

fused; whereupon Perkins, who was a large man, seized him around the waist and heaved him bodily into the saddle. Thomas Malone, the Court Clerk who had played backgammon with Perkins that fateful night, and now a member of the escort, caught the reins and urged the horse along, while the soldiers whipped it from behind. Thus, still struggling, Burr was whisked out of sight in a cloud of dust before the astonished citizens could recover their wits. For the first time in his life Burr, fatigued, oppressed with emotion, gave way to tears, and Malone sobbed with him.<sup>64</sup>

Perkins took no more chances with his prisoner. He placed him in a closed and shaded gig, and conveyed him by stealth to Fredericksburg, there to find orders awaiting him from Jefferson to carry Burr to Richmond, where the President had determined to set the stage for his trial on the charge of high treason.

John Randolph of Roanoke, in the town of Bizarre, looked out of his window and beheld a strange sight the afternoon of March 23rd. "Col. Burr (quantum mutatus ab illo!) passed by my door the day before yesterday under a strong guard."<sup>65</sup>

On March 26th, in the evening, the sorry cavalcade cantered into Richmond — and journey's end.

## CHAPTER XXIV

### THE STAGE IS SET

#### 1. CONVICTED IN ADVANCE

**I**N Washington, the President of the United States was jubilant. Burr was at last in his power, and he was determined that he should not escape this time. He proclaimed exultantly that "Burr has indeed made a most inglorious exhibition of his much overrated talents. He is now on his way to Richmond for trial."<sup>1</sup> But the following day, with a fine inconsistency, he was informing an anonymous correspondent, "No man's history proves better the value of honesty. With that, what might he [Burr] not have been!"<sup>2</sup>

Since Wilkinson's vague alarms had come to trouble his ears the preceding November, he had steadily increased his already overabundant spleen toward the man who had made him President. He became judge, prosecutor and jury, all in one. He had tried the question of Burr's guilt in the public eye before his capture; he had given the impression that he had in his possession the most irrefutable proofs of his treason and convicted him accordingly. He had utilized every resource of the Government to achieve his purpose — to blacken the name of Aaron Burr forever — whether the means were legal or illegal; and now, during the course of the ensuing trial, he injected himself into what was a judicial proceeding in a way that bespoke the most vindictive persecution and interference with the orderly processes of the law of the land. It is indeed a strange episode in the life of an otherwise great figure in American history. A philosopher displaying spleen, passion and enmity; a democrat acting the tyrant; a scientist rearing a structure of hate on the flimsiest premises; the ardent prophet of the Bill of Rights tearing every constitutional guaranty of personal liberty to shreds; the disciple of the Enlightenment adopting the Jesuitical doctrine that the end justifies the means!

Had Jefferson been sincerely convinced of Burr's guilt, and that the nation was in danger of subversion, his course might at least be understandable, if not wholly to be approved. But the record casts serious doubts on Jefferson's own convictions, no matter what he pretended to the public. His first Proclamation made no mention

of internal treason, though obviously he intended the people to read between the lines. A filibustering expedition against Spain did not justify the pursuit of the proponent with such unrelenting vigor. In the eyes of the nation, it was considerably less than an offense. But he was feeling his way, slowly and carefully, building up public opinion to the boiling-point.

The Proclamation was followed a few days later by detailed references in the annual message to Congress. Burr's crime was still merely the technical misdemeanor of an expedition against Mexico. But the people waited breathlessly for revelations they knew must soon be forthcoming. They were not disappointed. Rumors of Wilkinson's charges, of Eaton's fantastic story, were skilfully placed in circulation. Dark looks and muttered words hinted at other and more definitive proof in the possession of the Government, so damning in its implications that, for reasons of State, it could not be released for public consumption.

To the general populace, these were sufficient. The hints and rumors were magnified and distorted, until Aaron Burr, the traitor, became an execration and a byword. But winks, and portentous shakings of heads, and the carefully released stories of Wilkinson and Eaton, met with incredulity on the part of those who knew Burr well and intimately. Wrote Senator Plumer to a friend, "I am too well acquainted with the man to believe him guilty of all the absurdity that is ascribed to him. He is a man of first rate talents. He may be capable of much wickedness, but not of folly."<sup>3</sup>

This was indeed to be the constant cry of well-informed men, and one which Jefferson could only overcome by constant reiteration, assiduous propaganda, and a horde of witnesses. They had known Aaron Burr for years; it was incredible that such fantastic, insane schemes could be the product of that brilliant mind. It was the "folly," not the "wickedness," that led to total disbelief. A little later, Plumer was to repeat, "I must have plenary evidence before I believe him capable of committing the hundredth part of the absurd & foolish things that are ascribed to him." In fact, "the president of the United States, a day or two since, informed me that he knew of no evidence sufficient to convict him of either high crimes or misdemeanors . . ." <sup>4</sup> And, in that very conversation, Jefferson had remarked that "he believed Yrujo was duped by Burr" into advancing him money.<sup>5</sup> In other words, at the turn of the year, Jefferson had no evidence of guilt, and, by his reference to the *duping* of Yrujo, was not at all himself convinced of a design for disunion.

Yet when John Randolph, bitter critic of Jefferson, rose in the House on January 16, 1807, and demanded that the President of the United States lay before them any information he possessed touching the conspiracies mentioned in his Message, the President showed no such public qualms as he had exhibited in private. His response on January 22nd to the Resolution was positive, unequivocal, detailed. No longer was it merely an expedition against Spain; it was now as well a plot to disrupt the Union; Aaron Burr, he stated emphatically, is "the principal actor, whose guilt is placed beyond question." On information received from Wilkinson and Eaton, as well as on a mass of "letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines," he was enabled to inform Congress of every move, of every thought, of Burr. He had intended to sever the Union beyond the Alleghanies, Jefferson declared; he had intended also to attack Mexico; his scheme for the colonization of the Bastrop grant was a mere blind for his treasonable purposes. Then, finding the West impervious to his designs, he had formed the desperate scheme of descending on New Orleans, of robbing the banks, and plundering the city. But Wilkinson, "with the honor of a soldier and fidelity of a good citizen," had punctured the plot and arrested the conspirators within his reach, and had hastened to notify the President of the United States of the base treason which had unwittingly been opened to him. In fact, on January 18th, only a few days before, Jefferson had received from that singular patriot a translation of the damning cipher from Burr, which, to Jefferson, was convincing evidence of Burr's infamy. Furthermore, Swartwout, Bollman and the others were even then on the high seas, bound for Atlantic ports as prisoners of state. To this extraordinary document he attached Wilkinson's letters — but not the private despatch of October 21st — and Wilkinson's affidavit justifying the arrests, as well as the famous translation.<sup>6</sup>

The Message created a profound sensation. Here was convincing evidence, statements made without any hesitation. The Chief Executive of the United States had declared positively that Burr was guilty beyond question. The story was complete in every detail. Even the men who had known Burr began to waver. Though Plumer thought the cipher letter sounded more like Wilkinson's style than Burr's, and doubted the accuracy of the translation, the overwhelming mass of detail led him, by January 26th, reluctantly to the conclusion that Burr must in truth be guilty as charged.<sup>7</sup>

Only crusty, obstinate old John Adams held out against the tremendous clamor. "I have never believed him [Burr] to be a Fool," he declared. "But he must be an Idiot or a Lunatick if he has really planned and attempted to execute such a Project as imputed to him." But, he remarked dryly, politicians have "no more regard to Truth than the Devil . . . I suspect that this Lying Spirit has been at work concerning Burr." However, regardless of everything else — and here old Adams rose to incontrovertible heights, "if his guilt is as clear as the Noon day Sun, the first Magistrate ought not to have pronounced it so before a Jury had tryed him."<sup>8</sup>

Jefferson was not troubled with such trifling scruples. He proceeded on his subtle, tortuous way to enmesh and bedevil Burr in advance of arrest, in advance of trial, in advance of conviction — and with utter disregard of Constitutional provisions.

On January 23, 1807, the day following the receipt of the Message, William B. Giles, the Administration whip, brought before the Senate in secret session a resolution for the suspension of the Constitutional right of habeas corpus. This was introduced for one purpose — to hold Bollman and Swartwout, who were already in Baltimore, in the clutch of the military, without affidavit or formal accusation of specified crimes. It went through almost *viva voce*, with only Bayard of Delaware vehemently opposed to this determination to impose what was tantamount to a military dictatorship upon the country. The Bill then went immediately before the House, where an attempt was made to rush it through behind closed doors. But the House revolted in disgust and astonishment. By a vote of 123 to 3 the doors were flung open to public audience, and, after an angry debate, led, astonishingly enough, by John W. Eppes, Jefferson's son-in-law, who shouted that "never, under this Government, has personal liberty been held at the will of a single individual," the House rejected the Senate measure by a vote of 113 to 19.<sup>9</sup> The Bill had proved a boomerang.

But the Message had already done its deadly work. All over the country, as the news of it penetrated to the most distant parts, the people blazed into indignation and fury at the unspeakable Burr. No further evidence was needed to deepen the conviction of guilt: the President had spoken, and the trial was an unnecessary formality. Even Joseph Alston, Burr's own son-in-law and partner, hastened to humble himself in abject dissociation from the treason. On February 6th, he wrote to Governor Pinckney of South Carolina in imploring accents. "I have received and read the President's Message with deep mortification and concern; but the letter annexed to it, stated to be a *communication in cyphers*

from Col. Burr to Gen. Wilkinson, excites my unfeigned astonishment. I solemnly avow that, when that letter was written, I had never heard, directly or indirectly, from Col. Burr, or any other person, of the meditated attack on New Orleans . . . On the other hand, I had long had strong grounds for believing that Col. Burr was engaged by other objects, of a very different nature from those attributed to him, and which I confess the best sentiments of my heart approved. I need not add that those objects involved not the interests of my country . . . I confess," he submitted hesitantly, "there are times even now, when, in spite of the strong facts which have been exhibited, I am almost inclined to believe my suspicions [of Burr] injurious. Whatever may be thought of the *heart* of Mr. Burr, his *talents* are great beyond question, and to reconcile with such talents, the chimerical project of dismembering the Union, or wresting from it any part of its Territory, is difficult indeed." Let not the fact, he begged, that he was Burr's son-in-law involve him; "let me," he said, "always be judged by *my own acts*, and I shall be satisfied."<sup>10</sup> A disgusting, cowardly performance, indeed, and one which, when discovered by his wife, must have filled her with scornful fury for her impotent husband. Even Blennerhassett spoke of him always with words of contempt.

Yet Jefferson himself was under no particular illusions as to the magnitude of Burr's enterprise, or the danger to the country. On January 3rd, he told Wilkinson that "I do not believe that the number of persons engaged for Burr has ever amounted to five hundred," and "that the enterprise may be considered as crushed." As for the fear of an attack on New Orleans from the West Indies, "be assured there is not any foundation for such an expectation. . . . The very man whom they represented to you as gone to Jamaica, [Truxton] and to bring the fleet, has never been from home, and has regularly communicated to me everything which had passed between Burr and him. No such proposition was ever hazarded to him."<sup>11</sup>

On February 3rd, in answer to the flow of frightened bombast from Wilkinson, he was assuring him that Burr "began his descent of the Mississippi January 1st, with ten boats, from eighty to one hundred men of his party, navigated by sixty oarsmen not at all of his party." While he approved in the main of Wilkinson's arrests and deportations, he cautioned him not to "extend this deportation to persons against whom there is only suspicion, or shades of offence not strongly marked. In that case, I fear the public sentiment would desert you; because, seeing no danger here, violations of law are felt with strength." In other words, illegalities and out-

rage of personal liberty are quite all right as long as the public will stand for it. But, continued Jefferson, Wilkinson could rest assured of his support in whatever measures he takes. "You have doubtless seen a good deal of malicious insinuation in the papers against you. This, of course, begot suspicion and distrust in those unacquainted with the line of your conduct. We, who knew it, have not failed to strengthen the public confidence in you; and I can assure you that your conduct, as now known, has placed you on ground extremely favorable with the public. Burr and his emissaries found it convenient to sow a distrust in your mind of our dispositions towards you; but be assured that you will be cordially supported in the line of your duties."<sup>12</sup>

And, on the same day, he amplified this amazing doctrine that the violation of private rights by military force was justified as long as it was limited to specified individuals. "On great occasions," he wrote Claiborne, "every good officer must be ready to risk himself in going beyond the strict line of law, when the public preservation requires it . . . The Feds, and the little band of Quids, in opposition, will try to make something of the infringement of liberty by the military arrest and deportation of citizens, but if it does not go beyond such offenders as Swartwout, Bollman, Burr, Blennerhassett, Tyler, etc. they will be supported by the public approbation."<sup>13</sup> What had happened to the man who had listed in the Declaration of Independence as a cardinal grievance against the King of England that "he has affected to render the Military independent of and superior to the Civil power"; who had insisted on a Bill of Rights before he would approve of the new Constitution; who had written the Kentucky Resolutions — that ringing declaration against the Federal Government for usurpation of power in enacting the Sedition Laws?

But no better evidence can be adduced of the President's knowledge of the chief purposes of the man he was hounding than his confidential letter to the American Minister in Madrid, to whom he unbosomed himself so that Spain might be apprised of the gracious efforts of the United States in its behalf — *à la Wilkinson!* "No better proof of the good faith of the United States [toward Spain] could have been given than the vigor with which we acted . . . in suppressing the enterprise meditated lately by Burr against Mexico. Although at first, he proposed a separation of the western country, and on that ground received encouragement and aid from Yrujo, according to the usual spirit of his government towards us, yet he very early saw that the fidelity of the western country was not to be shaken, and turned himself wholly towards Mexico. And

so popular is an enterprise on that country in this, *that we had only to lie still, and he would have had followers enough to have been in the city of Mexico in six weeks.*"<sup>14</sup> Yet, at the very time that this was written, Burr was on trial for his life, with Jefferson himself as Prosecutor-in-Chief!

## 2. PRELIMINARY TRIALS

Bollman and Swartwout were the first of Wilkinson's prisoners to arrive. From Baltimore, the point of debarkation, they were hustled to Washington, and, on January 22, 1807, thrown into a military prison, to be "guarded, night and day, by an officer & 15 soldiers of the Marine Corps."<sup>15</sup> Rumbles of habeas corpus proceedings reaching the Presidential ear; it was attempted, as already stated, to suspend altogether that invaluable weapon against oppression. The attempt not only failed, but a resolution to strengthen the privilege barely missed passing in the House by the narrowest of margins — the Federalists and Randolph's band of Quids working harmoniously together in its favor.

On January 23rd, a squad of soldiers escorted Bollman to the Secretary of State's office, where he found Jefferson and Madison awaiting him. He was entirely willing, he professed, to disclose all that he knew of Burr's conspiracy, provided he were assured that nothing which he might divulge or admit to them, would be thereafter used for any purpose. With imperfectly restrained eagerness, they assured him that such would be their course. Now they would hear the truth — that truth which would place Aaron Burr's neck in the noose.

Bollman told them, and they wrote busily, that the plan was to revolutionize Mexico and make a monarchy of it, that it was intended to seize the French artillery still in New Orleans (to which the United States had no title), but to avoid violence and invasion of private rights; then to seize the harbor shipping, by force if necessary, and convey their forces to Vera Cruz. That, as soon as Burr was embarked, Bollman was to hasten back to Washington to acquaint the Government of the enterprise, and urge it on to war with Spain. He frankly avowed that Yrujo had been duped into a belief that Burr's object was to revolutionize Louisiana and separate the Western States, but that this had been done to lull the suspicions of Spain. Then he went on to spin elaborate embroidery. Yrujo had been most eager, had offered arms and money, but Burr had "despised the dirty character of Yrujo, and never would accept either money or any thing else from that quarter."

To Merry, however, the real truth had been told — that the sole object was Mexico. More embroidery! The English government had been warm in favor, but Pitt's death had changed the complexion of things. As for Merry, Bollman was at pains to assure his listeners that he "had no wish to injure the interests or infringe the authority of the United States, but solely to advance those of Great Britain."<sup>16</sup> A dexterous concoction, in which fact and fancy were inextricably mingled, and which left Jefferson and Madison sorely puzzled.

A writ of habeas corpus was in the meantime sued out in behalf of Swartwout and Bollman, but before it could be properly tested, a superseding bench warrant charging high treason had placed them in the custody of the Civil Courts. Whereupon a motion was made for their discharge on the ground that the supporting evidence failed to make out a *prima facie* case against them. Jefferson hastened then to procure Eaton's affidavit, with its tale of horrors and proposed assassinations, in order to bolster that of Wilkinson. Charles Lee, Robert G. Harper and Francis S. Key represented the prisoners. After long argument before a vast concourse of curious people, the Court sustained the warrant and committed them to jail for trial by a vote of two to one — two Republican judges to one Federalist.

An appeal was taken from the District Court to the Supreme Court, with the redoubtable Luther Martin now associated with the defense. On February 21, 1807, Chief Justice John Marshall delivered the majority opinion of the Court. After an elaborate analysis of the famous cipher letter (in Wilkinson's translation), after a consideration of the various affidavits produced in support of the charge of treason, it was their opinion that there was no evidence whatsoever of acts constituting treason under the Constitution. Whereupon the two men were discharged from custody.

The next prisoner to arrive was Alexander, the New Orleans attorney whose sole offense it had been to act as counsel for the victims of Wilkinson's despotic seizures. He, too, was promptly released on a writ of habeas corpus. On February 17th, the endless procession of deportations brought John Adair and Peter V. Ogden to Baltimore's shore. More writs — and they likewise found themselves freed of custody and restraint.

"Very much to my surprise and mortification," wrote the Justice who had signed the writs, to Jefferson, "there was no proof of any nature whatsoever with them, although I administered an oath to Lieutenant Lockett with a view to acquire the necessary information from him. He could give none except the common

conversation of the day. And I was under the necessity of discharging the prisoners."<sup>17</sup> Impartial justice indeed! But Jefferson consoled the disgruntled Nicholson, Republican friend whom he had placed upon the Bench, with the remark that "their crimes are defeated, and whether they should be punished or not belongs to another department, and is not the subject of even a wish on my part."<sup>18</sup> It is a pity that the President of the United States did not pursue this wise and tolerant course in the case of Aaron Burr, soon to be tried before another court.