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**THE TREASON TRIALS OF AARON BURR  
A LAW STORY FROM THE EARLY REPUBLIC**

## **Editors' Preface**

There is something almost seductively attractive about Aaron Burr. Slight and short, with a high brow and piercing eyes, no one who met him ever forgot this founding father. A trusted and admired friend to some, a feared and reviled adversary to others, no founding father provoked such strongly divided opinions in his time--or in ours.

Nor did any of the revolutionaries experience such dramatic swings in their fortunes as he. Accused variously of a hair-brained plot to "revolutionize" the West and detach it from the rest of the nation, of an invasion of Spanish Mexico that would leave him its king, and of a variety of more mundane canal, land development, and banking schemes, he seemed to combine in his life all the excesses of ambition common to his contemporaries.

Historians and biographers still debate whether he was a swashbuckling wit or a scheming traitor. If historians cannot seem to get enough of his conspiracies, his trials for treason and high misdemeanor are worth a fresh look. The trials attracted more attention than any other in the first four decades of the new nation. They caused the first recorded media frenzy, bringing correspondents from newspapers to Richmond from all over the country. They also brought together Burr, Chief Justice John Marshall, and agents of President Thomas Jefferson, who watched the course of the trials from afar. Hovering over them, like the ghost of Banquo at MacBeth's coronation feast, was the rival Burr killed in a duel, Alexander Hamilton.

The two great political parties of the day, Jefferson's Republicans and the Federalists, had equal, if divergent, stakes in the outcome of the trials, for the Federalists had supported Burr when he and the Republican Party leader Jefferson received an equal number of presidential electors' votes, but had now turned against him. Jefferson's dislike for Burr had grown, and the

Republican press insinuated the Burr could never be trusted. The world was watching too, for Britain, France, Spain all had imperial interests in North America, and Burr had connections to delegates from all three.

But something more—and less—was at stake in the trials than the political fate of Burr and his fellow conspirators. Though from their inception, the accusations against him were as motivated by personal and partisan spite as by anything that Burr did or could have done, and the trial in some respects had a predictable ending, his acquittal posed obstacles to any who would use treason charges as a political weapon. Here John Marshall and Thomas Jefferson played as important, perhaps more important, roles in the story than Burr himself. For Jefferson branded Burr guilty before the trial had begun, and Marshall's genius was never more in evidence than in his management of the trial and his rulings on the law.

Chief Justice Marshall's opinions in these cases created important precedent on substantive and even more so on procedural grounds. At the time, the law of evidence, of what was admissible in court and what was not, of which party in court bore the "burden of proof" at any given time in the trial, was not well established. Today a major part of the law school curriculum and the subject of many treatises as well as a set of Federal Rules, then the rules for the admissibility of evidence was catch as catch can. Hearsay and rumor, suspiciously produced documentary evidence which one party could not produce or the other party could not see in advance, could all be entered at trial. Marshall's rulings on the written evidence would become the bedrock of an American law of criminal evidence.

The trials had a curiously modern aspect as well—for they were the first of the celebrity state cases, political trials of wide notoriety in America. While there were other cases in which

the government had a compelling interest, the principals were important men, and the events were public, nothing matched the Burr trial for publicity. Was Burr unfairly tried in the media before the court even sat? James Cheetham and other scurrilous journalists had made careers out of rumor mongering against Burr. Could he get a fair trial in Richmond, home to his Republican enemies?

Although much has been written about Burr and the trials, the author's contribution to the literature includes taking the arguments of counsel and the rulings of the court seriously. He has reproduced them with a running commentary, linking them to prior and future cases. Insofar as the counsel were among the leading legal thinkers of the day, and on the bench sat one of the titans of American constitutional jurisprudence, the give and take in the court demands close reading. The author has one more trick up his sleeve before he is done—an explanation for Burr's otherwise bizarre conduct that no one has yet proposed, but in light of all the circumstances, cannot be ignored.

## **Table of Contents**

### **Introduction**

### **Chapter One A Meeting in the Eagle Tavern**

### **Chapter Two The Western Adventures of Aaron Burr**

### **Chapter Three What is A Little Treason among Revolutionaries?**

### **Chapter Four The Great Conspiracy Revealed**

### **Chapter Five Dress Rehearsal: Ex Parte Bollman I and II**

### **Chapter Six Waiting for Wilkinson**

### **Chapter Seven The Trial of the Century: U.S. v. Burr**

### **Chapter Eight Concluding Acts**

### **Afterword What Was Burr Really After?**

### **Chronology**

### **Bibliographical Essay**

### **Chapter Three      What is A Little Treason among Revolutionaries?**

Burr had by the time of his capture and rendition already twice faced charges of treason. Every government in western history passed laws against this offense. But this most heinous of crimes, from the perspective of the government, was also the most controversial of them in the new nation, in part because the Revolution was in one sense treason on the grandest scale. The framers of the Constitution and the first Congresses had thus a double task. The first was to protect the new federal government, and the nation, against domestic insurrections. The second was to prevent government from using a charge treason to punish those who merely opposed the current regime.

The law of treason in Anglo-American world has a long and controversial history. It is the most political of all criminal charges, the most serious (or taken as such) and yet the most diffuse and broad in scope. For a treason in English law might not entail an act, but merely the discussion of an act. The Statute of Treasons of 1351 laid out the understanding of the crown, and the legislation underscored the broad discretion the crown gave to its own courts and prosecutors in determining who fell under the shadow of the offense.

The key element of the crime was the protection of the crown and the succession to the crown, not the security of the nation per se. “If a man compasses or imagines the death of our lord the king, of our lady his consort, or of their eldest son and heir; or if a man violates the king's consort, the king's eldest daughter being as yet unmarried, or the consort of the king's eldest son and heir” it was treason. “If a man makes war against our said lord the king in his kingdom, or is an adherent of enemies to our lord the king in the kingdom, giving them aid or comfort in his kingdom or elsewhere” the charge was treason. The levying of war must be within

the kingdom, or the charge of treason could be laid against any prisoner of war or captive anywhere that England fought. The statute also made counterfeiting and “making payments in deceit of our said lord the king or of his people” treasonous, so intimately were royal power and the royal treasury connected. Finally, anyone who “slays the chancellor, treasurer, or justice of our lord the king ... while [such official is] in his place and attending to his office” was a traitor, for these officials were corporeal extension of royal power.

The overbroad and vague statute allowed the crown to prosecute its most vocal opponents as traitors, to seize their property, and silence their followings. For what did it mean to “imagine” the death of the king? Or to give comfort to his enemies at home? Were words sufficient to comprise the offense? Were thoughts, expressed out loud? Did hatching a plot without any act in its furtherance amount to treason? Yes to all of these.

For attached to the treason law in England was “salvo” or rider the essence of which was the swaying the sentiments of the king’s subject against him was “constructive treason.” What was more, other offenses not specifically mentioned in the statute might amount to treason. The salvo broadened an already Falstaffian statute to cover just about any form of politically inapposite behavior, thought, or utterance. For example, in the treason trial of Sir John Perrot (1592) the prosecution argued, “the original of his Treasons proceeded from the imagination of his heart; which imagination was in itself High-Treason, albeit the same proceeded not to any overt fact: and the heart being possessed with the abundance of his traitorous imagination, and not being able so to contain itself, burst forth in vile and traitorous Speeches.”

Even speech that was not direct or incendiary came under the purvey of the treason statute. In 1535, Henry VIII arranged for his former friend and chancellor Thomas More to be

tried for high treason. Although More would have been aghast at any act encompassing the death of King Henry, much less ravishing the king's consort, he refused to accede to Henry's desire to make himself head of the English church. There was no act of treason, only the allegation of words of opposition, and prosecution witnesses to these plainly bribed to perjure themselves.

At his examination, More conceded that his conscience demanded he oppose the King, but he was enough of a lawyer to understand he must not act against the king: "he would say no more than that the Statute was like a two-edged Sword, for if he spoke against it, he should be the Cause of the Death of his Body; and if he assented to it, he should purchase the Death of his Soul."

During the trial More was allowed to speak, for all the King really wanted was More's contrition and obedience. More offered neither, but his defense is worth recalling for it touched on all the elements or essentials of the offense. "As to the first Crime objected against me, that I have been an Enemy out of stubbornness of Mind to the King's second Marriage; I confess, I always told his Majesty my Opinion of it, according to the Dictates of my Conscience, which I neither ever would, nor ought to have concealed." The good advisor always told the king the truth, for what would his advice be worth if it were not his best effort "being required to give my Opinion by so great a Prince in an Affair of so much importance"?

To the next charge, of violating the Act of Supremacy making Henry VIII the head of the state church, More assayed a little sophistry. "The second Charge against me is, That...I would not, out of a malignant, perfidious, obstinate and traitorous Mind, tell them my Opinion, whether the King was Supreme Head of the Church or not." But More had "nothing to do with that Act, as to the Justice or Injustice of it, because I had no Benefice [office] in the Church." As an officer

of the crown, “I had never said nor done any thing against it; neither can any one Word or Action of mine be alleged, or produced, to make me culpable.” Opinion was not treason; actions were treason.

More’s answer to the third charge revolved around the law of evidence—a subject of great importance in all treason trials. In the “third principal Article in my Indictment...I am accused of malicious Attempts, traitorous Endeavours, and perfidious Practices against that Statute [of Supremacy].” This is what was called a general charge, a grab bag of miscellaneous acts and words. In the general charge, the crown did not have to detail every criminal act. Among More’s “Traitorous endeavors and perfidious practices,” was his writing “diverse Packets of Letters to Bishop Fisher; whereby I exhorted him to violate the same Law and encouraged him in the like Obstinacy” while More was imprisoned in the Tower of London.

More raised an objection to this evidence. “I do insist that these Letters, be produced and read in Court, by which I may be either acquitted or convinced of a Lye; but because you say the Bishop burnt them all, I will here tell you the whole truth of the matter.” Written evidence produced and verified in court might have incriminated More, but testimony about documentary evidence had far less weight when the physical evidence could not be produced. For now the truth depended on whom one believed, and a jury might presume that the burden of proof in such contests lay with the prosecution. In More’s, it did not. It took a jury hand picked to insure conviction but an hour to reach the foregone verdict. For the court was the king’s, the offense was defined by the king to protect his interest, and nothing, certainly not a jury, could stand between him and his object.

In 1603, Sir Walter Raleigh’s loyalty to the late Queen Elizabeth festered in the mind of

successor, James Stuart, and Raleigh had to stand trial for allegedly encompassing the death of James. The prosecution rested on the confession of a confederate, but when that confession could not be produced in evidence, the prosecutors fell back on hearsay. A boat pilot overheard another man say that Raleigh planned to depose King James.

When Raleigh, who conducted his own defense (no defense counsel was allowed in treason trials until 1695) protested against hearsay evidence, “This is the saying of some wild Jesuit or beggarly Priest; but what proof is it against me?” Edward Coke (later chief justice and still later a victim of James’ enmity himself) replied that the rumor “must perforce arise out of some preceding intelligence and shews that your treason had wings.” Raleigh languished in the Tower of London because that is where James wanted Raleigh.

Thomas Wentworth, the first Earl of Strafford was abandoned by his master, Charles I, and impeached in Parliament for high treason in the winter of 1640-1641. His offense was the general charge that his actions tended to the destruction of the law and the liberties of the people. Strafford, a notably arrogant man, was a highhanded military governor in Ireland, a tyrannous commander in the war against the Scots, and unpopular and unloved in England. But did the twenty-eight charges laid against him amount to a treason against the king? Surely not, for he had the king’s permission for everything he did. One should note that the lawyers who led the prosecution for parliament argued for the broadest and most vague definition of treason, while Strafford, who loathed lawyers surrounded himself with them and argued for the narrowest most legalistic definition of the offense. He was convicted and beheaded.

The abuses of the treason law came full circle when James I’s son Charles I was tried and convicted of High Treason in 1648, on a charge of being a “Tyrant, a Traitor, a Murderer, and a

public Enemy to the Commonwealth of England.” To which the King, powerless and without legal counsel himself, replied “Ha...Let me see a legal Authority warranted by the Word of God, the Scriptures, or warranted by the Constitutions of the Kingdom, and I will answer.” Adjudged guilty, he was beheaded. Was his attempt to regain his kingdom by force a treason, when the only definition of treason on the books was levying war against the king? Parliament amended the treason statute in 1695 to permit “all just and equal Means for Defence of their Innocencies in such Cases,” which meant that defense counsel could examine and cross examine witnesses and could compel the production of evidence. It did not make treason an offense against the realm, however. The object was still to protect the person and the succession of the ruling prince.

The English experience proved that treason charges were powerful government weapons—particularly when joined to two other offenses. First, treason might entail conspiracy. Even if the conspirators were not successful, even if there was no overt act on their part, merely whispering treasonous plans was treason.

As it happened, there was an analogous offense to the English notion of constructive treason in the Anglo-American colonies. A conspiracy among slaves to harm their masters, called “petty treason,” was punishable by death even if the conspirators did nothing to further the plan. This offense was as broadly defined and as impervious to defense argument as the constructive treason. The crime need not come to fruition, nor the conspiracy involve more than words.

Just as the constructive conspiracy charge was a perfect way for a government to control various suspect groups, so the slave conspiracy was a perfect way for the master class to use law to control unruly slaves.

In the American colonies and the new states, slaves were the subject of these conspiracy

laws, for slaves were always suspected of plotting to free themselves. As the number of slaves grew in the southern colonies, the lawgivers adopted Barbados' 1661 Black Code's definition of "slave conspiracies." These were simply gatherings of slaves at which a crime was discussed. No attempt to carry out the plot by any of the slaves was necessary to institute the prosecution. All the slaves present (passive as well as active participants in the conversation) were equally liable under the law. As the number of slaves in any colony increased past the tipping point, the colonial lawgivers adopted the slave conspiracy provisions. For example, the Maryland colonial law of 1692 defined the crime of conspiracy as a plot to commit perjury, something that slaves, who could not testify under oath, could not commit. By the second decade of the eighteenth century, Maryland's slave population had doubled from what it had been in 1690. In 1717 Maryland legislators amended the colonial code to include slave conspiracies of any kind, with any outcome. Similar laws were adopted in New York and New Jersey after slave conspiracies were uncovered in the early 1710s.

Conspiracy prosecutions turned crimes merely imagined or anticipated by the master class into opportunities to punish those slaves who dared to speak aloud of resistance to slavery. The slave conspiracy laws survived the Revolution, the framing of the Bill of Rights, and the "Jeffersonian Revolution." Indeed, how ironic that Jefferson turned to the slave law to accuse Burr of engaging in a criminal conspiracy.

The second offense that touched treason was seditious libel. Any libel of the government, no matter its truth, was actionable. Both of these quasi-treasonous offenses came to the colonies and persisted into the early national period. While the salvo of the Edwardian treason law was not heard in the courts its distant echo was in the charge of seditious libel—a written "censure of

public men” for their official conduct. Truth was no defense to the charge of seditious libel in England until Fox’s libel law of 1792, for criticism based on truth might be far more injurious to the government than wild eyed speculation and censorious opinions.

Seditious libel prosecutions became one tool for American colonial governors to silence their opposition. In Zenger’s Case (1735) a New York newspaper editor who criticized governor William Cosby only escaped conviction when his counsel convinced the jury that truth was a defense to the law. (In fact, as the chief justice of the colonial court instructed the jury, it was not a defense.)

In the new nation the seditious libel provisions of the Sedition Act of 1798 punished any person who might “write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Jeffersonian Republicans hated the act not only because it was aimed at them, but because the judges of the federal courts at the time were all Federalists, the federal marshals who chose the juries were all Federalists, and one could expect the jurymen to be all Federalists. Over a dozen trials resulted in convictions of Republican editors and writers. Jefferson pardoned them all and Congress, after the act expired in 1801, repaid the fines.

The long shadow of the English law of treason, the English paranoia about conspiracies, and the severe punishments of the seditious libel laws darkened the Revolutionary crisis. On August 23, 1775, King George III, whose subjects the American colonists were in law and long usage, proclaimed:

Whereas many of our subjects in divers parts of our Colonies and Plantations in North America, misled by dangerous and ill designing men, and forgetting the allegiance which they owe to the power that has protected and supported them...have at length proceeded to open and avowed rebellion, by arraying themselves in a hostile manner, to withstand the execution of the law, and traitorously preparing, ordering and levying war against us...we have thought fit, by and with the advice of our Privy Council, to issue our Royal Proclamation, hereby declaring...that all our subjects of this Realm, and the dominions thereunto belonging, are bound by law to be aiding and assisting in the suppression of such rebellion, and to disclose and make known all traitorous conspiracies and attempts against us.

While the King was warning the revolutionaries against treason, the revolutionaries were warning the loyalists. The Second Continental Congress resolved, in 1775, “That all persons abiding within any of the United Colonies...owe, during the same time, allegiance thereto. That all persons, members of, or owing allegiance to any of the United Colonies...who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies...giving to him or them aid and comfort, are guilty of treason against such colony.” While the language seemed to be a mirror image of the King proclamation, the Congress did require that offenders perform some overt act of treason. The word “conspiracy” was not mentioned.

With the King and the Revolutionaries hurling treason charges against one another, the notion of treason became a centerpiece of revolutionary legal thinking—and serious concern. Was treason simply a matter of perspective? Could the winners in battle simply punish the losers as

traitors? Was the definition of the offense merely a matter of proclaiming that one's enemies were traitors? If so, then the Revolutionaries would have welcomed into their laws the very arbitrariness and brutality of the common law against which they had fought. As Jefferson himself wrote when secretary of state, in 1792, "Treason...when real, merits the highest punishment. But most codes extend their definition of treason to acts not really against one's country. They do not distinguish between acts against the government and acts against the oppressions of the government; the latter are virtues; yet they have furnished more victims to the executioner than the former; because real treasons are rare; oppressions frequent. The unsuccessful strugglers against tyranny, have been the chief martyrs of treason laws in all countries."

The ambiguity about what was, and what was not, treason continued to beset the founders of the new nation in the Confederation Period, from 1781 to 1788. In Massachusetts, the hard times following the war for independence had left many western farmers without the money to pay their mortgages or their taxes. Banking interests in Boston and Salem demanded that the legislature help them collect. Dominated by creditor party, the legislature obliged. Resistance to foreclosure for failure to pay led to armed insurrection, led by one Daniel Shays, a revolutionary war hero. After two affrays, a mercenary troop raised by governor John Bowdoin routed the rebels. Not only had the governor used mercenaries to quell the rebellion, a step that was entirely foreign to Revolutionary thinking, he had asked the legislature to suspend of the writ of habeas corpus—the means by which anyone in government custody could seek a court hearing on the reasons for the imprisonment. The legislature complied.

The rebellion in western Massachusetts, and the means that Bowdoin had used to quash

it, had given politicians all over the new United States pause. While only two of the many insurrectionists who followed Daniel Shays were executed, it was plain that the streak of stiff-necked New England resistance to central authority that had fed the revolutionary fervor had not died with the end of the war. Shays' rebellion was one of the reasons why so many of the states (save Rhode Island) sent delegates to the constitutional convention in Philadelphia, the next year. A stronger national government than the Articles of Confederation Congress was necessary if such rebellions were not to spread from state to state.

Part of the effort to insure the peace and tranquility of the republic would be to include provisions for the suppression of rebellions and the punishment of treason in the federal Constitution. According to the records of the constitutional convention, the first try at including a definition of treason in the nascent federal constitution came as part of the work of the "committee of detail." The committee met for a long stretch during the dog days of summer, 1787, and Edmund Randolph of Virginia, a member of the committee, proposed that treason, so open an offense to prosecutorial discretion in England, was to be closely cabined in the new document. A draft document in Randolph's hand limited the offense to "levying war" against the United States or adhering to its enemies in time of war.

The Randolph draft, with additions by other committee members, was debated in the convention on August 20, 1787, and the convention added the "aid and comfort" and "two witnesses to" the same "overt act" to its language. While the debate demonstrated that some delegates simply wanted to import the language of the English statute, overall the members of the convention preferred to limit the definition. No one argued that constructive treasons should be included or were included in the definition by implication. The final version, inserted at the end

of Article III on the courts, read: “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. 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.”

James Wilson, also a member of the committee of detail and one of the first justices of the new United States Supreme Court was particularly pleased with the limitations on the definition of treason. If the two witness rule made prosecution difficult, the likelihood of party prejudice, perjury, and prosecutorial misconduct required some kind of constraint on the prosecution. As he lectured in 1791, too loose a definition of treason gave too much power to a government, and led to untrammelled despotism.

Wilson told his Philadelphia audience that “Treason is unquestionably a crime most dangerous to the society, and most repugnant to the first principles of the social compact. It must, however, be observed, that as the crime itself is dangerous and hostile to the state, so the imputation of it has been and may be dangerous and oppressive to the citizens.” The members of the convention recognized the danger that treason posed to public order, that partisan treason accusations had posed to liberty, and had to balance the two. “To secure the state, and at the same time to secure the citizens--and, according to our principles...the law of treason should possess the two following qualities. 1. It should be determinate. 2. It should be stable.”

Insofar as party, interest, or immediate passions might rule the government at a given time, the charge of treason might be entirely partisan “to harass the independent citizen, and the

faithful...by prosecutions for treasons, constructive, capricious, and oppressive.” The English law here “was grossly deficient.” The definition of treason was “uncertain and ambiguous; and its denomination and penalties were wastefully communicated to offences of a different and inferior kind.” Wilson’s not so subtle reference to the treason indictments against the leading revolutionaries could not have been missed by his audience, many of whom had feared they too might be hanged if Britain had won the war.

But victory had brought the opportunity to reform the law of treason, to make it republican. “Admonished by the history of such times and transactions as these, when legislators are tyrants or tools of tyrants...the people of the United States have wisely and humanely” written safeguards into the law. The result was that “Little of this [English] statute, however, demands our minute attention now; as the great changes in our constitutions have superseded all its monarchical parts.” With a single stroke, Wilson swept away the English cases and commentaries on the subject, or tried to, but in fact the old law books would remain on the lawyers shelves, and the English cases and commentaries would find their way into American prosecutions soon enough.

By arguing that the precedents set in English cases no longer applied to American treason law, Wilson raised the importance of the precise language of the Constitution. As he understood it, only citizens of this country could commit treason against it. Levying war was when the suspects were "arrayed in a warlike manner. As where people are assembled in great numbers, armed with offensive weapons, or weapons of war, if they march thus armed in a body...If they have no military arms, nor march or continue together in the posture of war; they may be great rioters, but their conduct does not always amount to a levying of war...So an actual insurrection

or rebellion is a levying of war, and by that name must be expressed in the indictment.”

In treason, war must be levied against the United States, not against a particular person, even if that person held high office. “A rising to maintain a private claim of right; to break prisons for the release of particular persons...this is not a levying of war against the United States...The line of division between this species of treason and an aggravated riot is sometimes very fine and difficult to be distinguished. In such instances, it is safest and most prudent to consider the case in question as lying on the side of the inferiour crime.”

Did the salvo on constructive treason arrive, under the radar, and attach itself to the constitutional language? Wilson thought not. But Chief Justice Oliver Ellsworth, riding circuit (the Supreme court justices sat with district court judges to hold federal circuit courts until 1891) charged a grand jury that their purview included “all offences against the United States...Those offences are chiefly defined in the statutes...the residue are...acts manifestly subversive of the national government, or of some of its powers specified in the constitution.” The last phrase sounded ominously like a constructive treason. Ellsworth sailed even closer to that port in his next words. “An offence consists in transgressing the sovereign will, whether that will be expressed, or obviously implied. Conduct therefore, clearly destructive of a government, or its powers, which the people have ordained to exist, must be criminal.”

What were these offenses, if not spelled out in the statutes? Ellsworth found them in the very place that Wilson said one should not look—the common law of England. “It is not necessary to particularize the facts falling within this description, because they are readily perceived, and are ascertained by known and established rules; I mean the maxims and principles of the common law of our land. This law, as brought from the country of our ancestors, with here and

there an accommodating exception, in nature of local customs, was the law of every part of the union at the formation of the national compact; and did, of course, attach upon or apply to it, for the purposes of exposition and enforcement.” Did this apply to the treason provisions?

Supreme Court Justice James Iredell, sitting on a circuit court, had considered that point, and rejected it. In a treason case coming to court in 1800, he opined, “a mere act of [the U.S.] Congress...could not interpret the meaning” of the treason clause. “In this we differ from the practice of England, from whence we received our jurisprudential system in general; for they having no constitution to bind them, the parliament have an unlimited power to pass any act of whatever nature they please; and they, consequently, cannot infringe upon the constitution.”

While the treason statute of Edward III gave parliament this power, ““Because other like cases of treason may happen in time to come, which cannot be thought or declared at present, it is thought that, if any such does happen, the judges should not try them without first going to the king and parliament, where it ought to be judged treason, or otherwise felony”” Congress was forbidden to add to the types of treason or the requirements to prove it by the strict language of the constitutional provisions on treason.

Two major rebellions in the 1790s forced the new federal courts to decide whether they would, by interpreting the constitutional definition broadly, do what Iredell said Congress could not do--return treason to its common-law breath. The first real test for the courts came after the suppression of the “Whiskey Rebellion” in 1793-4. Farmers in western Pennsylvania and other wheat growing regions in the western portion of the nation objected to the excise taxes Congress, at Hamilton’s behest, passed on distilled liquors. It was customary for farmers to distill grains that could not be transported to market. The excise tax fell particularly heavily on these farmers.

While in other states farmers simply evaded the taxes, in Pennsylvania they threatened the excise tax collectors, closed the courts, and armed themselves to resist federal authority.

In reply, on August 7, 1794, President Washington issued a proclamation against those: “combinations to defeat the execution of the laws...in some of the western parts of Pennsylvania...proceeding in a manner subversive equally of the just authority of government and of the rights of individuals.” The rest of the proclamation sounded remarkably like King George’s, in 1775. The rebels had “effected their dangerous and criminal purpose by the influence of certain irregular meetings...by endeavors to deter those who might be so disposed from accepting offices...through fear of public resentment and of injury to person and property, and [by] compel[ling] those who had accepted such offices by actual violence to surrender or forbear the execution of them.” The revolutionaries had done all of the above, and more, in violation of the laws and their sacred oaths to the crown.

Washington surely was aware of the similarities, but “by intercepting the public officers on the highways, abusing, assaulting, and otherwise ill treating them; by going into their houses in the night, gaining admittance by force, taking away their papers, and committing other outrages, employing for these unwarrantable purposes the agency of armed banditti disguised in such manner as for the most part to escape discovery” the Whiskey rebels were engaging in an insurrection “which I am advised amount[s] to treason, being overt acts of levying war against the United States.”

Governor Thomas Mifflin, a conservative Republican, refused to call out the militia, recognizing that many militiamen were among the rioters. He wanted the federal courts to handle the problem. But the federal circuit judge, Supreme Court Justice Wilson, signified to the

president that ““in the counties of Washington and Allegany, in Pennsylvania, laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of that district.”” Consequently, Washington ordered “all persons, being insurgents, as aforesaid, and all others whom it may concern, on or before the 1st day of September next to disperse and retire peaceably to their respective abodes. And I do moreover warn all persons whomsoever against aiding, abetting, or comforting the perpetrators of the aforesaid treasonable acts all in arms to lay them down.”

Setting aside the disturbing similarity between 1794 and 1775, could a president define for himself what treason was? Was the President the final authority on the meaning of the Constitution? Although the point of precisely defining the scope of treason in the Constitution was (according to Wilson) to deny Congress the power to politicize treasons, nothing he said related to the power of the president.

Washington marched an army to the area in rebellion and the rebels surrendered. In the following trials, the courts had the opportunity to decide whether the executive or the judicial branch had the final say on the meaning of the Constitution. Only two of the thousands of protesters were convicted and Washington, mindful of the revolutionary echoes of the protest, pardoned both men. The only case that came to the High Court—the court whose interpretation of the Constitution would govern proceedings in all the federal circuit and district courts—was U.S. v. Hamilton (1795), and that case the High Court did not redefine the constitutional provisions or deal with Washington’s proclamation.

In 1795, the courts faced the question of whether they could, or should, read the treason

clause of Article III loosely or strictly. They consistently elected to read the language in its narrowest, strictest, sense. Bearing in mind that the judges were all Federalists, and that the culprits were not, one sees in the treason cases not party politics but a stern and self-denying fidelity to the rule of law.

Another anti-tax riot erupted in Pennsylvania in 1799, led (like Shays' rebellion) by a revolutionary war hero--John Fries. When federal officials and property were endangered, John Adams issued a similar proclamation to Washington's: "I...command all persons being insurgents as aforesaid, and all others whom it may concern...to disperse and retire peaceably to their respective abodes: and I do, moreover, warn all persons whomsoever, against aiding, abetting or comforting the perpetrators of the aforesaid treasonable acts." The end result was the capture of Fries and two others and their trials for treason for forcibly rescuing other rioters from jail. Whether or not the direct tax Congress levied on homes was constitutional or not, armed resistance to the tax and its collectors was surely an offense--but what offense?

Iredell delivered a charge to the grand jury and summed up the evidence to the trial jury in Fries' case. The justice spent much of his time defending the Federalist Congress, warning about War with France, and explaining why the Sedition Act was constitutional. "Such incessant calumnies have been poured against the government for supposed breaches of the constitution, that an insurrection has lately begun for a cause where no breach of the constitution is or can be pretended. The grievance is the land tax act, an act which the public exigencies rendered unavoidable, and is framed with particular anxiety to avoid its falling oppressively on the poor, and in effect the greatest part of it must fall on rich people only."

Was violent opposition to the act tantamount to treason? Iredell addressed the grand jury:

“The only species of treason likely to come before you is that of levying war against the United States. There have been various opinions, and different determinations on the import of those words...if, in the case of the insurgents...the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether (as for instance the land tax act, the object of their opposition), any forcible opposition calculated to carry that intention into effect, was a levying of war against the United States, and of course an act of treason. But if the intention was merely to defeat its operation in a particular instance, or through the agency of a particular officer, from some private or personal motive...it did not amount to the crime of treason.”

Iredell continued: There must be two witnesses to the same overt act. Conspiracy to undermine the government, punishable under the Sedition Act, did not by analogy or loose construction make conspiracy to levy war against the government treasonous, for treason required overt acts. Congress could not enlarge the definition of treason. Trial could be held where the federal court sat, and not (as would be true in a state criminal proceeding) in the county where the offense occurred. There must be a treasonable intention as well as the overt act of levying war. There must be force, but its extent may only be minimal. (It was not necessary to harm, merely to threaten harm.) With these instructions, and the evidence before it, the jury convicted Fries, but John Adams pardoned him in 1800. It was one of Hamilton’s many grievances against Adams.

In the meantime, a Congress increasingly polarized by party alignments demonstrated its willingness—or rather the willingness of the majority—to define and penalize treason-like acts. While treason itself was limited by the Constitution to levying war or giving aid and comfort to

our enemies in time of war, our posture of neutrality in the Wars of the French revolution led the Federalists to impose penalties on those who carried on private wars. The “Neutrality Act” of 1794, proposed in Washington’s address to Congress on December 3, 1793, drafted by Hamilton, and passed on June 4<sup>th</sup> of 1794 punished those who waged wars against nations with whom the U.S. was at peace. “Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state...to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony...with whom the United States are at peace...shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years.”

The purpose of the statute was generally to maintain American neutrality in the wars engulfing Europe. In particular it barred Americans from outfitting vessels to aid the French. As such, the Federalists pushed it and the Republicans opposed it, because France, a military ally under the treaty of 1778, had called upon the United States to honor its commitment to mutual defense. The federal government unilaterally renounced that obligation in the Spring of 1793, when President Washington issued his Neutrality Proclamation. That decision sent Secretary of State Jefferson out the door, to return to Monticello and retirement, and put Hamilton even closer to the levers of power.

How ironic, then, that the statute became the basis for a second charge against Burr. If the arming of men and the procurement of the river boats was intended for an invasion of Spanish possessions, Burr and his men would have been guilty of a high misdemeanor under the statute.

For this reason, when Burr came to trial, the prosecution lodged two charges against him, one for violation of the statute, the other for high treason. The evidence for both charges came principally from Eaton, Wilkinson, and Thomas Jefferson.