Constitutional Requirements for a Treason Conviction—A Primary Sources Activity

Prepared 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 analysis and discussion of primary sources related to the Aaron Burr treason trial, students will gain a deeper understanding of the constitutional definition of treason and the criteria for conviction on charges of treason. Drawing on arguments by the defense and prosecution attorneys and on the decisions of Chief Justice John Marshall, students will identify and analyze conflicting definitions of treason and conflicting standards of interpreting the Constitution.

Essential Questions

- Does the Constitution require the direct use of force and presence at the site of an act of war for conviction on charges of treason, or is it sufficient for conviction that a defendant is "constructively present" where the act took place, by playing a key role in organizing and supporting the act of treason?
- When are federal judges required to follow precedents established by earlier Supreme Court decisions? Does every part of a Supreme Court decision have equal weight or authority?
- Why did the framers include in the Constitution restrictions on the prosecution and conviction of defendants accused of treason? How did these limits on treason prosecutions differ from the criteria for treason convictions in Great Britain or the American colonies?

Legal Issues Raised by the *Burr* Trial

The trial of Aaron Burr on charges of treason presented the federal court and the jury with questions about the constitutional requirements for treason convictions, and questions about whether the long-standing legal concept of "constructive treason" had any authority in the federal courts.

Estimated Time Frame

Two to three 50-minute class periods.

Recommended Prep Work

Review "The Aaron Burr Treason Trial," by Charles F. Hobson, especially "A Short Narrative," pp. 1–8; the Lawyers' Arguments and Strategies, pp. 18–19; and biographies of Burr and Blennerhassett, pp. 23–26. (*Note*: All page citations refer to the PDF version of the unit, available online at http://www.fjc.gov.)

Prepare student copies of the following excerpts and documents:

1. U.S. Constitution, Article III, Section 3 (below)
2. The Law of Treason (pp. 1–2)
3. Indictment of Burr for treason (pp. 46–48)
4. Marshall's opinion, August 31, 1807 (pp. 56–60)
5. Defense argument, John Wickham, Aug. 20–21, 1807 (pp. 50–53)
6. Worksheet—Defense Arguments (below)
7. Prosecution argument, William Wirt, Aug. 25, 1807 (pp. 53–56)
8. Worksheet—Prosecution Arguments (below)

Description of the Activity

Activity Overview

The lesson begins with the teacher's review of the following: the circumstances of Burr's arrest; background on the law of treason; the *Bollman and Swartwout* case; the Burr indictment; and the motion that led to the arguments. Students then use worksheets to analyze Wickham's defense argument and Wirt's prosecution argument. After a debrief of the arguments, the lesson closes with a review of Chief Justice Marshall's decision and an exploration of the essential questions.

The Law

Distribute copies of "The Law of Treason" from the unit narrative. After students have read the handout, discuss the crime with which Burr was charged, the relationship and difference between English and U.S. definitions of treason, and the role of courts in interpreting what the Constitution identifies as "levying war." Be sure students understand the term "constructive treason," as it will come up again in the primary sources they will read.

The Ex Parte Bollman and Swartwout Decision

Inform students that in presenting their arguments on what treason entails, the attorneys refer to the *Ex parte Bollman and Swartwout* decision of the previous spring.

Marshall's opinion in *Ex parte Bollman and Swartwout* ordered the prisoners' release on the grounds that there was no probable cause to commit them on charges of treason. The opinion offered general observations about the nature of treason that were to have an important bearing in the trial of Aaron Burr. To be

traitor, said Marshall, an individual did not have to appear "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, and who are actually leagued in the general conspiracy, are to be considered as traitors" (p. 3).

The Burr Indictment

Give students an opportunity to briefly examine the indictment (attached excerpt or copy from pp. 46–48) under which Burr was brought to trial for treason. Can students find the statement indicating that Burr is charged with the treasonable crime of "levying war"? Can they find the requisite words—acted "treasonably" (or "traitorously") and "against his allegiance"? (*Note*: The petit jury's verdict was attached to the indictment filed in court records at the close of the trial.)

The Motion to Exclude Evidence

Explain that a motion is a written or oral application requesting a court (the judge or judges) to make a specified ruling or order. In this case, once the defense made the following motion, the defense argued that the judge should rule to allow the motion, given their interpretation of treason—while the prosecution argued for the judge to deny the motion, given their very different interpretation.

"After only a dozen witnesses had been examined, the defense moved to exclude the admission of evidence that did not go to prove the charge as defined in the indictment, that Burr had committed treason by levying war on Blennerhassett's Island on December 10, 1806. This motion provoked an elaborate argument over the meaning of treason that continued through August 29" (p. 11, Hobson, *The Aaron Burr Treason Trial*).

Examining Primary Sources

1. Distribute copies of the defense arguments of John Wickham and the accompanying worksheet. Working individually or in small groups, students should complete the worksheet. Hold a full class discussion of the arguments, reviewing and discussing answers on the worksheet.

Conclude by focusing on the final selection from Wickham's argument. Do students agree with Wickham that the language of the Constitution in Article III, Section 3, is "plain, simple, and perspicuous"? What restatements do students have to offer?

2. Distribute copies of the prosecution arguments of William Wirt and the accompanying worksheet. Point out that "the gentleman," "him," and "he" refer to Burr, who is speaking through his attorney, Wickham. "The decision" refers to the Su-

preme Court's decision in *Ex parte Bollman and Swartwout*. After students have completed the worksheet, hold a full class discussion of the responses.

3. Review and compare the arguments.

- How might a jury respond to each?
- Why might Wickham have chosen to focus on common law? Remind students that the prosecution drew on common law to prove Burr's guilt.
- Why might Wirt have taken the line of argument he did rather than countering Wickham's common-law arguments? Was this a successful strategy?
- To whom or what was Wirt responding in denying that his argument was based on an extrajudicial passage of a decision?

4. Distribute copies of the excerpts from Chief Justice Marshall's decision that relate to the issues raised in these arguments. Explore with students their responses to the attorneys' arguments. (*Note*: It is this decision to limit further evidence that led to the jury's verdict of "not guilty on basis of evidence.")

- How does Marshall respond to Wickham's argument that the common law related to treason does not apply to proceedings in a federal court?
- What does Marshall say about Burr's participation in the assembling of troops on Blennerhassett's Island?
- Did Marshall agree with Wirt that the Supreme Court's decision in *Ex parte Bollman and Swartwout* applied to the case of Burr? Why or why not?
- Do you agree with Marshall's conclusions? Why?

Debrief and Wrap-up

Focus on student understanding of the essential questions and Chief Justice Marshall's criteria for conviction on treason charges. Discuss what was unique about the law of treason under the U.S. Constitution.

Assessment

- Evaluation of student worksheets.
- Students can write an essay explaining their agreement or disagreement with Chief Justice Marshall's decision to exclude further evidence.

Alternative Modalities and Enrichment Activities

Have students:

- Rewrite the indictment using contemporary language, but taking care to include the requisite terms.

- Wickham refers to "sufferings under Robespierre" as an example of what can happen under a legal system that embraces constructive treasons. Research this reference and write a report on the "sufferings."
- Create a cartoon depicting one or more of the pictures that Wirt painted using words in his argument.
- Assume the role of a journalist and write a report of the attorneys' arguments.

Involving a Judge

Invite a judge to discuss how courts decide what evidence is admissible and what are the grounds for barring testimony of witnesses.

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.

D. Evaluate alternative courses of action, keeping in mind the information available at the time, in terms of ethical considerations, the interests of those affected by the decision, and the long- and short-term consequences of each.

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.

Documents

U.S. Constitution, Article III, Section 3

[1] 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.

[2] The 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.

Indictment of Burr for Treason, U.S. Circuit Court, Virginia, June 24, 1807 (excerpt)

In criminal law, the person accused of a crime must first be indicted by a grand jury before being tried by a petit jury. An indictment is a written accusation framed by the prosecutor upon the grand jury's "presentment" that a crime has occurred. In Burr's case the grand jury was composed of sixteen members, at least twelve of whom had to concur that the facts alleged were true. Foreman John Randolph's endorsement of "a true bill" signified that this minimum number agreed to Burr's indictment.

The indictment below follows a set form and contains much standardized language. Certain terms of art were required in treason indictments, as for example wording to the effect that the accused acted "treasonably" (or "traitorously") and against his "allegiance."

Also endorsed on this indictment is the petit jury's verdict, as entered by foreman Edward Carrington, implying that the jury might have voted to convict if it had heard additional evidence. Burr protested against this irregular verdict, but Chief Justice Marshall allowed it to stand as the jury wished, while noting that the entry on the official record would be "not guilty."

[Document Source: United States v. Burr, U.S. Circuit Court, Va., Ended Cases (Restored), Library of Virginia.]

Virginia District:

In the Circuit Court of the United States of America in and for the fifth Circuit and Virginia district: The grand inquest of the United States of America, for the Virginia district, upon their oath do present that Aaron Burr, late of the City of New York, and state of New York, attorney at law, being an inhabitant of and residing within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the same United States, not having the fear of god before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, wickedly devising and intending the peace and tranquillity of the said United States to disturb and to stir move and excite insurrection, rebellion and war against the said United States, on the tenth day of December, in the year of Christ one thousand eight hundred and six at a certain place called and known by the name of Blannerhassetts island in the County of Wood and district of Virginia aforesaid, and within the jurisdiction of this Court, with force and arms, unlawfully falsely, maliciously and traitorously did compass imagine and intend to raise and levy war, insurrection and rebellion against the said United States, and in order to fulfil and bring to effect the said traitorous compassings imaginations and intentions of him the said Aaron Burr, he the said Aaron Burr, afterwards to wit on the said tenth day of December in the year one thousand eight hundred and six aforesaid at the said island called Blen-

nerhassetts island as aforesaid in the County of Wood aforesaid in the district of Virginia aforesaid and within the jurisdiction of this Court, with a great multitude of persons whose names at present are unknown to the grand inquest aforesaid, to a great number, to wit to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say with guns, swords and dirks, and other warlike weapons as well offensive as defensive, being then and there unlawfully maliciously and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States, and then and there with force and arms did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States, and then and there, that is to say on the day and in the year aforesaid at the island aforesaid, commonly called Blannerhassett's island in the County aforesaid of Wood, within the Virginia district, and the jurisdiction of this Court, in pursuance of such their traitorous intentions and purposes aforesaid, he the said Aaron Burr with the said persons so as aforesaid traitorously assembled and armed and arrayed in manner aforesaid most wickedly, maliciously, and traitorously did ordain prepare and levy war against the said United States, contrary to the duty of their said allegiance and fidelity, against the constitution peace and dignity of the said United States and against the form of the act of the Congress of the said United States in such case made and provided. . . .

[Endorsed with Petit Jury's Verdict: "We of the Jury find that Aaron Burr is not proved to be guilty under this Indictment by any evidence submitted to us. We therefore find him not Guilty. / E. Carrington/ foreman."]

Defense Argument of John Wickham (excerpts), U.S. Circuit Court for the District of Virginia, August 20–21, 1807

[Document Source: United States v. Burr, 25 Fed. Cases 116–22.]

[*Note*: This is a journalist's account of Wickham's remarks rather than an exact transcription. After beginning in the third person, the account switches to a first person narrative.]

. . . Mr. W. contended that the clauses of the constitution which declare that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and that "no person shall be convicted, unless on the testimony of two witnesses to the same overt act," must be construed according to the plain, natural import of the words. The constitution is a new and original compact between the people of the United States, and is to 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. It being new and original, and having no reference to any former act or instrument, forbids a resort to any other rules of construction than such as are furnished by the constitution itself, or the nature of the subject. Hence, artificial rules of construction, drawn from the common law and the usages of courts in construing statutes, cannot be resorted to, to prove that these words of the constitution are to be construed, not according to their natural import, but that an artificial meaning, drawn from the statute and common law of England, is to be affixed to them, entirely different.

Under the federal constitution, I presume, it will hardly be contended by the counsel for the prosecution that we have any common law belonging to the United States at large. I always did believe, and still believe, that we have no common law for the United States, especially in criminal cases. The only ground on which the common law becomes a rule of decision in the federal courts, is under that clause in the judiciary law, which makes the laws of the several states a rule of decision, as far as they respectively apply. The common law is part of the law of Virginia, and the act of congress has adopted the laws of Virginia as the rule of decision in cases where they apply. With respect to crimes and offences against the United States, which must be punished in a uniform manner throughout the Union, it seems clear, for the reason already given, that none such can exist at common law, as the United States have in that character no common law, and that they must be created by statute. Unquestionably the gentlemen will not deny this uniformity; they will not contend that what is treason in Maryland is not treason in Virginia, or vice versa. If it exist at all, it must be uniform, embracing

the whole of the United States. That the United States have no common law, and that offences against them must be created and prohibited by statute, is the opinion of the learned Judge Chase; and I believe that this opinion received the unqualified approbation of those who thought most unfavorably of his opinions and judicial conduct on other occasions. Now, as 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.

This brings me to the consideration of the constitution itself. I have before endeavored to demonstrate that this instrument is not to be explained by the same narrow, technical rules that apply to a statute made for altering some provision of the common law; but that such a construction should be given as is consistent not only with the letter but the spirit in which the great palladium of our liberties was formed. The object of the American constitution was to perpetuate the liberties of the people of this country.

The framers of the instrument well knew the dreadful punishments inflicted, and the grievous oppressions produced, by constructive treasons in other countries, as well where the primary object was the security of the throne as where the public good was the pretext. Those gentlemen well knew from history, ancient as well as modern, that, in every age and climate, where the people enjoyed even the semblance of liberty, and where factions or parties existed, an accusation of treason, or a design to overturn the government, had been occasionally resorted to by those in power as the most convenient means of destroying those individuals whom they had marked out for victims; and that the best mode of insuring a man's conviction was to hunt him down as dangerous to the state. They knew that mankind are always the same, and that the same passions and vices must exist, though sometimes under different modifications, until the human race itself be extinct. That a repetition of the same scenes which have deluged other countries with their best blood might take place here they well knew, and endeavored as far as possible to guard against the evil by a constitutional sanction. They knew that when a state is divided into parties, what horrible cruelties may be committed even in the name and under the assumed authority of a majority of the people, and therefore endeavored to prevent them. 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. . . .

. . . He insisted that in so far as any expressions were to be found in the opinion of the supreme court in the Case of Bollman and Swartwout, which might seem to imply that force was not necessary, they were obiter and extra-judicial. He cited other authorities which are here omitted, and insisted that the evidence wholly failed to show that there had been anything like force, or violence, or military array displayed on Blennerhassett's Island.

Worksheet

Argument of John Wickham, U.S. Circuit Court for the District of Virginia, August 20–21, 1807

I. Define the following terms as used in this document

construction

construe or construed

perspicuous

deed

palladium

obiter

extra judicial

II. Answer the following questions by citing the appropriate excerpt from Wickham's argument.

1. What is the significance of Wickham's repeated emphasis on the Constitution as "a new and original compact"? What impact does this have on the interpretation of the treason provisions of the Constitution?

2. How should judges determine the meaning of the Constitution? How does this process of decision making differ from earlier legal practice in Great Britain and the individual states?

3. Why does Wickham conclude that there is no common law in the United States? What impact does this belief have on interpretation of the treason provisions of the Constitution?

4. What, according to Wickham, is the danger of a legal system that accepts the concept of "constructive treason"? What specific examples from history does Wickham cite in support of this argument?

5. Why, according to Wickham, did the framers of the Constitution require the testimony of two witnesses for conviction on charges of treason?

6. What is the basis for Wickham's argument that Chief Justice Marshall's opinion in *Ex parte Bollman and Swartwout* is consistent with Wickham's own argument that the use of force is necessary for a treason conviction?

7. Are you persuaded by Wickham's argument? Why or why not?

Prosecution Argument of William Wirt (excerpts), U.S. Circuit Court, August 25, 1807

Wirt's speech was mainly a point-by-point reply to Wickham. Here Wirt attacked what he considered to be the weakest part of Wickham's argument—Wickham's studious avoidance of the Supreme Court's opinion in Ex parte Bollman and Swartwout. The prosecution relied heavily on this precedent to show that Burr had committed treason even though he was not present on Blennerhassett's Island.

[Document Source: United States v. Burr, 25 Fed. Cases 122–36.]

[*Note*: This document is a journalist's account of Wirt's remarks rather than an exact transcription. After beginning in the first person, the narrative switches to the third person in the final paragraph.]

Sir, if the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument, for the path of inquiry in which he was led him directly to it. Interpreting the American constitution, he would have preferred no authority to that of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity. He would have set it before you in every possible light. He would have illustrated it. He would have adorned it. You would have seen it, under the action of his genius, appear with all the varying grandeur of our mountains in the morning sun. He would not have relinquished it for the common law, nor have deserted a rock so broad and solid to walk upon the waves of the Atlantic. But he knew that this decision closed against him completely the very point for which he was laboring. Hence it was that the decision was kept so sedulously out of view, until, from the exploded materials of the common law, he thought he had reared a Gothic edifice so huge and so dark as quite to overshadow and eclipse it.

Let us bring it from this obscurity into the face of day. We who 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. The inquiry is whether the presence at the overt act be necessary to make a man a traitor. The gentlemen [the defense] say that it is necessary—that he cannot be a principal in the treason without actual presence.

[*Note*: Here the narrative switches to the third person and the "he" mentioned below refers to Wirt, not to Burr.]

What says the supreme court in the Case of Bollman and Swartwout? "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." He insisted that this decision of the supreme court had settled the principle that actual presence was not necessary, and that the passage upon which he relied was not a mere obiter dictum, and not extra judicial; that in the Case of Bollman and Swartwout the question whether actual presence at the place where the overt act was committed was necessary to constitute the crime of treason was a material question to be considered by the court.

Worksheet

Argument of William Wirt (excerpts), U.S. Circuit Court, August 25, 1807

I. Define the following terms as they are used in this document.

judicial construction

avidity

sedulously

edifice

leagued

extra judicial

obiter dictum

II. Answer the following questions by citing the appropriate excerpt from Wirt's argument.

1. Why, according to Wirt, had Wickham dismissed the significance of John Marshall's decision in *Ex parte Bollman and Swartwout*?

2. What arguments does Wirt offer for establishing the authority of Supreme Court precedents?

3. What according to Wirt is the most important question before the court in this case?

III. Explain the following passages by responding to the questions/instructions.

1. *"[We] . . . 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."*

What is the "source of light"?

Who does Wirt suggest is not looking at that source of light?

What does he imply is the reason for doing this?

2. To what do the underlined words refer in this passage?

"He would not have relinquished <u>it</u> for the common law, nor have <u>deserted a rock so broad and solid</u> to <u>walk upon the waves of the Atlantic</u>."

- <u>it</u> –
- <u>deserted a rock so broad and solid</u> –
- <u>walk upon the waves of the Atlantic</u> –

3. To whom or what is Wirt responding in making his final argument that "*this decision of the supreme court* [*Ex parte Bollman and Swartwout*] *had settled the principle that actual presence was not necessary, and that the passage upon which he relied was not a mere obiter dictum, and not extra judicial . . .*"? Who raised this question earlier?

4. Are you persuaded by Wirt's argument? Why or why not?

Marshall's Opinion (excerpts), U.S. Circuit Court, Virginia, August 31, 1807

Chief Justice Marshall delivered the principal opinion in the Burr treason trial. Broadly speaking, the opinion addressed the question, What is the meaning of treason under the Constitution? He devoted a major portion of the opinion to explaining and clarifying the Supreme Court's opinion in Ex parte Bollman and Swartwout.

In this first excerpt, the Chief Justice rejected the defense's argument that the opinion was "extrajudicial," that is, not directly related to the court's decision and thus not having the authority of precedent. He also denied the prosecution's contention that the opinion adopted the English common-law doctrine that an accessory—one who advised, aided, or abetted the crime—could be implicated as a principal in treason.

[Document Source: United States v. Burr, 25 Fed. Cases 159–80.]

It may now be proper to notice the opinion of the supreme court in the case of the United States against 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 extra-judicial and was delivered on a point not argued. This court is therefore required to depart from the principle there laid down.

It is true that, in that case, after forming the opinion that no treason could be committed because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. . . . The court had employed some reasoning to show that without the actual embodying of men war could not be levied. It might have been inferred from this that those only who were so embodied could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the court proceeded to observe: "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 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 to be considered as traitors."

This court is told that if this opinion be incorrect it ought not to be obeyed, because it was extra-judicial. 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 question again before the supreme court for reconsideration, in a case in which it would directly occur and be fully argued. . . . I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes.

Some gentlemen have argued as if the supreme court had adopted the whole doctrine of the English books on the subject of accessories to treason. But certainly such is not the fact. Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "perform a part," which will furnish the overt act; and they must be "leagued in conspiracy." The person who comes within this description in the opinion of the court levies war. The present motion, however, does not rest upon this point; for if under this indictment the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony, in its present stage.

. . .

It is, then, the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's Island; or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place; indeed, the contrary is most apparent.

With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion that if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and therefore is not admissible in this country unless by virtue of a similar operation; a point far from being established, but on which, for the present, no opinion is given.