Chapter XXV

TRIED FOR TREASON

1. The Titans Gather

THE stage was now set for the final act in the tremendous drama of conspiracy and treason with which the nation had been regaled. For months the country had been tossing in a confused welter of rumors, alarms, tales of phantom armies and desperate rebellion; now the mists had cleared to disclose the slight, elegantly dressed figure of Aaron Burr, pale but composed of face, eyes as brilliantly inscrutable as ever, as the focal-point of all the tumult. The beating spotlight which had hitherto dissipated its energies on diverse and remote sections of the land, now concentrated its blinding gleam on the town of Richmond, in the State of Virginia, and upon the spare, erect little man with hair carefully brushed back from his high, intellectual forehead. Aaron Burr, against whom all the resources of Government, all the ingenuity of President and Cabinet, all the power of public propaganda and an envenomed press, were to be directed in a mighty effort to convict him of high treason and sedition, and thereupon hang him high upon a gallows, his head snapping in the encircling noose, his trim feet dancing for the last time on the insubstantial breeze. No wonder the nation quivered and thrilled with an emotional orgy, and all eyes – and numerous feet – were directed to the gracious, aristocratic precincts of Richmond. The drama was approaching its climax.

Richmond had been chosen as the seat of the trial because of an unfortunate dictum tossed off by Marshall in the course of his opinion discharging Swartwout and Bollman from custody. To support the charge of treason, he had said, " war must be actually levied . . . To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by an assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed." This was sound constitutional law. For the Constitution of the United States had clearly defined treason against the United States to consist " only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Obviously the two prisoners had neither

assembled nor levied war. But Marshall, as too many judges are prone to do, added more than was essential to a decision of the instant case. It was not necessary, however, he continued, that one should in fact " appear in arms against his country . . . 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 the action, and who are actually leagued in the general conspiracy, are to be considered as traitors." [1] This *obiter dicta* was to cause the Chief Justice many uncomfortable moments during the trial of Aaron Burr.

For the Government attorneys, studying the decision, seized upon this section of the opinion as the thin wedge whereby their more important prisoner could be convicted. In most of those territories where Burr had actually appeared in an assemblage of armed men, he had already been held guiltless of any crime by qualified Grand Juries. These were Kentucky and Mississippi. Which left Ohio and Indiana as possibilities – questionable because of the fleeting nature of his sojourn, and the prospect that in those remote places, far from the vigilant eye of the Government, trial would again mean speedy acquittal.

But if it were not necessary for Burr to have been present at the place of assemblage – and Marshall had so stated – then the matter was simplified. The real place of gathering of men armed for desperate emprise had been Blennerhassett's Island – where the militia had attacked and wreaked vengeance on wine barrels and defenseless fences. And Blennerhassett's Island was providentially situated in Wood County, in the State of Virginia. Wherefore Richmond became the *situs* of trial, not far from Washington, and the unfaltering regard of Jefferson himself.

There was, however, one ironical fly in the ointment. The Justice of the Supreme Court in whose Circuit Richmond lay was none other than that redoubtable upholder of Federalist principles and the inviolability of judicial supremacy, Chief Justice John Marshall himself. The battle thereby became triangular, with Burr, Marshall, and Jefferson occupying the apexes. The three most impressive and titanic personalities of the day were thus joined in mutual conflict, on the result of which one man's life depended, and the reputations of the other two. But to Jefferson's jaundiced eye, it seemed more like a coalition of judge and prisoner against the Administration, and he prepared his course cannily to lime the one and snare the other. Let him but catch Marshall showing favor and bias towards Burr, and he would have him, as well as the entire judiciary, discredited before the country.

There were many angles to this last great battle of the gods. Marshall stood like an impassive stone colossus in Jefferson's way. So did Burr, who should have trembled at the bar of justice, yet did not. The Federalists had plucked up courage, after years of supine acquiescence, and were nammering once more at Jeffersonian policies. The present *cause célèbre* was their opportunity. Worse still, the irrepressible John Randolph and his little band of recalcitrant Republicans, known to all and sundry as the *Quids*, were hovering on his flanks like stinging hornets. Let him make but one false step and the opposition would grow to an irresistible clamor. The lone figure of Aaron Burr, therefore, had become more than that of a mere traitor, of a man against whom Jefferson had held peculiar personal animosity; he was the focal-point for all the latent and open opposition against the Administration, the symbol and rallying-cry for all discontent. It was therefore necessary to convict and hang him at all costs – for Jefferson's own political sake. The question of meticulous, abstract justice, of due process of law, could not be permitted to be entertained. Aaron Burr *must* be destroyed! And if John Marshall attempted to block the path of political expediency, he, too, must be destroyed – discredited, impeached, removed from office, and the power of a hated judiciary forever obliterated.

The opposition planned its attacks skilfully. It did not cry out the innocence of Aaron Burr, though informed men like Senator Plumer, after much shifting, had come finally to the conclusion that " Burr's object was the Mexican provinces – not a seperation [*sic*] of the Union." [2] The people of the country had been propagandized into an ineradicable belief in the guilt of the former Vice-President. Instead, those opposed to the President began to snipe persistently at his Achilles' heel – to wit, one General James Wilkinson. The latter's reign of terror at New Orleans – of which reports were coming thick and fast – his devious courses, the deep cloud of suspicion which surrounded his every move, were meat and drink to the snipers. They fulminated against the General in the halls of Congress; they howled against him at every possible opportunity – and the public was listening. Wilkinson himself wrote in fear and trembling to his protector, Jefferson, " You must long before this perusal have heard . . . of the persecution and abuse I have suffered and am suffering in consequence of it . . . But sir, when the tempest has passed away and dangers have disappeared I must hope I shall not be left alone to buffet a combination of bar and bench." [3]

Jefferson was compelled to give him aid and comfort. Willy-

nilly, he had to assume the ungrateful role of protector to the malodorous General, to approve of his acts – no matter how indefensible, and to safeguard him from all attacks. For the General was the chief and almost only real witness against Burr. Let his reputation be destroyed, and the case of the Government *versus* Burr failed of its own weight. Thus it came about in March, 1807, when Major Bruff told Secretary of War Dearborn that he could prove Wilkinson's treasonable complicity in the conspiracy, Dearborn blandly replied " there might be an enquiry after the present bustle was over, but at present, he [Wilkinson] must and would be supported." And further, that Wilkinson " had stood low in the estimation of government before his energetic measures at New Orleans, but now he stood very high." When Bruff, astounded at this exhibition of Administration ethics, went to the Attorney General with his story, it was to meet with a cynical shrug of shoulders and an inquiry – " what would be the result if all this should be proven? – why just what the federalists and the enemies of the present administration wish – it would turn the indignation of the people from Burr on Wilkinson; Burr would escape, and Wilkinson take his place." [4] All of which was to come to light at the trial, and must take its place in history as an example of the unbiased, open-minded and judicial spirit with which the Government of the United States, under the guidance of that philosopher and believer in " the rights of man," Thomas Jefferson, proceeded to try the question of the guilt or innocence of Aaron Burr.

2. Marshall Defines Treason

John Marshall hastened down from Washington to Richmond, and issued a warrant whereby the prisoner, Aaron Burr, was taken out of the custody of the military, in whose grasp he had been ever since his initial arrest, and delivered over to the civil authorities for examination.

On March 30, 1807, Burr, under close guard at the Eagle Tavern, was taken before the Chief Justice, in a retired room in the same building, for the preliminary hearing and commitment. A celebrated array of counsel crowded into the small chamber behind the prisoner – the greatest assemblage of legal talent ever witnessed at one time in America, to participate in the most famous criminal trial in American history. To the disappointment of the curious citizenry the door swung shut behind them, and they were compelled to cool their heels in the tap-room of the Tavern, there to wait expectantly for the news as it filtered out from the

sanctum, meanwhile consoling themselves with small beer and headier potations, to the great delight of mine host, the innkeeper.

For the defense, there was first and foremost Aaron Burr himself, one of the finest lawyers the nation had yet produced, resourceful, technical, familiar with every loophole and cranny of the law, logically formidable and coolly intellectual, even when his own life was the stake. Around him he had gathered the flower of the country's bar – great lawyers who had volunteered their services in behalf of their accused compeer. All of them were Virginians – Edmund Randolph, who had held the offices of Attorney General and Secretary of State under Washington; Benjamin Botts, learned and thorough; John Baker, acquainted with the ways of juries; and, later, Charles Lee, former Attorney General of Maryland. But the weight of the defense rested on two men – John Wickham, a truly great lawyer whose talents have not been adequately appreciated, whose close marshaling of facts rivaled the talent of Burr himself, and who was more philosophical and comprehensive in his grasp of the material. He was to make the greatest speech and finest forensic effort of the entire trial. With him was Luther Martin, who had thundered and roared at the impeachment trial of Justice Chase, and who detested and was reciprocally hated by Jefferson with wholesome cordiality. It was upon this nicknamed "bulldog of Federalism" that the defense was to rely for epithet and denunciation, the flowery periods so impressive to the lay mind, and the political scarification of the President. For the defense had no illusions as to the master mind in back of the prosecution: every move, every detail of strategy, was dictated by Thomas Jefferson himself, of the Executive branch of Government.

For the prosecution the array of attorneys was considerably lighter in number and in legal weight. Caesar A. Rodney, the Attorney General, whose province it should have been to direct the case, hastily dissociated himself from the prosecution under one lame pretense or another. He saw no profit for himself in the proceedings, and wisely foresaw only a considerable lessening of prestige. The chief burden rested upon George Hay, United States District Attorney for Virginia, a capable enough attorney, but blundering confusedly throughout the trial – possibly because his heart was not in it, possibly because of the constant interference by the President of the United States. Associated with him were William Wirt, young and aggressive, of the flowery school of oratory to counterbalance Luther Martin, yet possessed of considerable wit and talent; and Alexander McRae, Lieutenant-

Governor of Virginia, a definitely inferior lawyer, brought into the case for political reasons.

In the judicial chair of this tavern court sat Chief Justice John Marshall, under whose powerful sway the Supreme Court had steadily forged ahead to assume a commanding position in the structure of government possibly not contemplated by the authors of the Constitution. Beveridge describes him as "towering, ramshackle, bony, loose-jointed, negligently dressed, simple and unconventional of manner," physically a perfect contrast to the scrupulously elegant, short, erect Burr. Burr was fifty years of age, Marshall six months older. Both were logical, clear, purposeful thinkers; both were subtle and astute, both were lucid in statement, though Marshall was prone to tiresome repetition, while Burr was concise and irrefutable. There they stood facing each other, as once before they had done, when Marshall had administered and Burr had repeated the oath of the Vice-President of the United States.[5]

George Hay opened the hearing by introducing into evidence a copy of the record in the case of Bollman and Swartwout, which included the depositions of Wilkinson and Eaton; then Nicholas Perkins took the stand to testify to the capture of the prisoner. When he had finished, Hay moved to commit Burr for the Grand Jury on two grounds: first, high misdemeanor "in setting on foot, within the United States, a military expedition against the dominions of the King of Spain"; second, and more important, "for treason in assembling an armed force, with a design to seize the city of New-Orleans, to revolutionize the territory attached to it, and to separate the western from the Atlantic states."[6]

Whereupon Marshall adjourned court for argument on this crucial motion until the following day, and directed that further hearings be held in the State Capitol building. Meanwhile he admitted Burr to bail of $5,000 *pendente lite*. Hay had insisted on a larger arena for the trial of the cause, and even for the preliminary motions. This was Jefferson's idea, to dramatize and hold the proceedings in the full glare of publicity, both to arouse the popular emotion and to keep every move of Marshall under open scrutiny.

When court opened again in its new quarters, the great room was immediately jammed to capacity, and hundreds clamored vainly outside for admission. Hay, still under orders, demanded that they adjourn to the Hall of Delegates, to give all and sundry a chance to hear and see the show. Marshall, curiously enough, complied, and that too was promptly filled in every nook and

cranny. Mob spirit was in the air; though Burr was not without friends, and daily he was making more by his composure, his conduct before his accusers, and the more and more obvious malice of the prosecution. Daily the Federalists rallied to his standard, and the more fearless and disinterested Republicans.

For two days the argument swung back and forth on the motion, with Hay the proponent and Wickham in opposition. Hay declared that Burr's cipher letter to Wilkinson was proof positive of treasonable intent, while Wickham was equally certain that it was evidence of an innocent design. Where is there a single phrase that could possibly be construed as traitorous? Here is specified only an expedition against Spanish possessions, *if and when* the United States declared war. Perfectly innocent, perfectly laudable; in fact, the project of a true patriot.

Burr himself rose to speak, but only "to repel some observations [by Hay] of a personal nature." He was being persecuted, he said, on a series of mere conjectures, with which the infamous Wilkinson had only too easily frightened the President and the country. He spoke feelingly of his military incarceration, the illegality of his arrest, his denial of all civil privileges; and called attention to his three former trials for the same offenses, in which he had been uniformly found guiltless, his conduct praised and that of his persecutors severely scored. Then he sat down, having made his points for the benefit of the spectators as well as for the Court.[7]

On April 1st, Marshall delivered his opinion. It was lengthy and carefully prepared. On the question of the misdemeanor, he said, the cipher letter and Wilkinson's deposition sufficiently constituted a *prima facie* case to warrant committing Burr for Grand Jury action. But as for the graver charge of treason – and here the spectators leaned forward breathlessly in their seats – the Constitution of the United States had defined it plainly and with precise detail. "Treason against the United States," declared that sacred document, "shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Further to safeguard the individual against governmental tyranny, the Constitution stated emphatically 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."

Marshall then amplified the Constitutional provisions in the light of Blackstone and other eminent English commentators. He analyzed the affidavits of Wilkinson and Eaton, sole evidence before the Court to the charge, and found nothing but mere rumor

and conjecture, mere intention as against commission. "An intention to commit treason," he argued, "is an offence entirely distinct from the actual commission of that crime. War can only be levied by the employment of actual force. Troops must be embodied, men must be assembled in order to levy war . . . these are facts which cannot remain invisible. Treason may be machinated in secret, but it can be perpetrated only in open day and in the eye of the world. Testimony of a fact which in its own nature is so notorious ought to be unequivocal."

He proceeded now from the general to the particular. "The fact to be proved in this case is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction, and numbers must witness it. It is therefore capable of proof; and when time to collect this proof has been given, it ought to be adduced, or suspicion becomes ground too weak to stand upon.

"Several months have elapsed," he continued reading, "since this fact did occur, if it ever occurred. More than five weeks have elapsed, since the opinion of the supreme court [in re Swartwout and Bollman] has declared the necessity of proving the fact, if it exists. Why is it not proved?" He paused, and an audible sigh came from the crowded courtroom. This was obviously a direct thrust at Jefferson. Then he resumed. "If, in November or December last, a body of troops had been assembled on the Ohio, it is impossible to suppose that affidavits establishing the fact could not have been obtained by the last of March . . . I cannot doubt that means to obtain information have been taken on the part of the prosecution; if it existed, I cannot doubt the practicability of obtaining it; and its nonproduction, at this late hour, does not, in my opinion, leave me at liberty to give to those suspicions which grow out of other circumstances, that weight to which at an earlier day they might have been entitled. I shall not therefore," he closed, "insert in the commitment the charge of high treason." Bail was fixed on the misdemeanor count at $10,000, which was furnished that same day by five sureties, and Burr walked out, temporarily at least, a free man.[8] For seven weeks he was to remain free, until the next term of the United States Circuit Court, on May 22nd.

The prosecution was stunned, and Jefferson, to whom the news was sent by fast courier, was furious. The prey, of which he had been so certain, was escaping. The misdemeanor charge – levying war against Spain – was trivial in the eyes of the nation. Surely it was not enough to justify the extraordinary measures both he

and Wilkinson had taken. He was discomfited; more, he was discredited. And John Marshall, the Federalist, the third formidable antagonist of his career – after Hamilton and Burr – had administered the blow.

The very next day he was writing James Bowdoin in a rage that "hitherto we have believed our law to be, that suspicion on probable grounds was sufficient ground to commit a person for trial, allowing time to collect witnesses till the trial. But the judges here have decided, that conclusive evidence of guilt must be ready in the moment of arrest, or they will discharge the malefactor. If this is still insisted on, Burr will be discharged; because his crimes having been sown from Maine, through the whole line of the western waters, to New Orleans, we cannot bring witnesses here under four months. The fact is, that the federalists make Burr's cause their own, and exert their whole influence to shield him from punishment, as they did the adherents of Miranda. And it is unfortunate that federalism is still predominant in our judiciary department, which is consequently in opposition to the legislative and executive branches, and is able to baffle their measures often." [9]

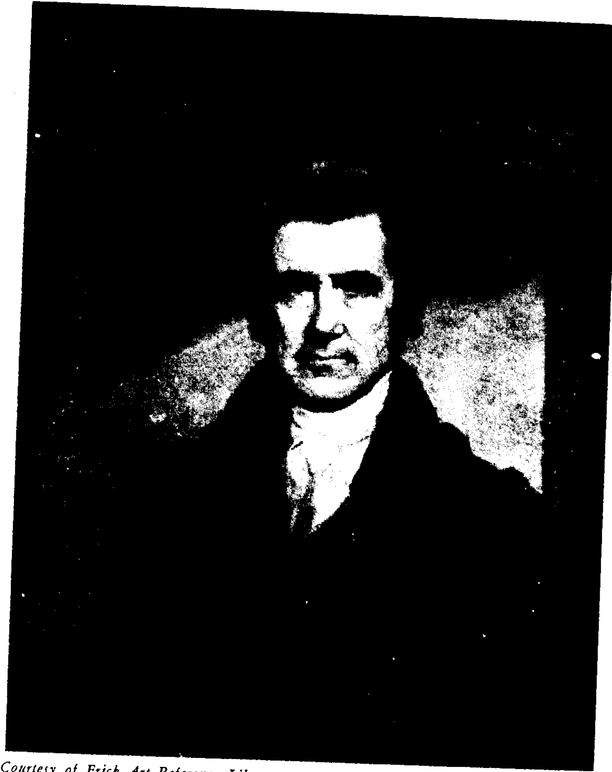
Jefferson was permitting his spleen to disturb his reasoning powers. At no time had mere suspicion of a crime been sufficient to hold a prisoner for trial, after a preliminary hearing. This was the instrument of autocracy and unbridled tyranny, not of the English common law. There must always be adduced sufficient testimony to make out a *prima facie* case, such a case as would be sufficient to convict on a trial, if uncontradicted or not explained away. The rest of his dissertation is mere rhetoric. It was not necessary to obtain witnesses from Maine to New Orleans; it was sufficient to have two competent witnesses to a single act of treason anywhere along the line – in this particular instance, Wood County, Virginia, not very far away.

The fact is, as Marshall pertinently pointed out, that the whole might of the Administration had been concentrated from an earlier period in an eager search for testimony. As far back as February 27th, the Cabinet had decided to "institute an inquiry into the proceedings of Burr and his adherents from New York to New Orleans," and to appoint men in all the places along that route to take affidavits as to his alleged crimes.[10] Attorney General Rodney acted immediately on these instructions. He printed lists of questions, and broadcast them throughout the land, with appeals to all good citizens having knowledge of the facts to come forward and make affidavit thereto; while Government agents scoured the

Courtesy of The New York Historical Society

THOMAS JEFFERSON

From a bust by Jean-Antoine Houdon



Courtesy of Frick Art Reference Library

JOHN MARSHALL

From a portrait by John Wesley Jarvis

country, ferreting out every scrap of evidence. No pains were spared, and no expense, to make the search as extensive and thorough as possible.

But now, in the face of Marshall's decision, Jefferson ordered renewed activity, on a scale before and since unexampled in the history of American justice. Government agents swarmed everywhere, prying and snooping; a deputy marshal and special messenger went forthwith to Wood County to collect depositions and summon witnesses. Jackson was solicited by Madison as well as by Rodney to disclose what he knew. Wilkinson sent agents into the Mississippi Territory to collect all available testimony, and to manufacture it, if necessary. He blustered and threatened and bribed members of Burr's expedition, in a desperate attempt to obtain proof against Burr. Jefferson was not content with the misdemeanor charge; he hoped and expected to be able to hang Burr for high treason.

On April 20th, he was still complaining bitterly of the perfidy of the Federalist Chief Justice. "That there should be anxiety and doubt in the public mind, in the present defective state of the proof, is not wonderful; and this has been sedulously encouraged by the tricks of the judges to force trials before it is possible to collect the evidence." Five weeks? Five months was barely time enough. He had instructed Rodney to inform Marshall of this condition unofficially, but the Chief Justice had refused to listen. "All this, however, will work well," Jefferson exclaimed. "The nation will judge both the offender and judges for themselves. If a member of the executive or legislature does wrong, the day is never far distant when the people will remove him. They will see then and amend the error in our Constitution, which makes any branch independent of the nation. They will see that one of the great coordinate branches of the government, setting itself in opposition to the other two, and to the common sense of the nation, proclaims impunity to that class of offenders which endeavors to overturn the Constitution, and are themselves protected in it by the Constitution itself; for impeachment is a farce which will not be tried again. If their protection of Burr produces this amendment, it will do more good than his condemnation would have done." The trial was rapidly broadening out into a wholesale battle of political principles and parties, and involving the fundamental structure of the government itself.

Jefferson ended his letter in a manner highly reminiscent of similar remarks by Hamilton, and, like them, outraging every sense of truth or probability. "Against Burr, personally," he said,

"I never had one hostile sentiment. I never indeed thought him an honest, frank-dealing man, but considered him as a crooked gun, or other perverted machine, whose aim or shot you could never be sure of. Still, while he possessed the confidence of the nation, I thought it my duty to respect in him their confidence, and to treat him as if he deserved it; and if his punishment can be commuted now for an useful amendment of the Constitution, I shall rejoice in it." [11] Words entirely belied by his actions. Every effort was concentrated to crush and destroy Burr, and, in the process, Marshall and the judiciary. Jefferson's own prestige depended on it. He had gone too far to retract now; had he not said that Burr was guilty beyond all question?

Surrounded thus by the baying hounds of the Administration, Aaron Burr was not dismayed. He realized to the full that his initial victory in having the charges against him reduced to a mere misdemeanor was but a temporary one; that his enemies would not rest or cease to harry him with all the resources at their command. Nevertheless he retained, as always, that perfect outward composure and inner calm which had marked him throughout his career. He had never been known to complain at the keenest arrows of misfortune, nor would he permit others to lament for him.

Poor Theo was taking her father's imprisonment and pending trial with that anguish of spirit which comes only to a keenly sensitive and imaginative mind. Burr would have none of that, and reproved her sharply. "Your letters of the 10th and those preceding seemed to indicate a sort of stupor; but now you rise into phrenzy. Another ten days will, it is hoped, have brought you back to reason." He was beginning to be very skeptical of democracy now – at least the particular brand devised by Jefferson. "You have read to very little purpose," he admonished his daughter, "if you have not remarked that such things happen in all democratic governments. Was there in Greece or Rome a man of virtue and independence, and supposed to possess great talents, who was not the object of vindictive and unrelenting persecution." [12]

Hay, the prosecuting attorney, wondered at the defendant's calmness and seeming lack of interest. He wrote his superior in office that "Burr lies here entirely dormant. I do not understand that he pays visits, and I believe he receives very few. The disposition manifested by the enemies of the administration to patronise him, and raise a clamor, seems to have gone off." [13]

But Hay was not very observant. Burr was extremely busy, and never less dormant than now. He was engaged closely with his counsel in mapping his defense against all contingencies, in planning, searching and briefing the law of treason with a diligence and perspicuity hardly to be equaled in the annals of law. He was also carefully and slowly gathering around him, by the infinite charm of his manner, the leading families of Richmond, socially if not politically powerful, and whose influence was therefore all the more subtle and penetrating. John Wickham, of counsel, gave notable dinners at which the flower of Virginia society was gathered – there to meet the man whom Jefferson had called a traitor. At one of these dinners the Chief Justice, John Marshall, was present. So, too, was Aaron Burr. It is certain they did not discuss the case, or exchange any remarks except the normal courtesies, yet the Jeffersonian partisans seized upon the episode with loud clamors as an effective means of destroying public confidence in the integrity of the Court. Judge and prisoner hobnobbing over wine, and toasting "treason" arm in arm!

Nor did the Administration permit the intervening time to pass in idleness. The Republican papers teemed with abuse, depositions were gathered by the ream, witnesses were dragooned and subpoenaed to Richmond from the ends of the earth. A Grand Jury was drawn for the ensuing term, and it had been selected with care for the purpose in hand. "The grand jury," Burr advised his daughter, "is composed of twenty democrats and four federalists. Among the former is W. C. Nicholas, my vindictive and avowed personal enemy – the most so that could be found in this state [Virginia]. The most indefatigable industry is used by the agents of government, and they have money at command without stint. If I were possessed of the same means, I could not only foil the prosecutors, but render them ridiculous and infamous. The democratic papers teem with abuse against me and my counsel, and even against the chief justice. Nothing is left undone or unsaid which can tend to prejudice the public mind, and produce a conviction without evidence." [14]

3. Court Convenes

On May 22, 1807, the hitherto placid town of Richmond was a seething, swarming hive of humanity. Overnight, the population of five thousand had been almost doubled. Rough men from the mountains, clad in coarse woolens and deerskin jackets, jostled with scant ceremony elegant gentlemen in silk knee-breeches, and long queues carefully powdered and beribboned. Dainty ladies

with parasols against the Southern sun tripped along the narrow sidewalks to the round-eyed envy of frontier women in red flannel petticoats and to the rude snickers of the frontier louts. Politicians rubbed shoulders with small farmers, mere visitors from far-off New York and Boston disputed the streets with a horde of witnesses, willing and reluctant alike, come from Maine and New Orleans, flanked day and night by watchful agents, vigilant against unholy contact with the defense, prodding their memories, conning their well-taught lessons for them.

Such a swarm had never descended upon the town within the memory of man. The taverns were full to bursting, every private house in town in reduced circumstances, and many with bolder fronts, took in guests who paid in coin of the realm for the courtesy; and still the clamor for beds and accommodations was unabated. The country folk perforce slept in tents or wagons on bedded straw, or on the river banks under the open starlight. The taverns emptied all day to the courtroom and rang all night with oaths and loud talk and calls for liquor and more liquor. Bets were freely made on the outcome – wagers of substantial size – while tobacco-juice spattered sand-box and floor and walls with indiscriminate liberality. It was a show they had come to see, and they would not be denied. The greatest show America had ever offered for the entertainment of its populace – the proud spectacle of a solitary man, bankrupt in fortune, pitting his strength against the mighty government of the United States in a dramatic battle for his life. Gentlemen of the press watched the crowd, the Court, the shifting pageantry of tavern and counsel bench, and sharpened their quills to the task in approved modern fashion.

It was chiefly a Republican audience, come to see their idol, Jefferson, overthrow the son of Belial, the traitor Burr. For months it had been beaten into their ears with trumpets and drums – Burr was a traitor, a scoundrel who had sought to break up the glorious Union. It would take more than mere logic, more than esoteric legalisms, to make them change the stubborn mold of their minds. Only here and there, among the Federalists, or the more thoughtful Republicans – aside from Burr's own personal friends and immediate circle – was there a doubt as to the ultimate guilt of this prisoner whose bearing and dignity made all forget his stature, and whose eye could not be met without an inward quailing. That doubt grew more and more formidable as the weary, yet infinitely dramatic trials wore on from day to day; others joined the band of those who had come to curse and remained to wonder; but even at the end they were but a small, and

for the most part discreetly voiceless, minority. Jefferson and Wilkinson had done their task but too well.

The hall of the House of Delegates was crowded to the rafters when Chief Justice Marshall banged his gavel a little past noon to demand some modicum of order from the motley throng of spectators. It was an impressive sight, for all its mingling of urban polish and frontier crudeness. Two men dominated the proceedings from beginning to end. John Marshall, in the seat of the mighty, and Aaron Burr, prisoner before the bar. They were foemen – in a sense – worthy of each other's steel. "There he stood," exclaimed young Winfield Scott, later to become Lieutenant-General and hero of the Mexican War, "in the hands of power, on the brink of danger, as composed, as immovable, as one of Canova's living marbles."[15] Clad in black silk, elegant, distinguished, slim, eyes blackly brilliant, hair brushed neatly back and tied in the fashionable powdered queue; speaking in quiet, even tones, yet whose least syllable penetrated the stir and bustle of the courtroom, Aaron Burr was a figure to impress the rudest. On the bench next to the tall, loose-jointed Chief Justice sat an Associate Justice for that Circuit, one Cyrus Griffin, conceived in anonymity and dedicated throughout the long proceedings to silences more utter than those of frozen Antarctica. No arguments were addressed to him by opposing counsel, no sign of his presence exists in the three-volume record except for a faint few words, modest in tone and thought, followed by quick relapse into the caverns of discreet darkness. One wonders at his thoughts as he sat, day after day, a lay figure, while his towering colleague delivered pathfinding opinions and the oratorical thunder burst in salvos about him.

Surrounding Burr were his counsel – Edmund Randolph, John Wickham, Benjamin Botts, and John Baker. Luther Martin and Charles Lee were to enter the proceedings later. Across the way sat the prosecution – George Hay, William Wirt, and Alexander McRae, fumbling their papers, nervous, reading the latest instructions from the master-mind, Jefferson, cocking ears toward the door for sound of a new messenger, direct from Washington, with more instructions. Advice, strategy, documents, in an endless stream from the President of the United States.

The Court opened with the impaneling of the Grand Jury – that Jury which had been handpicked for the task. To it was to be entrusted the task of considering *in camera* the evidence against Aaron Burr, and deciding on indictment or dismissal of the charges of filibustering and treason. As the clerk droned the

names of the assembled jurymen, Burr arose and made his objections. After a preliminary skirmish addressed to the method of summoning the jurors, he challenged specifically Senator William B. Giles, who had, he said, made public and private statements evidencing a formal prejudgment of the case; and also Wilson C. Nicholas, former Congressman, who had always evinced for Burr the bitterest personal animosity. With much reluctance these two gentlemen withdrew. John Randolph of Roanoke appeared, and Marshall promptly appointed him foreman of the Grand Jury. A clever stroke, but not creditable to Marshall's judicial conduct. For Randolph hated Jefferson and loathed Wilkinson. Yet he was convinced of Burr's guilt as well, and asked to be excused from duty on that ground. Burr looked at him quietly, and observed, "I am afraid we shall not be able to find any man without this prepossession," and permitted him to remain. In fact, as juror after juror was examined for his opinions, it was discovered that practically every one had already formed an opinion prejudicial to Burr. George Hay, the prosecutor, remarked with thinly veiled triumph, "There was not a man in the United States, who probably had not formed an opinion on the subject; and if such objections as these were to prevail, Mr. Burr might as well be acquitted at once." [16] Whereupon the defense objected no more, and permitted the impaneling of a Grand Jury notable for the political and personal prominence of its members, and notable also for the antagonism it displayed to the defendant in advance of submitted evidence. Fourteen of them were Republican and two were Federalist.

After Marshall had charged the Grand Jury, the battle opened; to be conducted, at least on the side of the defense, with infinite resource, learning and a maze of legal technicalities that obviously bewildered the prosecution and astounded even Marshall himself. When Hay objected to Burr's request for certain instructions to the jury on the admissibility of evidence, and declared with heat that Burr "stood on the same footing with every other man charged with crime," Burr raised his voice for almost the only time in the long contest. "Would to God," he exclaimed, "that I did stand on the same ground with every other man. This is the first time that I have been permitted to enjoy the rights of a citizen." [17] Whereupon court was adjourned for further argument and the presentation of evidence to the Jury.

But Wilkinson, the star witness for the prosecution, was still on his way to Richmond from New Orleans, and the Jury was compelled to adjourn from day to day, marking time, pending the General's arrival. In spite of this, Hay moved on May 25th to commit Burr for treason on the ground of newly adduced evidence. At once Burr and his battery of lawyers were on their feet protesting that no notice of this new motion had been given them, as previously agreed, and that Hay was now attempting to compel the Court to usurp the functions of the Grand Jury, then in session. Hay retorted that the reason he had given no notice was because Wilkinson was soon to come, and, he added sneeringly, "I do not pretend to say what effect it might produce upon Colonel Burr's mind; but certainly Colonel Burr would be able to effect his escape, merely upon paying the recognisance of his present bail." [18] Whereupon the floodgates on both sides burst loose. Botts poured the vials of his scorn upon government and Wilkinson alike, inquired sarcastically of Hay whether he was trying his case in a court of law or in the public press and the poisoned minds of the populace, and demanded why this star witness was not already there. Wirt and Hay answered in kind. Burr summed up coldly to the effect that the Government, with six months of accumulating evidence, was admitting by its constant adjournments that it had not enough to go before the Grand Jury to obtain indictments, yet now wished the court to usurp those functions and commit him to jail on the flimsiest of rumors and suspicions. Wirt had charged them with declamation against the Government. It was no mere declamation, Burr declared, when a democratic government aped the despotism of European autocracy, shanghaied his friends, robbed post-offices, utilized military authority while civil courts were functioning. The President had shouted war, yet for six months they had hunted for this mythical war and found no traces of it.

Again and again, during every argument, on every motion, Burr and his counsel were to hammer at Jefferson, at the malignancy of his persecution, at the illegality of his acts, until the Government attorneys writhed and frothed at the mouth. It was grand strategy, plotted in advance. Before they were through, a bewildered court and spectators alike were not quite sure who actually was on trial: Burr – or Jefferson and Wilkinson. The court was a sounding-board for political speeches and accusations on both sides, addressed to the spectators' benches as well as to the gangling figure of Marshall; addressed still more to the wide country outside, in attempt to sway public opinion. What a trial it would have been for the modern broadcaster and his magic tubes and wires!

On May 26th, Marshall rendered his decision on the question of

jurisdiction. He overruled Burr's objections, and declared that such a motion to commit was proper in form, and could be used instead of presenting bills for indictment to the Grand Jury then sitting.[19]

On the same day, Jefferson, from his watchtower in Washington, was telling Hay that "it becomes our duty to provide that full testimony [of the proceedings] shall be laid before the Legislature, and through them the public. For this purpose, it is necessary that we be furnished with the testimony of every person who shall be with you as a witness. If the Grand jury find a bill, the evidence given in court, taken as verbatim as possible, will be what we desire. If there be no bill, and consequently no examination before court, then I must beseech you to have every man privately examined by way of affidavit, and to furnish me with the whole testimony . . . Go into any expense necessary for this purpose, and meet it from the funds provided by the Attorney General for the other expenses." [20]

Hay demanded that Burr post heavy additional bail. Burr refused. Whereupon he produced his witnesses in support of the motion to commit for treason, and announced that he would place them on the stand and read the depositions of the absent in "chronological order." But Wickham rose to insist that a "strict legal order" be followed: i.e., that first the overt act itself be proved, and then Burr's complicity therein. Hay was taken aback, spoke vaguely of one great plot, involving both treason to the United States and an attack on Spain, and demanded a free hand. But Burr was in no mood to grant any favors. He intended to take advantage of every legal technicality arising out of the situation, as indeed he ought and must. He was on trial for his life, and it was no time for so-called "courtesies."

Hay, badgered beyond endurance by the proddings of the defense, their constant flow of technical objections to his every move, cried out angrily, "If, sir, exceptions are thus to be continually taken to the most common measures; if in this way every inch of ground is to be disputed, contrary to every practice that has prevailed in our country; instead of ten hours, or ten days, this trial will take up ten years." [21]

Marshall ultimately ruled that the Government be permitted a certain latitude in the introduction of its testimony. Whereupon Hay triumphantly offered Wilkinson's famous affidavit. Botts objected with tireless vigor. The *overt act!* he clamored. First submit evidence as to that, as to the *war* in Virginia, the *situs* of the alleged treason. He flung Marshall's own opinion *in re* Bollman

and Swartwout back at him. This affidavit represents mere talk, he said, mere asseverations supposed to have been made by Swartwout to Wilkinson far from the scene of the war. Show us first that there had been a war; for without a war the charge of treason fails. "In this country," he finished impressively, "as there cannot be a constructive treasonable war, plans, and acts of associates, can only come in when the former have been executed, and the latter have been visibly and publicly assisted." [22] This was to be the crux of the defense, and the cry was ever to be raised, at every move of the prosecution, of *overt act* and *no constructive treason* until a bedeviled Hay and his associates heartily wished that such words and phrases had never been invented.

Marshall gently inquired of Hay why he produced Wilkinson's affidavit, inasmuch as the Supreme Court in the former case had already decided it contained no proof of the *overt act,* and was therefore inadmissible.

Hay then called his witnesses to prove the act: i.e., that war had been waged by the conspirators on Blennerhassett's Island. Peter Taylor, the gardener, told the story of his journey to warn Burr of impending mobs, of Blennerhassett's confused, rambling talk, of the assemblage of armed men on the Island that fateful night of December 10th when Blennerhassett and Tyler fled; and Jacob Allbright, the day laborer, unfolded his fantastic story of leveled muskets and Tupper's breast. But both admitted that Burr had not been on the Island during these alleged acts of war against the Government of the United States.

Then Hay attempted to read into evidence the affidavit of Jacob Dunbaugh. This was that sergeant from Fort Massac whom Bissell had given a furlough to accompany Burr. Inasmuch as he was a soldier, and subject to military discipline, Wilkinson had been more successful with him than with any others of Burr's entourage. Dunbaugh, it seemed, had exceeded the term of his furlough and had accordingly been posted as a deserter. To avoid certain obvious penalties, Wilkinson had *induced* him to sign an affidavit alleging the hasty destruction by Burr of large stands of arms and warlike material just before the flotilla was searched in Mississippi. But of this testimony, more later.

At the hearing, however, the defense objected to the introduction of this affidavit, and succeeded in keeping it out on technical grounds. Hay had no further evidence to produce until Wilkinson's arrival. Nevertheless he had the audacity to demand a heavy increase in the defendant's bail pending that event. Marshall, in some embarrassment, preferred not to render an opinion on this

point, whereupon Burr came to the prosecutor's rescue by offering voluntarily an additional ten thousand, though Luther Martin, now joined in the defense, remarked sarcastically, " The motion of the gentleman [Hay] amounts to this: 'We have no evidence of treason, and are not ready to go to trial for the purpose of proving it; we therefore move the court to increase the bail.' "[23]

And now court, jurors, lawyers, defendant, spectators, the nation itself, settled back to await with varying degrees of patience the advent of the long-heralded, but never-appearing General Wilkinson. Without him the prosecution admitted it could not present its case. All depended on him. The country was raised skilfully to a fever-pitch of expectation. The redoubtable General became enlarged through propaganda to mythical proportions. Bets were freely offered in the Richmond taverns that Burr, rather than face the righteous accuser, would abscond before his arrival, bail or no bail. The witnesses loitered in town, at Government expense, waiting for the chief of them all. Eaton, in red sash and tremendous hat, swaggered with boon companions from pothouse to pothouse, drinking himself to the color of his sash, bragging and blustering against Burr. The ten thousand awarded him by a grateful Government for his affidavit itched in his pockets, demanding to be spent. General Jackson, summoned as witness by the prosecution, was now convinced of Burr's innocence. Whereupon he acted with his accustomed fiery courage. In an atmosphere of menace and threats, he harangued the crowds in Capitol Square, almost in front of the court, defending his friend, Burr, and denouncing the mighty Jefferson as a man afflicted with the demon of persecution.[24] More, he accused Wilkinson outright as a pensioner of Spain, and prophesied that he would not dare show his face in Richmond.[25]

And so it began to seem as June came, with its sweltering heat, and the overcrowded town waited and waited, while the long, lazy days slipped by. Young Washington Irving, in Richmond as a newspaper correspondent of sorts, and friendly to Burr – his brother, Dr. Peter Irving, was the editor of the *Morning Chronicle*, which Burr had godfathered – wrote home on June 4th that " we are now enjoying a kind of suspension of hostilities; the grand jury having been dismissed the day before yesterday for five or six days, that they might go home, see their wives, get their clothes washed, and flog their negroes." As for Burr, he " retains his serenity and self-possession unshaken, and wears the same aspect in all times and situations." [26]

While Wilkinson dawdled somewhere on the way, and hundreds wasted precious days in idleness, Burr was preparing himself, sawing wood with quiet assiduity. " Busy, busy, busy from morning till night – " he wrote Theo, still in Charleston, confused with a thousand alarms, " from night till morning, yet there are daily amusing incidents; things at which you will laugh, also things at which you will pout and scold." [27] The results of these midnight activities were soon to become visible. Burr was preparing *sub rosa* a bombshell to explode under the noses of the prosecution, whose repercussions were to extend even to the Executive Mansion itself.

4. The President is Subpoenaed

On June 9, 1807, when court had opened for what seemed another day of futile wonderment at Wilkinson's whereabouts, Burr quietly arose from his seat, a sheaf of papers in his hand. He had a motion to direct to the presiding Justices. Marshall cocked his head wearily to listen to another of the interminable petty technicalities; Cyrus Griffin, his alleged colleague, was frankly half asleep; the prosecution table barely stirred. The few spectators in court sprawled with the sultry June torpor. It was time, thought most, to pack up and go home. There never would be a trial.

Speaking in his clear, even voice, Burr called the Court's attention to Jefferson's message to Congress in which he had spoken of a certain letter and other documents, all dated October 21, 1806, which he had received from General Wilkinson. The President had also mentioned various orders of the army and navy. Burr paused, patted his carefully knotted stock. He had applied for copies of the latter to Robert Smith, Secretary of the Navy, and had been refused. It was necessary, he continued, for the preparation of a proper defense that these several documents be made available to him, and therefore he requested the honorable Court to issue a subpoena *duces tecum* to the President of the United States to produce these papers in open court, unless, and he turned courteously to the now thoroughly aroused lawyers of the prosecution, they would consent to submit them to the inspection of the defense.

Here at last was sensation! The news spread through the town, and the spectators' benches rapidly filled. Hay was hot and fuming, and stammering as well. He would try and obtain those papers which the Co irt thought material. How could he decide on their materiality, inquired Marshall gently, when they were

not before him? Hay's voice rose in anger. The Court had no power to compel the Executive's attendance by means of a subpoena. Marshall himself was doubtful. It was a ticklish point, and in the existing exacerbated state of emotions, a dangerous one — the judiciary attempting to haul the President of the United States before its judgment seat by compulsory process. He would call for argument on the moot question by counsel, he declared. Whereupon court adjourned for the day.

Hay hastened to his rooms and sent off an agonized letter to Jefferson, appealing to him to forward the papers without delay, because the "detention of them will afford [Burr] pretext for clamor." [28]

On June 10th, the historic argument opened. The heat was forgotten, except as it inflamed further already inflamed tempers. Hay invoked a technicality. This was a proceeding to commit, he argued, not a trial after indictment. Burr had no standing in court as yet, and was therefore not entitled to any legal process.

Luther Martin lumbered to his feet: he of the thundering voice and beet-red face, colored by years of assiduous potations. He was the spearhead of Burr's forensic army, the vituperative bludgeoner, the tickler of groundlings, even as John Wickham was the wielder of briefs and documented logic, while Burr himself remained the canny general and marshaler of his forces. "We did apply for copies; and were refused under presidential influence," he rumbled. "In New-York, on the farcical trials of Ogden and Smith the officers of the government screened themselves from attending, under the sanction of the president's name. Perhaps the same farce may be repeated here." He turned and looked squarely at his friend, John Marshall. "This is a peculiar case, sir. The president has undertaken to prejudge my client by declaring, that 'Of his guilt there can be no doubt.' He has assumed to himself the knowledge of the Supreme Being himself . . . He has proclaimed him a traitor in the face of that country, which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend. And would this president of the United States, who has raised all this absurd clamour, pretend to keep back the papers which are wanted for this trial, where life itself is at stake? . . . Can it be presumed that the president would be sorry to have colonel Burr's innocence proved?" [29]

Sensation upon sensation. A direct, vitriolic attack on the sacrosanct person of the President himself. The courtroom reverberated with his thunder, while the spectators gasped and the

government lawyers grew pale with anger. Magnificent vituperation, well calculated to speed on the wings of rumor up and down the land.

McRae tried vainly to establish a definitive position for the prosecution, and failed. He admitted that Jefferson *as a private individual* could be subpoenaed, but tried to show there was something inherently different in a subpoena *duces tecum*, which required the President to produce papers. These were, he said, "confidential communications." Whereupon all of the lawyers leaped joyously into the fray, and the discussion went on, day in and day out, until June 13th, when Hay came into court with Jefferson's reply to his letter of June 9th.

"Reserving the necessary right of the President of the United States to decide, independently of all other authority," he wrote cautiously, "what papers, coming to him as President, the public interests permit to be communicated, and to whom, I assure you of my readiness under that restriction, voluntarily to furnish on all occasions, whatever the purposes of justice may require." Thus hedged in against judicial compulsion, he authorized the production by Hay of Wilkinson's letter of October 21st, *but,* he was to withhold those parts which were not material. As for the Army and Navy orders, these should be specified by proper description.[30]

On June 13th, Marshall delivered his opinion. The point at issue, he said, was "whether a subpoena *duces tecum* can be directed to the president of the United States, and whether it ought to be directed in this case?" His decision was sweeping. He could find nowhere in the Constitution, or the Statute, any exception whatever to the right of the accused to compulsory process. "The single reservation," he added significantly, "is the case of the king." There were many points of difference, he went on ironically, between a president and a king. Of these he need mention only two. "The king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate." The tables were being reversed with a vengeance when a Federalist could insinuate, even by indirection, an attempt by Thomas Jefferson, Democrat, to assume the perquisites of kingship. Wherefore, he directed that a subpoena *duces tecum* issue against the President.[31]

Hay was thunderstruck, and wrote his usual daily letter to the strategist in Washington. "There never was such a trial from the beginning of the world to this day," he cried plaintively. And, in the course of his opinion, Marshall had dared also to say that the Government *expected* Burr's conviction, but he had later

hastened to apologize privately to Hay for the unfortunate expression.[32]

When the messenger brought the news to Jefferson, his wrath knew no bounds. Yet deep within his heart he realized that the decision had been rendered on good republican principles; that the President was not superior to or different from any other citizen before the law. By a process of rationalization, he turned on Luther Martin.

Something must be done about this "unprincipled & impudent federal bull-dog," he fumed. He had just heard that Martin had known all along about Burr's treasonable enterprise. "Shall we move to commit L M as *particeps criminis* with Burr?" he asked Hay, or just summon him as a witness?[33] To such tortuous measures was Jefferson descending in the vindictiveness of his wrath.

In the meantime, an even more unlovely situation had arisen. Not on account of the subpoena, for Jefferson had acquiesced in that, albeit reluctantly and with reservations; but because of one Erich Justus Bollman. Hay had finally proceeded to call additional witnesses on the long-delayed motion to commit. Bollman was his first. Now, that European emigré and confidant of Burr had made certain statements to Jefferson and Madison which Jefferson himself had promised would remain inviolate, and that the paper would never go out of his hand. Yet Jefferson, with a fine disregard for his promises, had forwarded the written statement to Hay, so that, if Bollman "should prevaricate, ask him whether he did not say so and so to Mr. Madison and myself." He also enclosed a sheaf of blank pardons, which Hay was to fill in at his own discretion, and distribute them among the petty offenders, and even to "the gross offenders," if it should ever "be visible that the principal will otherwise escape."[34] One of these especially was to be offered to Bollman. In other words, if only Burr could be convicted of treason, Jefferson did not care if all the others went scot free.

But Bollman, when placed on the stand, where he had the right to refuse to answer incriminating questions, unaccountably and with a fine scorn turned down the proffered pardon. He was not guilty of any crime, he insisted, and hence the pardon was at once an insult and an admission of guilt on his part. Hay insisted that the pardon was nevertheless effective, willy-nilly, and Marshall reserved decision on that point; never, somehow, to decide it. Hay hastened to ask Jefferson's advice as to his course if Marshall should uphold Bollman, and Jefferson ordered angrily that Hay

"move to commit him [Bollman] immediately for treason or misdemeanor, as you think the evidence will support."[35]

5. The Mammoth of Iniquity

The Grand Jury had also commenced its inquiry into the indictments before it. News had come that the elusive Wilkinson was definitely on his way, and would be in Richmond shortly. So that there were now two separate and distinct moves on the part of the prosecution against Burr. A Grand Jury inquiry on bills of indictment, and a simultaneous motion to commit him to jail before the Court as committing Magistrates. Thomas Truxton, Benjamin Stoddert, Stephen Decatur, and others, were sworn by Marshall as witnesses, and sent before the Grand Jury to testify. But Bollman was another matter. He had refused a pardon, dramatically; hence, he could refuse to testify on the ground that he would incriminate himself. After a heated argument, he went into the deliberative chamber, with reservations as to the legal purport of his testimony and the proffered and rejected pardon.[36]

And now, General James Wilkinson himself appeared, gross of body, eyes deep-sunk in folds of fat, resplendent in full uniform, strutting, striding the streets of the town like long-expected Deity. Large sums passed hands on his appearance. For, wrote Irving, "the bets were against Burr that he would abscond, should W. come to Richmond; but he still maintains his ground, and still enters the Court every morning with the same serene and placid air that he would show were he brought there to plead another man's cause, and not his own."[37]

The prosecution heaved a sigh of relief. With their star witness safely in town, the battle was as good as won. But the defense was not impressed. When, on June 15th, it was the General's turn to appear before the Grand Jury, they promptly objected to his taking any papers along with him, even if only to refresh his recollection, unless the Court had first passed on their evidential pertinence. After lengthy argument, and much citation of law, Marshall permitted the Jury to inspect only such papers as represented an integral part of Wilkinson's narrative, and which had been written by the accused himself.

Wilkinson was a bit flustered and bewildered. He had expected to find Burr a cowering, trembling wretch, overwhelmed with the terror of expected conviction. Instead . . . but let him tell his own story. "I dreampt not of the importance attached to my presence," he wrote Jefferson in plaintive accents. "For I had

anticipated that a deluge of testimony would have been poured forth from all quarters to overwhelm him [Burr] with guilt and dishonor. Sadly, indeed, was I mistaken, and to my astonishment I found the traitor vindicated, and myself condemned by a mass of wealth, character, influence, and talents. – Merciful God, what a spectacle did I behold – integrity and truth perverted and trampled under foot by turpitude and guilt, patriotism appalled and usurpation triumphant. Did I ever expect it would depend on my humble self to stop the current of such a polluted stream? Never, never."

He was beginning to feel inward qualms at the spectacle. But he did not disclose these to Jefferson. Instead, he narrated for the President's delectation how, on first meeting the man in court whom he had basely betrayed, " in spite of myself my eyes darted a flash of indignation at the little traitor, on whom they continued fixed until I was called to the Book; – here, sir, I found my expectations verified – this lion-hearted, eagle-eyed Hero, jerking under the weight of conscious guilt, with haggard eyes in an effort to meet the indignant salutation of outraged honor; but it was in vain, his audacity failed him. He averted his face, grew pale, and affected passion to conceal his perturbation." [38]

But Washington Irving, observing both antagonists from a spectator's bench, had a different story to narrate of the celebrated meeting. " Wilkinson strutted into court . . ." he reported, " swelling like a turkey-cock." But Burr " did not take notice of him until the judge directed the clerk to swear General Wilkinson; at the mention of the name Burr turned his head, looked him full in the face with one of his piercing regards, swept his eye over his whole person from head to foot, as if to scan its dimensions, and then coolly resumed his former position, and went on conversing with his counsel as tranquilly as ever. The whole look was over in an instant; but it was an admirable one. There was no appearance of study or constraint in it; no affectation of disdain or defiance; a slight expression of contempt played over his countenance." [39]

For four days Wilkinson held the center of proceedings in the Grand Jury room. His trump card, the cipher letter Burr had sent him, was examined, re-examined, re-deciphered and skeptically questioned by the implacable foreman, John Randolph. Outside, the world waited breathlessly. " Wilkinson is now before the grand jury," Irving reported, " and has such a mighty mass of *words* to deliver himself of, that he claims at least two days more to discharge the wondrous cargo." [40] There were others as well – Swartwout, Dunbaugh, Taylor, Allbright, the Morgans – a continuous stream of witnesses who disappeared into the sinister maw of the jury room, later to be disgorged with admonitions of secrecy.

On June 17th, within the surcharged atmosphere of the courtroom, Burr exploded another bomb. This was a motion to attach Wilkinson, Judge Toulmin of the Mississippi Territory, and Congressman John G. Jackson for improper practices in the examination and intimidation of witnesses, and for the illegal transport of such witnesses from New Orleans by military force. Wilkinson blustered and quaked. His own sacred person was in danger of judicial process. It was then that he cried upon the remote Jefferson for aid and comfort.[41]

Hay tried desperately to save his favored witness from such malignant persecution. Such a motion, if ever to be heard, he cried, should be postponed until after the completion of the trial. But Marshall summarily brushed aside the objection and ordered a hearing.[42] Burr submitted affidavits by James Knox and Chandler Lindsley in support of his latest move. Knox deposed that Wilkinson had carried him before Judge Hall in New Orleans, who refused him counsel, and threatened him with deportation to Richmond if he did not sign a deposition. Under persistent pressure, Knox answered some questions, and refused to answer others; whereupon he was placed in jail and sent, a prisoner, to Richmond without other clothes than those on his back. But he weakened the effect of his tale of coercion by admitting that Wilkinson had used no terroristic tactics against him, that he had told Wilkinson he had no objection to going to Richmond if he were properly treated, and that Wilkinson had given him money to purchase clothes.[43] Whereupon Marshall decided that the illegal acts, if any, were those of Judge Hall, and denied the attachment against the General – much to that worthy's manifest relief.

And, while the Grand Jury heard evidence and deliberated, the tilts in Court grew ever sharper. Every slightest move by either side was made the basis of impassioned oratory and exhaustive, and exhausting, citations of authority. Wearily, delicately, Marshall trod his judicial way between the embattled forces. Jefferson had not obeyed the subpoena, though he had offered certain copies, and Burr contemplated a body attachment against him to compel attendance.

Behind closed doors, an exciting drama was also taking place. From accuser, Randolph was endeavoring to place his especial aversion, James Wilkinson, in the position of the accused. He had the cipher letter brought before the Jury, forced the perspiring

General to an admission that he had made certain erasures and alterations of phrases tending to implicate him with Burr, and pressed vigorously for an indictment of the Administration hero. He failed by the narrowest of margins, and then only on a technicality adduced by some lawyer member of the Jury, who, incidentally, was a Republican.

While Jefferson was writing approvingly to the favorite that "your enemies have filled the public ear with slanders, and your mind with trouble on that account," and that "no one is more sensible than myself of the injustice which has been aimed at you,"[44] the Grand Jury, by a vote of 9 to 7, decided against an indictment of his quaking protégé. The disgusted Randolph wrote Nicholson that "the mammoth of iniquity escaped; not that any man pretended to think him *innocent*, but upon certain wire-drawn distinctions that I will not pester you with. W——n is the only man that I ever saw who was from the bark to the very core a villain."[45] And, a few days later, he repeated to Nicholson, "W. is the most finished scoundrel that ever lived; a ream of paper would not contain all the proofs; but what of that? He is 'the man whom the king delights to honor!'" Randolph had no use for Jefferson either. As to Wilkinson's demeanor before the Jury, "all was confusion of language and looks. Such a countenance never did I behold. There was scarcely a variance of opinion amongst us as to his guilt."[46]

6. The Grand Jury Indicts

Meanwhile, the suspense grew to unbearable proportions. The witnesses filed in and out, but still the Grand Jury had not come to a decision. Burr's attitude was admirable, as even the much-harried Hay was obliged to confess.[47] Public opinion in Richmond was veering in his favor; the heralded Wilkinson had left a bad taste in many mouths. Burr's partisans became bolder. The society and elite of the town, at least, were favorable to Burr. The accused's progress to and from court each day resembled a triumphal procession. Two hundred gentlemen accompanied him as a bodyguard, breathing defiance to Government.[48] Parties were given in his honor, and everywhere the houses of fashion and planter aristocracy were open to him. His friends were loyal and devoted. Young Swartwout met the somewhat bedraggled General in the street, and deliberately and painstakingly shoved him flying from the narrow sidewalk into the muddy gutter. Wilkinson hastened away to the jeers of the bystanders. Andrew Jackson,

still haranguing all who would listen on the persecutions of the Government, the craven villainy of Wilkinson, and the exalted innocence of his friend Burr, went "wild with delight."[49]

Wilkinson pocketed the gross insult, and did not challenge. Whereupon Swartwout challenged *him*. Wilkinson turned poltroon, and refused to fight. Swartwout then published him in the public press as a traitor, a forger, a perjurer and a coward.[50] Thereafter, Wilkinson slunk along the streets where once he had preened himself and strutted, while the Virginians looked on him with contempt and loathing. From a hero he had turned to something less than a worm.

But, on June 24th, the thunderbolt descended with crushing force. John Randolph marched into the suddenly hushed courtroom, where only a moment before counsel had been wrangling over the motion to attach Wilkinson. The Grand Jury, he announced, had brought in indictments against Aaron Burr and Harman Blennerhassett, charging them with treason against the United States, and misdemeanor in preparing an expedition against Spain.

For a moment there was silence. Burr was the first to recover his wits. He immediately asked that he be admitted to bail, instead of being sent to jail like a common felon. But neither he nor Luther Martin could produce any precedents for such a course, and Marshall accordingly committed him to the Richmond Municipal Jail.

From his cell Burr exhorted Theo, waiting anxiously for news in far-off South Carolina, "I beg and expect it of you that you will conduct yourself as becomes my daughter, and that you manifest no signs of weakness or alarm."[51] The Spartan daughter of a Spartan father!

It was later to be discovered that the indictment had been based on a misapprehension of Marshall's charge as to what constituted the *overt act* in treason, as delivered in the Swartwout and Bollman case – that famous *obiter dicta* which was to be a continuing source of embarrassment to the Chief Justice during the instant trial.[52]