

The Aaron Burr Treason Trial—Suggestions for Judges

Judges can make an important contribution to students' understanding of the cases included in the Federal Judicial Center's Teaching Judicial History project. When meeting with students who are studying the cases, judges may wish to draw on these suggested discussion topics. See also [Involving a Judge in the Teaching Judicial History Project](#).

Overview

During the summer of 1807, Chief Justice John Marshall, sitting in the U.S. Circuit Court for Virginia, presided over the treason trial of former Vice President Aaron Burr. After leaving office in 1805 and under the shadow of his fatal duel with Alexander Hamilton, Burr had toured the western territory of the United States and organized a military expedition of uncertain purpose. James Wilkinson, commanding general of the U.S. Army and governor of the Louisiana territory, secretly conferred with Burr, but before Burr's "army" marched toward New Orleans, Wilkinson sent President Jefferson information about an alleged plot to establish a separate republic in the West. Jefferson issued a proclamation of conspiracy, and army officers arrested Burr, who was carried to Richmond to face charges of treason.

The trial provided dramatic confrontations between former Republican Party rivals Jefferson and Burr, and between the executive and judicial branches, represented by longtime enemies Marshall and Jefferson. Marshall approved Burr's request for a subpoena of presidential records, but Jefferson managed to provide the documents without directly responding to the court's order. After lengthy arguments on what evidence could be presented, Marshall narrowly defined the constitutional requirements for treason convictions, despite an earlier Supreme Court ruling in which the Chief Justice determined that Burr's associates could be held responsible for acts of war that they planned, even if they did not themselves take up arms. The proceedings failed to expose Burr's intentions, which remain a mystery, but Marshall's decision ensured that treason would remain a difficult crime to prosecute.

Understanding the court procedures and legal questions

In studying historic cases, students find it helpful to understand the differences between historical and current procedures in the federal courts. They also want to learn how the current courts define treason or handle subpoenas of governmental records. The questions below highlight features of the Burr trial that can frame

conversations between judges and students. Related background: [The Aaron Burr Treason Trial: A Short Narrative](#) (p. 1); [Legal Questions Before the Federal Courts](#) (p. 13).

1. The subpoena of presidential documents continues to be controversial. According to John Marshall, was the President subject to court subpoenas for evidence or testimony? What protection did a President have against harassment by subpoena? What executive privileges did Jefferson claim?
2. What was the impact of the Burr trial for future prosecutions of treason?
3. Jury selection in the Burr trial presented many challenges because so many citizens of Richmond opposed the former Vice President. How does the jury selection process protect the rights of a defendant?
4. Critics of Jefferson argued that the trial of Burr was an effort to punish a political enemy, and Jeffersonians harshly criticized John Marshall for what they characterized as a political decision to embarrass the president and his administration. Was the Burr treason trial a political trial? What characterizes a political trial? Can judges limit or restrict politically motivated prosecutions?
5. John Marshall's decision to bar much of the testimony planned by government prosecutors left the jury with no choice but to acquit Burr of the treason charges. How do judges decide what evidence is admissible?

Focus on Documents

These excerpted documents can be the basis of a classroom discussion with students who have read about the Burr trial and reviewed these selections in advance of a judge's visit.

1. Arguments of John Wickham, August 20–21, 1807

Defense Attorney John Wickham recalled the Framers' efforts to ensure that treason prosecutions would not be used for political ends, as had happened in England and, more recently, Revolutionary France. How did the Constitution restrict treason prosecutions? Did the indictment of Burr meet the criteria for treason convictions as defined by the Constitution?

The events which have since occurred in another country, and the sufferings under Robespierre, show how well human nature was understood by those who framed our constitution. The language which they have used for this purpose is plain, simple, and perspicuous. There is no occasion to resort to the rules of construction to fix its meaning. It explains itself.

Treason is to consist in levying war against the United States, and it must be public or open war; two witnesses must prove that there has been an overt act. The spirit and object of this constitutional provision are equally clear. The framers of the constitution, with the great volume of human nature before them, knew that perjury could easily be enlisted on the side of oppression; that any man might become the victim of private accusation; that declarations might be proved which were never made; and therefore they meant, as they have said, that no man should be the victim of such secret crimination; but that the punishment of this offence should only be incurred by those whose crimes are plain and apparent, against whom an open deed is proved.

2. Opinion of John Marshall, U.S. circuit court, Virginia, August 31, 1807

In his opinion limiting the government's right to call witnesses against Aaron Burr, Chief Justice Marshall anticipated the popular outcry that would greet his decision that effectively ended the treason prosecution of Burr. What principles, according to Marshall, must guide a judge's decisions?

Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly; but which may, perhaps not improperly, receive some notice. That 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. No man is desirous of becoming the peculiar subject of calumny. No man might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him 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. That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should, on each side, 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, perhaps, a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that it would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

3. *Virginia Argus*, editorial, December 4, 1807

Typical of the press attacks on Chief Justice Marshall was this editorial printed by a paper in the Chief Justice's hometown of Richmond. How does the author of the editorial define judicial independence? How had Marshall violated the author's sense of the proper separation of powers? How does this definition of judicial independence differ from the use of the term today?

The extraordinary proceedings in the case of AARON BURR . . . clearly shew that an *independent* Judiciary (that is to say, a Judiciary not controlled by the laws, and above the fear of violating them) is a very pernicious thing. That the federal Judiciary is, in this sense of the word, *independent*, is, perfectly certain; since no power at present exists by which it is probable a Judge could be punished even for palpable treachery to his country and wilful perversion of the law; a trial before the supreme court of impeachments being only a solemn and expensive farce.

Every friend of a free government must wish the members of the Judiciary to be independent of all improper influence; to be free from the smallest suspicion of being governed by fear, favor, or affection; and to enjoy salaries sufficient to set them far above the temptation of bribery or corruption.

But this desirable independence of the Judges is very different from that which places them above the law; enabling them not only to legislate by their decisions, but to vary from and dispense with those decisions, whenever it suits their purposes.

It is evident that in delivering his opinions in the case of Burr, Judge Marshall must have known that he possessed the latter of these two species of independence; that he felt himself to be 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; that as he looked down with contempt on the opinions of the people, so also he was conscious of being above the reach of punishment.