

The Cabinet and the Supreme Court Discuss Burr's Subpoena of the President—A Simulation Activity

Based on a model by Charlotte C. Anderson

For use in conjunction with "The Aaron Burr Treason Trial," by Charles F. Hobson, available at <http://www.fjc.gov/history/home.nsf>. A unit in the Teaching Judicial History Project, developed by the Federal Judicial Center in partnership with the American Bar Association's Division for Public Education.

Activity Objectives

Through an examination of the debate over the subpoena of documents from President Thomas Jefferson, students will gain an understanding of early debates over the separation of powers and conflicts between the executive and judicial branches. Examining the responses to Burr's motion for the subpoena duces tecum, students will understand the larger constitutional questions that have recurred throughout the history of the federal government. Students will also consider the political implications of the subpoena and the President's response.

Essential Questions

- How did the subpoena of President Jefferson relate to the principles of separation of powers, an independent judiciary, and executive privilege?
- What claims of executive privilege did Jefferson offer in response to the threat of subpoena?
- On what grounds did Chief Justice Marshall decide that the President must be subject to subpoenas from the federal courts? What special considerations was Marshall willing to grant the President in regard to subpoenas?
- What was the inherent conflict between the principle of separation of powers and the rights of defendants? How could that conflict be resolved?

Legal Questions Raised by the *Burr* Trial

The trial of Aaron Burr presented the federal courts with questions about the subpoena of the President in the face of executive branch claims of national security concerns and constitutional privileges of independence from the other branches of government.

Estimated Time Frame

Three to four 50-minute class periods.

Recommended Prep Work

Students need a basic familiarity with *Marbury v. Madison* (1803), an earlier confrontation between the executive and judiciary. Teachers should review “The Aaron Burr Treason Trial,” by Charles F. Hobson, available online at <http://www.fjc.gov>.

Prepare copies of the following excerpts and documents:

1. U.S. Circuit Court, Virginia: Grand jury (pp. 5–6)
2. Legal Questions Before the Federal Court: Could a subpoena duces tecum issue to the President of the United States? (pp. 13–14)
3. Biographies of Marshall, Jefferson, and Burr (pp. 20–24)
4. Marshall’s opinion (excerpts), U.S. Circuit Court, Va., June 13, 1807 (pp. 42–44)
5. Subpoena duces tecum, June 13, 1807 (pp. 45–46)
6. The “cipher letter” to James Wilkinson, July 22–29, 1806 (pp. 40–41)
7. Media Coverage and Public Debates (pp. 34–39)

(*Note:* All page citations refer to the PDF version of “The Aaron Burr Treason Trial,” by Charles F. Hobson, available online at <http://www.fjc.gov>.)

Description of the Activity

Activity Overview

After reviewing the basic facts of the Burr case and the political background to the trial, students will use secondary and primary sources to develop scripts for an imaginary conference of Supreme Court justices and an imaginary meeting of President Jefferson’s Cabinet. As it is unlikely that students would have sufficient background on the Burr case to hold a freewheeling, substantive discussion, they will receive questions for which they will prepare responses.

Introduction

Briefly review the basic facts of the Burr trial, with a focus on the subpoena duces tecum and on the previous confrontation between the executive and the judiciary related to the Supreme Court case, *Marbury v. Madison*.

Simulation

Tell students that Chief Justice John Marshall has convened an informal meeting of Supreme Court justices to discuss Burr’s motion to subpoena records from President Jefferson. Jefferson, in response to the subpoena, has convened a meeting of his Cabinet and other advisors, including U.S. Attorney George Hay, to discuss how he should proceed. (*Note:* Marshall frequently consulted with the associate justices on procedural and substantive legal questions. See letter to Justice William Cushing in the Burr unit historical documents, pp. 49–50.)

Working Groups

Divide the class into two groups and distribute the handouts. As per the directions on the worksheets, Group One will divide into smaller groups to develop the scripts for the discussion of the motion for the subpoena of the President. Group Two will divide into smaller groups to develop scripts for the Cabinet discussion concerning the President's response to the subpoena.

Timing

At least one class period will be needed for research and script preparation. Students will need to be told the length of the simulated meetings so that their scripts will accommodate that timeframe. Depending on your schedule and instructional goals, the scripted discussions can be as brief as 20 minutes or as long as 40 minutes.

Final Preparation for the Simulation

When the scripts are ready, Group One should select one person to act as John Marshall, and Group Two should select one person to act as Thomas Jefferson. In these roles, the selected students will present the key questions for discussion. The chair may also ask follow-up questions or engage other panelists.

Debrief and Wrap-up

Focus on the simulation and the general subjects raised by each group. Review the points made by the participants. Are there any questions or disagreements regarding statements made? Are students clear on the way this episode in the trial unfolded and was ultimately resolved? Did the discussions answer the essential questions presented above, and did they address the legal question raised by the subpoena?

Assessment

For assessment purposes, students can be required to identify the sources they consulted and how these sources supported the information and conclusions made in their script.

Students in each group can write an essay describing and assessing the points raised by the other group. Did the other group's discussion change the student's opinion about the court's authority to issue the subpoena of the President?

Alternative Modalities and Enrichment Activities

Students could research and write a comparative essay on the subpoena of President Richard Nixon and the "Watergate tapes."

Taking the role of President Jefferson, have students write a letter to U.S. Attorney George Hay explaining the President's position regarding the subpoena.

Have students rewrite the cipher letter using their own codes.

Assuming the role of the editor for the *Virginia Argus* or *Gazette*, students can write an editorial giving their perspective on the subpoena duces tecum episode.

Students can hold a debate on the following position: "President Jefferson should ignore the subpoena duces tecum."

Involving a Judge

Invite a judge to discuss the challenges of presiding at a trial involving conflicts between two or more branches of government. What characterizes a political trial? Can judges limit or restrict politically motivated prosecutions?

Standards Addressed

U.S. History Standards (Grades 5–12)

Era 3—Revolution and the New Nation (1754–1820s)

Standard 3: The institutions and practices of government created during the Revolution and how they were revised between 1787 and 1815 to create the foundation of the American political system based on the U.S. Constitution and the Bill of Rights.

Era 4—Expansion and Reform (1801–1861)

Standard 3: The extension, restriction, and reorganization of political democracy after 1800.

Standards in Historical Thinking

Standard 2: Historical Comprehension

- A. Identify the author or source of the historical document or narrative and assess its credibility.
- C. Identify the central question(s) the historical narrative addresses.
- E. Read historical narratives imaginatively.
- F. Appreciate historical perspectives.

Standard 3: Historical Analysis and Interpretation

- A. Compare and contrast differing sets of ideas, values, etc.
- B. Consider multiple perspectives.
- F. Compare competing historical narratives.

Standard 5: Historical Issues-Analysis and Decision-Making

- A. Identify issues and problems in the past and analyze the interests, values, perspectives, and points of view of those involved in the situation.

- F. Evaluate the implementation of a decision by analyzing the interests it served; estimating the position, power, and priority of each player involved; assessing the ethical dimensions of the decision; and evaluating its costs and benefits from a variety of perspectives.

Handout 1

Group One Assignment

The conference of Supreme Court justices: Chief Justice John Marshall has convened an informal conference of the justices to discuss Burr's motion for a subpoena duces tecum and to discuss Marshall's draft of the opinion he would deliver in the U.S. circuit court on June 13, 1807.

Questions for the conference of justices:

1. What was Burr's objective in asking for the subpoena of the President?
2. What distinction does Marshall make between the "first magistrates" of a democracy and a monarchy in responding to a subpoena duces tecum? Might some of the justices disagree?
3. Can a President be expected to take the time to respond to a subpoena—and why, or why not?
4. Should the court's order distinguish between a subpoena of documents and a subpoena of courtroom testimony?
5. Might the authority to subpoena documents from a sitting President threaten national security? How might a court accommodate concerns about national security?
6. The Burr trial had already provoked heated political debate, and both the prosecution and defense lawyers accused the others of carrying out a political agenda. How can the federal courts avoid being caught in this political debate?
7. What have the newspapers had to say about this subpoena issue? (to be drawn from the newspaper articles provided on pp. 34–39)
8. Should judges in the federal courts consider the possible political ramifications of their decisions?

Divide the students in Group One into smaller groups to develop scripts addressing these questions or other questions the group might suggest. One member of each smaller group should be responsible for presenting the response to the question. Strive to use formal language such as would have been used in the 1800s. The scripts answering the questions should be based on information found in the appropriate documents, but students should put the answers in their own words. Note that some questions can be answered by giving facts found in the documents. Other questions require the panelists to draw inferences from what they have read and know. It is important to keep the answers as concise and clear as possible. Try to limit answers to three minutes, although some should take less time and others a little more.

Students should consult these key documents and other sources as time allows:

- Excerpt from the short narrative: “U.S. Circuit Court, Virginia: Grand jury,” pp. 5–6
- Legal Questions Before the Federal Court: Could a subpoena duces tecum issue to the President of the United States? pp. 13–14
- Biographies of Marshall, Jefferson, and Burr, pp. 20–24
- Marshall’s opinion (excerpts), U.S. Circuit Court, Va., June 13, 1807, pp. 42–44
- Subpoena duces tecum, June 13, 1807, pp. 45–46
- Media Coverage and Public Debates, pp. 34–39

When the drafts of scripts are completed, check the total time the scripts will require and make adjustments if necessary.

Handout 2

Group Two Assignment

The President's Cabinet: President Thomas Jefferson has assembled his Cabinet and other advisors to discuss his response to the subpoena issued by Chief Justice John Marshall in the U.S. Circuit Court of Virginia.

Questions to be addressed by the Cabinet:

1. What did the subpoena request of President Jefferson?
2. Why would the defense want the documents identified in the subpoena?
3. By what means should the President communicate with the court?
4. Should Jefferson avoid appearing in court? Why or why not?
5. How might Jefferson maintain executive privilege without refusing to comply with the order of the court?
6. What is Jefferson's relationship with Burr? Did this relationship complicate his response to the subpoena?
7. How might the precedent of *Marbury v. Madison* affect Jefferson's response to the subpoena? What implications did *Marbury* and the Burr subpoena have for executive authority and the proper separation of powers?
8. What have the newspapers had to say about this subpoena issue? (to be inferred from the newspaper articles provided on pp. 34–39) What might be the political ramifications of Jefferson's response to the subpoena?

Divide the students in Group Two into smaller groups to develop scripts addressing these questions or other questions the group might suggest. One member of each smaller group should be responsible for presenting the response to the question. Strive to use formal language such as would have been used in the 1800s. The scripts answering the questions should be based on information found in the appropriate documents, but students should put the answers in their own words. Note that some questions can be answered by giving facts found in the documents. Other questions require the panelists to draw inferences from what they have read and know. It is important to keep the answers as concise and clear as possible. Try to limit answers to three minutes, although some should take less time and others a little more.

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