John Marshall and the Burr Trial

ROBERT K. FAULKNER

THAT political bias, rather than legal principle, controlled Chief Justice John Marshall's decisive actions at the trial of Aaron Burr for treason in 1807 remains the prevailing view among historians, despite two recent studies of contrary tenor. The opinion is mistaken and its correction is important. Not only does Marshall's reputation yet suffer from the judgment of the distinguished scholar, Edward S. Corwin, that the trial exhibits "the one serious blemish on his judicial record," but understanding of the trial itself is clouded by the obscurity attending Marshall's role. It seems that even modern law has been muddied by the controversy. Congress' official edition of the Constitution, still influenced by Corwin, holds the great Chief Justice's "vacillation . . . between the Bollmann and Burr cases" to be one reason why "the law of treason [is] in a somewhat doubtful condition."¹

The prevailing belief was most cogently spelled out, if not originated, by Corwin in 1919.² Corwin seemed to feel that only political bias, in the crude sense of antipathy toward Thomas Jefferson, could explain what appeared to him manifest difficulties in Marshall's conduct. Chief among these were inconsistencies between Marshall's decisive opinions at Burr's trial and common law principles by which the Constitution's treason clause must be interpreted and with which Marshall himself had expressly agreed.

Mr. Faulkner is assistant professor of politics in Princeton University.

¹ The Constitution of the United States of America: Analysis and Interpretation (Senate Doc. No. 39, 88 Cong., 1 Sess., 1964), 733-34. See also 728-29.
in *ex parte Bollmann* and *ex parte Swartwout*. Suppose, however, that no such contradictions, manifest or subtle, exist. The allegations of distorted law and of vacillating opinions then collapse; the imputations of political motivation become but speculations unnecessary and even irrelevant to the explanation of Marshall's deeds.

The charge of a sharp divergence between Marshall's views and those implicit in the Constitution could have been questioned long before this, at least since the publication in 1945 of Willard Hurst's fine articles on "Treason in the United States" and on its English background. Yet Corwin's has remained the received account of Marshall's behavior at the Burr trial, perhaps because it was not expressly questioned by Hurst. Such an explicit challenge has been made in Bradley Chapin's *The American Law of Treason*. Yet the treatment is not fully satisfactory. While Chapin demonstrates that the procedural grounds on which Marshall in effect halted Burr's trial were perfectly consonant with the common law, he does not expressly confront Corwin's various criticisms of Marshall's substantive notion of treason. Nor does he examine Corwin's crucial allegation of a divergence between the Burr and Bollmann opinions. In fact he obscures that question by a loose restatement of it. While the recent writers provide the scholarship required for an appraisal of Marshall's conduct, the actual clarification still needs to be done. The purpose of this article is to demonstrate that in the light of the findings of Hurst and Chapin, Marshall's opinions amount to an accurate grasp of the Constitution's tenor, that there is no contradiction between Marshall's views at the Burr trial and his opinions previously expressed, and that the imputation of obscure and biased motives is unsupported by any other evidence worthy of the name.

Corwin's argument turns on the contention that Marshall demanded from Burr's prosecutors evidence patently more strict than the Constitution itself required. Article III, Section 3 of the fundamental law prescribes that "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." Since Burr did not openly confess, the prosecution had to prove by two witnesses an overt act of treason. Marshall demanded that it thus prove that personal overt act of Burr which constituted the particular act of treason with which he was charged. The indictment charged Burr with a specific act of "levy-
ing war," which had taken place at the island retreat of his associate Har-
man Blennerhassett. If, as the prosecution maintained, this meant a charge
of procuring the assemblage of force on that island rather than a charge of
being present in that assemblage, then that act of procuring, like actual
presence, must be shown by two witnesses. "If then the procurement be
substituted in place of presence," Marshall intoned, "does it not also con-
stitute an essential part of the overt act? . . . If in one case the presence of
the individual make the guilt of the assemblage his guilt, and in the other
case the procurement by the individual make the guilt of the assemblage his
guilt, then presence and procurement are equally component parts of the
overt act, and equally require two witnesses."

Burr's acquittal was then inevitable. The prosecution admitted his ab-
sence from Blennerhassett's island and lacked any witnesses to his actual
procurement of the assemblage there.

According to Corwin, however, Marshall's interpretation is obviously
too stringent. The Constitution does not require two witnesses to the per-
sonal overt act of the accused. In accord with the common law doctrine that
"in treason all are principals," it requires two witnesses only to an overt act
of treason with which the accused may be otherwise linked. "When by fur-
ther evidence any particular individual is connected with the treasonable
combination which brought about the overt act," Corwin writes, "that act, as-
suming the Common Law doctrine, becomes his act, and he is accordingly
responsible for it at the place where it occurred." "Can it be, then," he
later asks, "that the Constitution is chargeable with the absurdity of re-
garding the procurers of treason as traitors and yet of making their convic-
tion impossible?"

The very least that may be concluded from a comparison of Corwin's ar-
gument with the modern interpretations of early national treason law is
that it treats Marshall's problem as unduly "simple." Corwin adopted Wil-
liam Wirt's contention that, since the "entire phraseology" in question
comes from an English statute of Edward III's time, it ought to be con-
strued in light of the English common law. The reasoning is not impres-
sive. The Constitution does not follow the famous statute of Edward III
precisely. It leaves out the action of "compassing or imagining the death of
the king" and includes an express evidential requirement of two witnesses
to the same overt act. Thus it is by no means obvious that ancient English

*David Robertson, Reports of the Trials of Colonel Aaron Burr for Treason and for a
Misdemeanor . . . (2 vols, Philadelphia, 1808), II, 436, 438
*Corwin, John Marshall, 107-08
interpretations, presuming with Corwin but against Hurst and Chapin that these were unambiguous, ought to control interpretation of the American Constitution.\(^7\)

In particular, it is not manifest that the Constitution’s evidentiary requirements should be interpreted in the light of the common law doctrine that “in treason all are principals.” The application of this maxim would render traitors in principal degree those who are said in common law parlance to have performed only an accessorial role, such as procuring a treasonable assemblage. This could well imply the creation of federal crimes by common law doctrine. Precisely the federal government’s authority to punish acts rendered illegal merely by the common law, however, was a hotly disputed issue even in 1807. It was a question actually decided in the negative by the Supreme Court some five years after Burr’s trial. This difficulty is not even mentioned by Corwin, although it was raised by Burr’s attorneys and by Marshall as well.\(^8\)

If one presumes the applicability of the common law, Marshall’s decisive failure to conform to its dictates cannot be demonstrated. The prosecution’s indictment was faulty even under the common law. Whatever the comparable culpability of procurer of a treasonable assemblage and participant in such an assemblage, it seems that under the common law as received from England the accused had to be charged with the particular act of treason, be it procuring or participating, which he had committed. The indictment, however, charged Burr with “levying war”—a head of action long taken to mean actual perpetration—while the prosecution had evidence to prove only that he procured the war levied on Blennerhassett’s island. The prosecuting attorneys, as well as Corwin, tried to link Burr with the action on the island by arguing that he was “constructively present,” a doctrine which Chapin calls “unknown to the common law” in such a context.\(^9\) It was the prosecution and not the defense which here insisted upon the inapplicability of English common law definitions and distinctions. “There is a moral sense,” urged Wirt, “much more unerring in questions of this sort, than

\(^7\) Ibid., 104; Hurst, “English Sources of the American Law of Treason,” 316; Hurst, “Treason in the United States,” 250-55, 395-417; Chapin, American Law of Treason, 3-9, 83-84.


the frigid deductions of jurists or philosophers. . ."10 Chapin has even called the prosecution's "faulty indictment" the "fundamental fact" underlying disposition of the case and in this manner has exonerated Marshall completely from Corwin's charges. It is quite true that Marshall was disposed to interpret the indictment according to its common law meaning, and then to find it faulty. But it is also true that he allowed himself to suppose that the indictment's language might be read in the prosecution's lenient manner, as alleging procurement of war with a charge of levying war, and he still would not permit further introduction of evidence unless the prosecution could prove Burr's personal overt act. Even if the charge were taken to be procurement, the Constitution's restrictive intent required that particular charge to be supported by two witnesses—and the prosecution could not provide one.11

Thus, even if one grants the adequacy of dubious pleadings as well as the applicability of technical legal doctrines whose bearing was disputed, there remains at issue the sufficiency of the prosecution's evidence in light of the peculiar intent underlying Article III, Section 3. In a way this is the basic question, for the Constitution's intent might well encompass common law doctrines and enlarge common law meanings.

It is not impossible that the framers of this section presumed that procurers of treason against the United States would be punished as traitors. They could hardly have been ignorant of certain English glosses on "levying war" which authorized this. Yet it must be said that the evidence of their wishes fails to manifest such a purpose. It is not easy to see why Corwin is so certain that Marshall's problem was "simple." In a manner unusual for the constitutional scholar, he discusses neither the words of the fundamental law nor the speeches of its framers.

In fact, both words and speeches display—if they show any purpose with respect to the crime's definition and punishment—a purpose perhaps contrary to that just mentioned. They exhibit the framers' pervasive concern to prevent, by defining the crime strictly and requiring unequivocal evidence, the use or abuse of treason prosecutions in domestic political conflict. Hurst does not tire of observing that the "outstanding feature" of the treason clause, compared with provisions in colonial and Revolutionary legislation, is that "it is on its face restrictive of the scope of the offence. . ."12 It is well known that no offense analogous to "compassing" the king's death was included in treason's definition, that the crime "shall con-

11 Ibid., 432, 436, 438.
12 Hurst, "Treason in the United States," 235.
sist only in levying war" and adhering to the country's enemies, and that "giving them aid and comfort" was added probably as a qualification to the last clause.\textsuperscript{13} The progressive restriction of the language of Section 3 during its framing, and the language itself, bespeak the framers' concern for a limited definition of treason, perhaps so very limited as to apply most literally only to those who have themselves not only subtly procured but obviously prosecuted open acts of treason. The requirements of evidence seem to reflect this spirit. In fact, as Hurst observes, a motion was introduced in the Convention on August 20 to provide that "Treason against the United States shall consist only in some overt act of levying war against the United States. . . ." The motion was voted down. But it was voted down only after the Convention added to the constitutional requirement of two witnesses the words "to the same overt act." No reference to these happenings occurs in Madison's \textit{Notes}. Nevertheless, Hurst writes, "the inference seems fair that there was a definite intent to require the showing of an overt act as an independent element of the offence, that the first insertion, which made this plain, was stricken probably for artistic reasons. . . ."\textsuperscript{14} If Hurst's inference is correct, the superiority of Marshall's argument to Corwin's chief criticism is confirmed by the records of the Constitutional Convention itself. The personal overt act of the accused must be proved. Whether or not Hurst's inference is just, it is at least clear from the words of the document, from the majority of the few speeches in convention on the subject, from the \textit{Federalist} and other pamphlets, from the many citations of Montesquieu, from the ratifying conventions and subsequent law treatises, that the principal purpose of the clause was restrictive. The provision bounds treason prosecutions in order to secure "independent citizens" from the political persecutions which might be part and parcel of the contests of "violent factions," as Madison phrased it in the \textit{Federalist}. Whatever might be their supposition as to the guilt of those who procure the levying of war, then, the framers were dominated by the perhaps contrary wish to surround treason trials with rather stringent limits. Hurst and Chapin suggest that the law of treason, even in England, was becoming more lenient. Corwin's focusing on old English legal precedents overlooks the framers' decisive application to America's popular conditions of an increasingly influential, more or less Lockean, liberalism, a philosophic jurisprudence which re-


garded individual security with the humane solicitude appropriate to a "right" prescribed as fundamental by nature itself.15

If the Constitution's pervasive concern for private safety be grasped, then it is easy to see that Marshall's views at the Burr trial, far from contra-
vening that spirit, only articulate it. It is the very ambiguity attending the intent of Article III, Section 3, in fact, that occasions the complication for which Marshall's crucial opinion from the bench has often been tasked. Marshall believed it "scarcely conceivable" that the term "levying war" was not "employed by the framers of our constitution in the sense . . . affixed to it by those from whom we borrowed it."16 Thus, his whole dispo-
sition throughout the trial is to interpret "levying war" as perpetrating war and hence to look dubiously upon the effort to prosecute Burr for levying war at a place from which he was absent. The Chief Justice grants, how-
ever, the possibility of the prosecution's interpretation and does not deter-
mine the case finally by an unyielding adherence to common law meanings. In similar fashion, Marshall displays considerable doubt as to the Constitu-
tion's inclusion of the maxim that "in treason all are principals." He indi-
cates repeatedly his reluctance to have an inferior court decide such a "ques-
tion of vast importance" with such extensive implications, and he never does decide it.17 Thus the rambling course of Marshall's reasoning amounts to a progressive and flexible, if inconclusive, sifting of arguments to indi-
cate the fundamental alternatives, until a kind of lowest or least doubtful
denominator is reached. The theme dominating both the sifting and the choice of a denominator is obvious. The peculiarly restrictive wording of the treason clause reflects the peculiarly restrictive purpose of its makers. The Constitution's care in defining treason, while failing to single out any other crime, bespeaks treason's stature as "the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosom of contending parties struggling for power."18 In cases of doubt, then, the law of treason, like penal laws gen-
erally but more than any other penal law, ought to be interpreted strictly. Is

16 Robertson, Reports, II, 402, 409.
17 Ibid, 405.
18 Ibid, I, 13-14, 81, 100, 105, 148. "As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal be-
fore which it is made a deliberate and temperate inquiry" Ex parte Bollmann and ex parte Swartwout, 4 Cranch 125 (1807). See generally 125-27. For Marshall's own de-
this an indefensible interpretation of a constitutional intent which may be admitted to be not perfectly clear?

Even if Marshall's opinion had contradicted the Constitution's manifest tenor, the prevailing attitude that he deviated from legal principles in order to spite Jefferson would not be thereby sustained. For he might simply have followed his own understanding, however mistaken, of the Constitution. Corwin's key argument asserts that in the Burr trials Marshall contradicted his own principles. These were the maxims which Corwin finds in the common law, presuming the culpability and even the preeminent culpability of those who procure the levying of war. The constitutional scholar points to only one previous Marshallian expression of this view, but that is a passage from *ex parte Bollmann* and *ex parte Swartwout* which had been conspicuously debated by counsel and interpreted by Marshall himself during the trial of Burr:

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, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.\(^{19}\)

In truth, this is hardly an unequivocal statement that procurers of treasonable assemblies are at least as culpable as perpetrators. To begin with, the first line quoted indicates that the passage qualifies Marshall's thematic insistence upon an assemblage in force to constitute the crime. However, it is quite true that there is, at first glance, a certain plausibility in Corwin's presumption that the key phrase, "all those who perform any part, however minute, or however remote from the scene of action," refers to persons who procure the treasonable assembly. This plausibility, however, will not survive a careful examination of the whole passage in question. If Corwin were right, there would be no need for Marshall to distinguish "playing a part" as one ingredient of the crime. Corwin supposes Marshall's adherence to a common law definition of treason. This notion implied that all those "leagued in the conspiracy" were traitors if an act of levying war was performed by any one of them. But the passage in question strongly distinguishes performing a part in the levying of war from conspiring to levy war—and requires that a man be engaged in both before he is considered a traitor. Corwin's interpretation is thus open to a decisive objection.

\(^{19}\) 4 Cranch 75, 126 (1807).
On the other hand, Corwin’s objection to the alternative rendering given by Marshall himself simply comes to naught. The passage can be read as distinguishing not between participating in the armed assembly and procuring the armed assembly, but between different kinds of participation in the assembly. During the Burr trials Marshall explained the words as distinguishing between participation as an armed soldier prepared for combat, and other participation, such as that of an officer supplying the army with provisions or recruiting soldiers. This rendering accounts for Marshall’s insistence upon “playing a part” as one ingredient of the crime. Corwin, however, rejects this reading because it assumes that a “part” in the action might be played by one “however remote from the scene of action.” But is this such a foolish presumption? It is hardly unreasonable to suppose that logistical and recruiting officers are active members of an army mobilized for war, even if they are absent from the place of gathering in force. Corwin’s objection, then, cannot be sustained.

It might also be said that Marshall’s own reading is in other respects more in accord with his particular language here and with his general usage than is Corwin’s proposed alternative. The express “intention of the court” is to show only that persons other than those who have “appeared in arms” might be prosecuted, not that men other than those playing a part in the armed assembly could be. And Corwin’s views simply do not correspond with the whole restrictive tone of Marshall’s opinion in ex parte Bollmann and ex parte Swartwout, marked by premises identical to those expressed in the Burr trials and by a similarly repeated, if vague, disjunction between “levying war” and “conspiracy to levy war.” Corwin fails to show a basic inconsistency between the Burr and Bollmann opinions.

With the constitutionality of Marshall’s decisive views defended, or with merely their consistency vindicated, speculations as to his anti-Jefferson motivation, even if true, lose all relevance in explaining the shape of his opinions during the trials of Burr. In any event, these speculations have never been supported by substantial evidence. They are, in fact, manifestly implausible on their face. Admitting Marshall’s violent dislike of Jefferson, one might have expected him to choose better ground for embarrassing the

20 “If, for example, an army should be actually raised for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object and leaguing himself with the rebels, supplied that army with provisions; or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him.” Robertson, Reports, II, 402; see also 404-05, 427-29, 438-39
President than that occupied by Burr. Popular fever ran uproariously against Burr, not for him. It was the Chief Justice, not the President, who after the decision was the object of almost universal vituperation from the press, who was hung in effigy, whose impeachment was covertly threatened in Jefferson's annual message, not to mention the more explicit first draft. Marshall, foreseeing the "bitter cup" of "calumny," "the opprobrium of those who are denominated the world," recognized that "this court" had "many, perhaps peculiar motives" for treating the presidency with respect. He could do Jefferson no serious damage, and he knew it; a vindictive effort could injure only himself and his Court. And, whatever his political opinions, Marshall was undoubtedly possessed of the "political sagacity" with which Corwin credits him. Moreover, neither traitors in general, nor Burr in particular, were any favorites of the Chief Justice.

The fact decisive to the allegations of political motivation, however, is that a close reading of the trial record reveals no substantial political bias of a kind which could help Burr. It is really not easy to see any political or personal bias in Marshall's remarks. Two or three at which the prosecution took umbrage are of a character sufficiently uncertain to occasion as easily wonder about the prosecution's extreme sensitivity as awareness of Marshall's prejudiced bearing. The remarks might well evidence a certain haste or even insensitivity on Marshall's part. It is hard to see that they manifest a governing political bias against the prosecution. When the existence of such an inference was twice pointed out to Marshall, in fact, he was at great pains to deny that he had meant any "allusion to the conduct of the government in the case before him." In one instance, he actually expunged the remark from his opinion, rather than allow it to continue to give rise, however unintentionally, to such an inference. Insofar as any acerbity steals into Marshall's many statements, it may be most fairly traced to his indignation at the government's harrying of Burr, an indignation which most scholars, including Corwin, admit to be just.

21 Beveridge, Life, III, 530-45
22 Robertson, Reports, I, 187, II, 444-45.
24 Robertson, Reports, I, 11n, 189
25 Ibid., I, 197 By way of apology Marshall is said to have told the prosecuting attorney "that he had been so pressed for time, that he had never read the opinion after he had written it." Quoted by Beveridge, Life, III, 449.
Marshall and the Burr Trial

It is true that Marshall appointed John Randolph, Jefferson's enemy, as foreman of the grand jury. But it is also true that several of Jefferson's closest personal friends were on that jury and that ten of the jurors were administration Republicans and only two Federalists. More to the point is the fact that Randolph had confessed a strong prepossession, implicitly against Burr. Still more to the point is the fact that Randolph was undoubtedly a man of strong character and independent judgment, traits particularly desirable when the entire community was swayed by passion and flitting rumor.

Finally, Marshall did allow service of the famous sub poena duces tecum to the President, but in a spirit far removed from that of deliberate challenge to Jefferson's authority. He "would much rather" that counsel would arrange among themselves for production of the letters and orders. If the President would only send the papers in question, there would of course be no need for him to attend in person. Should the President be busy, or should the papers be "state papers," that would surely be a reason to be considered should he not obey the sub poena. Courts should make certain that the chief executive is not harassed by legal writs. "The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production." Still, it is a fact that Marshall issued a sub poena duces tecum to President Jefferson. The reasons, so far as the trial record reveals them, were connected not with party bias, but with his view of a court's duties, with his particular view, that is, of justice to individuals according to American laws. The "genius and character of our laws and usages" need to be respected; they demand in criminal trials treatment of the defendant "with as much liberality and tenderness as the case will admit." The accused should be permitted all reasonable means, especially in a capital case, to acquire the papers necessary to his defense, and the President is "subject to the general rules which apply to others."

If any twisting of Marshall's usual notions of Lockean justice can be observed, its tendency is not to spite the wishes of Jefferson and the people, but to conciliate them. The Chief Justice seemed at times to bend over backwards to "pacify the menaces and clamorous yells of the cerberus of Democracy with a sop," as Burr's pathetic accomplice Blennerhassett some-

27 Robertson, Reports, I, 178, 186; II, 534-535.
what elaborately put it. And Burr too thought that the Chief Justice had been disposed to "sacrifice . . . principle to conciliate Jack Cade." Marshall himself acknowledged that he had set Burr's bail higher than "his own ideas of propriety" alone would have recommended. While warning the prosecution from the trial's opening that Burr's overt act was the essential thing to be proved, moreover, he showed himself disposed to allow prosecuting attorney George Hay to pursue his own course. With his sagacious regard for the judiciary's safety, Marshall might well have taken the most scrupulous care in argument and bearing to avoid any imputation of favoritism toward Burr.

Thus, it might be concluded with some irony, Marshall did display a kind of bias during the trial of Burr, but it was only a prudent bias toward the popular clamor and toward Jefferson. But even this conciliation of the public was limited by Marshall's devotion to justice as he understood it: protection with "liberality and tenderness" of the rights of the accused. As Marshall put it: "The interest which the people have in this prosecution, has been stated; but it is firmly believed, that the best and true interest of the people is to be found in a rigid adherence to those rules, which preserve the fairness of criminal prosecutions in every stage."

29 Quoted by Beveridge, Life, III, 531 (n3). Consider an incident which Blennerhassett records. "Did you not do an unprecedented thing," a friend asked Marshall, "in suspending a criminal prosecution and granting two days, in the midst of the argument on a point then under discussion, for counsel to get ready to speak upon it?" "Yes," replied the Chief Justice, "I did and I knew it But if I had not done so I should have been reproached with not being disposed to give the prosecutors an opportunity to answer." Quoted ibid, 494.

Quoted ibid, 527. Beveridge quotes from several sources expressions of dismay at Marshall's "timidity" in "conciliating" the public.

Robertson, Reports, II, 486-87. See also ibid, I, 18-20.

Ibid, I, 85-86, 94, 469-72, 530.

Ibid., I, 100.