

## The First Claim: The Burr Trial, *United States v. Nixon*, and Presidential Power

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While we consider *United States v. Nixon*<sup>1</sup> during its twenty-fifth anniversary, we are doing so in light of the extraordinary constitutional replay of Watergate today. Putting to one side what one thinks of the underlying substantive offenses in either Watergate or Intern-gate, the constitutional similarities are striking. In both cases, the criminal justice system demanded information and documents from the President of the United States. In both cases, the President refused to cooperate and sought to quash the subpoena by arguing that presidential communications of various kinds were protected by an executive privilege. In both cases, the President's men (and now women) argued that the executive branch had an independent right to interpret the Constitution, and so it also had the right to decide whether the requested materials could be kept secret. In both cases, the federal courts rejected presidential arguments of confidentiality and, in ordering the President to turn over the evidence, asserted the supremacy of the judiciary in interpreting the Constitution. And we haven't even started talking about impeachment.

That these two morality plays have had the same constitutional ending is due to *United States v. Nixon*. Ever since the Supreme Court announced the Watergate Tapes Case, it has become the target of scholarly controversy and criticism, of which Professor Michael Paulsen's piece is a splendid example. These critiques of *Nixon* often include challenges to the Court's

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1. 418 U.S. 683 (1974).

derivation of executive privilege and its creation of an unpredictable balancing test to weigh the reasons for the privilege against the needs of the criminal justice system. The deeper, structural problem with *Nixon*, Professor Paulsen (like Professor Gerald Gunther before him)<sup>2</sup> alleges, is its outright assertion of judicial supremacy over the other branches in interpreting the Constitution. In *Nixon*, the Court claimed that its interpretation of the scope of executive privilege trumped that of the President, and that to allow President Nixon's claim of privilege to prevail would amount to a transfer of the Judicial Power to the Article II branch.<sup>3</sup> It is indeed difficult to reconcile *Nixon* with a vision of the Constitution that assumes that each branch of the government is coordinate, equal, and supreme within its own sphere of action, what many have described as concurrent review or the "Jeffersonian" vision of judicial review.<sup>4</sup> As one might have guessed from his paper, Professor Paulsen is one of the recent advocates for this vision of constitutional interpretation, which he set out in fuller form in a 1994 article.<sup>5</sup>

But just as the Clinton cases were merely the sequel to the Nixon cases, so too were the Nixon cases a constitutional rerun of the Aaron Burr treason trial. A former Vice-President, Burr apparently had attempted to raise a rebellion in the western territories during President Jefferson's second term. Arrested and indicted, Burr was put on trial before Chief Justice John Marshall, who was sitting as a circuit judge in Richmond, Virginia. Burr claimed that administration officials knew and approved of his plans and asked that President Jefferson turn over documents that might prove his innocence. Chief Justice Marshall then issued a subpoena duces tecum to President Jefferson, who initially claimed immunity from the

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2. See, e.g., Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 33 (1974) (*Nixon* "seems to me to convey a misleadingly broad view of judicial competence, exclusivity and supremacy."); Kenneth L. Karst & Harold W. Horowitz, *Presidential Prerogative and Judicial Review*, 22 UCLA L. REV. 47 (1974).

3. *Nixon*, 418 U.S. at 704-05.

4. See, e.g., ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* (1986); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279 (1992).

5. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

subpoena under executive privilege. Whether, why, and how President Jefferson complied with this judicial order is the source of some confusion and controversy. Eventually, Burr was acquitted. The parallels between the Burr conspiracy, Watergate, and the Clinton cases are striking. In all three cases the federal courts sought to enforce a subpoena for information against the President. In all three cases the Presidents initially defied the subpoena based on some claim of immunity from judicial process. In all three cases, the President eventually lost.

As the first case in which a President claimed executive privilege against a court order, Burr's trial has been taken to mean different things by the different sides of the executive power/judicial supremacy debate. Writing for the Court, Chief Justice Burger repeatedly refers to, and quotes from, the treason trial of Burr,<sup>6</sup> mostly for the proposition that while the President is subject to judicial process, the courts should afford him or her special procedures that recognize the dignity of the office.<sup>7</sup> In fact, Chief Justice Burger liked Chief Justice Marshall's opinion in the case so much that he quoted the same line from it twice: "In no case of this kind would a court be required to proceed against the president as against an ordinary individual."<sup>8</sup> Writing soon after *Nixon*, Professor Paul Freund took the Burr precedent as establishing that the President could not claim an absolute privilege in criminal proceedings and that "in the [Watergate] tapes case, these principles were largely confirmed."<sup>9</sup> The Court continued its reliance on *Burr* when it refused President Clinton's pleas for immunity from civil damage suits for his non-official actions taken before becoming President.<sup>10</sup>

Professor Paulsen and others, however, have sought comfort from Burr for the opposite proposition. In his 1994 article, upon which his contribution to this symposium is based, Professor Paulsen—like Professor Edwin Corwin before him—found that President Jefferson had refused to appear

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6. *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

7. *See Nixon*, 418 U.S. at 707-08, 713-15.

8. *See id.* at 708 (quoting *United States v. Burr*, 25 F. Cas. at 192).

9. Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 31 (1974).

10. *See Clinton v. Jones*, 117 S. Ct. 1636, 1649 (1997). Justice White also relied on *Burr* to claim that the President was subject to judicial process, *see Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982) (White, J., dissenting), as did the lower court in *United States v. Nixon*, *see Nixon v. Sirica*, 487 F.2d 700, 709 (1973).

personally in the Richmond courtroom, and from this fact concluded that Jefferson had refused to obey the orders of an Article III court.<sup>11</sup> This, we are told by Paulsen and others, stands as the first significant executive branch precedent in favor of independence in interpreting the Constitution and against the idea of judicial supremacy. In the Burr trial, apparently, Jefferson gave birth to the idea of unilateral executive branch authority to interpret the Constitution, and thus set the foundation for similar claims of authority by Presidents Lincoln, Roosevelt, Nixon, and now Clinton. This reading has received some support from the Supreme Court, which relied on the Jefferson precedent in granting President Nixon immunity from civil damages suits for his official actions.<sup>12</sup>

The story of the Burr trial, however, is not so simple and does not stand as a rock-solid precedent for either side. It seems to me from the historical evidence that Jefferson did not defy a court's subpoena. On the issue of amenability to judicial process, Jefferson appears to have accepted the power of the court to issue a subpoena to the President. It does not appear, however, that Chief Justice Marshall fully prevailed on the question of judicial supremacy. For when it came to executive privilege, Jefferson refused to allow the courts the final say on what executive branch materials were to remain secret. Throughout these disputes, the courts and the President reached an accommodation that allowed for the production of evidence but that preserved presidential powers for the future. In this respect, the Burr trial stands in sharp contrast to the efforts of the Nixon and Clinton administrations, which mistakenly sought to win in the courts a permanent victory concerning the extent of presidential power. The different results achieved by Jefferson, on the one hand, and by Nixon and Clinton, on the other, impart important lessons about the nature of presidential powers and of the separation of power generally.

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11. See Paulsen, *supra* note 5, at 282; EDWARD S. CORWIN, *THE PRESIDENT: OFFICE & POWERS 1787-1957*, at 113, 326; *see also* DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 275-76 (Kermit Hall & David O'Brien eds., 1994).

12. See *Nixon v. Fitzgerald*, 457 U.S. at 750-52 & n.31.

## I. UNITED STATES V. BURR: WHAT REALLY HAPPENED?

If the O.J. Simpson trial was the trial of this century, then the Aaron Burr case was the trial of the last.<sup>13</sup> Burr was a charismatic, swash-buckling, risk-taking lawyer, military officer, politician, and adventurer. The son of the president of Princeton College and the grandson of Jonathan Edwards, Burr was a revolutionary war hero who had distinguished himself at the battles of Quebec and West Point. He and Jefferson had tied in the electoral college voting in 1800, due to the absence of separate balloting for the offices of President and Vice-President. He had lost the Presidency only because Alexander Hamilton, his New York rival, had used his influence in the House of Representatives to throw the election to Jefferson.<sup>14</sup> He had shot and killed Hamilton in a duel, apparently for insults to his honor made during Burr's campaign for governor of New York.<sup>15</sup> While under criminal indictment for the murder in New York and New Jersey, he had presided over the 1804 impeachment trial of Justice Samuel Chase. This had led one Federalist newspaper to quip that traditionally it was "the practice in Courts of Justice to arraign the *murderer* before the *Judge*, but *now* we behold the *Judge* arraigned before the *murderer*."<sup>16</sup>

By 1805 Burr had been out of politics for a year. During that time he apparently hatched a plan while touring the Western territories of raising a volunteer army to attack the Spanish holdings in Mexico. He had two followers, Andrew

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13. Detailed histories of the Burr conspiracy can be found in: THOMAS P. ABERNETHY, *THE BURR CONSPIRACY* (1968); WALTER FLAVIUS MCCAULEY, *A NEW LIGHT ON AARON BURR* (1966); HERBERT S. PARMET & MARIE B. HECHT, *AARON BURR: PORTRAIT OF AN AMBITIOUS MAN* (1967); DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM 1805-1809*, at 215-370 (1974); GEORGE LEE HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815*, at 246-91 (1981); 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 274-545 (1919); HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON* (Library of Am. 1986). I have also found helpful the balanced account in FORREST McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* 110-14, 120-30 (1976). The account that follows is drawn from these sources.

14. To prevent such a tie ever again, the Twelfth Amendment was ratified in 1804 to provide for separate balloting for President and Vice-President.

15. Hamilton urged his supporters to vote for the Republican candidate for the governorship rather than for Burr, who had ended up running for the office as a Federalist, due to a series of political machinations that were typical when Burr was involved.

16. McDONALD, *supra* note 13, at 91.

Jackson, then brigadier general of the Tennessee militia, and James Wilkinson, a friend from the Revolutionary War who was commander of the United States Army and governor of America's new Louisiana territory.<sup>17</sup> Burr then met with representatives of different governments seeking their financial and military support for a more treasonous plan. To the British, in exchange for financial and naval support, Burr offered to lead his volunteers in an effort to break the western states away from the United States and attack Spain. To the Spanish, Burr claimed that his expedition would attempt to free the new territories and return them to Spanish control. During this period (the winter of 1805 and the spring of 1806), Burr also dined privately with President Jefferson on a number of occasions, and although there are no records of their meetings, some have speculated that Burr received Jefferson's tacit permission to attack Mexico in conjunction with an American declaration of war against Spain.<sup>18</sup> Burr then established his headquarters on an island in the Ohio River, from which to launch his adventure. Once again, riverfront property would become the setting for a presidential scandal.

Historians still are not sure whether Burr actually intended only to lead an attack upon the Spanish, or whether he held the more treasonous motive of separating the Western states from the Union.<sup>19</sup> When the Spanish began a series of provocations along the border in Louisiana in the summer of 1806, Burr gathered a small volunteer force of only 500 men, left his Ohio River island headquarters in several small boats, and asked General Wilkinson to lead his army troops in a coordinated attack on Mexico. In fact, upon learning of the Spanish incursions, President Jefferson separately had ordered General Wilkinson to advance to the border and repel the invaders by force. Burr sent letters to Wilkinson in cipher attempting to provoke him to attack quickly, claiming that he would bring 1,000 men, that the British navy would support his plans, and that the people of Mexico were "prepared to re-

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17. Wilkinson also happened to be a spy who received an annual pension from the Spanish government.

18. See McDONALD, *supra* note 13, at 112-14.

19. Of the major works, McCaleb believes that Burr was innocent of treason and sought only to attack Spain, while Abernethy takes the position that Burr plotted treason. McDonald's account, which seems to best explain the evidence, takes the position that Burr flirted with treason, but in the end he chose to only lead an attack on Spain in coordination with American forces.

ceive us."<sup>20</sup> Burr then set out down the Mississippi river with a ragtag group of adventurers to meet Wilkinson in Louisiana.

Burr's mistake was that he had relied upon a man as treacherous as he. Wilkinson decided to turn informant on Burr. On October 21, 1806, he wrote two letters to Jefferson, claiming no involvement in the conspiracy and alleging that a large force was moving to attack Mexico and to detach the Louisiana Territory from the Union. He then negotiated a truce with the invading Spanish and took the courageous move of advancing to New Orleans, where the general declared martial law and established a military dictatorship of sorts. Wilkinson arrested several of Burr's couriers without warrants and denied them access to their lawyers.<sup>21</sup> When Burr's agents received writs of habeas corpus anyway, Wilkinson also arrested their attorneys, the judge, the editor of the local newspaper, and sixty other citizens, denied them access to counsel, and shipped them off to Washington, D.C. so they could not be tried in the territory.

As exaggerated rumors of Burr's plots stoked a public panic, Jefferson addressed the conspiracy during his December 1806 annual message to Congress. He proclaimed that the enterprise be suppressed, its ships and weapons seized, and its participants be arrested.<sup>22</sup> Burr was arrested the following month, but when grand juries in the Mississippi territory refused to indict him, he was sent for trial to federal court in Richmond, Chief Justice John Marshall presiding.<sup>23</sup> Jefferson already believed Burr to be guilty, which he announced to the nation in a special message to Congress in January, 1807,<sup>24</sup> but he had little hope that Burr would receive an honest trial at the hands of the Federalists. Jefferson believed that Burr, Marshall, and the Federalist Party intended to use the proceedings to embarrass his administration. In fact, the President appears to have hoped to use any acquittal of Burr as

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20. Letter from Aaron Burr to James Wilkinson (July 29, 1806), in 3 BEVERIDGE, *supra* note 13, at 614-15.

21. The fates of these couriers is recorded in *Ex parte Bollman* and *Ex parte Swartwout*, 8 U.S. (4 Cranch) 75 (1807).

22. See Sixth Annual Message (Dec. 2, 1806), in THOMAS JEFFERSON, WRITINGS 525 (Merrill Peterson ed., Library of Am. 1984).

23. See 3 BEVERIDGE, *supra* note 13, at 365-80. The Ohio River island that served as Burr's headquarters lay within the jurisdiction of Marshall's circuit.

24. See Special Message on the Burr Conspiracy (Jan. 22, 1807), in JEFFERSON, *supra* note 22, at 532.

grounds to either impeach Marshall or to introduce a constitutional amendment to allow the President and Congress to remove federal judges. "All this, however, will work well," Jefferson wrote in April, 1807, to a Republican Senator. The people "will see then & amend the error in our Constitution, which makes any branch independent of the nation. If [the federalist judges'] protection of Burr produces this amendment, it will do more good than his condemnation would have done."<sup>25</sup>

It is difficult to overstate the personal animus that Jefferson and Marshall appeared to hold for one another, and this rivalry no doubt affected their actions during the trial. This was compounded by the intensely partisan lens through which Jefferson viewed events, which caused the President to suspect that his political enemies were engaged in a vast conspiracy to support Burr. For example, when word reached Jefferson that Marshall had criticized the executive branch in open court for dragging its feet, the President exploded. "[A]ll the principles of law are to be perverted which would bear on the favorite offenders who endeavor to overrun this odious Republic," he wrote.<sup>26</sup> Jefferson privately accused the Federalists, of which Marshall was the most prominent office-holder left, of "making Burr's cause their own."<sup>27</sup> According to Jefferson, the Federalists were "mortified only that [Burr] did not separate the Union or overturn the government," and they "would have joined him to introduce his object, their favorite monarchy."<sup>28</sup> Jefferson made these comments in a letter to a leading Senator, no less.

Such intensity of feelings explains why Jefferson took such a personal interest in the case itself. For example, the President took the extraordinary step of personally interrogating one of the key witnesses, of striking a plea bargain with him that exchanged a pardon for testimony, and then of instructing the prosecutor on how to examine him at trial.<sup>29</sup> In his 1807 message to Congress, before Burr had even been captured, Jefferson had declared that Burr was "the principal actor, whose

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25. Letter from Thomas Jefferson to William Branch Giles (Apr. 20, 1807), in JEFFERSON, *supra* note 22, at 1175.

26. *Id.* at 1174-75.

27. *Id.* at 1173.

28. *Id.*

29. Letter from Thomas Jefferson to George Hay (May 20, 1807), in 10 WORKS OF THOMAS JEFFERSON 394-401 (Paul Leicester Ford ed., 1905); see also LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 70-73 (1963).



guilt is placed beyond question" in a scheme to "sever[ ] the Union."<sup>30</sup> As historian Leonard Levy has characterized Jefferson's actions, "the first Magistrate proceeded relentlessly to mobilize executive resources to prove the preconceived guilt. Jefferson . . . acted himself as prosecutor, superintending the gathering of evidence, locating witnesses, taking depositions, directing trial tactics, and shaping public opinion as if judge and juror for the nation."<sup>31</sup> Jefferson established a courier between Washington, D.C. and Richmond, Virginia so that he could remain in close contact with the federal prosecutor, George Hay, who seemed barely competent at best.<sup>32</sup> He became so heated at times during the trial that he called Luther Martin, the famed lawyer and delegate to the Constitutional Convention who was ably representing Burr as he had Justice Chase in his impeachment proceedings, an "unprincipled and

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30. Special Message on the Burr Conspiracy, *supra* note 24, at 532, 534.

31. LEVY, *supra* note 29, at 71. Jefferson's micro-management of the prosecution can be seen in the numerous letters he sent to Hay on various trial issues. For example, Jefferson advised the federal prosecutor of the precise legal arguments to make before Marshall. He suggested to Hay that *Marbury v. Madison* was not good law and ought to be ignored.

I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, & denounced as not law; & I think the present a fortunate one, because it occupies such a place in the public attention. I should be glad, therefore, if, in noticing that case, you could take occasion to express the determination of the executive, that the doctrines of that case were given extrajudicially & against law, and that their reverse will be the rule of action with the executive.

Letter from Thomas Jefferson to George Hay (June 2, 1807), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 397.

Jefferson even went so far as to attempt to deprive the federal courts of jurisdiction when he felt they would impede the suppression of the Burr conspiracy. When Burr's aides filed habeas petitions before the Supreme Court, having been arrested and detained without a warrant, Jefferson's allies in the Senate passed a bill suspending the great writ—only the House prevented passage of the measure. See 3 BEVERIDGE, *supra* note 13, at 346-48; 16 ANNALS OF CONG. 44 (1807).

Jefferson's activities on this score can only be described, at times, as paranoid. For example, in one letter to Hay he enclosed a letter from an old flour merchant in Baltimore who claimed that Luther Martin, Burr's attorney, knew all about Burr's scheme. Jefferson suggested that Hay put Martin on the stand, confront him with this new witness, and perhaps move to jail Martin. There was no evidence that this Baltimore informant had any knowledge of the affair. See Letter from Thomas Jefferson to George Hay (June 19, 1807), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 402-03.

32. See MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 868 (1970).

impudent federal bull-dog."<sup>33</sup> Jefferson even personally relayed groundless rumors to Hay that he believed implicated Martin in Burr's plot. Jefferson needed no Bob Bennett or David Kendall to run his legal affairs.<sup>34</sup>

It must be noted that Marshall's conduct was not exactly above reproach either. On the evening that he released Burr on bail, for example, Marshall attended a dinner at the home of John Wickham, a leading Richmond Federalist. Wickham also happened to be the chief counsel for Burr, who also was in attendance.<sup>35</sup> Naturally, this led Republican newspaper writers to scream of a "wanton insult" to the country and of Marshall's "wilful prostration of the dignity of his own character."<sup>36</sup> Marshall apparently allowed defense counsel, whose strategy was to prove Burr's innocence by attacking the President, to engage in "the grossest invective" against Jefferson, and, at one point in the proceedings, Marshall even exclaimed that the prosecution seemed more interested in a conviction than in a fair trial.<sup>37</sup> Marshall struck the remark from the record upon the protest of the prosecution.<sup>38</sup> Jefferson and other Republicans even complained of the *voir dire* process overseen by Marshall. When ten Republicans and two Federalists were chosen for the grand jury, Jefferson again exploded in anger at Marshall and the Federalist judiciary, which the President claimed "from the citadel of the law can turn it's [sic] guns on those they were meant to defend."<sup>39</sup> Jefferson believed that two Federalists were two too many.

A particular issue that placed Jefferson and Marshall at odds, and which set the substantive context for the presidential subpoena and executive privilege questions, was the constitutional definition of treason. Under Article III, Section 3, treason consists "only in levying War against" the United States, or

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33. Letter from Thomas Jefferson to George Hay (June 19, 1807), *supra* note 31, at 403.

34. Andrew Jackson, no lover of the judiciary he, denounced Jefferson during the Burr trial as "a persecutor who sought the ruin of one he hated," 3 BEVERIDGE, *supra* note 13, at 404, and wrote that the trial had "assumed the shape of a political persecution." 3 *id.* at 405.

35. See PETERSON, *supra* note 32, at 867.

36. *Id.*

37. MALONE, *supra* note 13, at 319-20.

38. See PETERSON, *supra* note 32, at 869.

39. Letter from Thomas Jefferson to John W. Eppes (May 28, 1807), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 412-13.

providing "Aid and Comfort" to its enemies.<sup>40</sup> A court cannot convict a defendant of treason "unless on the Testimony of two Witnesses to the same overt Act" or by confession in court.<sup>41</sup> In the habeas case of Burr's couriers, Marshall had suggested that anyone who had aided and abetted a treasonous levying of war against the United States was a traitor, even if that person had not been present when a treasonous gathering of forces took place.<sup>42</sup> During the Burr trial, however, Marshall issued an opinion requiring Burr's physical presence at the scene of the crime when the traitors actually assembled to wage war against the nation.<sup>43</sup> Since no eyewitnesses could place Burr at the Ohio River island when his forces gathered there, Marshall ordered the prosecution to end the presentation of its case. The jury was left with little choice but to acquit. Some, such as Edwin Corwin and Merrill Peterson, have interpreted Marshall's change of view as evidence of his partisan bias in the case.<sup>44</sup> Others have praised the decision as an effort by Marshall to de-politicize the judiciary by making it difficult to bring treason charges against individuals, which would remove the federal courts from the business of determining citizen loyalty.<sup>45</sup> Naturally, Jefferson did not share this view; he ordered Hay to hold all the witnesses and defendants and seek further proceedings on a misdemeanor charge, all in the hopes that another acquittal would "heap coals of fire on the head of the Judge."<sup>46</sup>

It was in this explosive context that the Court and the President fought over executive privilege. The Burr trial took three distinct phases: 1) the June 24 and 26, 1807 grand jury

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40. U.S. CONST. art. III, § 3.

41. *Id.*

42. In *Ex parte Bollman*, Marshall had written that if an "assemblage of men for the purpose of executing a treasonable design" had occurred, then "all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are . . . traitors." 8 U.S. (4 Cranch) 75, 126 (1807).

43. See *United States v. Burr*, 25 F. Cas. 55, 159-80 (C.C.D. Va. 1807) (No. 14,693).

44. See EDWIN CORWIN, JOHN MARSHALL AND THE CONSTITUTION 108-09 (1919); PETERSON, *supra* note 32, at 873.

45. See, e.g., HASKINS & JOHNSON, *supra* note 13, at 286; HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835, at 131 (1997); JEAN E. SMITH, JOHN MARSHALL: DEFINER OF A NATION 370-74 (1996).

46. Letter from Thomas Jefferson to George Hay (Sept. 7, 1807), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 408; see also *United States v. Burr*, 25 F. Cas. at 187.

indictments, in which Burr was charged both with treason and with the misdemeanor of waging war against a friendly nation (Spain); 2) the treason trial, which led to Burr's acquittal in September, 1807; and 3) the misdemeanor trial, which two weeks later also produced a judgment of not guilty. Chief Justice Marshall actually issued two different subpoenas to the executive branch for information, the first on June 13, 1807 in connection with the grand jury proceedings, and the second on September 4, as part of the misdemeanor trial. While the first subpoena, addressed to President Jefferson, is the more famous one for provoking a struggle over executive privilege and judicial supremacy, the second—overlooked—subpoena had an equally significant impact on those questions.

## II. SUBPOENA AND PRIVILEGE

### A. THE PRESIDENT SUBPOENAED

For the Burr camp, one of the important documents necessary for the defense was the letter sent by General Wilkinson to Jefferson in October of 1806.<sup>47</sup> It was this letter, it will be recalled, that notified the President of Burr's plans and that claimed that one of Burr's objectives was raising rebellion in the West. President Jefferson specifically had described the letter in his January, 1807 special message to Congress as proof of Burr's treasonable intentions.<sup>48</sup> Jefferson claimed that the Wilkinson letter had finally provided him with enough information to call out the militia and deploy the military to suppress Burr's expedition.<sup>49</sup> The document was likely to indicate whether Jefferson actually had sufficient grounds to suspect Burr of treason and whether Spain had engaged in hostilities against the United States at the time. No doubt the defense also planned to use the letter to impeach General Wilkinson's testimony by demonstrating his complicity in Burr's scheme.

Aside from the legal relevance of the letter, seeking its production served certain strategic goals for the defense. Early in the trial, public relations had been going badly for Burr;

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47. This letter, which appears to be the first document over which executive privilege had ever been claimed by a President against a judicial order, is reproduced in the Appendix to this article.

48. See Special Message on the Burr Conspiracy, *supra* note 24, at 533-34.

49. See *id.* at 534-35.

most newspaper accounts of the adventure suggested that Burr had wanted to dismember the Union. Public sentiment against Burr was reflected during the voir dire for the grand jury. "Have you not said that Col. Burr ought to be hung," the defense counsel had asked one prospective juror. "No, I said hanging was too good for him," came the answer back.<sup>50</sup> Hay reported to Jefferson that most of the jurors were already convinced that Burr was guilty.<sup>51</sup> Burr's side had to change the subject, and change it quickly. Seeking a subpoena of the President would transform the treason trial into a confrontation between the judicial and executive branches, and it also provided the defense with the opportunity to attack Jefferson personally.<sup>52</sup> Burr had retained the perfect man for the job, Luther Martin, who was a well-known critic and personal enemy of the President.<sup>53</sup>

Thus, while waiting in June, 1807 for General Wilkinson to arrive as a witness before the grand jury, Burr personally made a motion that the court order the President to produce the October letter, as well as documents from the War and Navy Departments relating to the suppression of his expedition. It should be pointed out that Burr did not request that Jefferson personally appear—as many have mistakenly thought—only that he send the trial court the document.<sup>54</sup> Burr sought a subpoena duces tecum, not a subpoena ad testificandum. The partisan temper of the proceedings can be seen in the arguments of Luther Martin, who accused the President of prejudging his client, of proclaiming him a traitor before the nation, and of "let[ting] slip the dogs of war, the hell-hounds of persecution to hunt down my friend."<sup>55</sup> Asked Martin rhetorically: "And would this president of the United States, who has raised all this absurd clamor, pretend to keep back the papers which are wanted for this trial, where life itself is at stake?"<sup>56</sup>

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50. PETERSON, *supra* note 32, at 870.

51. *See id.*

52. *See* MALONE, *supra* note 13, at 315. Jefferson himself believed that this was the true objective of the subpoena. *See* Letter from Thomas Jefferson to George Hay (undated draft letter), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 406-07.

53. *See* MALONE, *supra* note 13, at 312-14.

54. *See* United States v. Burr, 25 F. Cas. 30, 30-31 (C.C.D. Va. 1807) (No. 14,692d).

55. MALONE, *supra* note 13, at 316.

56. *Id.*

To their credit, neither Hay nor Jefferson leapt to the bait. At first, Hay argued that the documents were not relevant because the grand jury had yet to request them. When this argument did not fly, the federal prosecutor promised that he would produce the letter and any other documents that were relevant, but that there ought to be some provision for preserving state secrets. Hay never argued that the President was immune from judicial process. Instead, he argued that the subpoena to the President was "unnecessary" because the executive branch would produce the documents voluntarily.<sup>57</sup> Oddly, the U.S. attorney even suggested that the court could compel Jefferson to testify personally, but perhaps not to produce papers, but he then withdrew this argument.<sup>58</sup>

Despite these offers of cooperation, Chief Justice Marshall issued the subpoena duces tecum anyway. He did not, however, issue the sweeping order that the *Nixon* Court or its progeny have suggested. Like *Nixon*, the issue in *Burr* really broke down into two separate questions: first, whether the President was subject to a subpoena at all, and second, whether the chief executive could withhold certain information whose secrecy was vital to the national security. Marshall's rulings on these questions, like Jefferson's positions on them, were more subtle and, ultimately, more accommodating than has been commonly understood. To be sure, Marshall found that the Constitution as well as a federal statute provided the defendant with the right of compulsory process in his defense.<sup>59</sup> Marshall also found that the Constitution's requirement here contained no exception for the President. "The propriety of introducing any paper into a case, as testimony, must depend on the character of the paper, not on the character of the person who holds it."<sup>60</sup> Marshall's language indicates that the federal judiciary is not constitutionally barred from issuing a subpoena even to the President.

Whether the President had to obey that subpoena, however, was another matter. Anticipating the arguments raised by President Clinton in *Clinton v. Jones*,<sup>61</sup> Marshall recognized

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57. *United States v. Burr*, 25 F. Cas. at 31.

58. *See id.* at 34.

59. *See id.* at 33.

60. *Id.* at 34.

61. 117 S. Ct. 1636, 1643-45 (1997); *see also* Akhil Reed Amar & Neil Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995).

that suits against the President might interfere with his ability to perform his constitutional duties. "If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects."<sup>62</sup> While he doubted that the duties of office were so "unremitting" as to prevent a President from satisfying a subpoena, Marshall suggested that the chief executive could refuse to obey the subpoena on such a ground. In fact, Marshall indicated that a court in its discretion might allow a president, consumed by other pressing national matters, to defy the judicial order. "The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued."<sup>63</sup> In other words, if the President ignored the subpoena because of pressing official business, the court would accept that decision.

Jefferson's thoughts concerning the October letter also focused on convenience, rather than on constitutionality. Of course, there should be little doubt that at this time Jefferson believed that each branch of the national government had the power to interpret the Constitution independently within the course of executing its own powers. As is well known, for example, upon taking office Jefferson had pardoned individuals who had been convicted under the Sedition Act, even though the courts had pronounced the law constitutional, because he believed it was not.<sup>64</sup> In criticizing *Marbury v. Madison* in a private letter, for example, Jefferson thought that "[w]here different branches have to act in their respective lines, finally & without appeal, under any law, they may give to it different

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62. *United States v. Burr*, 25 F. Cas. at 34.

63. *Id.* at 34.

64. See Letter from Thomas Jefferson to George Hay (June 2, 1807), *supra* note 31, at 396-97 ("But the executive determined that the sedition act was a nullity under the Constitution, and exercised his regular power of prohibiting the execution of the sentence, or rather of executing the real law, which protected the acts of the defendants."); see also Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 88-90:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them.

and opposite constructions.”<sup>65</sup> As with the Louisiana Purchase, however, Jefferson’s thoughts about the Constitution and his actions were not always consistent.

Jefferson never argued to the court, either directly or through his subordinates, that the Constitution provided the President with an immunity from judicial process. Before Marshall even had ruled on the subpoena issue, the President wrote to Hay on June 23 to “assure you of my readiness . . . voluntarily to furnish on all occasions, whatever the purposes of justice may require.”<sup>66</sup> Hay read this letter aloud in court.<sup>67</sup> Jefferson encountered some delay in finding the subpoenaed letter, because he had sent it to the Attorney General, whom he thought had left it with Hay, who did not have it. But the Wilkinson letter was not to become the Rose Law Firm billing records of the Jefferson administration, as a copy was soon located and provided to Hay.

Contrary to the arguments of Paulsen and others, Jefferson did not resist the Court. Instead, the President immediately promised full cooperation with Marshall in producing the Wilkinson document and any others that were desired. Jefferson even offered, on his own initiative, to be interviewed under oath. “[I]f the defendant supposes there are any facts within the know[ledge] of the Heads of departments, or of myself, which can be useful for his defence,” Jefferson wrote to Hay five days later, “we shall be ready to give him the benefit of it, by way of deposition, through any persons whom the Court shall authorize to take our testimony at this place.”<sup>68</sup> Hay also read this letter aloud in open court.<sup>69</sup> What concerned Jefferson was not whether the Presidency was constitutionally subject to judicial process, but whether multiple courts could simultaneously demand the chief executive’s attendance, thereby preventing him from running the government. Wrote Jefferson to Hay:

As to our personal attendance at Richmond, I am persuaded the Court is sensible, that paramount duties to the nation at large control the obligation of compliance with their summons in this case; as they

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65. Letter from Thomas Jefferson to George Hay (June 2, 1807), *supra* note 31, at 396.

66. Letter from Thomas Jefferson to George Hay (June 12, 1807), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 398.

67. See *United States v. Burr*, 25 F. Cas. at 65.

68. Letter from Thomas Jefferson to George Hay (June 17, 1807), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 400.

69. See *United States v. Burr*, 25 F. Cas. at 69.



would, should we receive a similar one, to attend the trials of Blannerhassett & others, in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place, other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function. It could not then mean that it should be withdrawn from it's [sic] station by any co-ordinate authority.<sup>70</sup>

These "paramount duties" to which Jefferson referred no doubt included the brewing problems with Great Britain, which was impressing American sailors with a fleet that was at sail in front of American ports. If the trial were held in Washington, D.C., apparently, the President would have had no problem attending, if called upon.

Once Jefferson received the subpoena and read Marshall's June, 1807 opinion, however, he began to voice the idea that the courts could not force the executive branch to comply with their orders. In a June 20, 1807 letter that is often cited to prove Jefferson's narrow vision of judicial review, the President wrote Hay: "The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience . . ."<sup>71</sup> Jefferson continued this theme in a more ominous tone: "The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others . . ."<sup>72</sup> If the branches were to come to blows, Jefferson had no doubt that the executive branch would prevail. "[T]o none has [the Constitution] given more effectual or diversified means than to the executive."<sup>73</sup> One can see why this letter is much quoted. It sounds as if Jefferson is threatening what President Nixon momentarily considered after *United States v. Nixon*, and what President Clinton reportedly flirted with after he was subpoenaed to testify before the Whitewater grand jury.

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70. Letter from Thomas Jefferson to George Hay (June 17, 1807), *supra* note 68, at 400-01.

71. Letter from Thomas Jefferson to George Hay (June 20, 1807), in 10 WORKS OF THOMAS JEFFERSON, *supra* note 29, at 404.

72. *Id.*

73. *Id.*

All three had considered using the physical forces at the command of the presidency to resist the enforcement of a judicial order.

Taken in context, however, the June 20 letter shows only that the President still based his objections on convenience. Before launching into the language quoted above, Jefferson asked rhetorically: "if the Constitution enjoins on a particular officer to be always engaged in a particular set of duties imposed on him, does not this supersede the general law, subjecting him to minor duties inconsistent with these?"<sup>74</sup> The threat to the executive branch was not judicial review or judicial commands, but what would occur "if the several courts could bandy [the President] from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties."<sup>75</sup> He then asked whether Marshall would apply his doctrine to himself and his own brethren. What would happen, Jefferson wrote, if the "sheriff of Henrico [county]" called Marshall out as part of a posse "to quell a riot somewhere in his county?"<sup>76</sup> What would happen if the New Orleans territorial court or the Maine state court subpoenaed all the justices of the Supreme Court? "Would they abandon their posts as judges, and the interests of millions committed to them, to serve the purposes of a single individual?"<sup>77</sup> Of course not. Similarly, Jefferson argued at the end of the letter, it cannot be the case that presidents "are to be dragged from Maine to Orleans by every criminal who will swear that their testimony 'may be of use to him.'"<sup>78</sup> In this conclusion, Jefferson had reached virtually the same position as Marshall, who, as we have seen, suggested that a President could return a subpoena without complying should his duties prevent him.

Subsequent events in regard to the subpoena support the notion that Jefferson and Marshall had reached a common ground. Significantly, Jefferson did not ask Hay to read his confrontational, emotional, June 20 letter to the court, and it never saw the light of day. Rather, Marshall only received from Jefferson the conciliatory June 12 and June 17 missives. In response to the subpoena, Jefferson immediately ordered

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 405.

that executive branch officials turn over the requested documents, and both Burr and Marshall considered the subpoena satisfied.<sup>79</sup> Jefferson even offered to be deposed. From the court's perspective, Jefferson never challenged the judiciary's authority to subject the president to judicial process, but rather only asked that administrative convenience be taken into account. For his part, Marshall never sought the President's personal testimony, either in court or by deposition, he recognized that the President's official business could provide a ground for refusing to obey a subpoena, and he considered the matter closed when Jefferson provided the documents. From Jefferson's perspective, then, while the court had declared that it could issue a subpoena to the president, it never claimed the right to enforce it in all circumstances. Rather than confrontation, the historical record shows that the judiciary and the executive cooperated to a great extent in order to reach a workable accommodation.<sup>80</sup> While surely combative in private, Jefferson in public accepted the amenability of the presidency to judicial process and did all that he could to obey Marshall's subpoena.<sup>81</sup> There was a great difference between what Jefferson thought in private and what he said in court.

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79. See *United States v. Burr*, 25 F. Cas. 55, 69-70 (C.C.D. Va. 1807) (No. 14,693).

80. That this was Jefferson's intent is also shown in a draft letter from Jefferson to Hay which, according to Professor Paul Ford, may never have been sent. "The enclosed letter is written in a spirit of conciliation & with the desire to avoid conflicts of authority between the high branches of the govmt which would discredit it equally at home & abroad." Letter from Thomas Jefferson to George Hay (undated draft letter), *supra* note 52, at 406-07. Interestingly, Jefferson laid the blame for the clash between the branches upon Burr, and Jefferson believed that Marshall's "prudence or good sense" would lead the Chief Justice not "to press it." Jefferson believed that the problems with the subpoena indicated that a congressional statute providing for judicial process of executive branch officers was needed.

I hope however that the discretion of the C.J. will suffer this question to lie over for the present, and at the ensuing session of the legislature he may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases, without breaking up the government.

*Id.* at 407.

81. That Jefferson did not believe that he had a constitutional basis for resisting a subpoena might also be demonstrated by his eagerness to find a non-constitutional ground for such a position. For example, Jefferson considered arguing that he did not have to obey the subpoena because a district court's process was only good within its district. Because Marshall's circuit court did not encompass Washington, D.C., Jefferson might have been able to avoid complying with the subpoena. See Letter from Thomas Jefferson to James Madison (Aug. 25, 1807), in 3 *THE REPUBLIC OF LETTERS: THE*

## B. EXECUTIVE PRIVILEGE

Less agreement existed, however, on the scope of what we today would call executive privilege. Whether the President was subject to judicial process was a different, though related, question from whether the executive could withhold some information from the court in the national interest. For example, the President can obey a subpoena by appearing in court or producing documents, but still claim executive privilege by redacting information from those documents or refusing to answer certain questions. Indeed, *United States v. Nixon* itself recognizes this distinction, for while it required that President Nixon obey a subpoena for the Watergate tapes, it also acknowledged that the chief executive could refuse to hand over information that involves the national security, military, or diplomatic information.<sup>82</sup>

Despite their history of conflict, Marshall and Jefferson continued to seek an accommodation on the question of executive privilege. At first, however, it appeared that Jefferson would assert a broad right of executive privilege. Wrangling over executive privilege began in the context of the first subpoena to Jefferson for the October, 1806 Wilkinson letter. Although, as we have seen, Jefferson promised to fully cooperate with the court, he did so while "[r]eserving the necessary right of the President of the U S to decide, independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom."<sup>83</sup> A few days after this statement, Jefferson asserted that the president was to be the sole judge of the scope of the privilege. Hay read this portion of the letter aloud in open court:

With respect to papers, there is certainly a public & a private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, & other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary, that for the advantageous conduct of

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CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1491 (James M. Smith ed., 1995).

82. 418 U.S. 683, 706 (1974) ("Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.").

83. Letter from Thomas Jefferson to George Hay (June 12, 1807), *supra* note 66, at 398.

their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication. Hence, under our Constitution, in requests of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed . . .<sup>84</sup>

Jefferson cited as an example Congress's request for information on the Burr conspiracy, which had allowed him to withhold any papers whose continuing confidentiality he deemed necessary for the public welfare.<sup>85</sup>

Jefferson's response to the court deserves careful analysis. He distinguishes between what may be thought of as public records generated by the Presidency, on the one hand, and documents that record "executive proceedings" on the other. It is unclear whether executive proceedings refers to deliberations within the executive branch or to the conduct of certain executive functions, such as foreign and military affairs. That Jefferson might have been thinking of the latter is suggested perhaps by his reference to the practice of other nations. Jefferson maintains that this authority to maintain the confidentiality of certain papers is plenary; in other words, only the President may decide what information can be withheld in the public interest. Implicitly, Jefferson rejected the idea that the judiciary can decide for itself what materials the executive branch must turn over.

One point of interest in this passage is Jefferson's failure to identify a constitutional provision as the source of this power. In fact, he is quite incorrect in saying that the Constitution contains a carefully expressed exception to some general duty to produce documents. Executive privilege, however, might spring from his theory of the separation of powers, in which each branch is supreme within its own sphere, and in which each may reach different interpretations of the Constitution in the course of executing its enumerated powers. Thus, the plenary power to keep information secret must arise from the exercise of some other presidential authority. It also might derive from some general executive duty that Jefferson thought that he possessed to protect the public welfare.

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84. Letter from Thomas Jefferson to George Hay (June 17, 1807), *supra* note 68, at 401.

85. *See id.*

It is unclear, however, what material in the Wilkinson letter might have deserved executive privilege. Jefferson had revealed much of the letter's content in his special message to Congress on January 22, 1807.<sup>86</sup> In response to a congressional resolution asking for all information in his possession on the Burr conspiracy, Jefferson had described how he had learned of it and what steps he had taken in response. He also had provided Congress with copies of different affidavits and letters from Wilkinson and others. While the Wilkinson letter does include a document summarizing Burr's scheme that allegedly was provided by an informant, this informant was none other than Wilkinson himself, who wrote an "anonymous" memo describing Burr's plans, and then wrote a covering letter to Jefferson in his own name saying that the memo somehow had fallen into his hands.<sup>87</sup> Wilkinson's letter did not contain any relevant information that was not already known publicly by the time of the Burr trial, and the letter was more remarkable for the exaggeration and unfounded rumor it apparently contained. It is doubtful, therefore, that Jefferson might have claimed privilege because—to put it in modern terms—he was protecting a law enforcement source. Nonetheless, he still could have claimed that the letter as a whole was a state secret because it contained national security and military information; it had been sent by the commander in the field concerning a threat to the national security and relations with another country.

Jefferson could have claimed broad executive privilege on this ground, and it would have been consistent with his theory of the separation of power, but he did not. Jefferson never asserted a general right to keep all documents from the court, but only to keep out of the public eye those portions of the documents that were not material to the judicial proceedings. This can be seen in Jefferson's June 12 letter to the court, in which Jefferson delegated to the prosecutor the authority to decide what portions of the Wilkinson letter to keep confidential. "I must beg leave to devolve on you," Jefferson wrote, "the exercise of that discretion which it would be my right & duty to exercise, by withholding the communication of any parts of the letter, *which are not directly material for the purposes of jus-*

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86. See Special Message on the Burr Conspiracy, *supra* note 24, at 532.

87. See ABERNETHY, *supra* note 13, at 150-52; Letter from General James Wilkinson to President Jefferson (Oct. 21, 1806), *infra* Appendix.

tice.”<sup>88</sup> Through the prosecutor, Jefferson also claimed a right to withhold parts of the letter that ought not to be disclosed due to public safety, and again asserted that he was to be the sole judge of what information ought to be publicly disclosed. Hay argued, for example, that “it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose.”<sup>89</sup> “It might contain state secrets, which could not be divulged without endangering the national safety.”<sup>90</sup> Despite these arguments, Jefferson did not actually seek to withhold any parts of Wilkinson’s October 21 letter. Instead, Jefferson and Hay made the letter fully available to the court and to the opposing counsel. They were content to allow the court to view fully the entire letter, and then to decide for itself whether any of it ought to be suppressed. Again, Jefferson demonstrated his reluctance to engage in constitutional brinksmanship and his willingness to reach an accommodation with the judiciary.

Marshall’s response to the executive also demonstrated a spirit of compromise. Marshall did not claim that the judiciary had an absolute right to all information. Rather, the Chief Justice acknowledged, the executive could withhold certain information if it were not material to the case or if its confidentiality were necessary to the public safety. In his June, 1807 opinion issuing the subpoena duces tecum to Jefferson, Marshall found that: “There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety.” But if the letter “does contain any matter which it would be imprudent to disclose,” Marshall wrote, “which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.”<sup>91</sup> While conceding the point that privilege existed, however, Marshall still sought to make the determination a matter of judicial decision. “If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear upon the return [of the subpoena],” Marshall wrote in the June opinion. “If they do not,

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88. Letter from Thomas Jefferson to George Hay (June 12, 1807), *supra* note 66, at 399 (emphasis added).

89. *United States v. Burr*, 25 F. Cas. 30, 31 (C.C.D. Va. 1807) (No. 14,692d).

90. *Id.*

91. *United States v. Burr*, 25 F. Cas. at 37.

and are material, they may be exhibited.<sup>92</sup> The Chief Justice expected the President to hand over the letters, explaining why he might wish certain portions to be redacted, and then the court would decide whether the executive's justification would be permitted. Indeed, Jefferson and Hay did exactly as Marshall had asked, but before he had asked it.

Although Jefferson and Marshall had reached an accommodation on the substance of the privilege, they still disagreed concerning the ultimate issue of judicial supremacy. Marshall had maintained that the courts were to decide what was to be privileged and what was not. While he had complied with Marshall's request, Jefferson had not conceded the power to judge for himself the scope of executive privilege. Instead, we can view his action as a decision to avoid a confrontation with the judicial branch by refusing to press his arguments to the limit. Later events in the Burr trial would allow the President to make his point. In light of Burr's acquittal on the treason charge, the result of the misdemeanor proceeding was almost a foregone conclusion. Hay had urged the President to drop the charges, but Jefferson—on Madison's advice—had decided to press ahead in the hopes of embarrassing the Chief Justice in the event of a second acquittal.<sup>93</sup> Jefferson's desire to either convict Burr or to undermine Marshall provided Burr with yet a second opportunity to provoke a confrontation between the judiciary and the executive.

Once the misdemeanor trial began on September 3, Burr promptly made a motion for a second subpoena duces tecum to the President. At first, he sought the original of Wilkinson's October, 1806 letter, in order to verify the copy that had been made available in response to the first subpoena.<sup>94</sup> Hay said that he did not have the original, but that a certificate attesting to the copy's authenticity could be produced. While Burr declared that the President was in contempt of court for not producing the original, he dropped the matter in order to focus on a second letter that had come to his attention, one from Wilkinson to Jefferson on November 12, 1806.<sup>95</sup> Jefferson had provided Hay with a copy of this second letter, but he specifically had delegated to the prosecutor the authority to withhold

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92. *Id.*

93. Letter from Thomas Jefferson to George Hay (Sept. 7, 1807), *supra* note 46, at 408.

94. See *United States v. Burr*, 25 F. Cas. at 189.

95. This letter is also included in the Appendix to this article.



portions of it that were not relevant to the proceedings. Following Jefferson's instructions, Hay sought to reach an accommodation that would avoid another conflict between the branches: he offered to turn the letter over to the court clerk, who would copy portions relevant to the defense; he even proposed providing the document to three of Burr's counsel to verify if the confidential portions were indeed relevant, "depend[ing] on their candor and integrity to make no improper disclosures."<sup>96</sup> Any dispute between Hay and Burr's counsel over confidential passages could be referred to the court for resolution.<sup>97</sup> The government's concern clearly was not with handing the document over to the court or even to opposing counsel, but with "public inspection." Some have speculated that Jefferson took this position because the confidential material in the letter was of a political nature, and that it would have been of personal embarrassment to Wilkinson.<sup>98</sup> Later comments by Hay indicated that these portions might have been personal gossip about other political figures in the Republican party.<sup>99</sup> The nature of Hay's proposal to share the letter with the Burr counsel supports this view, as Hay pointedly excluded Luther Martin, whose involvement in the defense Jefferson and Hay believed to be utterly partisan.

Despite these offers, however, Burr rejected Hay's efforts at cooperation. Acceptance of Hay's proposal would have frustrated Burr's efforts to turn the misdemeanor trial into yet another confrontation between Marshall and Jefferson. Instead, Burr's counsel moved to postpone the trial if Jefferson failed to provide the full letter.<sup>100</sup> Pressed to the wall, the prosecutor provided only a copy of the letter, "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined."<sup>101</sup> Hay justified his authority to withhold these portions as the exercise of power delegated to him by the President. To prove that he was not attempting to hide relevant evidence, the prosecutor repeated his offer to show the full

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96. *United States v. Burr*, 25 F. Cas. at 190.

97. *See id.*

98. *See MALONE, supra* note 13, at 343.

99. *See United States v. Burr*, 25 F. Cas. at 190. The letter, however, does not appear to discuss such gossip. It does convey Wilkinson's belief that many in the city of New Orleans were disloyal.

100. *See id.*

101. *Id.*

letter to the court. "The accuracy of this opinion I am willing to refer to the judgment of the court, by submitting the original letter to its inspection," Hay argued in court.<sup>102</sup> He further suggested that the confidential information was irrelevant and would not be admissible if it were presented as oral testimony.

As with the motion on the first subpoena, Marshall did not adopt wholesale the position of the defendant, which would have subjected the President to the same rules that governed a private citizen. Surely, the Chief Justice declared, it was incontrovertible that "the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession."<sup>103</sup> These rules, however, did not preclude the existence of executive privilege. Marshall recognized that the chief executive "may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production."<sup>104</sup> In the case in which a letter would be "improper to exhibit in public, because of the manifest inconvenience of its exposure," the court would require that the defense's need for the document be "very strong" and that it be "fully shown to the court."<sup>105</sup> In such an event, the court still might recognize the President's request for confidentiality. "I admit, that in such a case, much reliance must be placed on the declaration of the president; and I do think that a privilege does exist to withhold private letters of a certain description."<sup>106</sup>

At this point in the opinion, the Chief Justice formulated a theory of executive privilege that went beyond his recognition that "state secrets" ought to be kept confidential. Marshall's theory, however, bears little resemblance to Burger's or to Jefferson's. In *Nixon*, the Court established the President's right to secrecy upon the independence of the executive branch and its right to secrecy in performing its constitutional duties. In *Burr*, by contrast, Marshall seems to derive executive privilege from some sense of personal privacy that applies to the President as much as to any individual citizen. "The reason," Marshall wrote, for privilege

is this: Letters to the president in his private character, are often written to him in consequence of his public character, and may relate

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102. *Id.*

103. *Id.* at 191.

104. *Id.*

105. *Id.* at 191-92.

106. *Id.* at 192.

to public concerns. Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view.<sup>107</sup>

Marshall appears to believe that private letters to a president, like similar missives between ordinary citizens, would not ordinarily be produced in court if they related solely to personal matters. But such letters to the President, speculated the Chief Justice, although private in form often discussed public matters. Apparently, Marshall believed that documents from public officials to public officials about public matters ought not to receive confidentiality, but that letters that discussed private matters would. The Chief Justice had trouble with Wilkinson's letter because it fit into neither category: it was a letter between two government officials, and it certainly discussed official business, but it also contained information that was of a private, non-official character. By defining the issue in this manner, Marshall handed Jefferson a way out: the President could offer to reveal all but the non-official information in the Wilkinson letter.

Nonetheless, Marshall equivocated between recognizing a secrecy for executive communications and granting the defendant an untrammelled right to see all evidence relevant to his defense. He still thought it "a very serious thing, if such letter should contain any information material to the defense, to withhold from the accused the power of making use of it."<sup>108</sup> Torn between these competing considerations, Marshall declared that he could not "precisely lay down any general rule for such a case."<sup>109</sup> Confused, he suggested that "[p]erhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it," but then in the same sentence said that this "conclusive" determination would be overcome if the "letter could be shown to be absolutely necessary in the defence."<sup>110</sup>

It was in this context that Marshall then uttered the words that would become the favorite of the *Nixon* Court: "In no case of this kind would a court be required to proceed against the president as against an ordinary individual."<sup>111</sup> What followed, however, was not the elaborate in camera process that the

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

*Nixon* court claimed to have adopted from the *Burr* case. Rather, Marshall demanded that Jefferson, rather than Hay, claim privilege over the letter, because "[t]he propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge."<sup>112</sup> From this has come the modern rule that only the President can claim executive privilege. Marshall did discuss providing the letter to the counsel and the court, and not the public, but he did this before Jefferson had decided which portions would be kept secret.<sup>113</sup> In context, it appears that Marshall was threatening to turn the letter over to Burr's counsel, and thus Luther Martin, unless Hay sought directions from Jefferson. Hay announced the next day, a Saturday, that he would send an express courier to Monticello, where Jefferson was staying, to request instructions.

Jefferson's response to Marshall's opinion and to Hay's questions amounted to an assertion of the executive's right to withhold evidence from the judiciary. Hay had sent the second November, 1806 Wilkinson letter back to Jefferson along with the subpoena and a letter stating his belief that Marshall had hinted that "any return from the P[resident] himself would be sufficient."<sup>114</sup> Jefferson returned to Hay on September 7 a letter with instructions, the subpoena, a copy of the Wilkinson letter with the confidential portions omitted, and a certificate explaining why he had excerpted the passages.<sup>115</sup> In effect, Jefferson had withdrawn Hay's offer to open the letter for inspection to the court and the defense counsel. Jefferson wrote to Hay:

As I do not believe that the district courts have a power of *commanding* the executive government to abandon superior duties & attend on them, at whatever distance, I am unwilling, by any notice of the subpoena, to set a precedent which might sanction a proceeding so preposterous. I enclose you, therefore, a letter, public & for the court, covering substantially all they ought to desire. If the papers which were enclosed in Wilkinson's letter may, in your judgment, be communicated without injury, you will be pleased to communicate them.<sup>116</sup>

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112. *Id.*

113. *See id.*

114. MALONE, *supra* note 13, at 343-44 (quoting Letter from George Hay to Thomas Jefferson (Sept. 5, 1807), on file in the Jefferson Papers at the Library of Congress, 30088-89).

115. *See* Letter from Thomas Jefferson to George Hay (Sept. 7, 1807), *supra* note 46, at 409.

116. *Id.* at 408.

In his certificate, Jefferson declared that the omitted portions of the letter were "confidential, given for my information in the discharge of my executive functions, and which my duties & the public interest forbid me to make public."<sup>117</sup> While the President asserted that the information was irrelevant to the charges against Burr, he did not give the court the opportunity to review his determination, and Jefferson appears to have retained the original of the letter rather than return it to Hay or to the court.<sup>118</sup>

Thus, Jefferson had responded to Marshall's offer of a compromise with his own, but one that retained for the presidency the final authority to decide on the scope of executive privilege. Jefferson refused to turn over the letter in toto, but in order to avoid a confrontation with the judicial branch, he provided the redacted letter and the certificate in an effort to reach an accommodation that would suit Marshall. It appears that Jefferson's decision was treated as a *fait accompli*. On Wednesday, September 9, Hay presented the President's certificate and the redacted letter to the court, and both Marshall and Burr appear to have let the matter drop. In light of this silence, and the fact that the trial then continued, it appears that Jefferson's production was accepted by the court. With the prospects of another executive-judicial confrontation fading, Burr wisely turned his attention to more important issues.

### III. LESSONS OF PRESIDENTIAL POWER

The Burr trial is worth re-evaluating for more than just historical interest. Chief Justice Marshall's opinions in *United States v. Burr* and President Jefferson's arguments still influence the decisions we make today about executive power and judicial supremacy. As we have seen, *United States v. Nixon* gave rise to the idea that *Burr* stands for judicial supremacy in disputes between the judiciary and the executive. Later cases, most notably *Clinton v. Jones*, have followed the *Nixon* Court's misreading of *Burr*. On the other hand, defenders of executive

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117. *Id.* at 409.

118. Raoul Berger appears to have misread the significance of Jefferson's September 7 letter in his analysis of the second subpoena. Berger believes that Hay had turned the letter over to the court, which was holding it until called for by Burr's counsel. RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 358-59 (1974). Professor Berger fails to note that Hay sent the letter back to Jefferson, who then returned only a redacted copy, which was then accepted by the court.

power have cited to Jefferson's letters to support the theory that the President has the authority to defy judicial process and to interpret the Constitution independently.

The way that *Burr* has been read, however, is quite different than the way in which it was resolved. It is difficult to interpret *Burr* as standing firmly for the propositions that: 1) the judiciary has the power to compel presidents to obey its commands without question; and 2) that the courts have the final say on questions of executive privilege. Subsequent readers of the case have read it as an outright confrontation between the executive and judicial branches that has yielded the bright lines sketched above. The lessons of the case are much more complex and subtle. On the question of judicial process, for example, while it is true that Jefferson apparently did believe that the unremitting nature of the President's official duties might preclude him from obeying a subpoena, he never made this argument in *Burr* itself. Jefferson confined most of his arguments, especially those claiming that the executive branch's independent constitutional authority permitted it to ignore the courts, to his private letters, rather than to his public actions. Jefferson fully complied with the subpoena and even went so far as to volunteer for a deposition.

Nor can *Burr* be read as a clarion call for judicial supremacy. As we have seen, Chief Justice Marshall recognized the force of Jefferson's argument, and even suggested that in the appropriate case a President could refuse to comply with a subpoena. On the question of executive privilege, the events become even more difficult to read as supporting the result reached in *Nixon*. Both Jefferson and Marshall seemed to agree that the President could withhold information, such as state secrets, whose disclosure would be harmful to the public safety. But on the issue of who would have the final say as to the scope of the privilege, it appears that Jefferson ultimately prevailed, not Marshall. While in regard to the first subpoena, Jefferson turned over the demanded Wilkinson letter in its entirety, Jefferson took a firmer stand on the second subpoena. Rather than turn the letter over to the court for review, Jefferson removed portions of the letter in the version he provided to Marshall, on the ground that they contained private information imparted to him in the course of his executive duties. Marshall did not challenge Jefferson's actions; not exactly a ringing defense of judicial supremacy to decide upon the scope of executive privilege.

In this light, we can see that *United States v. Nixon*'s reliance upon *Burr* was somewhat misplaced. *Burr* does establish the principle that the President is subject to judicial process, but only in the absence of a conflict with the chief executive's constitutional duties. Chief Justice Marshall's opinions and actions, however, as well as those of President Jefferson, provide little support for the *Nixon* Court's holding that the federal judiciary may exercise the power to determine the constitutional powers of the executive branch. If anything, *Burr* showcases Chief Justice Marshall's efforts to accommodate—rather than limit—President Jefferson's theories of executive authority. *Burr* also strikingly demonstrates a President's desire not to press executive power to the limit, but to seek a common ground with the courts.

Unfortunately, *United States v. Nixon* was not to be the only case that has misinterpreted the constitutional significance of the *Burr* conspiracy. In *Nixon v. Fitzgerald*, for example, the Court relied upon Jefferson's comments to Hay on the first subpoena for historical support for its conclusion that the President is immune from civil damage suits for his official actions.<sup>119</sup> Asserting that "there is historical evidence from which it may be inferred that the framers assumed the President's immunity from damages liability," the *Fitzgerald* Court quoted Jefferson's letter to Hay on June 20, 1807, to show that the President ought not to be subject to judicial process.<sup>120</sup> It will be recalled that in this letter Jefferson asked whether "the executive [would] be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience."<sup>121</sup> The Court's reliance upon this history is disturbing, as Jefferson clearly was not discussing in this context any presidential immunity from damage suits, nor was he making this argument to Marshall. Instead, Jefferson was merely blowing off some steam; as we have seen, the President instead complied with the Chief Justice's subpoena duces tecum and ordered Hay to make public his two earlier, less confrontational letters.<sup>122</sup> Furthermore, any objections Jefferson did have to the subpoena were grounded not on constitutionality, but on convenience. Jefferson expressed to the Court his

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119. See *Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982).

120. *Id.*

121. Letter from Thomas Jefferson to George Hay (June 20, 1807), *supra* note 71, at 404.

122. See *supra* text accompanying notes 78-79.

concern that the President not be dragged "from pillar to post" so as to "keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties."<sup>123</sup>

The Court again erred in its reading of *United States v. Burr* when it later held the President subject, while in office, to civil damage suits for non-official acts in *Clinton v. Jones*.<sup>124</sup> While Justice Stevens, for the Court, correctly wrote that *Fitzgerald's* use of Jefferson was misleading, it oddly misinterpreted Chief Justice Marshall's orders to the President. In responding to President Clinton's reliance on *Fitzgerald*, the Court declared that "Jefferson's argument provides little support for respondent's position."<sup>125</sup> According to the Court, "the prerogative Jefferson claimed was denied him by the Chief Justice in the very decision Jefferson was protesting, and this Court has subsequently reaffirmed that holding."<sup>126</sup> The Court then relied upon two "long-settled propositions, first announced by Chief Justice Marshall," to support its holding that President Clinton was subject to Paula Jones' suit for sexual harassment: first, *Marbury v. Madison's* ruling that the Court can review the President's actions, and second, *United States v. Burr's* holding that the President was subject to subpoena.<sup>127</sup> Quoting Jefferson's question whether "the law is paramount" to the President's official duties by "call[ing] on him on behalf of a single one," the Court bluntly responded that "[f]or Chief Justice Marshall, the answer—quite plainly—was yes."<sup>128</sup> Our reconstruction of events indicates that the Court was wrong on this point. The answer to this difficult question was not quite plain to Chief Justice Marshall; in fact, he himself suggested that the President could ignore the subpoena if the press of official business demanded it. The Court did not deny Jefferson his argument; if anything, it respected and accommodated it. It was only Jefferson's wise decision to comply with the subpoena voluntarily rather than to resist it that allowed for the result that the Court in *Nixon* and *Clinton* favored.

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123. Letter from Thomas Jefferson to George Hay (June 20, 1807), *supra* note 71, at 404.

124. 117 S. Ct. 1636 (1997).

125. *Id.* at 1645 n.23.

126. *Id.*

127. *Id.* at 1649.

128. *Id.* at 1649 n.38.



This is not to say, however, that either President Clinton or Justice Breyer got it quite right in *Clinton v. Jones*. Citing Jefferson, President Clinton was on the right track when he argued that the press of official business was a ground to hold him temporarily immune from Paula Jones' lawsuit. Clinton's problem is that he went too far. Jefferson's claim of presidential inconvenience was a *reductio ad absurdum* argument, not a plea for blanket constitutional immunity. Jefferson himself, it appears, did not even believe his own hypothetical argument. He immediately complied with the subpoena and never sought to resist a judicial order on the ground that official business was unremitting. Immunity would only be necessary, according to Jefferson, if an avalanche of subpoenas began to flood the office that prevented him from fulfilling the duties of his office. Jefferson, however, never claimed that Marshall's subpoena had this effect, which is why he produced the requested letters.<sup>129</sup>

Similarly, Justice Breyer cited Jefferson to prove that the President ought to be immune from civil process if it would prevent him from fulfilling his constitutional duties. Quoting extensively from Jefferson's letters to Hay on June 17 and June 20, 1807, Justice Breyer concluded that "Jefferson . . . argued strongly for an immunity from both criminal and civil judicial process—an immunity greater in scope than any immunity, or any special scheduling factor, now at issue in the civil case be-

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129. Jefferson's decision to forego his argument is even more striking because he might have had legitimate grounds to make it in court. At the same time that he was under subpoena in the Burr case, another litigation was brewing in Connecticut that had the potential for calling upon Jefferson to testify. Like *Clinton v. Jones*, the case involved Jefferson's actions as a private citizen with a member of the opposite sex. Apparently, Jefferson had made romantic overtures to a married woman in 1768; a Federalist clergyman had used this rumor along with others about Jefferson's past as the ground for calling the President "a liar, whoremaster, debaucher, drunkard, gambler, and infidel." In 1806, a Jefferson-appointed federal judge led a grand jury to indict the clergyman, along with other prominent Federalists (including printers Hudson and Goodwin, whose case eventually would reach the Supreme Court), for seditious libel. By the summer of 1807, the same time as the Burr trial, the clergyman had subpoenaed James Madison and other prominent Virginians to testify to the truth of the rumors, as truth was still a defense to seditious libel. The implicit threat behind these maneuvers was that the defendant also would subpoena Jefferson, and it is not surprising that the suit was soon dropped. See 3 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON*, *supra* note 81, at 1479-80 & n.39, 1490-92; LEVY, *supra* note 29, at 61-69.

fore us."<sup>130</sup> The historical record indicates that this conclusion is incorrect.<sup>131</sup> Jefferson never made a broad claim that the President was immune from judicial process. Rather, Jefferson was concerned about conflicting judicial demands simultaneously calling upon the president, which potentially could force the president to leave Washington, D.C. to the detriment of the public's business. With modern advances in communication and travel, the specter of a president spending all of his time travelling from court to court to obey different subpoenas seems quite unlikely. Even with the slow communication and transportation times of the early nineteenth century, however, President Jefferson never invoked in court the claim that he was constitutionally immune from process because it would impede his ability to perform his duties. Justice Breyer, like President Clinton, erred in mistaking Jefferson's private thoughts on the Constitution to be his real actions in court.

Beyond its relevance as a judicial precedent, the Burr conspiracy and trial serves as a valuable record of the resolution of one of the earliest disputes between the judicial and executive branches. It is one that today's political leaders could well profit from, for it serves as a valuable example of both executive branch constitutional policymaking and of judicial flexibility, in sharp contrast to the political strategy pursued by the current administration. One characteristic that both the Nixon and Clinton administrations have shared in common in their responses to scandal has been a strategy of litigation. In the case of Watergate, President Nixon turned to the judicial system to confirm his executive power in cases such as *United States v. Nixon*. Repeating Nixon's mistakes twenty years later, President Clinton also has turned to the courts to validate his claims of presidential authority. *Clinton v. Jones* is only the first case to require a merits opinion from the Supreme Court. Since then, the current administration has gone

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130. *Clinton v. Jones*, 117 S. Ct. at 1655 (Breyer, J., concurring in the judgment). Professors Akhil Amar and Neal Katyal similarly rely on the Jefferson example for their claim that a president should not be subject to civil damages suits for his non-official actions. See Amar & Katyal, *supra* note 61, at 717-18.

131. Justice Breyer also misread the historical record when he characterized the struggle between Marshall and Jefferson as "a dispute about whether the federal courts could subpoena [Jefferson's] presence in a criminal case." *Clinton v. Jones*, 117 S. Ct. at 1655. As the record makes clear, Jefferson's personal attendance was never called for and Marshall never issued such a subpoena.

to the federal courts to press claims of executive privilege,<sup>132</sup> attorney-client privilege,<sup>133</sup> and Secret Service privilege<sup>134</sup> in order to frustrate the independent counsel investigation. Several of these cases have reached the Supreme Court via stay applications.<sup>135</sup>

By pursuing this course, President Clinton, like President Nixon before him, unwisely has engaged in a litigation strategy that threatens to diminish the presidency. President Clinton not only has used his executive powers to defend himself and his White House from the Whitewater investigation, but he also has turned to the federal courts to vindicate his positions. There is an important difference here—one that I believe that Jefferson and Marshall understood—between executive power in the arena of politics and executive power in the courtroom. When President Clinton or President Nixon sought to stem their political losses by pressing expansive claims of executive power in the courts, they risk freezing in place, if not restricting, the scope of presidential authority. If anything, the rise (and success) of the modern Presidency is the story of the gradual expansion of executive power, seized or ceded to it often in times of crisis.<sup>136</sup> This growth has been made possible by the wide reading we have given to the *implicit* rather than explicit powers of the presidency.<sup>137</sup> In examining the constitutional text, it appears that the President's unilateral powers are relatively few: to serve as Commander-in-Chief, to negotiate (but not approve) treaties, to receive ambassadors, to nominate (but not appoint) federal judges and officers of the United States, to seek opinions of cabinet officers, and so on.<sup>138</sup> Other presidential powers have been read as being implicit in

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132. See Mark Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069 (1999).

133. See *In re Lindsey*, 148 F.3d 1100 (D.C. Cir.) (denying claim of attorney-client privilege between Deputy White House Counsel and President), *cert. denied*, 119 S. Ct. 466 (1998).

134. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir.) (denying existence of protective function privilege for Secret Service agents guarding the President), *reh'g en banc denied*, 146 F.3d 1031 (D.C. Cir.), *stay denied*, 148 F.3d 1079 (D.C. Cir.), and *cert. denied*, 119 S. Ct. 461 (1998).

135. See, e.g., *In re Sealed Case*, 119 S. Ct. 1 (1998) (denying application for stay).

136. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

137. See, e.g., *United States v. Curtiss-Wright*, 299 U.S. 304 (1936); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

138. See U.S. CONST. art. II.

those textual powers, such as the power of removal,<sup>139</sup> of directing law enforcement,<sup>140</sup> of conducting foreign relations,<sup>141</sup> and of executive privilege.<sup>142</sup>

The Constitution, however, did not compel the recognition of these latter powers, and their existence does not seem to compel the dominating place of the presidency in our political system today. Instead, the presidency has grown in size and authority due to delegations from Congress and the Constitution's ambiguity in regard to the boundaries of presidential power. Thus, it has not been the President's textually enumerated powers, but his structural superiority in exercising power, that has led to the "imperial presidency." As Charles Black has written,

what very naturally has happened is simply that power textually assigned to and at any time resumable by the body structurally unsuited to its exercise, has flowed, through the inactions, acquiescences, and delegations of that body, toward an office ideally structured for the exercise of initiative and for vigor in administration. The result has been a flow of power from Congress to the presidency.<sup>143</sup>

Pressing arguments about executive power, and allowing the judiciary to define the boundaries of presidential power, undermines the structural superiority of the executive branch by permanently limiting its flexibility and potential for growth.

Presidents have exercised even greater powers during crises, and they have been able to do so because judicial precedents had yet to hem in executive authority. It is difficult to argue, when we look at the notable examples of such exercises of power, that the country has been the worse off for it. For example, at the start of the Civil War President Lincoln engaged in a wartime mobilization of the North without authorization of Congress, and throughout the rebellion pressed presidential

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139. See *Morrison v. Olson*, 487 U.S. 654, 686-93 (1988). See also Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994), which seems to me to have the better of the argument over Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

140. See *Morrison v. Olson*, 487 U.S. at 695.

141. See *Curtiss-Wright*, 299 U.S. at 319.

142. See *United States v. Nixon*, 418 U.S. 683, 711 (1974).

143. Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 17, 20 (1974); see also HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 118-23 (1990).

powers to the limit to issue the Emancipation Proclamation and establish military governorships in the defeated South.<sup>144</sup> While some of Lincoln's actions eventually reached the Supreme Court, this did not happen at the urging of the administration, and many potential cases did not make it that far in the system. In the face of the Great Depression and a looming world war with the fascist powers, President Franklin D. Roosevelt also used his inherent authority to take emergency economic measures and to turn the United States into the arsenal of democracy. Again, many of Roosevelt's actions did not involve resort to the judicial system and his exercises of power were made possible by the ambiguous outlines of the presidency. Both Lincoln and Roosevelt espoused broad theories of presidential power, but their primary theater of action was in the political realm, where their claims of authority convinced other actors—whether it be Congress, or the military, or the general public—to follow, and not in the judicial realm. By not pressing their aggressive claims to unilateral authority in court, these and other presidents preserved the flexibility of the executive to expand its powers to respond to a dire situation. In a sense, they lived up to John Locke's ideal of the executive prerogative as a right to act against or even above the law in order to secure the public safety. Or, as Abraham Lincoln put it during the Civil War, Presidents sometimes have to break the law in order to save the Constitution.

Viewed in this context, the actions of Presidents such as Nixon and Clinton appear all the more damaging to the modern Presidency. When President Nixon lost *United States v. Nixon* in the Supreme Court, as he had in the district court and the D.C. Circuit, he permanently fixed the powers of the presidency in regard to executive privilege. After *Nixon*, future Presidents who might have a legitimate need to protect their communications for the good of the country still must suffer through the *Nixon* balancing test. When President Clinton lost *Clinton v. Jones* in the Supreme Court, as he had in the Eighth Circuit, he too created a fixed marker on the boundaries of presidential power to resist harassment by frivolous private lawsuits. If President Clinton pursues claims of Secret Service privilege, executive privilege, and attorney-client privilege, he

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144. Lincoln's actions have generated a substantial controversy concerning his attitude toward civil rights. See, e.g., MARK NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991); JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1926).

further risks permanently reducing the ability of future presidents to receive candid advice and even physical protection from his staff. To be sure, at times it may make sense for a President to risk the constitutional powers of his office when the stakes are high; if necessary, a President Lincoln ought to litigate his power to issue the Emancipation Proclamation. But when presidential authority is being risked not to protect the health and safety of the Republic, but instead to conceal personal scandal, one must question whether the presidents involved have exercised the powers of their office wisely.

It is useful to return to the *Burr* case to see how Jefferson and Marshall addressed this same tension between risking the powers of the presidency and protecting the public interest. More than Nixon and Clinton, Jefferson had legitimate reasons to resist judicial process and supremacy. He was fighting what he believed to be a conspiracy by an ambitious former Vice-President to dismember the young Republic. His government had placed Burr on trial for treason, and in response the defendant sought access to reports written by the General of the United States Army to the Commander-in-Chief about the plot. Marshall was not just conducting any trial, but one for the ultimate crime against the state: treason. He was seeking to remove the court from politics at a time when the court was thrust into the very center of the most controversial domestic issue of Jefferson's second term.

Nonetheless, Jefferson and Marshall—contrary to the beliefs of those on both sides of the judicial supremacy debate—both adopted a course of accommodation to the demands of the other branch. Jefferson never challenged the duty of the President to obey a judicial subpoena; while he raised the issue of convenience, he did not question its constitutionality. Marshall, for his part, acknowledged that presidents might have grounds to refuse to comply with a subpoena, although he thought it would rarely occur. When the issue was executive privilege, Marshall took steps to recognize the need to maintain certain state secrets, and even to keep some aspects of the President's affairs private. Jefferson also sought compromise at first; he turned over Wilkinson's first letter in toto and provided the court with the relevant portions of the second letter, aside from personal political information. While Marshall could have pressed harder for the complete letter, he chose not to, as he had essentially invited Jefferson to claim privilege over the confidential portions of the letter. By avoiding direct

confrontation, the President and Chief Justice enhanced the nation's political stability and preserved executive power for future presidents who would need it.

We have no window into Marshall's motivations at this time, but Jefferson's desire to avoid conflict in the interests of stability are suggested in his correspondence during the Burr trial. In an undated letter sent to Hay some time during the struggle over either the first or second subpoena,<sup>145</sup> Jefferson remarked that his efforts at compromise were "written in a spirit of conciliation and with the desire to avoid conflicts of authority between the high branches of government."<sup>146</sup> If the President and the Supreme Court were to war with each other, Jefferson believed, it "would discredit [the nation] equally at home and abroad."<sup>147</sup> Jefferson, however, was very conscious that a conflict might quickly erupt, and he asked Hay to have a quick messenger available to notify him should the court send a marshal to enforce the subpoena. He also suggested to Hay that he ask the marshal not to enforce a subpoena, so as to prevent a head-to-head confrontation.<sup>148</sup> Jefferson had little doubt that the executive branch would prevail in such a meeting of forces, but he took every step possible to defuse the looming inter-branch dispute. Hence, Jefferson attempted to comply with the subpoena before it was ever issued. Jefferson realized that Burr was attempting to manipulate the branches in order to derail his treason trial, but he trusted that the Chief Justice's "prudence or good sense" would help in avoiding a conflict.<sup>149</sup>

Although Jefferson's second term was not marked with the successes of his first, it perhaps was just as significant for what it avoided as for what it achieved. In shunning a head-on confrontation with the court, Jefferson's attitude toward Marshall has been much more accommodating than has been commonly assumed. While he privately believed in executive branch in-

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145. Paul Ford believes the letter was never sent, and estimates its timing around September, 1807, but Dumas Malone appears to have the better suggestion that the letter was sent at the time of the first subpoena in June, 1807. See MALONE, *supra* note 13, at 323 n.30.

146. Letter from Thomas Jefferson to George Hay (undated draft letter), *supra* note 52, at 407.

147. *Id.*

148. See *id.* ("[Y]ou will advise the marshal on his conduct, as he will be critically placed between us. His safest way will be to take no part in the exercise of any act of force ordered in this case.").

149. *Id.*

dependence from judicial process, the President publicly accepted the power of the judiciary to summon the executive and his papers. On the other hand, Jefferson was not the shrinking constitutional lily that the *Nixon* and *Clinton* Courts have thought. When the question of executive privilege arose, Jefferson asserted a right for Presidents to remain the sole judge of what information was to remain secret. Throughout, however, Jefferson did his best to reach an accommodation with the judiciary and to avoid decisions on the books concerning the extent of presidential power. Jefferson displayed wise presidential leadership by leaving for future presidents flexibility and the potential for growth in their authority, rather than seeking vindication from the judiciary.

#### APPENDIX: LETTERS FROM GENERAL WILKINSON TO PRESIDENT JEFFERSON

October 20, 1806.<sup>150</sup>

The following information appears to rest on such broad and explicit grounds, as to exclude all doubts of its authenticity:

A numerous and powerful association, extending from New York through the Western States, to the territory bordering on the Mississippi, has been formed, with the design to levy and rendezvous eight or ten thousand men in New Orleans, at a very near period; and from

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150. A printed version of this letter can be found in 2 JAMES WILKINSON, *MEMOIRS OF MY OWN TIMES*, app. No. XCV (1816). Wilkinson wrote the memoirs apparently as part of an effort to defend himself from charges of incompetence during the War of 1812, for which he was court-martialed. As a result, Wilkinson's letters seem at points to be edited in his favor, and they must be compared to the original handwritten versions, which can be found in the Burr Conspiracy Collection, MMC-1088, Manuscript Division, the Library of Congress. For example, Wilkinson's printed version of his October 21, 1806 letter to Jefferson appears to show that he signed both the covering letter and the allegedly confidential informant's letter of the previous day. The manuscript, however, clearly shows that the October 20, 1806 letter was unsigned, and that Wilkinson intended it to appear that someone else had written it.

The Burr Conspiracy file contains original documents concerning the conspiracy which had been in the possession of the Department of State, but which were then handed over to the Library of Congress in 1906. The file contains most of the correspondence between President Jefferson, Secretary of State Madison, the state and territorial governors, and the military commanders regarding the Burr Conspiracy. Some important letters, however, are missing, such as Wilkinson's letter to Jefferson on November 12, 1806. Unfortunately, therefore, we have only Wilkinson's printed version of the letter to go on. We also cannot determine what portions of the November letter Jefferson sought to redact from the version he offered to the court. One wonders what ever happened to the original.



thence, with the co-operation of a naval armament, to carry an expedition against Vera Cruz.

Agents from Mexico, who were in Philadelphia in the beginning of August, are engaged in this enterprise; these persons have given assurances, that the landing of the proposed expedition will be seconded by so general an insurrection, as to insure the subversion of the present government, and silence all opposition in three or four weeks. A body of the associates is to descend the Alleghany river, and the first general rendezvous will be held near the Rapids of the Ohio, on or before the 20th of next month, from whence this corps is to proceed in light boats, with the utmost possible velocity, for the city of New Orleans, under the expectation of being joined in their route by auxiliaries from the State of Tennessee and other quarters.

It is unknown under what authority this enterprise has been projected, from whence the means of its support are derived, or what may be the intentions of its leaders, in relation to the territory of Orleans. But it is believed that the maritime co-operation will depend on a British squadron from the West Indies, under ostensible command of American masters.

Active influential characters have been engaged in these transactions, for six or eight months past; and their preparations are reported to be in such a state of maturity, that it is expected the van will reach New Orleans in December, where the necessary organisation and equipments are to be completed with promptitude, and it is proposed that the expedition should sail for Vera Cruz about the 1st of February.

This information has recently reached the reporter through several channels so direct and confidential, that he cannot doubt the facts set forth: and, therefore, he considers it his duty to make this representation to the executive by a courier extraordinary, to whom he has furnished five hundred dollars; being persuaded, should it prove unfounded, his precaution will be justified, and that otherwise his vigilance will be applauded.

JA. WILKINSON.

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[CONFIDENTIAL.]

*Natchitoches, October 21st, 1806.*

Sir.—Whatever may be the general impropriety, I persuade myself that on a subject irrelative to my official obligations, I shall be excused for addressing you directly and confidentially; but I have another and a more cogent reason for deviating, in this instance, from the ordinary course of my correspondence. It is possible the momentous occasion of this letter, and the vital importance attached to it, may have excited sollicitudes to beguile my understanding and delude my judgment; and in such case I trust the integrity of the intention will secure me your confidence, and that this letter, with the communication it covers, may find their graves in your breast. For although

my information appears too direct and circumstantial to be fictitious, yet the magnitude of the enterprise, the desperation of the plan, and the stupendous consequences with which it seems pregnant, stagger my belief, and excite doubts of the reality, against the conviction of my senses; and it is for this reason I shall forbear to commit names, because it is my desire to avert a great public calamity, and not to mar a salutary design or to injure any one undesignedly. I have never in my whole life found myself under such circumstances of perplexity and embarrassment as at present; for I am not only uninformed of the prime mover, and ultimate objects of this daring enterprise, but am ignorant of the foundation on which it rests, of the means by which it is to be supported, and whether any immediate or collateral protection, internal or external, is expected. Among other allurements proposed to me, I am informed you connive at the combination, and that our country will justify it; but when I examine my orders of the 6th May, I am obliged to discredit it—these imputations. But should this association be formed in opposition to the laws, and in defiance of government, then I have no doubt that the revolt of this territory will be made an auxiliary step to the main design of attacking Mexico, to give it a new master in the place of promised liberty. Could the fact be ascertained to me, I believe I should hazard my discretion, make the best compromise I could with Salcedo, in my power, and throw myself with my little band into New Orleans, to be ready to defend that capital against usurpation and violence. It is true the works of the place have mouldered to ruin; yet I think they may by extraordinary exertions, in a few weeks, be rendered defensible against an undisciplined rabble acting in a bad cause. But, sir, with my instructions before me, and without evidence of the design, principle or support, of the corps of associates expected from the Ohio, I dare not turn my back on the Spaniards, now in my front, and abandon this scene of disaffection to the certain evils which, without some strong measure of prevention, may possibly accrue in New Orleans.

If it should be found necessary to the preservation of exterior engagements or internal security, or to the support of the laws and government, to oppose the meditated movements from the Ohio, I would recommend the immediate adoption of the following measures, viz: 1st. The troops from the bank of the Missouri, from St. Vincents, South-west Point, and Massae, to take post at the Iron Banks on the Mississippi, about fifteen miles below the mouth of the Ohio, with the artillery at those posts, and orders to prevent the passage of persons or property (down the river) except under such passports as you may think proper to prescribe. I prefer the Iron Banks, because the river at that point is confined to a narrow bed, and may be effectually commanded, and I would recommend Captain D. Bissel, now at Massae, for the command: 2d. A squadron of sloops of war and gun boats should be ordered to take possession of the mouth of the Mississippi within the bar, to prevent the entrance of all armed vessels and transports, unless particularly licensed by government: 3d. A competent regular force should be levied and organised to pursue the outlaws, to shut them up and compel them to surrender at discretion.

By the first step, it would be proposed to cut off supplies of provisions and prevent the junction of auxiliaries from the sources of insurrection. By the second, to destroy every hope and expectation founded on co-operation of maritime force: and the third speaks too plainly for itself to need explanation.

Amidst the uncertainty and doubts which perplex me, I feel disposed to adopt the following conclusions: should the conduct of the Spaniards in my front justify it, I shall take the precaution either to go myself, or to send Colonel Cushing, to New Orleans, with every man who may be safely detached from this point, in order to put the words of the Forts St. Charles, and St. Louis, in the best possible state of defence, time and things may enable me, to secure the cannon, arms, military stores and other public property, against any lawless attempt, by whoever made.

If the designs of the combination should be pointed against the government, our communication by mail will be cut off, and all doubtful characters travelling from this quarter towards the Atlantic will be stopt: I have, therefore, judged it expedient, to silence suspicion, and to secure and accelerate the arrival of this dispatch to your hands, to cause the bearer, Lieutenant Thomas A. Smith, a young officer of good promise and entire trust, ostensibly to resign his commission and quit the service; it is, therefore, necessary you should instruct the secretary of war to reject his resignation and continue him on the rolls; and I hope, sir, should he acquit himself with satisfactory discretion and promptitude, on the journey he has undertaken, that you may give him some mark of your approbation, and send him back to me. Reposing, with entire confidence, in your justice and your wisdom, that no application will be made of this letter, which the national interests do not exact; I hold myself ready to receive and execute your orders, when and where you may think proper to direct.

And am, Sir,

Your faithful and obliged soldier and servant,

JA. WILKINSON.

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*Seat of Major Minor, near Natchez, Nov. 12, 1806.*<sup>151</sup>

Sir.—I again intrude upon you the subject of the duplicate under-cover, which presents a spectacle of human depravity, to excite our sorrow, indignation and abhorrence.

Many circumstances have intervened since my last, confirmatory of the information previously received, and demonstrative of a deep, dark and wicked conspiracy. My doubts have ceased, and it is my opinion, that nought but an immediate peace in Europe can prevent an explosion which may desolate these settlements, inflict a deep

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151. 2 WILKINSON, *supra* note 150, at app. No. C.

wound on our republican policies, involve us in a foreign conflict, and shake the government to its very foundation.

I received from a correct source the information under cover, at Natchitoches on the 6th instant, and make no question of the facts, though I trust the report of the agent alluded to was a mere "ruse de guerre" to popularise and gain auxiliaries to the real design, "to seize on New Orleans, revolutionise the territory, and carry an expedition against Mexico by Vera Cruz." This is indeed a deep, dark and widespread conspiracy, embracing the young and the old, the democrat and the federalist, the native and the foreigner, the patriot of '76 and the exotic of yesterday, the opulent and the needy, the ins and the outs; and I fear it will receive strong support in New Orleans, from a quarter little suspected, from whence I have been recently addressed by a Gallo-American, formerly distinguished at Olmutz in a better cause. By masking my purposes and flattering his hopes, I expect to discover the extent and leading characters of the combination in that city; and, till is effected, I shall carry an equivocal exterior to every person who may see me, excepting my confidential officers.

My letter to the secretary of war will expose to you my military movements and intentions, which may, I hope, meet your approbation; and I intreat that you may be pleased to order him to honour the drafts which may be made on him for materials and other disbursements essential to the fortifying the city of New Orleans, to enable me to defend it, to repulse the assailants, and command the pass of the river.

You will perceive on inquiry that my means are greatly deficient, but may rest satisfied that nothing shall be omitted which can be accomplished by indefatigable industry, incessant vigilance and hardy courage; and I gasconade not when I tell you, that in such a cause, I shall glory to give my life to the service of my country; for I verily believe such an event to be probable; because should seven thousand men descend from the Ohio, and this is the calculation, they will bring with them the sympathies and good wishes of that country, and none but friends can be afterwards prevailed on to follow them: with my handful of veterans, however gallant, it is improbable I shall be able to withstand such a disparity of numbers; and it would seem we must be sacrificed unless you should be able to succour me seasonably be sea, with two thousand men and a naval armament, to command the mouth of the Mississippi.

To give effect to my military arrangements, it is absolutely indispensable, New Orleans and its environs should be placed under martial law; for without this, the disaffected can neither be apprehended nor banished; private property can neither be appropriated nor occupied for public purposes; the indiscriminate intercourse between town and country cannot be restrained, and my every disposition will of course be hourly and daily exposed to my adversaries. To effect this necessary measure, I must look up to your influence and authority. To insure the triumph of government over its enemies, I am obliged to resort to political finesse and military stratagem. I must hold out false colours, conceal my designs, and cheat my adversaries into a state of security, that when I do strike, it may be with more force and

effect; and therefore my own bosom, were it possible, should the sole repository of my determinations. But independent of considerations of policy, my personal safety will require the most profound reserve, to the last moment of indecision; for were my intentions exposed, there are more than three desperate enthusiasts in New Orleans, who would seek my life, and although I may be able to smile at danger in open conflict, I will confess I dread the stroke of the assassin, because it cannot confer an honourable death.

Having put the front of the troops in motion for New Orleans under Major Porter, and made arrangements for the rest to follow under Colonel Cushing, I left Natchitoches on the 7th instant, and arrived here the 11th, to pick up what intelligence I could of the doings above; to sound the public mind; to require a body of militia from the Governor, and above all, to find some intelligent, confidential agent, who would convey this dispatch to you, with certain oral communications which I dare not letter, because nothing less than an overt act will, in my judgment, warrant the official commitment of names, and none such has as yet been committed, within my knowledge.

Mr. Briggs, with whose good sense and integrity I have been long acquainted, is the only person to whom I could venture to confide the important commission; and he, at my pressing instance, under the assurance I have ventured to make him of your approbation, has agreed to absent himself from his office; under some feigned pretext, and to hand this to you; and to guard against the loss of life or limb, and the casualties of disease, I have associated an attendant with him, who will proceed with my packet in case any accident should happen to Mr. Briggs.

JA. WILKINSON.

