id.* at 168.

reference to a sufficient common law or to any developed constitutional doctrines.[737] Marshall could then begin undoing *Bollman*'s pitfalls.

In *Bollman*, Marshall had explained that treason consisted of "[a]ny assemblage of men for [the] purpose" of revolution by force "would amount to a levying of war."[738] Moreover, *Bollman* established that it may have been "sufficient for the court to say, that unless men were assembled, war could not be levied."[739] However, he defended *Bollman*, stating that it "was not a treatise on [the definition of] treason, but a decision [in which] a particular circumstance was necessary to the consummation of the crime."[740] He acknowledged his problematic *obitur dictum*, stating that the Court's "[g]eneral expressions ought not to be considered as overruling settled principles, without a direct declaration to that effect."[741] Thus, in *Marbury*, the Court asserted the authority to say what the law is; and in *Burr*, it asserted the final authority to interpret what the Court said law was.

Marshall cautioned that treason's working definition was not "to be collected *only* from adjudged cases."[742] He wished to shift the precedent concerning treason and cautioned that "if a spurious doctrine have been introduced into the common law, and have for centuries been admitted as genuine, it would require great hardihood in a judge to reject it."[743] Marshall generated a historical analysis in which he asserted that "celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded," and "[p]rinciples laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected."[744] Marshall would not lightly reject such writers, however. William Blackstone *Commentaries on the Laws of England* was among

737. G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. OF INT'L L. 727, 727 (1989).

738. *Ex parte Bollman*, 8. U.S. at 75, 133.

739. *Burr*, 25 F. Cas. at 165 ("In the case of the United States against Bollman and Swartwout, there was no evidence that even two men had ever met for the purpose of executing the plan in which those persons were charged with having participated." *Id.* at 165. Based on this, "it was, therefore, sufficient for the court to say that unless men were assembled, war could not be levied. That case was decided by this declaration.").

740. *Id.* at 166; *see also* HOBSON, *supra* note 8, at 6 ("Rather than repudiate his earlier decision in Ex parte Bollman and Swartwout, Marshall explained and qualified it.").

741. *Burr*, 25 F. Cas. at 166.

742. *Id.* at 159 (emphasis in italics)

743. *Id.* at 160.

744. *Id.*

young John Marshall's favorite literature in his formative years.[745] Nevertheless, Marshall's use of scholarship in the treason's cases is curious, as G. Edward White noted that Marshall "unquestionably did not like legal research."[746] Rather, Marshall drew his legal insights from his refutation of or expansion upon the arguments presented to him.[747] Nevertheless, Marshall offered in *Burr* a synthesis that came close to serving as the treatise he cautioned *Bollman* was not, warning however that the "circumstances [of levied war] are so various . . . [,] it is hard to describe all [these principles] particularly."[748]

Marshall recounted that Lord Edward Coke suggested "actual rebellion or insurrection . . . is a levying of war."[749] Furthermore, Lord Coke, believing that conspiracy alone is insufficient to constitute treason, required that "there . . . be a levying of war in fact" with a "necessary ingredient" of "actual violence."[750] Jefferson too had once cited to Lord Coke, ironically, when then-Governor he drafted Virginia's criminal statute of 1788, suggesting a limitation the scope of treason to "prevent an intimidation of common law treasons."[751] Now, Marshall bore the responsibility undoing the common law treason that his own words created. Marshall cited Lord Matthew Hale's doctrine for the proposition that "a levying of war is partly a question of fact," but one comprised of both *speciem belli* and *vexillis explicatis*.[752] That is, with the "appearance of war" and explained by the banners and pageantry of war "with colors flying" or so "armed with military weapons, as swords, guns, . . . it may be reasonably concluded they are in a posture of war."[753] Though, Marshall noted Hale's purpose in requiring both appearance and pageantry was to prevent overbroad application in which "*de facto* . . . act[s]" of levying war magically rendered every public riot as treason.[754] In Marshall's eyes, Hale envisioned treason as a human assembly of war.[755] Marshall noted, under Hale's

745. PAUL, *supra* note 13, at 22.
746. WHITE, *supra* note 6, at 14.
747. *Id.*
748. *Burr*, 25 F. Cas. at 163.
749. *Id.* at 160.
750. *Id.* at 163.
751. Zellar, *supra* note 39, at 60-61.
752. *Burr*, 25 F. Cas. at 163.
753. *Id.* at 163.
754. *Id.*
755. *See id.* (asserting, "[i]t is obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea, he appears to suggest, that the apparatus of war is necessary, has been very justly combated by an able judge who has written a valuable treatise on the subject of treason; but, it is not recollected that his position, that the assembly should be in a posturn of war for any treasonable attempt, has ever been denied.").

doctrine, treasonous war levied included *guerrino arraiati*, a warlike array.[756] Marshall noted a distinction between preparation and manifestation of war; that is, when war is levied in a visible array, in which it is *bellum levatum*, preparing for a treasonable attempt.[757] However, once the overt act manifests, it is *bellum percussum*.[758] Marshall argued, in contrast to Hale, advising treason and assembling in treason are two distinct acts, and Hale's historical suggestions to the contrary are dicta without any legal support thereof.[759] Marshall characterized the prosecution's assertion of Hale's doctrine as "repugnant to the declarations we find elsewhere."[760] Moreover, the Court cannot extend a judge's "*dictum* . . . beyond its terms."[761] Parenthetically, Marshall was speaking introspectively in part with regard to his own dictum in *Bollman*. He noted that the great difficulty in applying Hale's principles was a lack of particularity and quantification of guilt when multiple parties levy war.[762] Nevertheless, he highlighted the fact Hale established no man could be declared "a principal in felony unless he be present . . . [h]e must be present at the perpetration."[763] Thus, without Burr's presence on Blennerhassett's Island, he could not commit treason.

Marshall turned to William Hawkins, who considered acts of treason to be acts purposed "to redress a public grievance, whether it be a real or pretended one," and an invasion of the government's "prerogative," requiring both "force and violence."[764] Next, Marshall recounted that English Judge Sir Michael Foster defined treason as "joining with rebels in an act of rebellion, or with enemies in acts of hostility" in which all are principal actors.[765] Judge Foster required a "pomp and pageantry of war, as essential circumstances to constitute the fact of levying war" and *furor arma ministrat*, tools of war "proper for the mischief [actors] intended to effect." [766] Most importantly for Foster, treason required "the actual employment of

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756. *Id.*
757. *Id.*
758. *Id.* at 164
759. *Id.* at 174
760. *Id.*
761. *Id.*
762. *See id.* at 160 (Marshall writing, "Hale, in treating on the same subject, puts many cases which shall constitute a levying of war, without which no act can amount to treason; but he does not particularize the parts to be performed by the different persons concerned in that war, which shall be sufficient to fix on each the guilt of levying it.").
763. *Id.* at 171.
764. *Id.* at 163.
765. *Id.* at 160.
766. *Id.* at 164.

force" to be present when one levies war.[767] Marshall summarized that Foster envisioned "a [real] state of force and violence" and "a posture of war" with "enlisting and marching."[768] Nevertheless, noted Marshall, while Foster conceived of constructive treason, he nevertheless saw force "as a material ingredient."[769] Whether "technically[,] as well as really," force was vital to treason.[770] Moreover, pursuant to the doctrine of principal participation, Foster asserted that he who "is charged . . . must be ready to render assistance to those who are" treasonously acting.[771] Citing both Foster and Hawkins, Marshall noted that a treasonist must "be ready to give immediate and direct assistance" to the other actors.[772] Thus, no matter what, from a doctrinal standpoint, Marshall could discount constructive treason from its very foundation.[773]

Marshall moved onto Blackstone and continued the development of the doctrine conclusively to establish an indisputable necessity of force. He wrote, Blackstone, "concur[ring] with his predecessors," expanded the doctrine by defining it as "taking arms, not only to [overthrow the government] but under pretense to reform religion or the laws, or to remove evil counsellors or other grievances, whether real or pretended. For the law does not. neither can it, permit any private man or set of men to interfere forcibly in matters of such high importance."[774] Blackstone too "contemplated actual force as a necessary ingredient" to treason with added hostility when war is levied.[775]

Beyond the text of historical jurists, Marshall afforded "particular attention" and looked over the opinions of several contemporary circuit judges who stated as much: Judges James Iredell and Richard Peters, who felt force and actual assemblage was necessary to levy war; Judge Chase who felt that a *quantum* of force is necessary and the exact number of persons "is wholly immaterial."[776] Thus, Marshall established that of the required assemblage, force was perceptively "never separated" therefrom and "was the particular point the court meant to establish."[777] He noted that American judges "required still more to constitute the fact of levying war, than has been required by the English books."[778]

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767. *Id.*
768. *Id.*
769. *Id.*
770. *Id.*
771. *Id.* at 172.
772. *Id.*
773. *See* HASKINS & JOHNSON, *supra* note 12, at 246.
774. *Burr*, 25 F. Cas. at 164.
775. *Id.*
776. *Id.* at 165.
777. *Id.* at 166.
778. *Id.* at 165.

However, Marshall acknowledged that it is asserted that "[a]ll these authorities have been overruled by the decision of the Supreme Court in" *Bollman*.[779] Marshall therefore laid the means by which he may resolve this seeming refutation.

C. Marshall's Structuralism

A structuralist infers meaning from multiple aspects of one legal document, inferring meaning from another across the Constitution's whole.[780] The process balances an analysis from other portions of the document to gain an understanding in "adherence to the Constitution's text."[781] Structuralism, however, requires "sufficient flexibility to apply across time as circumstances evolve."[782] Here, Marshall's pragmatic use of structuralism evoked a mission to maintain the Constitution's supremacy and to demonstrate the superiority of its firm American republican principles over England's malleable tools of tyranny.[783] Marshall briefly acknowledged structuralism in *Burr* and wrote, "[t]he question which arises on the construction of the constitution, in every point of view in which it can be contemplated . . . requires the most temperate and the most deliberate consideration."[784] The demands of logic and the construction of the Treason Clause led Marshall to the brisk conclusion that "there must be a war, or the crime of levying it cannot exist."[785] Structuralism plays upon the

779. *Id.*

780. Casey L. Westover, *Structural Interpretation and the New Federalism: FindingtThe Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 694 (2005).

781. *Id.* at 694.

782. *Id.* at 694.

783. *See* William N. Eskridge, Jr., *Relationships Between Formalism And Functionalism In Separation Of Powers Cases*, 22 HARV. J. L. & PUB. POL'Y 21 (1998) (writing of a pragmatic use of various approaches in which "Chief Justice John Marshall deduced from the text and structure-and maybe even the original intent-of the Constitution, rules apportioning national and state authority"); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 752 (1999) (writing, Marshall demonstrated "how structural argument often goes hand in hand with a certain kind of pragmatic argument. Stingy construction of the Constitution, Marshall argues, would offend the nature of the Constitution not merely as a suitably nationalist and populist document, but also as an inherently practical document. The Constitution was meant to work—and to work over long stretches of time, and vast reaches of space"). *See generally* Westover, *supra* note 790, at 702 (writing that Marshall "establish[ed] that the Constitution provides for judicial review [and] relied in sequence on two distinct structural themes, beginning with the supremacy of the Constitution and its superiority to other law").

784. *Burr*, 25 F. Cas. at 159.

785. *Id.*

reader's subconscious by logically connecting various aspects of the written document.[786] Marshall's use of structuralism follows naturally from his passion for dramaturgy and therefrom his working knowledge of perception, illusion, and human nature.[787]

Marshall's use of structuralism was a necessary component in legitimizing the Court's power to restrict the political branches' hectoring application of the Treason Clause by stressing the Court's judicial review over matters constitutional.[788] He had an uncanny ability to use seemingly disparate aspects of the Constitution to reconcile a proposition against the whole of the document and justify that proposition.[789] One gleans a functional application of logic in Marshall's structuralism.[790] Marshall accomplished this, for instance, by using thematic concepts and syllogism in reasoning the Constitution's text against itself.[791] Marshall strategically had used

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786. Maxwell O. Chibundu, *Structure And Structuralism In The Interpretation*, 62 U. CIN. L. REV. 1439, 1494 (1994) ("[S]tructuralism builds on the result of the deconstructive practice by exploiting both the conscious and subconscious forces at work in shaping institutional relationships.").

787. *See* McCulloch v. Maryland, 17 U.S. 316 (1819) (writing that Marshall justifies his position without the specificity of text itself, writing, "[t]here is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."); H. RICHARD UVILLER, WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 96 (Duke Univ. Press 2002) (writing that Marshall acknowledged the power of perception and its relation to the Constitution, writing that if there exists a power of "persuasion by convincing, then Mr. Madison was the most eloquent man I ever heard."). *See* generally PAUL, *supra* note 13, at 2,112.

788. *See generally* Sylvia Snowiss, *Text and Principle in John Marshall's Constitutional Law: the Cases of Marbury and McCulloch*, 33 J. MARSHALL L. REV. 973, 1016 (2000) (The legitimacy of a judicial restraint is tied to the structural characteristics of legal and judicial decision-making.").

789. *See id.* at 993 (noting among Marshall's major opinions is evoked his "capacity to confound principle and text and to maintain some kind of compliance with the doubtful case rule."); *see also McCulloch*, 17 U.S. at 407 (stating Marshall wrote, the Constitution's "nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of [its] limitations . . . introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. *In considering this question, then, we must never forget that it is a constitution we are expounding*" (emphasis added)).

790. *See* Amar, *supra* note 793, at 752 (writing that, for Chief Justice Marshall, "as a matter of general structural logic, surely the part cannot control the whole").

791. *See generally* Westover, *supra* note 790, at 702 (writing that

structuralism in rationalizing and strengthening the Judiciary's ability to enforce subpoenas over the political branches, specifically the Executive.[792] He noted that unlike English evidentiary rules, the American Constitution lacked a Presidential exemption for subpoena compliance, and leveraged that omission by structurally reasoning that the United States Constitution acknowledged limitations on the President, that he may be "impeached and removed from office," as his power flows "from the mass of the people."[793] Marshall declared that the President is not above the law and drew a distinction between Jefferson and the King of England, painting the contrast of American accountability against Great Britain's concept in which "the King can do no wrong."[794] Thus, according to structuralism, in Marshall's eyes, the Constitution treated no differently the President and the average person subject to subpoena.[795] Marshall, therefore, reasoned that the Court had authority to compel the President's compliance. What had been for Marshall an unproductive and, albeit unbeneficial battle between the Judiciary and the Executive, with the looming risk of impeachment via Legislative pawns, became yet another opportunity for Marshall to both check and balance the power of the Executive via structural reasoning.

D. Marshall's Common-Law Constitutionalism to Backtrack Bollman.

According to University of Chicago law Professor and constitutional theory scholar, David A. Strauss, common-law constitutionalism uses a body of judicial decisions to resolve the interpretive gaps that result between textual reliance and the daily practice of constitutional interpretation.[796] Professor Strauss noted,

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characteristically Marshall justifies the Court's position on an issue by "pulling themes from the text of the document, pointing to various clauses in the Constitution that imply a role for the Court").

792. *See* HASKINS & JOHNSON, *supra* note 12 at 272-73 ("[Marshall] observed that the Constitution admitted of no exception to the right of an accused to the compulsory process of the court, and [England's] law of evidence reserved an exception only for the king").

793. *Id.*

794. HARLOW GILES UNGER, JOHN MARSHALL: THE CHIEF JUSTICE WHO SAVED THE NATION 254 (2014).

795. *See Burr*, 25 F. Cas. at 37 (ruling that "a subpoena may issue to the president, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it").

796. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U.

however, the risk of judicial decisions that depart from text or the literal foundations of a law as lacking the perception of legitimacy.[797] While, like many theories of constitutional law, common-law constitutionalism has its variations, the prevailing theme emphasizes that the Constitution's power today derives from the continuous human faith in the wisdom of the authorities who ratified it.[798] Marshall's efforts in *Burr* led to his description as "a hard-nosed realist about human nature[,] . . . an idealist regarding . . . [how] law might aid human beings in rational deliberation," and a Justice "deeply rooted in his notion of the common law itself, which was part and parcel of his view of republican leadership."[799] Marshall overstepped in *Bollman*, trying to criticize subtly the Jefferson administration. It required that Marshall judicially recoil.[800] Marshall had therefore used his role on the Court and risked the posterity and legitimacy of the Judiciary on an unnecessary constitutional shell fight stemming solely from his personal conflicts with Jefferson.[801] Thus, in *Burr*, Marshall backtracked from his previous opinion in *Bollman*, disclaiming his error, "[t]his court is . . . required to depart from the principle there laid down."[802] He cautioned, "[i]t may not be proper to notice the opinion of the Supreme Court in the case of . . . Bollman and Swartwout. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extrajudicial, and was delivered on a point not argued."[803] Marshall declaimed that an opinion, such as *Bollman*, "which is to overrule all former precedents, and to establish a principle never before recognized," if truly meant to make such a change, "*should be expressed in plain and explicit*

Chi. L. Rev. 877, 877 (1996).

797. *See id.* at 877 ("An air of illegitimacy surrounds any alleged departure from the text or the original understandings.").

798. *See generally id.* at 885 ("The currently prevailing theories of constitutional interpretation are rooted in a different tradition: implicitly or explicitly, they rest on the view that the Constitution is binding because someone with authority adopted it.").

799. NEWMYER, *supra* note 165, at 202.

800. UROFSKY & FINKELMAN, *supra*, note 203, at 224; *see also* SMITH, *supra*, note 222, at 366,640 n. 108 (citing a letter from Marshall to Cushing, June 27, 1807).

801. *See generally* Ian Lancaster, *Agurus Bernhardus (L.)—An Introduction To The Natural History Of Hermit Crabs*, VLAAMS INSTTITUUT VOOR DE ZEE/ FLANDERS MARINE INSTITUTE FIELD STUDIES 189, 214 (1988) (writing "Shell fights" are a natural phenomenon in which two hermit crabs fight over a shell in a violent power struggle that will "follow a generally predictable pattern, and involve the attacker in manipulating the other crab's shell [via shaking] and usually 'rapping' its own shell against it a number of times before attempting to pull the occupant out and flinging it away").

802. *Burr*, 25 F. Cas. at 161.

803. *Id.*

terms."[804] Marshall presented the absurd reality of *Bollman* taken to its extreme and reigned in the means to enact a course correction. He stated that if the Court's true intention had been to change the historic doctrine of treason in such a revolutionary manner, "the court ought to have expressly declared, that any assemblage of men whatever, who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war."[805] Still, Marshall was apt to note *Bollman*'s criticisms are in hindsight and it should not be viewed with unfair aggrandizement or diminishment because it "was not a treatise on treason, but a decision of a particular circumstance . . . necessary" for the crime.[806] Marshall asserted the Court's sole power to limit what is read into the Court's opinions, as "[g]eneral expressions ought not to be considered as overruling settled principles, without a direct declaration to that effect."[807] It is altogether fitting that Marshall corralled the significance of precedent, as Professor Strauss noted the legitimacy of American constitutional law is largely a product of the Marshall Court.[808] For example, the Marshall Court's expansion of federal power both from and for the Judiciary.[809]

Marshall acknowledged the propriety of the defense's argument for *Bollman*'s abrogation, because it was "incorrect it ought not be obeyed, because it was extrajudicial."[810] In spite of Marshall effectively overturning *Bollman*, he attempted to justify why the Court had addressed issues beyond the mere inquiry of whether a treasonable assemblage had taken place. Sidestepping *Bollman*, he nevertheless bulwarked respect for common law and judicial precedent, writing:

> For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous, but I would certainly use any means which the law placed in my power to carry the

804. *Id.* at 165 (emphasis added).

805. *Id.* at 165.

806. *Id.* at 166.

807. *Id.*

808. *See* Strauss, *supra* note 806, at 904 ("The great achievements of American constitutional law today are the product not just of the Framers and their generation but of Marshall and Story, of the generation that fought the Civil War and initiated Reconstruction, of Brandeis and Holmes, of the New Deal generation, of the Warren Court, and of many other people (not just judges) along the way.").

809. *See generally id.* at 884 ("Most of the great revolutions in American constitutionalism have taken place without any authorizing or triggering constitutional amendment.").

810. *Burr*, 25 F. Cas. at 161.

> question again before the supreme court, for reconsideration, in a case in which it would directly occur and be fully argued.[811]

Marshall hesitated to admit an explicit error in precedent.[812] He wrote, "I then thought, and still think, [*Bollman*] perfectly correct, to carry the point, if possible, again before the supreme court, if the case should depend upon it . . . I still think the opinion perfectly correct[;] I do not consider myself as going further than the preceding reasoning goes."[813] Marshall had completed a great reframing of the circumstances in which the Court found itself. By marshalling respect for precedent, he redirected the burden to find the correct outcome the first time off of the Court and onto counsel to try harder the next time such an issue appeared before the Court. More than that, however, by surmounting his own opinion and admitting some error, Marshall used common-law constitutionalism by redirecting the understanding of American Constitutional governance back to the Constitution itself, and not the Court. *Burr* effectively brought closure to the mission of *Marbury* by transforming the Judiciary from the final point of authority into a portal by which all branches of government continually defer to the Constitution's power derived from "We the People. [814]

E. Marshall's Living Constitutionalism, Redefining "Treason" in Burr

A living constitutionalist recognizes that power is not centered in the government *per se*, *but rather, leveraged by the ever-growing needs of the people*.[815] As Alexander Hamilton stated in Federalist Paper 78, "the power of the people is superior" because sovereignty lies with the people.[816] Thus, a living constitutionalist views the acts of the judiciary as flowing of the people, by the people, for the people. Constitutional theorist Jack M. Balkin posits that living constitutionalism and originalism are "actually flip sides of the

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811. *Id.*

812. *See* HOBSON, *supra* note 8, at 6 ("Rather than repudiate his earlier decision in Ex parte Bollman and Swartwout, Marshall explained and qualified it.").

813. *Burr*, 25 F. Cas. at 161.

814. *See generally* Strauss, *supra* note 806, at 885 ("The currently prevailing theories of constitutional interpretation are rooted in a different tradition: implicitly or explicitly, they rest on the view that the Constitution is binding because someone with authority adopted it.").

815. Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1251 (2011).

816. THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* Ketter, *Second Amendment in Jeopardy*, supra note 55.

same coin"[817] Regardless, it functions as a constitutional analysis of "text and principle" in which "interpreters must be faithful to the original meaning of the constitutional text and to the principles that underlie the text" with a "method of text and principle . . . as a process of permissible constitutional construction."[818] Marshall had acknowledged that the Constitution is "the whole American fabric," as such, its threads are inescapably weaved in relation to one another.[819] Marshall, however, did not see an unlimited room for expounding upon the Constitution, but rather, a fledgling period of growth and a working understanding for the new republic's Constitution and its Judiciary.[820] Still, what he saw was an adaptable living framework of initial principles that may manifest in new concepts.[821]

When Marshall faced the question of what constituted treason, he had to eradicate the possibility of constructive treason and thus began his analysis by noting that Aaron Burr "was at a great distance and in a different state."[822] By contrast, the evidence showed Burr was not among the assembly on Blennerhassett's Island.[823] Explicitly addressing the issue of requisite evidence was vital for Marshall after Hay signaled to the Jeffersonian-impeachment of Justice Samuel Chase.[824] Marshall therefore wrote,

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817. Jack M. Balkin, *Original Ideas on Originalism: Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551 (2009).

818. *Id.* at 551-52.

819. *Marbury*, 5 U.S. at 176.

820. White, *supra* note 4, at 791 (writing, "when Marshall described the Constitution as requiring 'expounding,' and being 'adapted to the various crises of human affairs [in *McCulloch v. Maryland*],' he did not mean that the Constitution's principles changed with time. He meant, instead, that because the surfacing of newly contested legal issues was an endemic feature of American society, the continuing application of constitutional first principles to new disputes would be required."); *see generally*, Sylvia Snowiss, *Text and Principle in John Marshall's Constitutional Law: The Cases of Marbury and McCulloch*, 33 J. MARSHALL L. REV. 973, 1014 (2000) (acknowledging "Marshall's extension . . . to circumstances not immediately in the mind of the framers.").

821. G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 874 (1997) (writing of "Marshall's meaning of adaptability: the equivalent of a restatement of first principles in new contexts.").

822. *Burr*, 25 F. Cas. at 170; *see* HASKINS & JOHNSON, *supra* note 12, at 282 (arguing that Marshall hedged off even the possibility that Burr could be said to have been constructively present).

823. *Burr*, 25 F. Cas. at 170.

824. *See* Simon, *supra*, note 663, at 197-98 ("There is no doubt that the idea of impeaching Chase was initiated by the president . . . Chase, from the bench, [had taken] a thinly disguised swipe at Jefferson's suspected atheism."); *see also*, HOBSON, *supra* note 8, at 32, 58 (writing that referring to an impeachment article against Justice Chase concerning his conduct in an earlier treason trial,

"[i]t is . . . necessary to inquire whether . . . the doctrine of constructive presence can apply" to Burr's case.[825] Marshall again turned to Lord Coke stating that Coke supported the notion that all are principals in treason, but nowhere is there support for treason by constructive presence.[826] He turned back to Judge Foster for similar support to dismiss constructive treason and assert that as a "point of law . . . [a] man who incites, aids, or procures a treasonable act, is not . . . legally present when that act is committed" simply by "consequence of that incitement, aid or procurement."[827] Marshall invoked the doctrine of absurdity, declaring that if one may be "constructively present" several states removed from the scene of the act, "then he is present at every overt act performed anywhere; that omnipresent participant may then be tried in any state on the continent, where any overt act has been committed . . in which he had no personal participation."[828] Evidently, Wickham's argument resonated with Marshall.[829] Such an extension was "too extravagant to be in terms maintained" and "[c]ertainly . . . cannot be supported by the doctrines of the English law."[830] Marshall expressly rejected the prosecution's argument that in *Bollman* America adopted constructive treason under English common law.[831]

Marshall synthesized the meaning of treason as conduct in which the accused "appeared in arms against their country. That is, in other words, that the assemblage was . . . a warlike assemblage."[832] Marshall presented a definition of treason and accordingly opined in *Burr* that "war [as opposed to simple murder] is a complex operation, composed of many parts, co-operating with each other."[833] For Marshall, treason taken on its whole, consisted of a person's acts "subverting their government."[834] Marshall suggested that an act of war would bear "such appearance of force" to suggest an actor's "particular purpose" is to effect "an actual levying of war."[835] Indeed, Marshall recognized that "[a]ll those who perform the various and essential military parts of prosecuting the war which must be assigned to different persons, may with

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"Hay appeared to be warning Chief Justice Marshall of what might happen if he granted the motion to exclude evidence").

825. *Burr*, 25 F. Cas. at 170.
826. *Id.* at 116, 171.
827. *Id.* at 171.
828. *Id.* at 173.
829. *Id.* at 116.
830. *Id.* at 173.
831. HOBSON, *supra* note 8, at 56.
832. *Burr*, 25 F. Cas. at 166.
833. *Id.* at 160.
834. *Id.* at 159.
835. *Id.* at 166.

correctness and accuracy be said to levy war."[836] Moreover, when war is "actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are *actually leagued* in the general conspiracy," are traitors. [837] However, an actor must be "legally present" among an actual "assemblage in force."[838] Thus, pursuant to *In Re Burr*, a forceful domestic act, consisting of warlike assemblage, made against the people of the United States, properly constituted an act of treason. Marshall defined war stating that a levy of "[w]ar is an appeal from reason to the sword; and he who makes the appeal evidences the fact by the use of the means."[839] A levier's "intention to go to war may be proved by words; but the actual going to war is a fact which is to be proved by open deed."[840] Simply put, without putting on a case in which Burr was actually on Blennerhassett's Island, there could be no treason.

Giving some transparency to his definition, Marshall surmised an example; "[i]f a rebel army," hostile to the government, marches and disperses from military maneuver without firing a gun, "I confess I could not, without some surprise, hear gentlemen seriously contend that this could not amount to an act of levying war."[841] Marshall noted, as he did in *Bollman*, a critical distinction between conspiring to levy war and actually levying war.[842] He suggested that treason bears a general conspiratorial nature stating that "only who perform a part, and who are leagued in the conspiracy, are declared to be traitors."[843] Marshall's qualification of treason as a conspiracy, however, tacitly suggested that it is an offense requiring two or more parties, something that the Constitution's treason clause explicitly does not do. Thus, Marshall likely still left problematic *obitur dictum* rendering an obstacle to prosecuting a treasonist who levies war alone.

836. *Id.* at 161.
837. *Id.* at 161. (emphasis added).
838. *Id.* at 161, 171.
839. *Id.* at 162-63.
840. *Id.* at 163
841. *Id.* at 162.
842. *Id.* 177 ("This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising, certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war than of the actual levying of war."); *see also Ex parte Bollman*, 8 U.S. at 126.
843. *Burr*, 25 F. Cas. at 161.

F. Marshall's judicial statesmanship and public policy concerns

Marshall's opinion reflects that he was torn between politics, principle, and the People, and strove to achieve a balance thereof.[844] Marshall noted the compounded position the Court faced, writing, "[t]hat this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation;" however, the Court has "no choice in the case" with "no alternative presented . . . but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."[845] If Marshall's career was going to take a critical hit from Jefferson via impeachment or public disgrace over Burr's treason case, his historian experiences taught him to do his best to find his place in history as a martyr of the law, seemingly following the principle to its appropriate and logical junction.[846] His paramount goal was to continue the mission of American constitutional law and remove treason from a politicized definition while guaranteeing a fair trial to the accused.[847]

Echoing thoughts of the legendary British Conservative jurist, Edmund Burke, Marshall expressed concern that "man is incapable of governing himself" and feared another American Revolution against the newly formed Republic.[848] Marshall knew that if additional treasons could be invoked by the government and effectively read into the text of the Constitution, it could indeed

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844. *See* Hobson Interview, *supra* note 16, at 2 ("Marshall tried as best he could to cast his decision in favor of Burr's acquittal as a clash between the rule of law and the popular will — with the judge having no choice but to uphold the rule of law.").

845. *Burr*, 25 F. Cas. at 179 ; *see* HASKINS & JOHNSON, *supra* note 12, at 284-85 (arguing that here Marshall acknowledged the possibility that this decision risked his judicial impeachment).

846. *See* HOBSON, *supra* note 8, at 59 ("Marshall anticipated the criticism that would inevitably follow from his decision to prevent the jury from hearing further evidence in the case. He cast himself as the embattled judge obeying the stern dictates of judicial duty in resisting the popular tide."). *See generally* White, *supra* note 4, at 794-95 ("The authority of legal interpreters, by contrast, did not come from their human, partisan 'wills,' but from their status as savants, trained agents whose cultural and professional roles were to discern and to apply the law's fundamental principles, whose meaning was sometimes mysterious or obscure to average persons.").

847. *See* NEWMYER, *supra* note 411, at 196-97 ("[Marshall's] main concern and greatest accomplishment was to move American constitutional law toward a nonpolitical definition of treason and assure Aaron Burr a fair trial according to prevailing legal standards.").

848. PAUL, *supra* note 13, at 34.

create a revolt against the government. Thus, Marshall made a policy decision by avoiding this societal risk, but it required correcting course from *Bollman* and potentially undermining the Court's authority. In this case, Marshall rejected the common-law theory of constitutionalism, which bears relation to Edmund Burke himself.[849] For instance, the "Burkean Minimalism" theory suggests that judges decide as little as possible, to the narrowest of decisions according to judicial "experience and tradition."[850] As such, only overtime can large changes be made to bodies of precedent. Its purpose is to make change slowly, in order to maintain the Judiciary's credibility.[851] From a Burkean perspective, a Court potentially undermines its posterity by overturning precedents at will with no respect for the established prior ruling.[852] It is similar to the Common-Law Theory of constitutionalism in its respect for precedent, an approach for which scholars advocate that the country was founded upon notions of common-law, with the recognition that the Constitution is a higher power, but functions like the common-law.[853] Here, Marshall implicitly overturned his own Court's precedent generated within the same year of 1807. Marshall was forced to take this risk to the Court's credibility was that by overturning *Bollman*. Explicitly, Marshall acknowledged the overstep and a viable minimalistic approach, by noting that *Bollman* could have merely functioned as an "opinion that no treason could be committed, because no treasonable assemblage had taken place," and "the court might have [sufficiently] dispensed with proceeding further in the doctrines of treason."[854] Similarly to the disclaimer that Marshall inserted into *Bollman*, he attempted to limit *In Re Burr*'s scope, writing, "this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it- or who, being engaged in the

849. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 656 (1994).

850. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006).

851. Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1527 (2000).

852. *See id.* ("When the Court overrules its own precedent - at least when it does so in fairly short order, . . . , it acts like a legislature repealing a statute, and thus arguably forfeits some of its credibility as a trustworthy decisionmaker about rights. Of course, it can also be argued that the Court bolsters its credibility by quickly repudiating decisions that are obviously wrong.").

853. *See* Young, *supra* note 859, at 656, 668 ("Burke's theory of reform is . . . grounded in the common-law tradition of evolutionary change whereby custom was constantly being subjected to the test of experience . . . Burke's view coincides roughly with that of the common-law constitutionalists of the late nineteenth century.").

854. *Burr*, 25 F. Cas. 161.

conspiracy, fails to perform his part."[855]

Marshall took the opportunity to again defend *Bollman*, stating, "[i]t was not surprising" that the Court "made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them."[856] For just as judicial statesmanship has its success, it also has its failure. Here, Marshall acknowledged the failure of overswinging in *Bollman*. He would not make this mistake again. Marshall explicitly clarified that after this opinion in *Burr*, *Bollman* "contains nothing contrary to the doctrine now laid down."[857] Though just as he noted the Court's overswing, he noted Jefferson's. Knowing full well that Burr was found with only sixty men – a number that greatly contrasted the seven thousand with which the Jefferson administration purported Burr planned to assemble – Marshall wrote that an actual assemblage of "7,000 men is unquestionably to place those who are so assembled in a state of open force."[858] However, that was not the case.

Marshall asserted one more means by which Burr could not be found guilty. Marshall characterized Burr as an accessory to the Blennerhassett incident and, as a matter of criminal procedure "however atrocious, the trial of the accessory can never precede the conviction of the principal" because "[t]he legal guilt of the accessory depends on the guilt of the principal."[859] As such, it "can only be established in a prosecution against" the principal.[860] Therefore, Burr's guilt depended on the guilt of those who first assembled on Blennerhassett's Island.[861] Thus, Marshall affirmed another element of criminal procedure, an essential particularity that an indictment for treason cannot merely *allege* war was levied in a general manner, but instead, "must be more particularly specified by laying what is termed an overt act of levying war."[862] Marshall made sure to note that this opinion did not preclude accessorial charges of treason; nor did it address them.[863] He stated, rather, "I will not pretend that I have not individually an opinion on these points, but it is one which I should give only in a case absolutely requiring it."[864] Thus, Marshall found ways to assert himself without compounding problematic dicta. Moreover, he wrote, "[t]his opinion does not touch the case of a person who" takes no action

855. *Id.* at 161, 182.
856. *Id.* at 161
857. *Id.* at 176-77
858. BROOKHISER, *supra*, note 164, at 115.
859. *Burr*, 25 F. Cas. at 178.
860. *Id.*
861. *Id.* at 170.
862. *Id.* at 170..
863. *Id.* at 177
864. *Id.* at 176.

further than "advis[ing] or procur[ing] an assemblage."[865] Nevertheless, in spite of Marshall's disclaimers of minimal judicial expression, he wrote, "[i]t may possibly be the opinion of the Supreme Court, that those who procure a treason, and do nothing further, are guilty under the constitution; I only say that opinion has not yet been given."[866]

Marshall returned to the looming issue of executive privilege, what was perhaps, the subtle bulk below the proverbial iceberg. He addressed the issue of testimony admitted against Burr by acknowledging the prosecution's ability to enter the testimony but dually characterizing it as irrelevant.[867] Marshall wrote, "[i]t is, of necessity, the peculiar province of the court to judge . . . admissibility of testimony. If the court admit improper or reject proper testimony, it is an error of judgment, but it is an error committed in the direct exercise of their judicial functions."[868] Marshall did not leave the risk of the outcome in the hands of the jury, however. He undermined the quality of the testimony that had been admitted, countering that "its nature [is] merely corroborative, and incompetent to prove the overt act in itself;" furthermore, it "is irrelevant, until there be proof of the overt act by two witnesses.[869] The testimony connecting Burr was "totally irrelevant, and must, therefore, be rejected."[870] Marshall could not afford to put the Judiciary in a stalemate position of compelling the Executive to tender evidence, for (like the risks in *Marbury*) if Jefferson refused to comply, the Court had no ability to enforce.[871] Marshall knew that the defense's motions for evidence and the prosecution's assertion of privilege were disingenuous and tactical but nevertheless a product of duty; he noted, "the zeal with which [each side] advocate[d] particular opinions" manifested in that they "should . . . press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is

865. *Id.* at 177.
866. *Id.*
867. *Id.* at 113.
868. *Id.*
869. *Id.* at 180..
870. *Id.*
871. *See* ELLEN GRIGSBY, CENGAGE ADVANTAGE BOOKS: ANALYZING POLITICS 261 (2014) (writing that *Marbury* evinced a "realiz[ation] that judicial review is not an unlimited power. Although the Supreme Court can strike down laws and actions, the Court depends on other offices of government to apply Court decisions. In short, the Court lacks the power to enforce its own decision and needs federal and state politicians to interpret the Court's ruling and carry out the enforcement").

perhaps, a frailty incident to human nature."[872] Still, Marshall justified the Court's power over the Executive Branch by framing it within the concept of the Court's unwavering duty to ensure that a defendant's Sixth Amendment rights are upheld in a federal prosecution.[873] Thus, Marshall presented a plain duty using the fulcrum of the Constitution on which to levy his decision and the power of the Court as a balance against the Executive Branch.[874]

While problems on treason indeed remained after *Bollman*, Marshall left no stone unturned this second time around. He directed that the decision "amounts to this and nothing more, that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of war, do, in the sense of the constitution, levy war."[875] Marshall declared that the levying of treason was a question of fact to be decided by the jury from the circumstances of the case. [876] However, before Marshall concluded the Court's opinion on the law and left the case to the jury to judge the facts, he subtly boxed in their decision-making, "[i]n conformity with principle and with authority," Burr "was neither legally nor actually present at Blennerhassett's island; and the court is strongly inclined to the opinion, that, without proving an actual or legal presence by two witnesses, the overt act laid in this indictment cannot be proved."[877] Moreover, by limiting their ability to review the evidence, Marshall ensured an acquittal.[878] He stated, "[i]t 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 did take place."[879] Therefore, even if somehow constructive treason could be said to remain, Marshall removed its power in this case.

Ultimately, for Marshall and the Court in *Burr*, "[a]ny force connected with the intention . . . constitute[s] the crime of levying of war."[880] That force, in an overt act, must be "prove[d] by two witnesses, in such manner that the question of fact ought to be left

872. *Burr*, 25 F. Cas. at 180.

873. HOBSON, *supra* note 90, at 156.

874. MAGRUDER, *supra*, note 19 at 220.

875. *Burr*, 25 F. Cas. at 177.

876. *Id.* at 169.

877. *Burr*, 25 F. Cas. at 173; *See* HOBSON, *supra* note 8, at 13 ("Marshall cautiously refrained from deciding whether the assemblage on Blennerhassett's Island amounted to an overt act of treason, though he strongly implied that it did not.").

878. *See* Hobson, *supra* note 30 (writing Marshall's "ruling excluded most of the evidence from going to the jury, leaving it no choice but to acquit").

879. *Burr*, 25 F. Cas. at 177.

880. *Id.* at 179.

with the jury" who "will apply that law to the facts, and . . . find a verdict of guilty or not guilty, as their own consciences may direct."[881]

1. In the wake of In Re Burr

When Marshall concluded the opinion, Hay requested time to consider the opinion.[882] Marshall accommodated, giving Hay a copy of the opinion.[883] Then, on Tuesday, September 1, the Court reconvened, Hay stated that the case best be left with the jury.[884] The jury then retired and returned shortly thereafter with a verdict read by their foreman, Colonel Carrington.[885] Carrington, coincidentally was Marshall's brother-in-law.[886] Carrington stated, "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."[887] In spite of the acquittal, Burr and his counsel objected to the verdict "as unusual, informal, and irregular," in that the jury did not simply find "guilty" or "not guilty" but added additional language.[888] As such, according to Burr, procedure necessitated "that wherever a verdict is informal the court will either send back the jury to alter it, or correct it itself; that they had no right to depart from the usual form."[889] Burr declaimed. "If you find [a man] guilty, you are to say so," and "if you find him not guilty, you are to say so and no more."[890] Hay stated "the verdict ought to be recorded as found by the jury, which was substantially a verdict of acquittal; and that no principle of humanity, policy, or law, forbade its being received in the very terms used by the jury" and "form did not affect the substance."[891] Carrington, stated that "it was said among [the jury] that if the verdict was [perceived as] informal they would alter it; that it was, in fact," intended to be "a verdict of acquittal."[892] Marshall stated that indeed "the verdict was, in effect, the same as a verdict of acquittal," and if the jury desired, it would "stand on the bill as it was" announced.[893] Thus,

881. *Id.* at 180.
882. *Id.*
883. *Id.*
884. *Id.*
885. *Id.*
886. NEWMYER, *supra* note 165, at 201.
887. *Burr*, 25 F. Cas. at 180.
888. *Id.*
889. *Id.*
890. *Id.*
891. *Id.*
892. *Id.*
893. *Id.*

"an entry should be made on the record of 'not guilty.'"[894] Another juror, Richard E. Parker, stated to Marshall and the Court that he and his fellow jurors "knew that it was not in the usual form, but it was more satisfactory to the jury as they had found it; and that he would not agree to alter it."[895] Hay informed Marshall that precedent existed under *Rex v. Woodfall*, a libel case in which the jury deviated from form, adding words.[896] There the court took the verdict as was read because "it did not affect the substance."[897] Accordingly, Marshall ruled that the record would enter that Burr was found "Not Guilty," but "the verdict should remain as found by the jury."[898] Marshall discharged and thanked the jury for their patience "in this long trial."[899] However, Marshall likely suspected an acquittal that bore a sufficient muddiness would maintain American posterity for the Court and the greater nation. In fact, he planted the seed of such a decision to the jury by previously announcing in his decision that "[t]he guilt of the accused, if there be any guilt, does not consist in the assemblage, for he was not a member of it," thusly asserting that Burr was not inherently innocent; Burr was just not guilty of treason.[900] Therefore, Marshall's careful outcome was one in which the Court established that Burr was legally innocent, but perhaps morally guilty.[901]

With the jury's acquittal, Marshall had successfully navigated *Bollman*'s liabilities, by whittling his previous language to mean that the physical assemblance of an army against the government is an act of treason.[902] Marshall did so without the necessity of forcing Jefferson to tender the documents to the Court over which he asserted executive privilege.

G. A Political Epilogue: Another Prosecution and Jefferson's Reprise

Following Burr's acquittal, Jefferson did not shy away from criticizing John Marshall,[903] nor did he withhold criticizing the

894. *Id.*
895. *Id.*
896. Rex v. Woodfall (1774) 98 Eng. Rep. 914 (KB).
897. *Burr*, 25 F. Cas. at 180-81.
898. *Id.* at 181.
899. *Id.*
900. *Id.* at 175.
901. *See* MAGRUDER, *supra* note 19, at 226 (writing that there was "no other conclusion in accordance with the law. Whether Burr was morally guilty was a question which . . . cannot be regarded as having been settled by the verdict; but that he was not legally guilty is certain").
902. UROFSKY & FINKELMAN, *supra* note 203, at 224.
903. SMITH, *supra* note 222, at 372.

Marshall Court's opinion.[904] Jefferson did not blame Hay for any purported fault in prosecuting: nor did he acknowledge the weak case with which the administration proceeded against Burr.[905] Rather, he accused Marshall of interfering from the bench.[906] Jefferson, however, sank the prosecution that he so badly wanted by declaring Burr's guilt "beyond question," a conspicuous act that allowed Burr and his defense to recharacterize an impassioned federal prosecution into Jefferson's use of office to eradicate a once-close rival.[907] Moreover, Jefferson's conduct and the defense tactics allowed Marshall to guide the outcome via judicial statesmanship. Still, Jefferson would not retrospectively blame his prosecutor because Hay served as Jefferson's quintessential proxy. Marshall's first major biographer United States Senator Allan Bowie Magruder wrote that Jefferson's "personal animus" towards Marshall and "active interest" drove the narrative such that Jefferson became "the real prosecutor of the prisoner . . . stimulat[ing] the zeal and the eloquence of those who were conducting the prosecution" on the President's behalf.[908] On September 9, Hay attempted to try Burr for violating the Neutrality Act by attempting to provoke war with Spain.[909] On September 15, Marshall ruled that the evidence was insufficient and the jury acquitted after twenty minutes of deliberation. As a last-ditch effort, the Jefferson administration attempted to invoke a process in which the government filed a motion to commit Burr to a trial in Kentucky or Ohio's federal court on similar charges before Marshall and Judge Griffin listening to the same evidence.[910] On October 20, after much testimony, Marshall ruled, declining to commit Burr, but nevertheless ordering that Burr and Harman Blennerhassett should stand trial in Ohio on misdemeanor charges of provoking war with Spain.[911] The government finally declined to prosecute Burr after calling over fifty witnesses in his misdemeanor trial.[912]

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904. *See* MAGRUDER, *supra* note 19, at 219 (writing, Jefferson "had the bad taste and bad temper to denounce the opinion as an offensive trespass on the executive department of the government").

905. SMITH, *supra* note 222, 372.

906. *Id.*

907. *See* HOBSON, *supra* note 8, at 22, 29 (writing "[t]he President unwittingly made it possible for the Burr prosecution to become an indictment and trial of his own administration," a tactic conceived by Luther Martin).

908. MAGRUDER, *supra* note 19, at 220.

909. Zellar, *supra* note 39, at 233.

910. HOBSON, *supra* note 8, at 7.

911. *Id.* at 8, 26.

912. NEWMYER, *supra* note 165, at 9; *see also* HASKINS & JOHNSON, *supra* note 12, at 288 (After this trial devolved into evidentiary squabbles "more than fitfty witnesses were called against Burr on the misdemeanor charge, but the evidence taken as a whole, seems clearly to have shown that Burr's objective

Jefferson wrote to Hay after the trial in bitter reflection, stating, "[t]he event has been what was evidently intended from the beginning of the trial; that is to say, not only to clear Burr, but to prevent the evidence from ever going before the world."[913] Historians are unsure as to what evidence Jefferson referred, due to the presumption that Hay put on the best case that he could with the most competent evidence that he possessed.[914]

Jefferson, however, wanted to preserve his political battles against Burr and Chief Justice Marshall, instructing Hay as to the evidence withheld, "this latter case must not take place. It is now . . . indispensable that not a single witness be paid or permitted to depart until his testimony has been committed to writing."[915] In approaching *Burr*, Marshall's concern for the Court's posterity was neither touchy nor excessive because Jefferson intended to capitalize upon their rivalries. According to Jefferson, the proper remedy henceforth was to take the witnesses' recorded words that "[t]hese whole proceedings . . . be laid before Congress, that they may decide whether the defect has been in the evidence of guilt, or in the law, *or in the application of the law, and that they may provide the proper remedy for the past and the future*."[916] On September 7, Jefferson wrote Hay that he wished to continue the treason prosecution, for if Burr is "defeated, it will heap coals of fire on the head of [Marshall]."[917] The Jefferson Administration sought to prosecute Burr again; this time, for inciting war with Spain.[918] On September 9, this second prosecution commenced.[919] In this trial Burr and his defense team heavily cross-examined the prosecution's witnesses, with Burr contradicting witnesses based on his firsthand knowledge, effectively providing to Burr the role of an unsworn witness.[920] It lasted for six days with fifty witnesses called.[921] Burr still sought the original Wilkinson letter.[922] On September 21, Burr apologized to Marshall for an objection he levied that it may be "such apparent opposition to what appears to be the mind of the

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was the settlement of the Washita lands, and that the Mexican adventure was conditioned entirely on the existence of a state of war with Spain.")

913. ALF J. MAPP, JR., THOMAS JEFFERSON: PASSIONATE PILGRIM 139 (1991).

914. SMITH, *supra* note 222, at 372.

915. Mapp, *supra* note 924, at 139.

916. SMITH, *supra* note 222, at 372.

917. 4 THOMAS JEFFERSON, MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS 105 (Thomas Jefferson Randolph, ed., 1829).

918. SMITH, *supra* note 222, at 373.

919. *Id.*

920. DAVID O. STEWART, AMERICAN EMPEROR: AARON BURR'S CHALLENGE TO JEFFERSON'S AMERICA 264 (2012).

921. SMITH, *supra* note 222, at 373.

922. Stewart, *supra* note 931, at 264.

court."[923] The defense's attack on Wilkinson's character and Wilkinson's own testimony and had decimated the prosecution's faith in him.[924] Hay wrote to Jefferson, "my confidence in [Wilkinson] is shaken if not destroyed. I am sorry for it, on my own account, in the public account, and because you have expressed opinions in his favor. But you did not known then what you will soon know."[925] This letter was a warning from Hay to Jefferson that impeaching Marshall (like Chase) for interfering with the prosecution's evidence was a poor choice based on Wilkinson's poor veracity.[926] Finally, Hay moved that the jury be discharged and the case be motion *nolle prosequi*.[927] Marshall declined to grant the prosecution's motion to dismiss the jury without the defendant's consent; however, Burr demanded a verdict.[928] Marshall reviewed the case *in camera* and a jury ultimately acquitted Burr, now for the second time.[929]

Ultimately, as promised, Jefferson did send the evidence of Burr's trial before Congress in October 1807.[930] He urged the House to impeach Marshall, a plausible risk.[931] With the evidence that he sent, the president prefaced, "You will be enabled to judge whether the defect was in the testimony, in the law, or in the administration of the law, and wherever it shall be found the Legislature alone can apply or originate the remedy."[932] Hay bore mixed feelings on the proposition; similarly, Jefferson's likely harbored mixed intentions.[933] This may have been: to save face politically; to start a

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923. *Id.*

924. *See id.* ("By the time Wilkinson was done, even George Hay did not believe him. Hay urged Jefferson to investigate the general.").

925. 3 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA 471 (1921).

926. *See id.* ("The hint was strong. If Wilkinson were discredited, Jefferson himself was in danger. To attack the Supreme Court on such evidence was to invite a worse defeat than in the impeachment of [Samuel] Chase."); *see also* HOBSON, *supra* note 8, at 6 (writing the defense's "strategy was to discredit Wilkinson, the prosecution's star witness, whom they accused of criminal misconduct in ordering arrests, forcibly seizing and imprisoning potential witnesses, and then having them transported under military guard.").

927. SMITH, *supra* note 222, at 373.

928. *Id.*

929. *Id.*

930. HOBSON, *supra* note 8, at 23.

931. BEVERIDGE, *supra* note 92, at 530; *see also* HASKINS & JOHNSON, *supra* note 12, at 291 (noting that the House of Representatives was almost completely Republican and the Senate was very pro-Jefferson; thus, Marshall risked a successful vote to both impeach and convict him).

932. 10 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON: CORRESPONDENCE AND PAPERS 1803-1807 at 524 (2009).

933. *See* HASKINS & JOHNSON, *supra* note 12, at 289 (noting that Hay felt legislators should know of the full incident but nevertheless warned Jefferson

judicial impeachment; to spur Congress to pass a constitutional amendment to the treason clause, or the Judiciary's power, to see *Marbury* Congressionally overridden for once and for all.[934] Regardless of Jefferson's intent in delivering the materials to Congress, none of the above manifested. Nevertheless, Burr's political career never found its phoenix.[935] The trial had forever linked Burr to the indelible stain of treason.[936]

Some of Jefferson's desires to damage Marshall's reputation were successful.[937] In Baltimore, Maryland, a mob burned an effigy in the Chief Justice's likeness.[938] Coinciding with Jefferson's delivery, Republican news outlets denounced Marshall. For instance, on December 4, the *Virginia Argus* lambasted Marshall's prevention of Burr's conviction by overturning of *Bollman*, writing, "th[e] desirable independence of the Judges is very different from that which places them above the law . . . *legislating* on the subject of treason, and even dispensing with the law which the supreme court of the United States had previously declared on the same subject."[939] Moreover, the Republican newspaper hinted at Chase's unsuccessful, partisan impeachment in writing that Marshall "was conscious of being above the reach of punishment," and "even though no proof of corrupt motives can be exhibited against him, he ought to be *removed from office*."[940] Advocating for "an amendment . . . [authorizing] and requiring the President to remove any Judge from office at the request of a majority of both houses of Congress," an elected majority that unlike an independent judiciary, it wrote, "would generally be on the side of justice."[941] Still, on September 30,

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of his concerns regarding the political damage such a disclosure could do to the greater judicial system, a risk that Jefferson was willing to take).

934. BROOKHISER, *supra*, note 164, at 121; *see also* HASKINS & JOHNSON, *supra* note 12, at 290 (quoting Jefferson's concerns that there was a "radical defect in the administration of law").

935. *See* NANCY ISENBERG, FALLEN FOUNDER: THE LIFE OF AARON BURR 400-04 (2007) (noting that at seventy-seven years old, Burr married a fifty-eight-year-old wealthy widow, Eliza Jumel, who had reinvented herself from a young prostitute with a child out of wedlock into a socialite who divorced a dying Burr three years later after Burr squandered her wealth).

936. HOBSON, *supra* note 8, at 33 ("Burr escaped conviction as a traitor, but [prosecutor, William] Wirt forever linked him with the Biblical story of fallen humanity.").

937. *See* HASKINS & JOHNSON, *supra* note 12, at 291 (noting that then-Massachusetts Senator John Quincy Adams advanced a motion to cast doubts before Congress on Marshall's *Burr* opinion, which was ultimately unsuccessful).

938. SMITH, *supra* note 222, at 373.

939. 1 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY 155 (Bruce A. Ragsdale, ed., 2013) (italicization in original).

940. *Id.* (italicization in original).

941. *See id.* at 156 ("Such an amendment [to remove judges via presidential power] could not have the effect of producing any improper influence on the

the *United States Gazette* reprinted a Federalist party editorial that defended Marshall and criticized Jefferson's ongoing attempts "to run down the Judicial authority and attempt to merge it in that of the executive."[942] Over six years later, on January 14, 1814, bitterly, Jefferson wrote to Adams in reflection upon the Burr trial, "I dare say our cunning Chief Justice [Marshall] would swear to [anything], and find as many sophisms to twist it out of the general terms of our Declaration of rights . . . as he did to twist Burr's neck out of the halter of treason."[943] In a letter to Adams dated June 15, 1813, Jefferson had gone so far as to accuse Marshall of "writ[ing] libels."[944]

Roughly a month after the Burr trial had ended, Marshall wrote to Judge Richard Peters declaring that *Burr* left him, "fatigued and occupied [in] the most unpleasant case which has ever been brought before a Judge in this or perhaps any other country which affected to be governed by laws."[945] For Marshall and the Court, the case "was most deplorably serious."[946] Perhaps, he surmised, "I might . . . have made it less serious to myself by obeying the public will instead of the public law, and throwing a little more of the somber upon others."[947] However, for Marshall, supreme to the political whims of the president or the public, was: the Court's reputation, the checks and balances upon the Jefferson Administration, and the constitutional balances necessitating fairness for Burr.[948]

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minds of the Judges, or of diminishing their *legitimate and useful independence* . . . The opinion of the majority of both houses of Congress would generally be on the side of justice; and, if it sometimes erred, it is better in a free country that the will of the people should prevail.").

942. HOBSON, *supra* note 8, at 37 (citing Editorial—United States Gazette (Philadelphia), reprinted in the Virginia Gazette, September 30, 1807).

943. THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON & ABIGAIL & JOHN ADAMS 421 (Lester J. Cappon ed., 1959).

944. *Id.* at 331-32 (Jefferson and Adams corresponded regarding party differences between Federalists and Republicans).

945. BEVERIDGE, *supra* note 92, at 529.

946. *Id.*

947. *Id.*at 530.

948. *See generally* WHITE, *supra* note 6, at 22 (writing that among Marshall's principles of constitutionalism was a concept of "reciprocal obligations" in which the Branches must function "within the limits of their respective jurisdictions [with] a duty not to transgress these limits. The laws of the nation were the source of the power of government officials; and such officials had to obey those laws").

IV. CONCLUSION

Without damaging the Court's posterity or perceivably tarnishing Jefferson's presidency, Marshall rendered the opinion of *In Re Burr* and the power of the Judiciary over the Executive Branch in certain circumstances.[949] It is a Marshall Court case with undervalued significance. Marshall ushered *Burr* along in a careful fashion, similar to the manner in which he avoided the underlying issues of *Marbury*.[950] Moreover, he did it for the same reason: to prevent the public from plainly seeing the Court's lack of power to enforce its judgments.[951] Because of this, *Burr* did not manifest into the greater issue that was whether President Jefferson, or any president, may be summoned as a witness and ordered to produce documents in his possession.[952] Senator Beveridge estimated that the impact and relevance of *Burr* significantly carried onward through the Civil War, saving thousands of innocent lives that would have unconstitutionally fallen victim to "popular passion" based upon "groundless rumor and personal spite"[953] By 1885, it was characterized as an event that was "the most remarkable and imposing of any which up to that time had marked judicial annals of the country."[954] Its relevancy reared again a century and a half later when Jefferson's refusal served as precedent for President Richard M. Nixon's refusal to comply, claiming executive privilege with the Burger Court's order to produce the notorious White House tapes in *United States v. Nixon* (1974).[955] It even inspired a 2018

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949. *See* HOBSON, *supra* note 8, at 3 (writing that Marshall "maintain[ed] that the President was not exempt from court orders designed to protect the constitutional rights of criminal defendants").

950. *See* Scott Douglas Gerber, *The Supreme Court Before John Marshall*, 14 U. ST. THOMAS L.J 27, 35 (2018) (writing that in *Marbury*, Marshall "announce[d] that the Jefferson administration was wrong to withhold the judicial commissions . . . and that courts could issue writs to compel public officials to do their prescribed duty." Still, "the Supreme Court had no power to issue such writs," and "a showdown with the Jefferson administration was avoided, but Marshall still was able to 'reaffirm' the Court's power of judicial review").

951. *Id.*

952. *See* HOBSON, *supra* note 8, at 5 (writing that like *Marbury,* "[i]n Burr's case, too, the threatened confrontation did not occur"); *see also* UROFSKY & FINKELMAN, *supra* note 203, at 224.

953. BEVERIDGE, *supra* note 92, at 64-65.

954. MAGRUDER, *supra* note 19, at 199.

955. United States v. Nixon, 418 U.S. 683, 702 (1974) (Chief Justice Warren Burger writing on behalf of the Court, heavily referenced Nixon's renaissance of Jeffersonian claims for Executive privilege in *Burr*, wrote,

> "where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of

stage-play adaptation written by award-winning playwright, David L. Robbins, portraying the drama that Marshall faced when presiding.[956] Most recently, in 2020, *Burr* was a large focus of Chief Justice John Roberts' opinion over the constitutionality of compelling President Donald J. Trump's compliance with a subpoena, in spite of presidential immunity in *Trump v. Vance*.[957] Roberts wrote of Marshall's responsibility for "200 years of precedent establishing that Presidents, and their official communications, are subject to judicial process . . . even when the President is under investigation."[958]

Marshall's decision-making process was characteristically hierarchical, insofar as continually he centered his reasoning on the

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> Rule 17(c) have been correctly applied . . . From our examination of the materials submitted by the Special Prosecutor to the District Court in support of his motion for the subpoena, we are persuaded that the District Court's denial of . . . [President Nixon's] motion to quash the subpoena was consistent with Rule 17(c). We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production before trial. Although the courts will afford the utmost deference to presidential acts in the performance of an Art. II function . . . . W]hen a claim of presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on the ground that military or diplomatic secrets are implicated, but merely on the ground of a generalized interest in confidentiality, the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial and the fundamental demands of due process of law in the fair administration of criminal justice . . . [the Court] conclude[d] that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President.

Id. at 702, 707. *See* also, UROFSKY & FINKELMAN, *supra* note 203, at 224.

956. *The King of Crimes: The Aaron Burr Treason Trial in John Marshall's Court Premieres in January*, DOMINION ENERGY CENTER (Jan. 03, 2018), www.dominionenergycenter.com/news/detail/the-king-of-crimes-the-aaron-burr-treason-trial-in-john-marshalls-court-premieres-in-january [perma.cc/S2BB-ZRS4] (announced by the John Marshall Foundation).

957. *See Trump v. Vance*, 140 S. Ct. 2412, 2423, 207 L. Ed. 2d 907 (2020) (Chief Justice Roberts, writing, "In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena. In 1818, President Monroe received a subpoena to testify in a court-martial against one of his appointees." *Id.* "In 1875, President Grant submitted to a three-hour deposition in the criminal prosecution of a political appointee embroiled in a network of tax-evading whiskey distillers." *Id.* at 2423.).

958. *Id.* at 2427.

broadest terms conceivable in order to buttress its merit as a fundamental American principle of law.[959] In *Burr*, Marshall successfully shifted legal analysis from the large concept of treason, to analyzing the meaning of levying war, onward to the question of what constitutes an overt act, finally leaving the question of whether via constructive treason one could commit such an overt act.[960] Having felled the case at its analytical foundation, Marshall eradicated the concept of constructive treason in the young American Republic. "The mind is not to be led to the conclusion that the individual was present, by a train of conjectures or inferences, or of reasoning;" the Constitution is clear the fact of physical presence in the treasonous overt act of levying war "must be proved by two witnesses."[961] As UIC John Marshall Law School's Professor Olken stated of *Marbury*, "the chief justice deftly carved a set of legal issues from the political circumstances of the case in order to assert the importance of the Court in matters of constitutional interpretation."[962] So too here, Marshall redirected the potential for Burr's demise within the political tilt of Jefferson administration. For Jefferson's hopes to manifest and pursue a guilty verdict for Burr also meant that Jefferson's administration must acquiesce to the judiciary and Marshall. By miring a treason case in the political ramifications of executive privilege, Marshall completely frustrated Jefferson's goals.

While Marshall carefully crafted *Burr* to Jefferson's detriment in the judicial arena, Jefferson intended to seek the last word in the political arenas.[963] The fate of *Burr* appeared to be left in the jury's hands. However, Marshall was savvier. His showmanship and his judicial statesmanship had steered the Court and the country safely onward. Marshall facilitated the Judiciary's ability to occupy the thresholds of the political branches. He insulated the Judiciary from an undoing of criticism by deliberately exhibiting the center of this careful decision. Moreover, *Burr*, a case erroneously trivialized as a

959. WHITE, *supra* note 6, at 20-21.

960. *Burr*, 25 F. Cas. at 144 ("If one constructive treason be admitted, all may enter." *Id.* "The proposition that it could be is a startling one; and yet there would be no such overt act of levying war as, according to the decisions of the courts, would seem to be an indispensable element in the crime of treason." *Id.* 185.).

961. *Id.* at 185.

962. Olken, *supra* note 5, at 399.

963. SMITH, *supra* note 222, at 372; *see also* Hobson Interview, *supra* note 16, at 9 ("Marshall sought to build up respect for the Court . . . [by] separate[ing] law from politics, with the Court concerning itself with strictly legal matters . . . not an easy task, particularly during the tumultuous years of Jefferson's first administration. Defining what was 'law' and what was 'politics' remained controversial, of course, but Marshall to a great extent succeeded in creating a public perception of the Court as an impartial, disinterested legal institution, removed from the political arena.").

curious moment of history and law amid a lengthy career, rather, is a fascinating milestone of Marshall's unique legal, historical, and constitutional analysis. It serves as an exhibit that the pragmatic Chief Justice John Marshall was a quintessential judicial statesman. Marshall's place in history is profound, so too must be *In Re Burr*.