

Traitors and Tyrants:

The Burr Trial as a Defense of Individual Rights

Kassian A. Kovalcheck

On May 22, 1807, the Circuit Court of Appeals for the District of Virginia convened at Richmond for the most dramatic trial in the short history of the United States. With Chief Justice of the Supreme Court John Marshall presiding, the court began the tedious project of selecting a grand jury for the conspiracy trial of Aaron Burr, former vice-president of the country he was accused of betraying. While the nature of the charges and the character of the principal defendant attracted and maintained public interest, the questions involved were not only the alleged Burr Conspiracy, but also the conflict between the power of the federal government and the rights of individuals in American society. This trial tested the concept of civil liberties as much as it adjudicated the constitutional issues of treason. When on October 20, 1807, Chief Justice Marshall declared in his concluding statement that he could not find evidence significant enough to bind the defendant over, Burr left the court a free but ruined man. The Grand Jury, in an earlier statement, had expressed popular sentiment in their verdict: "We of the jury find that Aaron Burr is not proved to be guilty under this indictment."¹ Burr could protest that the jury had no right to deface the record of the court,"² but at the age of forty-nine his political and public life had ended.

Only through the skillful rhetorical strategies of a brilliant defense had he maintained his freedom, if not his honor.

As a soldier, lawyer, orator, politician, and would-be adventurer, Aaron Burr participated in many of the conflicts of early American history. The Burr Conspiracy--his ill-fated expedition into the Western territories--and the spectacular duel with Alexander Hamilton have overshadowed his accomplishments as the founder of the modern political machine, as the first American feminist, and as an able president of the United States Senate. In spite of the work of Walter McCaleb, the Burr Conspiracy remains a mystery. Throughout the long months of the trial neither treason nor high misdemeanor could be proven, but the battery of prosecution witnesses clearly demonstrated that some military action had been planned. The prosecution could never show that Burr intended anything more than a conflict with the Spaniards, but Burr never proved that was all he intended. His misrepresentations and furtive dealings, while suggesting that he could not have participated in all the undertakings he promoted, cloud the explanations of his motives.³

Public sentiment in the United States clearly pronounced Burr guilty. Much of this sentiment was engendered and promoted by the President and the Republican press. In an address to Congress, Jefferson explained the conspiracy, and, in referring to Burr, suggested that "his guilt is beyond question."⁴ The Maryland Gazette announced that "Indignation and abhorrence toward the traitors can only be exceeded by exultation at the issue."⁵ Not only did the papers carry reports of the entire proceedings, but

they also, before the trial began, published all the evidence against Burr.⁶ The Federalists, friends of neither Burr nor Jefferson, delighted in this conflict. The Washington correspondent for the Massachusetts' voice of Federalism, the Columbian Centinel, wrote:

It is extraordinary that all those who have lately been implicated in the so much talked of Conspiracies, rebellions, etc., should be, to a man, rank democrats, and high Jeffersonians. An insurgent in office is only a little more quiet than an insurgent out. And the relationship between Democracy and Conspiracy is as high almost as that of brother.⁷

Yet if Burr found any support in the press, it was from the Federalists, for the same correspondent had earlier written: "And though I may be alone in my opinion, and am indifferent were not only Burr, but one half of his democratic brethren convicted of TREASON, as they could have been of SEDITION, I do not believe the charges,"⁸ while another Federalist paper suggested that the Republicans, in their treatment of Burr, were laying the "foundation for despotism."⁹ This issue of government oppression was seized by the defense as their main rhetorical strategy. Surrounded by the best available legal talent, Burr mustered a formidable opposition to the prosecution. Edmund Randolph, chief counsel for the defense, was, at fifty-four, closing a distinguished career. He had served as mayor of Williamsburg, Attorney General of Virginia, member of the Continental Congress, Governor of Virginia, member of the Constitutional Convention, and Attorney General of the United States in Washington's Cabinet.

With the addition of John Wickham and Benjamin Botts, recognized leaders in the Virginia Bar, the defense was not only able to argue the involved intricacies of the Constitution, but also to sustain the contention that Burr was being persecuted and tyrannized by the federal government. Convinced that an impartial trial was impossible, Burr began this approach in the selection of the Grand Jury. When questioning Dr. William Foushes, a Republican who, while he admitted that he considered Burr's intentions treasonous, believed that he could be impartial to the facts, Burr presented a brief but tightly reasoned speech on whether a jurymen ought to be impartial, and concluded that "no man is impartial who has made up his mind as to intention."¹⁰ In another instance, when Joseph Eggleston confessed that, having read the depositions in the newspapers, he believed in Burr's guilt, Burr took full advantage of the situation. Declaring that "the industry that has been used throughout the country to prejudice my cause, leaves me very little chance indeed of an impartial jury," and suspecting that "there is very little chance that I can expect a better man to try my cause," he accepted Eggleston with the hope that "he will endeavor to be impartial."¹¹ In the selection of John Randolph of Roanoke as the foreman of the jury, the defense received their only favor. Although Randolph was not well disposed toward Burr, he also had little regard for Jefferson's action. Additionally, Randolph took the rights of the individual seriously. When, as a result of the "Conspiracy,"

the government attempted to have Congress suspend Habeas Corpus, Randolph proclaimed against the legislation. Suggesting that the Senate was a "two-penny gallery," which "rendered all their proceedings touching the public burden, or the liberties of the people, highly suspicious,"¹² Randolph concluded his speech by asking if the United States were under a military or a civilian government, and protested having men transported by military tribunal.¹³ Here then was an ideal jurymen for a defense based on individual rights and government oppression. When, early in the trial, the prosecution was unable to produce General James Wilkenson, the defense was able to clearly state its argument on government oppression. Wilkenson, Commanding General of the United States Army, who in his modestly titled autobiography Memoirs of My Own Times declared he had "a conscience void of offence,"¹⁴ was seriously implicated in the conspiracy. The depth of his involvement is unknown because of Burr's penchant for ciphered letters and secret dealings and because of Wilkenson's reputation as a liar. Regarded by Burr as a turncoat, Wilkenson had informed Jefferson of the Western expedition and became a chief witness for the prosecution. His delay for the trial, however, proved so embarrassing to the prosecution that even the pro-Jeffersonian Richmond Enquirer lamented Wilkenson's reliability.¹⁵ District Attorney George Hay, realizing the difficulty of his position, requested allowance be made for a man "of General Wilkenson's age and bulk to travel to this city."¹⁶ Edmund Randolph

replied that seventeen days should have been enough time, "even with the gigantic bulk of General Wilkenson himself."¹⁷ In the ensuing argument, Randolph suggested that the government had issued an order "to treat Col. Burr as an outlaw and to ruin and destroy him and his property."¹⁸ Burr then launched into a protracted statement explaining his persecution at the hands of the government. Suggesting he was being treated by the "amiable morality of this government," he stated that, in a "practice truly consonant with European despotisms," his friends had been seized by military authority, individuals had been dragged by "compulsory process" before tribunals and compelled to testify against him, his papers had been seized, and post offices had been broken open and robbed of his papers.¹⁹ In his tightly reasoned argument Burr concluded by asking: "Where then is equality between the government and myself?"²⁰ Clearly, Burr was attempting to portray himself as a powerless individual, denied his civil rights and oppressed by a vicious government. In an effort to bolster this position the defense next turned to direct attacks on Jefferson. In his message to Congress concerning the Conspiracy, Jefferson mentioned a letter received from General Wilkenson. Burr then requested this letter and other papers relevant to the trial and asked Chief Justice Marshall to issue a subpoena duces tecum to the President. Although this letter had little relevance to the constitutional arguments of the trial, Burr used it to enhance his position. Not only did the presence of the letter indicate that Jefferson personally

Burr's character and suggested that he was too much involved in secrecy. "His mysterious actions have so concealed truth and opposed public justice that what should not have taken as many hours has taken several weeks."²⁵ In answering the defense position that no overt act had been committed, Hay compared Burr to Bonaparte, and said that if the planning had been done by Burr then he also had responsibility for the acts.²⁶ The defense followed their original argument that under the Constitution it took two witnesses to an overt act, and continued to portray Burr as a helpless individual harassed by the government.²⁷ Additionally, they started to make personal attacks on the prosecution, suggesting that to have civil liberties in the hands of Hay was "dangerous for the people."²⁸ In proving that Burr was being persecuted by the government, the defense was aided by the prosecution. As the trial moved to a conclusion the prosecution perceived that Burr would be acquitted, and they began preparation for future actions. This caused Botts to protest, suggesting that the prosecution was attempting to get two indictments out of a single act, and asking, "Do we have fewer rights here than in Great Britain?"²⁹ When Burr, in an effort to receive additional information, requested another subpoena of the President, Wirt responded by stating that the government did not desire to release evidence because they could still try Burr in another court.³⁰ Hay, obviously bitter because the court had excluded most of his evidence, reminded the court that Burr could

still be tried for treason in other states.³¹ Burr said that he hoped the court would not proceed in anticipation of a motion not yet made,³² while Botts concluded that statements such as these were dangerous for civil liberties.³³ At the conclusion of the trial Chief Justice Marshall said, "A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver."³⁴ When the opinion was read, the defense found itself victorious, but Marshall's opinion lacked any mention of civil liberties as an issue in the trial. Burr went free not because of the actions of a vicious and oppressive government, but because Marshall could not find an overt act witnessed by two individuals as required by the Constitution. The Richmond Enquirer felt that the nation had been left to suffer at the hands of traitors,³⁵ and the Federalist press could only cheer Marshall's impartiality.³⁶ While Burr faced the possibilities of future trials--possibilities he clearly felt to be oppressive³⁷ --and while the trial had not been decided on the basis of individual liberties, the Burr Trials did show that protection of individual rights could be an effective rhetorical strategy. If the populace was not convinced of Burr's innocence, Jefferson's policies lacked, at least, total acceptance. A jury composed primarily of Jeffersonians, if it could not find Burr innocent, was unable to find Burr guilty. And the trial demonstrated that even the President was not outside the grasp of the courts. Civil liberties as a rhetorical issue, if not as a constitutional argument, received support from the Burr Trials.

NOTES

Kassian A. Kovalcheck, Assoc. Prof. of Speech, Vanderbilt University (MA, Ph.D Indiana).

- ¹David Robertson, The Report of the Trials of Col. Aaron Burr, Philadelphia: 1808, vol. I, p. 516. [hereafter referred to as the Burr Trials].
- ²National Intelligencer and Washington Advertiser, Sept. 11, 1807.
- ³For the best explanations of the conspiracy and the details of the trial see: Walter F. McCaleb, The Aaron Burr Conspiracy, New York: Wilson Erickson, 1936; Thomas P. Abernethy, The Burr Conspiracy, New York: Oxford Press, 1934; Francis F. Beirne, Shout Treason, New York: Hastings House, 1959.
- ⁴Columbian Centinel, February 4, 1807.
- ⁵Maryland Gazette, January 29, 1807.
- ⁶Ibid., February 5, 1807.
- ⁷Columbian Centinel, February 25, 1807.
- ⁸Ibid., February 4, 1807.
- ⁹New England Palladium, June 5, 1807.
- ¹⁰Burr Trials, vol. I, p. 45.
- ¹¹Ibid., vol. I, p. 47.
- ¹²Annals of Congress, Ninth Congress, Second Session, Washington: Gales and Seaton, 1852, p. 418.
- ¹³Annals of Congress, p. 419.
- ¹⁴James Wilkenson, Memoirs of My Own Time, Philadelphia: Abraham Small, 1816, vol. 11, p. 272.
- ¹⁵Richmond Enquirer, June 1, 1807.
- ¹⁶Burr Trials, vol. I, p. 63.

¹⁷Ibid.

¹⁸Ibid., vol. I, p. 70.

¹⁹Ibid., vol. I, p. 77.

²⁰Ibid., vol. I, p. 78.

²¹Ibid., vol. I, p. 90.

²²Ibid., vol. I, p. 98.

²³Ibid., vol. I, p. 350.

²⁴Ibid.

²⁵Ibid., vol. II, p. 529.

²⁶Ibid., vol. II, p. 210.

²⁷Ibid., vol. II, p. 280.

²⁸Ibid., vol. II, p. 515.

²⁹Ibid., vol. II, p. 488.

³⁰Ibid., vol. II, p. 487.

³¹Ibid., vol. II, p. 486.

³²Ibid., vol. II, p. 487.

³³Ibid., vol. II, p. 486.

³⁴Ibid., vol. II, p. 513.

³⁵Richmond Enquirer, October 23, 1807.

³⁶Columbian Centinel, October 25, 1807.

³⁷Burr Trials, vol. II, p. 488.