A Thesis
Entitled

Struggle to Define the Power of the Court:
President Thomas Jefferson v. Chief Justice John Marshall

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# Table of Contents

Acknowledgments iii

Table of Contents iv

Introduction 1

I. Last Minute Shuffle: John Marshall's Appointment as Chief Justice 9

II. The Initial Encounter 37

III. Unraveling the Federalist Judiciary 53

IV. Courtroom Intoxication: Impeachment of Federal Judges 87

V. The Final Straw: Treason Defined 123

Conclusion 173

Bibliography 179
"Thomas Jefferson presents his compliments to General Marshall. He had the honor of calling at his lodgings twice this morning, but was so unlucky as to find that he was out on both occasions. He wished to have expressed in person his regret that a pre-engagement for to-day which could not be dispensed with, would prevent him the satisfaction of dining in company with General Marshall, and therefore begs leave to place here the expressions of that respect which in company with his fellow citizens he bears him."\(^1\)

Jefferson left this note for Marshall in Philadelphia after the latter's return from France where he served as an envoy in the XYZ Affair. Evidently, Jefferson made a mistake and first wrote that he was "so lucky" to have missed Marshall, but then corrected it by inserting "un." Marshall later referred to the note as the only time Jefferson came close to telling the truth.\(^2\)

Marshall witnessed revolutionary France, which shaped his philosophy of government contrary to Jefferson's admiration for the French revolutionary ideals. Government ideology was one of the conflicts of interest between Marshall and Jefferson, but political differences have always existed between people. What makes the Jefferson/Marshall differences unique is the influence that their politics had on the judiciary system then and now. As evidenced by the aforementioned story, they had developed a sort of rivalry that was accelerated and publicized after Marshall's


\(^2\) Schachner, 606.
appointment as chief justice in January 1801, and Jefferson's inauguration in March of the same year.

The sources used to elucidate the argument are letters, documents, and other historians' perspectives. Both Marshall and Jefferson's personal papers have been published, however, the latter's far outnumber the former's, which has posed a problem providing balance to their insights on events. Secondary sources have been used to show how Marshall has been portrayed, which has perpetuated the romanticism of the Marshall Court. The point is to show that the changes Marshall made were not smoothly implemented into the judiciary. Jefferson fought any alteration that would give the judiciary independence or strength.

This thesis will examine four events that shaped the court and the executive's power between 1801 to 1807. The first three, the *Marbury v. Madison* decision, the repeal of the Judiciary Act of 1801, and the Impeachment of Federalist judges, occurred within the first few years and show how the power struggle evolved into the final showdown of the Aaron Burr treason trial. The Burr trial was an arena where the president and the chief justice faced off in a highly publicized trial that dealt with the most serious of crimes allegedly performed by the former vice president.

The first chapter, "Last Minute Shuffle," examines the early history of the court and Marshall's appointment. At the time, the American government was in a developmental stage and President George Washington served as the model for the executive branch. The judiciary, however, was not an equal branch and was disregarded by the citizens and even the men who served on the Court. John Jay was appointed the first chief justice but retired to run as governor of the state of New
York. John Rutledge, a recess appointment whom the Senate never confirmed, succeeded him, and Oliver Ellsworth, the third chief justice and diplomat, resigned for health reasons. The chief justiceship was not a desirable position since the Court performed time-consuming circuit duties and few significant cases were appealed to the Supreme Court.

When Ellsworth resigned, Adams knew he could either promote an associate justice or appoint someone outside of the Court, but he carefully, quickly, contemplated because he did not want the incoming Republican party to have the opportunity to make an appointment. Justice William Cushing of Massachusetts had seniority, followed by Justice William Paterson of New Jersey. Adams hesitated at promoting Cushing because illness often prevented his attendance which might lead to his resignation during the Jefferson administration, therefore guaranteeing a Republican chief justice. The President explored options outside of the Court, but there were too many complications to insure a Federalist chief justice. Marshall's appointment as chief justice was one of judgeships President Adams appointed before he left office in March, 1801. When Jefferson took the presidential oath of office from Secretary of State/Chief Justice John Marshall on March 4, 1801, he was prepared to fight the judiciary at all costs.

Jefferson disagreed with a strong judicial branch because the Court may override the Constitution and infringe on states’ rights; he said “the spirit of Marshallism” must be eliminated. Chapter two examines one of Jefferson’s attempts
to “humble the court.” The new president refused to deliver commissions to justices of the peace whom Adams had appointed and were approved by Secretary of State Marshall, but not delivered to the appointees. William Marbury demanded his commission, Secretary of State James Madison refused, and the case went to the Supreme Court. In what has been deemed a case of historic legal importance, the Marbury v. Madison decision was a powerful display of judicial power that tested the doctrine of judicial review. The precedent of judicial review had long-lasting effects and has been the focus of numerous studies, however, judicial review was not the main issue at the time. Marbury v. Madison was the first instance where Marshall and Jefferson flexed their muscles as chief justice and president. Jefferson was not pleased with the decision and he expressed his disproval throughout the rest of his life. For example, on June 12, 1823, he reminded Justice William Johnson of Marshall's practice of "traveling out of his case to prescribe what the law would be in a moot case not before the court."4

The Marbury v. Madison case was introduced in the Supreme Court in 1801, but was not decided until 1803 because Jefferson and the Republicans abolished the Court for fourteen months. Chapter three examines how the Federalists, during a lame-duck session, passed an act that replaced the Judiciary Act of 1789. Signed on February 13, 1801, the Federalists attempted to maintain power in at least one government branch before the Republicans took over in March. It abolished the

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Supreme Court justices’ tradition of riding circuit, a task that was burdensome and problematic since Supreme Court justices could hear a case in the circuit court and if appealed, hear it again in the high court. The act created more districts to accommodate westward expansion and circuit court judges and district judges to hear district cases. The Federalists changed the number of Supreme Court justices from six to five, claiming that the Court would appear unified without possible tied decisions. In reality, the Federalists intended to prevent the Jefferson administration from nominating a justice. Simultaneously, the Organic Act for the District of Columbia created new judges and justices of the peace, commonly called Adams’s “midnight appointments.” The administration withheld the appointments in *Marbury*, and the Repeal Act of March 1802 reestablished six Supreme Court justices and circuit court riding. The repeal also abolished the 1802 session by reinstating one session of Court rather than two; the Court did not meet between December 1801 and February 1803.

The Judiciary Act of 1801 and its repeal were deliberate attempts by both Federalists and Republicans to withhold power from the other party. However, the problem of riding circuit was a legitimate issue and had been since Washington's administration. In fact, Washington asked the justices to give his recommendations about how to make the court more effective. Circuit court duties were the biggest complaint of the justices and because Congress did not make the adjustments, Jay refused to accept a second term as chief justice and the justices were not able to effectively do their duties. This chapter provides insight into the history and inner workings of the Court and unfortunately, by looking at the evidence, it was a shame
that the two parties did not put aside their issues and strengthen the judiciary. However, the Federalists did not seriously consider it until they needed it for their advantage and Jefferson's fear of a strong judiciary would not allow him to consider changes.

Outspoken Federalist judges that the Republicans charged with conduct unbecoming, was another judiciary problem that the Republicans attacked and is discussed in chapter four, "Courtroom Intoxication." Republicans charged Federalist judges, Alexander Addison, John Pickering, and Samuel Chase with impeachable offenses. Jefferson led this attack, but mainly from the background as he rallied the forces behind John Randolph of Roanoke, leader of the prosecution in the Chase trial. The Republicans tested the water with the Addison and Pickering trials and then went after Supreme Court justice Samuel Chase. In this chapter, Marshall and Jefferson were in the background; Marshall anticipated the decision by the House of Representatives and Jefferson advised Randolph and gave favors to Vice President Aaron Burr who presided over the trial. The outcome had huge effects for both the executive office and the judiciary. William Plumer's Memorandum of Proceedings in the United States Senate, 1803-1807 provided a record of the trial and insight into some of the personalities of the people present. The trial occupied the House in the winter of 1804 to 1805 and after Chase's acquittal, Jefferson was more determined than ever to strike hard at the judiciary's power.

The final face off between Jefferson and Marshall discussed here is the treason trial of Aaron Burr. The details of Burr's conspiracy are amazing and interesting and Virginia's district court, over which Marshall presided, was the place...
where Jefferson was more determined than ever to reign in the judiciary. Like the chapters before, Jefferson was not physically present, but his presence was prominent through District Attorney George Hay. However, even with Jefferson's legal allowances to pardon any useful witness, the prosecution was not able to prove beyond a shadow of a doubt that Burr was guilty of treason. Marshall adjusted his earlier decision in *Bollman v. Swartwout*, to a more clarified version of treason, saying that two witnesses must be present in order to prove guilt. Jefferson was furious and moved to have Burr tried on misdemeanor charges in the district courts. His attempt was not successful and the power of the Court overstepped what the president tried to achieve, even at the expense of civil liberties.

The Burr trial is seen as the climax of the Marshall/Jefferson power struggle from 1801 to 1807. Clearly there are many events and details that remain hidden. The tension developed or escalated with Jefferson's "unlucky" message for Marshall, probably existing long before either were placed into the heads of two of the governmental branches. The early years of Marshall and Jefferson's terms are crucial to understanding the development of the power of the judiciary. Although the three branches were supposedly created equal, the judiciary lagged behind in gaining respect and when Marshall entered as chief justice that began to change, even with the president standing in the shadows conducting full fledged attacks.

Marshall and Jefferson both had strong convictions on the Constitution and the distribution of power in the government. Marshall believed in a strong judiciary while Jefferson pushed the executive to be the most powerful governmental branch and feared an independent judiciary. It is important to remember that Marshall and
Jefferson were politicians and did what they could in order to further their political beliefs. The purpose here is to show how the battles between President Jefferson and Chief Justice Marshall defined the court's power. There has always been a battle over the interpretation of the Constitution and each contest reflects the politics of the day, and 1801 to 1807 was no exception.
CHAPTER 1

LAST MINUTE SHUFFLE:

JOHN MARSHALL’S APPOINTMENT AS CHIEF JUSTICE

In January 1801, outgoing president John Adams frantically attempted to maintain federalist control of the Supreme Court after the ailing Chief Justice Oliver Ellsworth resigned at the most inopportune moment. Adams, who lost his reelection campaign to Thomas Jefferson, faced a dilemma in filling the Court’s highest position before inauguration day in March. Adams’s initial reaction was to reappoint the first chief justice John Jay because of his experience; however, Adams anticipated Jay’s refusal and debated whether or not to promote an associate justice or someone outside of the court. Secretary of State John Marshall delivered Jay’s rejection letter to Adams. Marshall recalled in his autobiography, “When I waited on the President with Mr. Jay’s letter declining the appointment, he said thoughtfully, ‘Who shall I nominate now’? I replied that I could not tell, as I supposed that his objection to Judge Patteson [sic] remained. He said in a decided tone, ‘I shall not nominate him.’ After a moments hesitation he said, ‘I believe I must nominate you.’ I had never before heard myself named for the office and had not even thought of it. I was pleased as well as surprized, [sic] and bowed in silence.”

Congress approved Marshall’s nomination in January and on February 4, 1801, he was sworn in as the fourth chief justice. Until Marshall’s tenure from 1801 to 1835, the Supreme Court of the United States lacked leadership and the other two branches of government, as well as most citizens discounted the Court's authority. Marshall set the precedent for leadership and unity, essential elements in the Court’s continuous struggle to achieve equality with the other two branches of government against the newly empowered Republican party.

Oliver Ellsworth had sent his resignation as chief justice to President Adams after he completed his duties as ambassador to France. Adams received the letter in mid-December, after the House of Representatives announced its decision on December 12, 1800, that Thomas Jefferson and Aaron Burr were tied in the presidential election. At this point in his career, Adams was estranged from many of the Federalists and therefore sought no counsel for Ellsworth’s replacement.2

Adams’s immediate choice, as noted, was former chief justice, John Jay who had resigned from office in 1795 to be candidate for governor of New York and planned

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2 Historian Manning J. Dauer thoroughly examined the split in the Federalist Party in his work, *The Adams Federalists* (Baltimore: The Johns Hopkins Press, 1953). A brief explanation for the purposes of this particular discussion is as follows. Adams asserted his independence from the extreme Federalists, called the High Federalists, led by Alexander Hamilton. The High Federalists called for more extreme measures in domestic and foreign policy than the moderate Federalists desired. One example is that the High Federalists were in favor of war with France, aiming to abolish the French threat in the west, but for American political benefits, Adams favored peace. For example, Adams believed that France would welcome a peace delegation and compensate the Americans for shipping losses. Adams was considered a moderate, but Dauer said “it was a general characteristic of the Hamiltonian wing to view Adams as further removed from them than he was.” Ibid., 90. When Adams assumed the presidency, Dauer reported that “the cabinet which Adams inherited from Washington was of mediocre ability” and “accustomed to consult with Alexander Hamilton on all important matters of policy.” Ibid., 121-122. Cabinet members included Timothy Pickering, Secretary of State, Oliver Wolcott, Treasury Secretary, James McHenry, Secretary of War, Benjamin Stoddert, Secretary of the Navy. Dauer detailed the cabinet members on pages 123-125. Historian Joseph J. Ellis argued that Adams sought to defy partisan politics with his decisions. President George Washington, who believed that the presidency should rise above both Federalists and Republicans, influenced Adams's position. Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Knopf, 2000), 192-195.
to resign as governor in 1801. Adams told Jay that this decision was “as independent of the inconstancy of the people as it is of the will of a president. In the future administration of our country,” Adams continued, “the firmest security we can have against the effects of visionary schemes or fluctuating theories, will be in a solid judiciary.” Hoping to convince Jay, the president said, “nothing will cheer the hopes of the best men so much as your acceptance of this appointment.” To justify his hasty appointment, Adams told Jay that “it appeared to me that Providence had thrown in my way an opportunity . . . of furnishing my country with the best security its inhabitants afforded against the increasing dissolution of morals.” Another reason for Adams's confidence in Jay was that he had continuously supported Adams even after many Federalists had sided with Alexander Hamilton. Adams believed that the Senate would easily approve Jay's appointment since he had been President George Washington's choice in 1789.

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5 Kathryn Turner, “The Appointment of Chief Justice Marshall,” *The William and Mary Quarterly* 17 (April 1960), 145. Jay turned down the appointment mainly because of the requirement that the judges travel to preside over the circuit courts. In his refusal of the chief justiceship, he recalled that when the Judiciary Act passed, Congress said that they would later remove this requirement "as the public mind became more composed and better informed." However, Jay remarked, "those expectations have not been realized nor have we hitherto seen convincing indications of a disposition in Congress to realize them. On the contrary, the efforts repeatedly made to place the Judicial Department on a proper footing have proved fruitless.” Jay to Adams, 2 January 1801, *Correspondence and Public Papers of John Jay*, vol. 4, 284-285. The debate on circuit riding will be renewed in the chapter on the repeal of the Judiciary Act of 1801.
Without consulting Congress or even Jay, Adams sent the appointment to the Senate and it was approved; however, there were doubts concerning the probability of Jay’s acceptance. John Marshall wrote to Charles Cotesworth Pinckney on December 18 and commented, “. . . Mr. Jay has been nominated in his [Ellsworth’s] place. Shoud [sic] he as is most probable decline the office I fear the President will nominate the senior Judge.”6 In his letter, Marshall made reference to the ailing Senior Judge William Cushing, age sixty-eight, whose health complicated Adams’s decision to promote a justice inside the court. Federalist power was waning, and they feared that if Cushing were appointed he could either retire or die during the next administration, allowing the next president, either Jefferson or Burr to make an appointment. Following the line of seniority, Justice William Paterson was a favorite among Federalists, but Adams balked at the idea of passing over Cushing. Some Federalists saw this as Adams’s defiance of the party since most had anticipated Paterson’s nomination if Jay did not accept. James McHenry wrote to Oliver Wolcott, “Mr. Adams, it strikes me, has committed another blunder, but it is true one not altogether so rare . . . . Here it was expected by every body, that he would have named Mr. Patterson [sic] to the vacant seat on the bench.”7

Marshall said in his autobiography that he suggested Paterson but, “The president objected to him, and assigned as his ground of objection that the feelings of

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7 James McHenry to Oliver Wolcott, 22 January 1800, Bernard C. Steiner, The Life and Correspondence of James McHenry (New York: Arno Press, 1979), 490. James McHenry served as
Judge Cushing would be wounded by passing him and selecting a junior member of the bench. I never heard him assign any other objection to Judge Patteson [sic], though it was afterwards suspected by many that he was believed to be connected with the party which opposed the second attempt at negotiation with France.”

Other evidence of Federalist support for Paterson came from Samuel Sewall’s letter to Theodore Sedgwick at “his pleasure at the prospect of Paterson’s succession as chief justice,” and added, “The Judiciary is now almost the only security left us—and it is at all times the most important branch of the federal government.”

Whether Adams purposely defied the Federalists or sincerely wanted to respect Cushing is debatable, but most likely he wanted to assert his independence from the extreme party members.

The difficulty Adams faced in selecting a chief justice was accelerated by the strife with some of the other Federalists. The publication of Adams’s correspondence with his wife Abigail and their son, Thomas, revealed that while Congress anticipated Paterson’s promotion, it feared losing an appointment on the Bench if the Judiciary Act passed while there was a vacancy in the Court. Hoping to prevent this, Adams attempted negotiations with Pennsylvania’s district attorney and leader of the state

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9 Turner, 158.
Ingersoll was one of a few Federalist appointees who did not want to serve if the Federalists lost the election. He had expressed his concerns to Thomas Adams, who lived in Philadelphia. The president wrote his son, entrusting him to persuade Ingersoll to withhold his resignation until March 3, 1801. He alluded to a possible higher appointment for the district attorney, but Adams did not intend to appoint Ingersoll as chief justice. He explained that if he chose to elevate a justice to chief justice, he would subsequently appoint Ingersoll to the vacant assistant position on the Bench. However, Ingersoll was concerned about the justice’s duty of riding circuit that required months of traveling to the district courts. Circuit duty was one of the revisions included in the Judiciary Act of 1801, and Ingersoll wanted to wait and see if the act would pass before he committed to a position on the Bench. Ingersoll’s hesitation complicated Adams’s plan. Federalists, not privy to Adams’s appointment filling strategy, pressured him to make a decision.

While waiting for Jay’s response to his offer, Adams anticipated the passage of Federalist proposed reforms for the judiciary. The Federalists called for a reduction in the number of Supreme Court judges from six to five at the next opening.

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10 This information was not included in the eminent works of Supreme Court historian, Charles Warren, *The Supreme Court in United States History*, vol. 1, 1789-1821 (Boston: Little, Brown, and Company, 1922), and Marshall biographer, Albert J. Beveridge, *The Life of John Marshall* 4 vols. (Boston: Houghton Mifflin, 1916-1919) because the letters were not available to the authors at that time. Kathryn Turner revealed the story of Ingersoll’s consideration in “The Appointment of Chief Justice Marshall.”

11 Thomas Adams to John Adams, 14 December 1800, Letters Received, Adams Papers, quoted in Turner, 147.

12 John Adams to Thomas Adams, 17 December 1800, Ibid., 148.

13 Ibid., 147-149.

14 The Judiciary Act of 1801 and the Repeal of 1802 is the subject of chapter three.
Adams did not want to risk an opening in the Court by elevating a justice in case the Republicans in the Senate took the opportunity to pass the bill that would limit the number of justices and leave the Federalists without an opportunity to appoint and strengthen the judiciary.\textsuperscript{15}

As the vote on the judiciary bill drew near, Congress was concerned about Adams’s plan for the Supreme Court. Benjamin Stoddert, Secretary of the Navy, joined the Congressional effort to insure a Federalist stronghold. Stoddert, unable to visit the president, wrote to Adams. “As the bill proposes a reduction of the Judges to five—and as there are already five Judges in commission, it is suggested that there might be more difficulty in appointing a chief Justice without taking him from the present Judges, after the passage of this bill even by one Branch of the Legislature, than before.”\textsuperscript{16} Both Adams and the Federalists realized the advantage they calculated with the Judiciary Act would be jeopardized if they waited too long to name a chief justice. The greatest advantage for Adams asking Marshall was the convenience of an immediate answer; Marshall was in Adams’s office and could answer verbally unlike waiting for a written reply.

After Marshall’s nomination, Federalist leaders proposed a compromise with Adams for Paterson instead, but the Judiciary Act passed in the House the day after Marshall’s nomination, and most Federalists feared that if they did not approve Marshall another nomination might not be approved before the next administration.\textsuperscript{17}

\textsuperscript{15} Turn\textsuperscript{er}, 150.

\textsuperscript{16} Benjamin Stoddert to John Adams, 19 January 1801, Letters Received, Adams Papers, quoted in Turn\textsuperscript{er}, 154.

\textsuperscript{17} Turn\textsuperscript{er}, 160; Warren, 174-177.
Why Adams refused to compromise and elevate Paterson is uncertain because at one point he did consider him for appointment.\textsuperscript{18} Historian Kathryn Turner asserted that perhaps “it seems more probable that the President, confronted now by a request that he alter the nomination, and resenting this as an unwarranted intrusion upon his authority, flew into one of the tempers for which he was noted at the implied criticism of his judgment and refused any suggested compromise.”\textsuperscript{19}

The Senate postponed a vote for one week, but "finding Adams inflexibly opposed to Paterson," they surrendered any further attempts to negotiate, and with a few weeks remaining in the Adams administration, the Senate on January 27, unanimously confirmed Marshall’s appointment.\textsuperscript{20} Just over a week later, the Senate passed the Judiciary Act; thus, six Federalists had their places secured on the Bench. The court faced an incoming Republican administration that would have to wait for two vacancies before appointing one of their own. Most of the Federalists were reluctant about Marshall’s appointment. James Hillhouse of Connecticut worried about Paterson’s morale, “that the feelings of so honorable and able a Judge should be wounded, as I have no doubt he will be, by having a younger lawyer, not more eminent in that line, put over his head.”\textsuperscript{21} New Jersey senator Jonathan Dayton wrote to Justice Paterson about Marshall’s confirmation in the Senate:

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\textsuperscript{18} John Adams to Thomas Adams, 23 December 1800, Letters Received, Adams Papers, quoted in Turner, 159; Abigail Adams to Thomas Adams, 25 December 1800, Ibid.
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\textsuperscript{19} Turner, 160.
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\textsuperscript{20} Warren, 176. Warren noted that "the fact that John Marshall attained the Chief Justiceship, in the face of pronounced Federalist opposition, and only because of the obstinacy of John Adams, is not generally known." Warren, 176-177. Samuel Dexter, Secretary of War, momentarily became secretary of state to sign Marshall’s commission.
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\textsuperscript{21} Ibid., 175-176.
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The delay which has taken place was upon my motion for postponement, and was intended to afford an opportunity for ascertaining whether the President could be induced under any circumstances whatever to nominate you. If we could have been satisfied of this, we should have taken measures to prevail upon Mr. Marshall to have himself declined the highest, for the lower seat, upon the bench, or in case of his refusal, have negatived [sic] him . . . . It must be gratifying to you to learn that all voices with the exception of one only, were united in favor of the conferring of this appointment upon you. The president alone was inflexible, and declared that he would never nominate you. Mr. Marshall lest another not so well qualified, and more disgusting to the Bench, should be substituted, and because it appeared that this gentleman was not privy to his own nomination, but had previously exerted his influence with the President in your behalf.\(^{22}\)

Paterson, however, approved of Marshall, and moreover, wrote back to Dayton displeased at his harsh words about Marshall and Adams.\(^{23}\) Paterson also wrote to Marshall, and although that letter has not survived, Marshall’s response to Paterson evidences its contents. Marshall wrote, “I had this instant the pleasure of receiving you letter of the 26\(^{th}\) of January. For your polite & friendly sentiments on the appointment with which I have been lately honor’d [sic] I pray you to accept my warm and sincere acknowledgements.”\(^{24}\)

Although Federalists were reluctant to approve Marshall because it would overlook Paterson and did so only in the face of potential Republican consequences, Adams was proud of his appointment. To Marshall’s son, Adams said, “My gift of John Marshall to the people of the United States was the proudest act of my life.”\(^{25}\) Even though the nomination surprised Marshall, since he thought Cushing would be

\(^{22}\) Turner, 161; Warren interpreted Dayton's letter as Federalist fear that "another four years of his administration would expose them to destruction." Warren, 177.

\(^{23}\) Warren, 177.


\(^{25}\) Quoted from Warren, 178.
the president’s choice, he was adequately prepared for the appointment.\textsuperscript{26} Marshall’s experience included, congressional duties, ambassador to France, secretary of state, as well as training and skill in the law. Aside from his congressional service, Marshall had filled positions offered to him by Adams. However, during the Washington administration, Marshall turned down several appointments offered by the commander-in-chief, citing duty to his family and his law practice in Richmond. In fact, Marshall reluctantly continued congressional service only after the retired Washington pressured him to run.\textsuperscript{27}

Even though Marshall did accept Adams’s appointment to France and as secretary of state, he longed to return home to Virginia. As he told Pinckney on December 18, 1800, “I shall return to Richmond on the 3\textsuperscript{rd} of March to recommence practice as a lawyer. If my present wish can succeed so far as respects myself I shall never again fill any political station whatever.”\textsuperscript{28} But Marshall had expressed these same sentiments when Adams appointed him Secretary of State the previous year:

I had not been long in Virginia when the rupture between Mr. Adams and Mr. Pickering took place, and I was nominated to the senate as secretary of state. I never felt more doubt than on the question of accepting or declining the office. My

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\textsuperscript{26} Marshall to Charles Cotesworth Pinckney, 18 December 1800, \textit{Papers of John Marshall}, vol. 6, 41.
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\textsuperscript{28} Marshall to Charles Cotesworth Pinckney, 18 December 1800, \textit{Papers of John Marshall}, vol. 6, 41.
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decided preference was still for the bar. But on becoming a candidate for Congress I was given up as a lawyer, and considered generally as entirely a political man. I lost my business altogether [sic], and perceived very clearly that I could not recover any portion of it without retiring from Congress. . . . the office was precisely that which I wished, and for which I had vanity enough to think myself fitted. I should remain in it while the party remained in power; should a revolution take place it would at all events relieve me from the competition for Congress without yielding to my adversaries, and enable me to return once more to the bar in the character of a lawyer having no possible view to politics. I determined to accept the office.²⁹

Therefore, regardless of Marshall’s deep-seeded desire to practice law, he was realistic that in order to be successful he would have to start over building his business again. Competition between lawyers swelled in Richmond and the secretary of state position would insure an adequate salary.³⁰ Marshall may have considered these factors when Adams shockingly said, “I believe I must nominate you,” after Marshall delivered Jay’s letter refusing the position.³¹ Perhaps Marshall believed that he was one of the strongholds that would survive the fading hours of Federalist power; Adams held the same confidence in him.

Marshall had earned the trust of the president. One Adams historian, Ralph Adams Brown, asserted that, “From John Adams’s viewpoint, the one bright spot in all of this political in-fighting was the increasingly effective leadership of John Marshall in the House. More and more the Virginian demonstrated courage and resourcefulness in supporting the president’s policies, and gave Adams cause to


³⁰ Marshall and his family enjoyed a modest, but comfortable lifestyle that he hoped to maintain and he was making payments on land he and his brothers-in-law had purchased, Jean Edward Smith, *John Marshall, Definer of a Nation* (New York: Henry Holt and Company, 1996), 267.

Both Adams and Marshall separated themselves from the party, especially the High Federalists. Marshall held strong views on the Constitution and voted against the party on issues that he believed violated individual freedoms, such as the Alien and Sedition Laws, “An Act to define more particularly the crime of treason” that targeted free speech and freedom of the press. On another occasion, Marshall voted with the Republicans against the Disputed Elections Bill that attempted to alter the process of choosing president by installing a Grand Committee of the House and Senate that would decide a presidential election in the event of an electoral dispute instead of the House of Representatives as stated in Article II of the Constitution. During the sixth session of Congress, Marshall developed confidence in voting against the High Federalists and this strengthened his bond with Adams as moderates in the party.

However, Adams’s confidence in Marshall did not quiet the fears and disgust of Republicans. Perhaps the Republicans were mostly outraged for Adams’s defiant appointment against the preferred Paterson, but the Aurora, the Republican organ, cited Marshall as “more distinguished as a rhetorician and sophist than as a lawyer and statesman, sufficiently pliant to succeed in a corrupt court, too insincere to

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33 Dauer, 162.

34 Biographers Albert Beveridge and Jean Edward Smith simplistically stated the relationship between Adams and Marshall, presenting the idea that they were each other's only allies. Beveridge, vol. 2, 457; Smith, 263.
command respect or confidence in a republic.” 35 Although Marshall sided with moderate Federalists, he would never side with Jefferson. Charles Cotesworth Pinckney wrote to James McHenry, “Marshall with reluctance accepts, but you may rely on his federalism, and be certain that he will not unite with Jefferson and the Jacobins.” 36

The animosity between Marshall and Jefferson was evident, and Republicans were especially angry about Marshall’s preference for Burr. In a letter to Edward Carrington, Marshall remarked on the close 1800 election, “In the event of equality it is extremely doubtful who will be the President. I take no part and feel no interest in the decision. I consider it as a choice of evils and I really am uncertain which would [sic] be the greatest. So far as I can learn however from what passes around me I really think the probability in favor of Burr. It is not beleivd [sic] that he woud [sic] weaken the vital parts of the constitution, nor is it beleivd [sic] that he has any undue foreign attachments.

These opinions incline many who greatly disapprove of him yet to prefer him to the other gentleman who is offerd [sic] to the choice.” 37 Marshall, however, expressed neutrality when Alexander Hamilton encouraged him to support Jefferson. Even though Hamilton and Jefferson had their differences in the past, Hamilton staunchly despised Burr, and encouraged Marshall to feel the same. Hamilton’s letter

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35 Turner, 158; *Aurora*, June 12, 1800, quoted from Warren, 181.
36 Charles Cotesworth Pinckney to James McHenry, date not provided, *Life and Correspondence of James McHenry*, 459-460.
to Marshall has not survived, but Marshall’s reply indicates Hamilton’s opinion of Burr, “Such a man as you describe is more to be feared and may do more immediate if not greater mischief. . . . but I can take no part in this business. I cannot bring my self to aid Mr. Jefferson.”38 Even with the claim of neutrality, Republicans interpreted Marshall as an opponent of Jefferson and the Republicans, and remembered this lack of support throughout Jefferson’s term in office.

After Jefferson’s victory was secure, Marshall questioned Jefferson’s intentions as president. In a February 26, 1801, letter to Rufus King, Marshall doubted Jefferson’s willingness to maintain strength in the national government, “The course to be pursued in future is of more importance and is not easily to be determined [sic] by those who have no place in the confidence of the President elect. So far as relates to our domestic situation it is believed [sic] and feared [sic] that the tendency of the administration will be to strengthen the state governments at the expense [sic] of that of the Union and to transfer as much as possible the powers remaining with the general government to the floor of the house of representatives.”39 Jefferson, claiming to support the people, and believing the House as the people’s most representative branch of government, would closely connect himself with the House. Marshall saw this as a ploy to strengthen Jefferson’s personal power, “He will diminish his responsibility, sap the fundamental principles of the government and become the leader of that party which is about to constitute the majority of the

38 Marshall to Alexander Hamilton, 1 January 1801, Ibid., 46-47.

39 Marshall to Rufus King, 26 February 1801, Ibid., 82-83.
Concerning cooperation with Great Britain, “My private conjecture is that the government will use all its means to excite the resentment and hate of the people against England without designing to proceed to actual hostilities.”

Marshall knew that he and Jefferson would not agree on particular policies of the executive and Jefferson understood their differences as well. To John Dickinson, Jefferson wrote, “My great anxiety at present is, to avail ourselves of our ascendancy to establish good principles and good practices . . . . On their part, they have retired into the judiciary as a stronghold . . . . By a fraudulent use of the Constitution, which has made judges irremovable, they have multiplied useless judges merely to strengthen their phalanx.” Historian Adrienne Koch, agreed with Jefferson’s concerns on the judiciary said that Jefferson’s days of fighting the Federalists were not over and the judiciary led by Marshall “was ready to challenge and obstruct the two elected branches of the government, the executive and the legislative.”

Marshall and Jefferson’s differences are brought into sharp relief when one examines their beliefs in the roles of the branches of government and the relationship between the state governments and the national government. But political differences separated scores of men during this period, so the Marshall/Jefferson debate runs deeper than interpretations of the Constitution. While they had remarkable

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40 Marshall to Alexander Hamilton, 1 January 1801, Ibid., 46.

41 Marshall to Rufus King, 26 February 1801, Ibid., 82-83.


similarities, their differing personalities separated the two and personal incidents escalated the drama. Both were Virginia natives born on the frontier, Jefferson in 1743 and Marshall in 1755.

They were distantly related through the prestigious Randolph line, William Randolph of Turkey Island and Mary Isham of Bermuda Hundred, sometimes referred to as the “Adam and Eve of Virginia;”44 Jefferson’s mother and Marshall’s maternal grandmother were first cousins. However, Marshall’s grandmother, Mary Randolph Keith, was ostracized from the Randolphps because she was married to men whom the Randolphps disapproved. Her first husband was a slave overseer and together they had a child. Family stories say that the Randolphps killed both her husband and child, and took her to her parents who lived at Tuckahoe. This dramatic episode allegedly drove Mary insane, but she recovered and married again. The Randolphps disliked Mary’s second husband, the Reverend James Keith, and used their authority in the parish to force his resignation. Keith’s exile was eventually rescinded and the two were married and lived in the Virginia frontier where Marshall’s mother was born and raised. Later in life, Mary Randolph Keith received a letter that claimed to be from her first husband which rekindled her mental instability and questioned the legitimacy of her marriage to Keith. During John Marshall’s life, he downplayed his connection to the Randolph family which may or may not have stemmed from his grandmother’s past. Jefferson on the other hand, proudly owned

44 Smith, 23.
his Randolph lineage and coincidentally, Jefferson’s father inherited the Tuckahoe plantation where Jefferson grew up in “patrician splendor.”

The family rivalry may have crossed into Marshall’s in-laws which adds to the curiosity of family, but again is not directly linked to the feud. Marshall’s wife, Polly Ambler, was the daughter of Jaquelin and Rebecca Burwell Ambler; coincidentally, Jefferson courted Burwell before she married Ambler. The Ambler women were outspoken about Jefferson’s inadequacies, especially his retreat from British invasion while serving as governor. While these were family stories and do not account for their complete dislike, these feelings probably played into their opinions of each other and throughout their careers greater disagreements confirmed any distasteful opinions that may have started in their early years.


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46 Jefferson probably met Rebecca, or Belinda, in Williamsburg and fell in love with her, but he planned a trip abroad with friends from school. Jefferson debated whether or not to confess his love and ask her to wait for him. When he finally worked up the courage, he fumbled his words and interpreted her reaction as disinterest in waiting for him and he never spoke to her again. Dumas Malone, Jefferson biographer, evaluated this period of Jefferson’s life and concluded that while Jefferson loved Burwell and blamed the relationship’s demise on his laziness, he was “now deeper in the law than in love.” Malone said that this was fortunate because Jefferson went on to immerse himself with his studies, behavior a young wife would have disliked. Malone downplayed the intellectual capacity of women and suggested that Jefferson’s close alliance with men contributed to his accomplishments. Jaquelin Ambler was later one of Jefferson’s constitutional advisors during his governorship. Malone, Jefferson the Virginian, 81-85.

47 Eliza Ambler’s letter to Mildred Smith in 1781 appeared in Atlantic Monthly denouncing Jefferson’s behavior, “Such terror and confusion you have no idea of. Governor, Council, everybody scampering. . . . How dreadful the idea of an enemy passing through such a country as ours committing enormities that fill the mind with horror and returning exultantly without meeting one impediment to discourage them.” Another comment on Jefferson after discussion of another man’s departure ridicules Jefferson, “But this is not more laughable than the accounts we have of our illustrious
of his greatest supporters. Albert J. Beveridge who is considered the standard Marshall biographer and ardent anti-Jeffersonian stated, “Jefferson properly named Marshall as the first of Washington’s friends in Virginia” because of Marshall’s heroics as a Virginia Federalist.\textsuperscript{48} Marshall’s leadership skills were partly attributed to the acclaimed first leader of America and friend of the Marshall family. Marshall, his father, and brothers served in the American Revolution and Marshall achieved a captain’s rank. Beveridge elaborated on Marshall’s revolutionary experience and said that during the war Marshall was known for his sense of humor and athleticism, even through the hardest times, and the Revolution cultivated leadership skills and inspired a desire for a strong government as he witnessed the weaknesses of the government first-hand as the soldiers suffered without supplies. Jefferson on the other hand did not have this Revolutionary experience, but instead served in the state legislature, “sowing the seeds of liberalism in Virginia.” Beveridge excused Jefferson and observed that he “was a philosopher, not a warrior. He loved to write theories into laws that correct civil abuses by wholesale, and to promote the common good by sweeping statutes” and time has revealed that he was devoted “to human rights” which “has made men tolerant of his grave personal shortcomings.”\textsuperscript{49}

Washington guided Marshall through his early years of public service career and Marshall considered the first president a close friend and confidant. When


Washington passed away on December 14, 1799, Marshall was serving in the House. The message of Washington's death was delivered to Marshall and it was he who first broke the news to the House. The following day, Marshall delivered his eulogy to Congress. Although he is sometimes attributed to the quote, “First in war, First in Peace, First in the hearts of his countrymen,” it was actually Henry Lee who coined the praise, and Marshall always gave Lee credit for his words.50 The capital memorialized Washington with a funeral procession to the German Lutheran Church six blocks from Congress Hall. Jean Edward Smith, whose Marshall biography consistently credited both Marshall and Jefferson with moderate behavior, revealed that in this instance Jefferson chose to snub Marshall’s lifelong hero: “Vice President Jefferson, in a curious display of petulance, refused to attend the services, a partisan move that scarcely elevated him in Marshall’s estimation.”51

At the time of Washington's death Jefferson was at his home, Monticello and planned to return to the capital in late December. The formal day of mourning was planned for December 26 and Jefferson probably could have been there in time, but he chose not to leave a few days early in order to reach the capital. Historian Dumas Malone offered Jefferson’s reasoning, "in view of all that had been said in recent years about his relations with his old chief, this exceedingly sensitive man may have concluded that he would find these ceremonies embarrassing. If he had been there,

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50 Smith, 255-56, note 123.

51 Ibid., 256.
some Federalist spokesman would almost certainly have described him as a hypocrite, and no doubt he was glad of a good excuse to be away."\textsuperscript{52}

After Washington’s death, Marshall became Washington's biographer and spent the remainder of his life attempting to perfect his \textit{The Life of Washington}.\textsuperscript{53} Jefferson criticized Marshall’s work on the biography and commissioned Joel Barlow to write a more non-partisan history of the United States.\textsuperscript{54} In 1802, Jefferson told Barlow about Marshall’s work, which was “intended to come out just in time to influence the next presidential election. It is written, therefore, principally with a view to electioneering purposes.” The president told Barlow that he and James Madison wanted him to write a history “from the close of the war downwards,” and offered to “open all the public archives” for his use. But Jefferson cautioned Barlow that the required sources were not all “on paper, but only within ourselves, for verbal communication.” Jefferson noted that one benefit of Marshall’s work was that it could “aid [Barlow] with information, as well as to point out the perversions of truth necessary to be rectified.”\textsuperscript{55}


\textsuperscript{53} Beveridge, vol. 3, 223-273. Marshall’s technique and scholarship are examined in William A. Foran, “John Marshall as a Historian” \textit{American Historical Review} 43 (October 1937), 51-64. Foran noted that Marshall “borrowed extensively and flagrantly from the \textit{Annual Register} and Gordon.” Foran, 59. The reference to Gordon is William Gordon, \textit{The History of the Rise, Progress, and Establishment of the Independence of the United States of America} (New York, 1801). Because of Marshall’s extensive use of other sources, which was not uncommon among writers at the time, Foran argued that \textit{The Life of Washington} was “not an outstanding Federalist interpretation of history. There is little of the Federalist in it because there is little of Marshall there.” Foran, 64.

\textsuperscript{54} Barlow began writing four essays that are printed for the first time in Christine M. Lizanich, “‘The March of This Government:’ Joel Barlow’s Unwritten History of the United States,” \textit{The William and Mary Quarterly} 33 (April 1976), 315-330.

\textsuperscript{55} Jefferson to Barlow, 3 May 1802, \textit{The Writings of Thomas Jefferson}, vol. 10, ed. Lipscomb and Bergh, 319-322.
When Marshall’s fifth volume was released, Jefferson told Barlow that he would “read it carefully, to correct what is wrong in it, and commit to writing such facts and annotations as the reading of that work will bring into my recollection, and which have not yet been put on paper.” To successfully edit Marshall’s information, Jefferson said he would “be aided by my memorandums and letters, and will send you both the old and the new.”\textsuperscript{56} Barlow’s history was never completed because he left the United States as ambassador to France in 1811 and died in 1812. Jefferson wished him well, but mentioned the unfinished history. “What is to become of our past revolutionary history? Of the antidotes of truth to the misrepresentations of Marshall? This example proves the wisdom of the maxim, never to put off to to-morrow what can be done to-day.”\textsuperscript{57}

To Marshall, the ultimate outrage was Jefferson’s letter to Philip Mazzei that criticized Washington. On April 24, 1796 Jefferson wrote to Mazzei, a friend living in Pisa, and alluded to Washington when he spoke of “an Anglican monarchical, and aristocratical party . . . whose avowed object is to draw over us the substance, as they have already done the forms of the British government.”\textsuperscript{58} Mazzei printed it in the Florence newspaper translated in Italian; the French paper, \textit{Moniteur}, printed it as well, and a French copy was eventually sent to the United States where it was printed.

\textsuperscript{56} Jefferson to Barlow, 8 October 1809, \textit{The Writings of Thomas Jefferson}, vol. 12, ed. Lipscomb and Bergh, 321-323.

\textsuperscript{57} Jefferson to Barlow, 16 April 1811, \textit{The Writings of Thomas Jefferson}, vol. 13, ed. Lipscomb and Bergh, 44.

\textsuperscript{58} Jefferson to Phillip Mazzei, 24 April 1796, \textit{The Writings of Thomas Jefferson}, vol. 9, ed. Lipscomb and Bergh, 335-336.
in English.\textsuperscript{59} During the 1800 presidential election, Marshall remarked to Hamilton, “The morals of the author of the letter to Mazzei cannot be true.”\textsuperscript{60}

Jefferson, for the most part, harbored deep animosity towards Marshall. In an account retold by Joseph Story at the Harvard Law School and recorded by Rutherford B. Hayes, Jefferson commented to Story, “when conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I’d reply, ‘Sir, I don’t know, I can’t tell.’”\textsuperscript{61} In a letter to James Madison, Jefferson remarked on Marshall’s success in the House as a Washington supporter, “He has been, hitherto, able to do more mischief acting under the mask of Republicanism than he will be able to do after throwing it plainly off. His lax lounging manners have made him popular with the bulk of the people in Richmond; and a profound hypocrisy, with many thinking men of our country. But having come forth in the plenitude of his English principles, the latter will see that it is high time to make him known.”\textsuperscript{62}

Beveridge remarked that Jefferson was the only person ever to call Marshall a hypocrite. He pointed out that there is no evidence of such a characteristic in

\textsuperscript{59} Beveridge, vol. 2, 537-538.

\textsuperscript{60} Marshall to Alexander Hamilton, 1 January 1801, \textit{Papers of John Marshall}, vol. 6, 46.

\textsuperscript{61} Hayes was Story’s student and recorded the quote in his notebook September 20, 1843. Charles R. Williams, \textit{The Life of Rutherford Birchard Hayes}, vol. 1, (Columbus, Ohio: F.J. Hear Printing Company, 1928), 33.

Marshall because his open-mindedness was uniform and unbroken; even men who disagreed with him in principle found him agreeable.63 Regarding Marshall’s “lax lounging manners,” Jefferson’s comment reflected Marshall’s easy going, personable character. Marshall relaxed in the taverns playing cards and billiards or quoits, free time activities from which Jefferson refrained.64

This was the status of Jefferson and Marshall's relationship when Marshall took the oath of chief justice February 4, 1801 at eleven in the morning, continuing the animosity between these two leaders and beginning the public display of their struggle for power.65 The new chief justice wrote to President Adams, “I shall enter immediately on the duties of the office and hope never to give you occasion to regret having made this appointment.” Adams replied, “. . . The circumstances however of the times render it necessary that I should request and authorise [sic] you, as I do by this letter, to continue to discharge all the duties of Secretary of State, untill [sic] ulteriour [sic] arrangements can be made.”66 Marshall, wearing a solid black robe

63 Beveridge said only a few others, Giles and Roane, probably thought Marshall a hypocrite, but did not outright say it. Beveridge, vol. 2, 139-140.

64 The Richmond Quoits Club or Barbecue Club met every Saturday May through September and its members were men who were involved in politics or business. The club rules stated that talk of politics, religion, business was excluded from this social atmosphere. Quoits was a game that involved throwing quoits, usually brass, into a pit with pegs. Marshall’s set reflected his simplicity, “rough iron quoits, which very few in the club could throw with any accuracy from hub to hub; but he threw them with great ease, and frequently rung the peg.” Marshall was a lifetime member of the club. Smith, 160-161; Beveridge, vol. 4, 76-78. The lawyer's dinners Marshall hosted were well known throughout Richmond. Beveridge, vol. 4, 78-79.

65 Smith, 286.

66 Marshall to John Adams, 4 February 1801, Papers of John Marshall, vol. 6, 73. Adams to Marshall, 4 February 1801, Ibid., 73-74. Marshall actually continued to serve as secretary of state until March 5 when Levi Lincoln was temporarily installed until James Madison, who was ill, arrived in May. This refutes the story that Lincoln took the office the night before Jefferson was installed and stopped Marshall from signing the commissions. Jefferson to Marshall, 4 March 1801, Ibid., 88; Marshall to Jefferson, 4 March [1801], Ibid., 89. Smith, 531, note 92; Malone, vol. 4, Jefferson the President, 34; Beveridge, vol. 2, 561-562.
rather than the flashy robes the justices usually sported in the tradition of the King’s Bench or their academic gowns, took the oath from Justice Cushing. The great legal minds of the time, George Wythe and Edmund Pendleton wore solid black robes, and Marshall thought these were more appropriate for the Court. This was a symbolic effort to shift away from the English judiciary and add a touch of the simplicity he preferred.67

The Court’s formation into a respectable and distinct branch evolved slowly under Marshall’s leadership, but Marshall instituted immediate changes to fulfill his vision of the Court’s prestige. This was a difficult task considering the Court met in a small committee room. In 1800, the capitol was moved to Washington and a room for the Court was not included in the original plans, a huge indication of how the Court was not a respected branch of the government. The Court met from 1801 until 1808 in a “half-finished Committee room, meanly furnished” as described by Benjamin Latrobe, the capitol’s architect.68 Marshall began by creating a brotherhood among the justices. Through Marshall’s encouragement, the justices roomed together during the session, first at Conrad and McMunn’s, and at Stelle’s Hotel after fire destroyed the former. Since none of their families came with them, they performed their daily duties, worked, and socialized with each other. The evenings at the boarding house were invaluable because the justices thoroughly explored the cases and each contributed to a single, solid opinion. Justice Story wrote

67 Warren, 48; Smith, 285-286.

to his wife during his first session in Washington, “the judges here live with perfect harmony, and as agreeably as absence from friends and families could make our residence. Our intercourse is perfectly familiar and unconstrained, and our social hours when undisturbed with the labor of law, are passed in frank conversation, which at once enlivens and instructs.” However, the justices did not entirely exclude themselves from the public in Washington; in fact, as the society in the capital evolved, their evenings were filled with invitations for dinners and theatre.

The changes that Marshall established created a unique brotherhood among the justices that lasted until Marshall’s final years.

The new chief justice declared that he wanted to steer the Court away from partisan politics, and began to issue opinions “of the Court” rather than opinions seriatim, individual opinions. The chief justice believed the Court should speak with one voice, not meaning his own, but rather a unified voice. This new delivery of opinions would give the appearance of unanimity of collaboration and consensus in determining the law. Jefferson was staunchly opposed to this change because it altered the tradition of the Court as well as disguised any opposition. In letters to one of his appointees on the Court, William Johnson, Jefferson said, “Why should not

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70 Smith, 318. James Sterling Young said that the justices only played a minor part in the Washington social circle because they only resided in the capitol for a short period and most of their time was spent at the capital building or in their boardinghouse. Young, 76-77. This was true during the early years of the Marshall court, but as they gained prestige, they were greatly involved in society. See Marshall’s letters to his wife, Polly. Frances Norton Mason, *My Dearest Polly: Letters of Chief Justice John Marshall to His Wife with Their Background, Political and Domestic, 1779-1831* (Richmond, Garrett and Massie, Incorporated, 1961).

71 Haskins and Johnson, 382-385.
every judge be asked his opinion, and give it from the bench, if only by yea or nay? Besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it is impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority.” Jefferson believed each judge should prove that he read the case and actively participated in the decision and “throw himself in every case on God and his country; both will excuse him for error and value him for his honesty. The very idea of cooking up opinion in conclave, begets suspicions that something passes which fears the public ear, and this . . . must produce at some time abridgment of tenure, facility of removal, or some other modification which may promise a remedy.”72 Jefferson’s words reveal that he opposed unified opinions and disliked the style because that increased the already difficult process of impeaching improperly behaving justices and complicated a check on the judiciary.73

The Court met only briefly Marshall’s first session, adjourning February 10. Regardless of their differences, the incoming president, and newly appointed chief justice decided to put their differences aside and stand together for the sake of the country’s future. Jefferson wrote to Marshall asking him to administer the oath on March 4 and Marshall replied in the affirmative, “I shall with much pleasure attend to administer the oath of office on the 4th and shall make a point of being punctual.”74 Marshall’s account of inauguration day was revealed in a letter to Charles Cotesworth


73 The Pickering and Chase impeachment trials are further detailed in a later chapter.

Pinckney and is telling of John Adams’s attitude toward the incoming administration and the transfer of power from the Federalists to the Republicans. Marshall began his letter before noon and continued it after he administered the oath:

To day [sic] the new political year commences—The new order of things begins. Mr. Adams I believe left the city at 4 o’clock in the morning and Mr. Jefferson will be inaugurated at 12. There are some appearances which surprize [sic]me. I wish however more than I hope that the public prosperity and happiness may sustain no diminution under democratic guidance. The democrats are divided into speculative theorists and absolute terrorists: With the latter I am not disposed to class Mr. Jefferson. If he arranges himself with them it is not difficult to foresee that much calamity is in store for our country—if he does not they will soon become his enemies and calumniators.75

This particular letter has raised some doubt among historians concerning Beveridge’s The Life of John Marshall and his use of the letter to strengthen his portrait of Marshall and cast a darker shadow on Jefferson. In Beveridge’s copy of the above paragraph he writes, “With the latter I am disposed to class Mr. Jefferson,” eliminating the word not. Beveridge cited the letter from “MS. Furnished by Dr. W.S. Thayer of Baltimore.”76 This was the version commonly referred to until Richard J. Hooker’s revelation of the true letter in 1948, but a whole generation of historians used Beveridge’s Life of John Marshall as the imminent source on Marshall, and for years Marshall was portrayed as an extreme conservative.77 Jefferson’s biographer Dumas Malone credited Beveridge’s mistake to an unreliable

75 Marshall to Pinckney, 4 March 1801, Papers of John Marshall, vol. 6, 89.
source, and that the misquote was not intentional. Beveridge is one example of the numerous historians who have written about Marshall and Jefferson and whose ideas have helped formulate the almost mythical heroism associated with these two leaders of the developing government. While most historians credit the differences to strong opinions and determination to shape the nation, the developing feud, which gained speed with every unprecedented move by the judiciary, displayed the complications and antagonisms between the leaders that had its roots in personality conflicts as well as ideological differences.

CHAPTER 2
THE INITIAL ENCOUNTER

*Marbury v. Madison*, one of the most celebrated cases associated with the Marshall Court, was decided in February 1803. It has been most often interpreted as a conflict over the Court’s use of judicial review.\(^1\) *Marbury v. Madison*\(^2\) was a legal victory for those who hoped to entrench the federal judiciary as the third branch of government, but the decision had roots in a political conflict between Republicans and Federalists. Supreme Court historian Charles Warren commented on the use of the case, “The perspective of history is often enlightening, but it is also often misleading. The temptation is often strong to project the present aspect of a case back to the date of its decision, and thus to obtain an erroneous view of its contemporary importance.”\(^3\) The dispute was not over judicial review per se, but rather how the Republicans perceived the power of the Court as a threat to the executive branch.

The background for the case elucidated the Federalist attempt to maintain power through the nominations of loyal party members to newly made judicial

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\(^2\) 1 Cranch 137 (1803)

positions. On February 27, 1801, the Federalist controlled Senate passed the Organic Act for the District of Columbia that divided the District of Columbia into two counties and gave the president the authority to name justices of the peace. Adams designated twenty-three justices of the peace for Washington County and nineteen for Alexandria County. These appointments were confirmed on March 3 by the lame duck Congress with Federalists in the majority, and are sometimes called Adams’s “mid-night appointments.”¹ The motive and timing of the appointments warranted the nickname since Adams made them in the waning hours of his administration, and in his haste to leave the capital, Adams did not realize that the commissions were never delivered to the appointees. Adams’s secretary of state, John Marshall was responsible for the finalization of the appointments by affixing the official seal to the documents. Marshall believed that the president's signature and the seal completed the commission and did not rush to send them until after Jefferson took the presidential oath the following day.²

Jefferson found the commissions in the Department of State, and refused to

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have them delivered declaring them “mere nullities.” 6 With distaste he denounced the “new appointments which Mr. A[dams] crowded in with whip and spur from the 12\textsuperscript{th} of Dec. when the event of the election was known . . . until 8 o’clock of the night at 12 o’clock of which he was to go out of office. This outrage on decency should not have its effect, except on the life appointments which are irrevocable.” 7 The Organic Act allowed the president to determine the number of officers and Jefferson appointed thirty instead of the original forty-two, and reinstalled twenty-five of Adams’s appointments. 8 William Marbury and his co-complainants in the case, Robert T. Hooe, Dennis Ramsay, and William Harper, all leading figures in the Federalist party, did not receive their appointments for justices of the peace originally processed by Adams. 9 Their position yielded limited authority and benefits. Justices of the peace served for five years and heard civil suits valuing less than twenty dollars. They had no salary, depending only on collected fees; therefore the position was intended to

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supplement their incomes. Attorney for the displaced justices, Charles Lee, said “The emoluments, or the dignity of the office, are no objects with the applicants.”

The case was brought before the Court in order to exert judicial force and the judiciary succeeded in disrupting the Republican definition of judicial powers.

Attorneys introduced the case in December 1801 but the opinion was not read until February 1803 because the repeal of the Judiciary Act of 1801 suspended the Court for nearly two years. Lee moved for a writ of mandamus, an instruction for a government official to perform a certain act, for Secretary of State James Madison to show cause why the commissions were not delivered. Section thirteen of the Judiciary Act of 1789 authorized the Supreme Court “to issue . . . writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.” The Court had the authority to issue a writ of mandamus and the Court heard the case and centered its opinion on three questions: “Has the applicant a right to the commission he demands? If he has a right, and that right has been violated, do the laws of his country afford...

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11 1 Cranch 137.

12 The repeal of the Judiciary Act of 1801 is the topic of the next chapter.

13 1 *United States Statutes at Large* 81.
him a remedy? If they do afford him a remedy, is it a mandamus issuing from this court?”14

Regarding the first question, Marbury’s right to the commission, the plaintiffs had no concrete evidence that the commissions existed, but during the forced intermission of the case, the plaintiffs petitioned the Senate for copies of their commissions. Republicans charged that this was an attempt to “pry into executive secrets” while Gouverneur Morris exclaimed that Jefferson supporters were in favor of “the most momentous system of tyranny ever to be brought before a national assembly.”15 This request created an extremely partisan debate in the Senate with the Federalists losing by a close vote. Aside from Adams, the other person who certainly knew whether or not the commissions existed was Marshall, however he was not put on the stand. Although the chief justice was greatly involved in the case and maybe should have stepped aside, historian Jean Edward Smith romantically asserted that Marshall had great faith in his ability to resolve the Court’s complicated situation. Since Justices Cushing and Moore were absent, if Marshall did not want to rule on the case, he should have recused himself on the valid grounds that he had a vested interest in the proceedings, but the Court would not have had a quorum.16 Marshall’s presence evidenced his determination to solve the issue that had been delayed by the Republicans in the repeal of the Judiciary Act of 1801. While his testimony would have proved that Marbury and the others had commissions, the Senatorial records

15 Malone, First Term, 147; Smith, 316.
16 Cushing missed the entire February session and Moore arrived February 18. Smith, 315-318, 325, note 44; Newmyer, 159, 161-162.
held this necessary information. Marshall realized that his position on the Bench was more crucial to the case than his testimony and the actual existence of the commissions was slight in comparison to the opportunity to issue an opinion on the matter.

In another attempt to prove the commissions existed, attorney Lee called Levi Lincoln and James Marshall to testify that they had seen the commissions. Lincoln, who served as interim secretary of state, requested that Lee write down the questions so he could prepare his answers. Marshall accommodated Lincoln to prevent a possible High Federalist attempt to humiliate the witness. In the end, Lincoln could not remember whether or not the commissions that he saw belonged to Marbury and the others. James Marshall, the chief justice's brother, was called because he was in the secretary of state’s office on March 4, 1801, and took several commissions to deliver, but was not able to carry all of them. Questions regarding his statements were never addressed because the defense refused to send someone to represent Madison.17

Regardless of Lee’s unsuccessful effort to provide the commissions in writing, Marshall addressed it in the opinion. Article 2, Sections 2 and 3 of the Constitution give the president the power to nominate, appoint, and commission officers of the United States. Marshall said that after the president signs the commission the Secretary of State affixes the official seal of the United States, which finalizes the commission, “. . . the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when

17 Smith, 315-316.
the seal is affixed the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of Government.”  President Adams and Secretary of State Marshall followed this procedure, therefore Marbury’s commission was valid.

Marshall proceeded to address the second question, whether or not the laws offer Marbury a solution to obtain his commission. Marshall quoted Blackstone’s Commentaries, the preeminent source for common law, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” Marshall, connecting these rights to the newly created union said, “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” After addressing two of the three questions and favoring the validity of the commission and Marbury’s right to a solution, Marshall treaded dangerous ground as he proceeded with the final point, the remedy that Marbury applied for, a writ of mandamus ordering Secretary of State James Madison to show why the commissions were not delivered.

Marshall said the issuance of the writ depended on the nature of the writ and the powers of the court. He established a distinction between acts of the executive that are subject to judicial examination, legal questions, and those which are not,

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19 Ibid., 172-175.

20 Ibid., 172.
political questions. Marshall determined that Marbury’s commission was not a threat to executive secrecy and was subject to judicial discussion. Marshall reviewed the structure of the court system as determined by the Constitution; “... the whole judicial power of the United States in one Supreme Court, [and in] such inferior courts as congress shall, from [time] to time, ordain, and establish.” Congress determined appellate jurisdiction for the Supreme Court in the Judiciary Act of 1789, but in cases of original jurisdiction, the Supreme Court was limited to “... cases affecting ambassadors, other public ministers and counsuls, and those in which as state shall be a party.” The limitations of jurisdiction were specifically dictated by the Constitution and did not include a right to issue a mandamus; this was irreversible, even by an act of Congress. After reviewing section thirteen of the Judiciary Act of 1789, which allowed the court to issue such writs, Marshall declared such writs an unconstitutional expansion of judicial power in cases originating in the Supreme Court, but not appellate cases. Thus, the right to issue a mandamus was unconstitutional for the Court at that particular time. Regardless of the Court’s decision that Marbury did in fact have a right to his commission, the mandamus from the Supreme Court was not the proper remedy.

The greatest misconception of Marbury was the outrage stemming from Marshall’s use of judicial review to declare an act of Congress void which was an attack on the legislative branch, not the executive. However, judicial review was not

21 Editorial note, Ibid., 161-163.

22 U.S. Constitution, Article 3.

a new feature to the judiciary and even Jefferson said that each branch of government should have its own interpretation of the Constitution. Judicial review was not explicitly stated in the Constitution, but during the discussions formulating the Constitution both Federalists and Anti-Federalists accepted judicial review in the new governing document. In a statement Jefferson presented to Congress regarding the Sedition Act, a significant paragraph was eliminated where Jefferson revealed his constitutional theory:

Our country has thought proper to distribute the powers of its government among three equal and independent authorities, constituting each a check on one or both of the others, in all attempts to impair its constitution. To make each an effectual check, it must have a right in cases which arise within the line of its proper functions, where, equally with the others, it acts in the last resort and without appeal, to decide on the validity of an act according to its own judgment, and uncontroled [sic] by the opinion of any other department. We have accordingly, in more than one instance, seen the opinions of different departments in opposition to each other, and no ill ensue. The constitution, moreover, as a further security for itself, against violation even by a concurrence of all the departments, has provided for its own reintegration by a change in the persons exercising the functions of those departments.

In a letter to Spencer Roane, Jefferson stated, “. . . that each of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question.” Judicial review was a part of the Marbury decision, but certainly not the most significant. Republicans complained the Court went too far by considering a mandamus, and alleged that the judiciary intruded on executive power.

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24 Newmyer, 171; Warren, 262.


Critics at the time said Marshall’s intention was to “discover and apply a principle for bringing executive acts under judicial scrutiny,” thus the distinction between “political,” acts not reviewed by court, and “ministerial” duties, those subject to judicial review.  Jefferson agreed with Marshall’s distinction between reviewable acts, but neither could offer a clear definition nor were willing to allow the other to clarify. Historian R. Kent Newmyer concluded that Marshall’s “primary objective was not to restrain Congress, then or ever, but to rein in a rampaging president.” However, Charles Warren, Supreme Court historian, noted that legal writers have dispelled the myth that Marshall and the Court "usurped" power in order to make their ruling in favor of judicial review. Technically, the president was not restrained, but the case was an opportunity for the Court to declare itself independent of the other two branches of government.

After an examination of important questions concerning jurisdiction and power of the court, Marshall even-handedly executed the decision, but did not escape criticism. Interpretations vary about how much partisan politics played into the case and whether or not Marshall and Jefferson made blatant efforts to attack one another. For instance, historians such as Dumas Malone and Albert Beveridge alleged that

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28 Malone, *First Term*, 152.

29 Newmyer, 162. Malone agreed that this was Marshall's objective. Malone, *First Term*, 143. Newmyer said that Marshall's attack on Congress was out of character for Marshall especially since he served in Congress, prior to serving as secretary of state, where he fought vigorously for legislative authority. Newmyer 172. Dumas Malone noted that Marshall’s greatest problems were eventually with state courts and state legislatures and the executive, not the national legislature, most notably decisions during the Andrew Jackson administration, Malone, *First Term*, 152.

30 Warren, 256.
both men, leaders of separate branches of the government, perceived the other as a threat to their own strength and maneuvered to defend the power of their office.\textsuperscript{31} The counter argument by historian Jean Edward Smith was that both men worked as moderately as possible to avoid conflict with the other.\textsuperscript{32} However, Jefferson did not take a moderate course when he refused to deliver the commissions or when he refused to send counsel for Madison.

Jefferson’s defiance was probably a reaction to Marbury and the others bringing a suit against Madison. Attorney Lee made it clear that the justiceships were not the essential element to the case. Jefferson had approved many of Adams’s appointment and they were already serving as the District of Columbia’s justices of the peace. Jefferson recognized the effort made by the Federalists to seize an opportunity to establish strength in the judiciary and refused to appease their efforts. However, both Marshall and Jefferson knew that the Court would not ever force the executive or the legislature to do something, i.e. deliver commissions, but Jefferson refused to give the Court any leverage to gain power that probably would have still resulted in Marshall’s non-partisan decision.

Jefferson was greatly disturbed by Marshall’s definition of a completed commission. While the Constitution stated that the signature of the president and the official seal affixed by the secretary of state finalizes an appointment, Jefferson placed emphasis on the delivery aspect, believing actual possession of the document completed the process. In letters to George Hay in 1807, he expressed his continued

\textsuperscript{31} Malone, \textit{First Term}, 143; Beveridge, vol. 3, 111-112.

\textsuperscript{32} Smith, 310-311.
anger at the Court’s validity of the commissions, “Until, therefore, the commission is delivered out of the hands of the executive and his agents, it is not his deed.”

Jefferson was still agitated by the decision in 1819 when he wrote to Spencer Roane, “I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is as yet no deed. . . . They cannot issue a mandamus to the President or legislature, or to any of their officers.”

Marshall’s opinion was representative of the hundreds he penned over the following three decades. Like in Marbury, which totaled over 11,000 words, he wrote long opinions, but in a clear and concise manner. He delivered most of the opinions during his time on the Bench with little dissent. In the mandamus case, Marshall was criticized for his composition because if he would have answered the questions in reverse order he would not have gone into a long lecture to the president; twenty of the twenty-six pages were targeted at the president.

Had Marshall first addressed jurisdiction, the answer would not have allowed for discussion of the other two. Nathaniel Macon commented that “. . . the Court reminded him of a member of Congress who always spoke on one side and voted on the other. Marshall denied Marbury’s petition after having elaborately argued for its

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33 Jefferson to George Hay, 2 June 1807, *The Writings of Thomas Jefferson*, vol. 11, ed. Lipscomb and Bergh, 213.

34 Jefferson to Spencer Roane, 6 September 1819, *The Writings of Thomas Jefferson*, vol. 15, ed. Lipscomb and Bergh, 212; Jefferson to Justice William Johnson, 12 June 1823, Ibid., 448. It is not clear what action validates a commission.

35 Smith, 325.

36 Newmyer, 166; Haines, 247-248.
rightfulness, thus managing to both have his cake and eat it.”\(^{37}\) Both President Jefferson and Secretary of State James Madison condemned Marshall’s political theory that he claimed to make a decision based on what the framers of the Constitution intended the Court to decide. Neither Jefferson nor Madison believed Marshall could make such statements without the notes of the debates during the Constitutional convention and these papers were in Madison’s possession. The papers were not released until it was believed that their contents would no longer harm the participants of the convention.\(^{38}\)

Jefferson and Republicans criticized Marshall’s strategy in delivering his opinion. In a letter to Justice William Johnson in 1823, Jefferson still criticized Marshall’s authority by citing Marbury, “This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. . . . Yet this case of Marbury and Madison is continually cited by bench and bar, as if it were settled law, without any animadversion on its being merely an obiter dissertation of the Chief Justice.”\(^{39}\) Jefferson’s direct attacks on Marbury were not evident until after the Aaron Burr treason trial in 1807, and Jean Edward Smith argued that because Jefferson did not immediately attack Marshall’s opinion, Jefferson sought to follow a moderate course

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\(^{37}\) Malone, First Term, 149.


during the case. Jefferson was not a non-partisan player however. Had he wanted to remain impartial, he would have delivered the commissions in the first place, and have sent a lawyer to represent Madison.

Marshall allegedly exhibited moderation as well, and his course of action has been praised. Smith suggested that *Marbury v. Madison* “is an essay on the necessity for moderation.” Marshall claimed that he intended to shift the Court away from partisan politics; however, he did not always remain non-partisan. An editorial in the *Washington Federalist* spoke in favor of the mandamus case, “It will remain as a monument of the wisdom, impartiality and independence of the Supreme Court, long after its petty revilers shall have sunk into oblivion.”

Marshall’s biographer, Albert J. Beveridge provided a sentimental analysis of *Marbury*, calling it a purely American principle that could never be overturned that was set up by “a coup as bold in design and as daring in execution as that by which the Constitution had been framed.” Beveridge contended that the decision was forced by Jefferson’s threat of possible impeachment of the justices, and only a man as strong as Marshall would have ever been able to ward off the intruding Republicans. Beveridge not only overstated the significance of judicial review, but incorrectly noted public opinion by saying that there was hardly any notice of the *Marbury*

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40 Smith, 324.

41 Ibid., 326.


decision.\textsuperscript{44} Historian Charles Warren, writing his history of the Supreme Court at the same time as Beveridge, corrected the over-zealous Marshall historian with several accounts from both Republican and Federalist papers. In fact, the best copy of the opinion was recorded in the \textit{National Intelligencer} rather than the court report which was incomplete. Republicans criticized the decision as an attack on the executive by the judiciary.\textsuperscript{45} Again, it cannot be denied that the case and the decision were motivated by partisanship. Constitutional historian Edward Corwin asserted that the case must “be regarded as a political pamphlet designed to irritate an enemy to the very limit of endurance, it must be considered a huge success. . . . To speak quite frankly, this decision bears many of the earmarks of a deliberate partisan coup.”\textsuperscript{46}

Regardless of how extreme either party interpreted the actions of the other, both Marshall and Jefferson aimed to strengthen their particular branch of the government and prove that neither would be overwhelmed by the other. The mandamus case was Marshall’s attempt to empower the judiciary by invoking judicial review on the executive, not the legislature as has been recently interpreted. Marshall knew that the Court at this time was too weak to use intimidation to enforce their decisions, for instance Madison could have ignored a writ a mandamus and Marshall could not force him to show cause. Thus the decision granted Marbury the right, but not the means to his appointment. \textit{Marbury} was a well-planned attack on the president by the judiciary that has been misconstrued by historians in order to

\textsuperscript{44} Ibid., 153.

\textsuperscript{45} Warren, 245-256.

maintain the prestige of the executive branch as an infallible element of the
government.

Two men with different opinions on the functions of government would not
always avoid a struggle, and therefore it was not surprising that a debate would arise
immediately after Marshall's appointment. Attention was momentarily diverted from
*Marbury* to activity in the western United States as Republicans and Federalists alike
were preoccupied with the Louisiana territory.47 However, the impeachment
proceedings against federal Federalist judges revived the conflict between Marshall
and Jefferson.

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148, 151.
CHAPTER 3
UNRAVELING THE FEDERALIST JUDICIARY

The Judiciary Act of 1789 described the functions and duties of the court system that the legislature was to later amend as needed. The Federalists sought to institute a more effective system, and introduced into the political realm the need for change. Shortly after the original bill passed in 1789, the Supreme Court justices realized its inadequacies, and the Judiciary Act of 1801 made the needed reforms, which passed during a lame duck session of Congress led by a Federalist majority. The Act was repealed a year later by the newly elected Republican Party that saw the bill as an attempt to maintain Federalist power in the judiciary. Therefore, it was arguably another Jeffersonian attack on the court and its leader, Chief Justice John Marshall.

Article III of the Constitution provided only a vague outline of the judiciary, “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” The details of the Court’s structure and duties were to be decided by Congress, and in April 1789, the first Congress formed a committee to
complete the judiciary. Twenty senators were elected to the first Congress, and ten were named to the committee intended to organize to the United States judiciary.¹

No official senatorial records were taken for the first five years, so the original Draft Bill as it was introduced and then amended, was unavailable until the twentieth century.² Until a recent discovery, most discussions of the Judiciary Act presupposed that the record existed. James Madison claimed in 1836 that the bill “was not materially changed in its passage into a law.”³ This was the primary belief held by historians until Charles Warren located the original Draft Bill and the original revision notes.⁴ Warren’s 1923 article in the Harvard Law Review provided a thorough analysis of the bill’s transformation into the compromise that is called the Judiciary Act of 1789. The debate regarding the passage of the 1789 bill is not the primary topic of this chapter. It is however, important to understand that the bill was not quietly passed by Congress without discussion. The judiciary debate began when the Constitutional convention drafted Article III and continued throughout the

¹ Members of the committee included: Richard Bassett, Delaware; Oliver Ellsworth, Connecticut; William Few, Georgia; Richard Henry Lee, Virginia; William Maclay, Pennsylvania; William Paterson, New Jersey; Caleb Strong, Massachusetts; Paine Wingate, New Hampshire. Charles Carroll, Maryland and Ralph Izard, South Carolina were added April 13, 1789. Abridgment of the Debates of Congress 1789-1856, vol. 1 (New York: D. Appleton and Company, 1857).

² Journals and letters from participants provide a few details into the closed-door arguments. William Maclay’s journal is particularly revealing but does not include a full copy of the Judiciary bill or arguments.

³ Madison made this statement at age eighty-five, which probably caused his faulty recollection of the bill’s passage. Supreme Court historian, Charles Warren hypothesized that had future justices know about these changes, “several of the leading cases before the Court might have been decided differently.” While this is crucial to understand how the bill developed, it is merely a guess at how justices may have used the amendments in adjust their decisions. Charles Warren, “New Light on the History of the Judiciary Act of 1789” Harvard Law Review 37 (November 1923), 51.

⁴ Warren, 49-132. Warren credited the secretary of state for helping him find the Draft bill and the amendments in the attic at the capitol. The bill as it was passed by the Senate was found in a cellar room, as Warren stated it, under a heap of miscellaneous papers of confused and intermingled dates and subjects. Ibid., 50, note 5.
Federalist era and Jefferson administration. The shortcomings and deficiencies of the 1789 Act must be recognized in order to understand the background of the 1801 judiciary bill that was finally passed in the waning months of John Adams’s administration and harshly criticized by the Republicans.

Drafting a bill to create the judiciary posed difficulties because such a bill could potentially amend the Constitution, even though the details were left in the hands of Congress. Half of the committee’s members had been participants in the Constitutional Convention, and Warren claimed that they were familiar with its intent to the judiciary. Although the senatorial records are incomplete, Paine Wingate’s letter to Timothy Pickering provides a good analysis of what the committee intended to accomplish. On April 29, 1789, Wingate wrote, “. . . It is a very intricate and difficult matter to adjust, so as to answer the design of the Constitution by securing impartial justice, and not make it burdensome and inconvenient for the people.” Committee members William Patterson, Oliver Ellsworth, and Caleb Strong were the primary authors of the bill but Ellsworth is remembered “to be the leading projector.” Senator William Maclay agreed in his journal, agreed. “This bill is a

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5 Legal scholar, William Winslow Crosskey noted that the powers of the courts really come from Congressional acts, not from the Constitution. This point is typically unclear and the result is “an entire misconception of the intended function of the national judiciary.” William Winslow Crosskey, Politics and the Constitution in the History of the United States, vol. 1 (Chicago: The University of Chicago Press, 1953), 611.

6 Warren, 57. Warren noted the 1888 case, Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297, that remarked on the Judiciary Act of 1789. It “was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.”

7 Warren, 59, quoting Pickering Papers, MSS. In Massachusetts Historical Society Library, Wingate to Pickering, 37 April 1789, hitherto unpublished.
child of his, and he defends it with the care of a parent, even with wrath and anger."\(^8\)

Congress debated this Draft Bill for two months and after adding amendments, passed with a vote of 14 to 6 on July 17. When the bill went to the House it was discussed with great urgency. As William Smith of South Carolina noted, “The Legislative and Executive are now in existence; but the Judicial is uncreated. While we remain in this state, not single part of the several systems can operate; no breach of your laws can be punished. . . . Greater harm will arise from delaying the establishment of the Judicial system than can possibly grow from a delay of the other subject. . . . The Judiciary is an essential part of the Government, and such ought not to remain a single instant in a state of torpidity.”\(^9\) After a month long debate, it passed the Senate on September 27, 1789.\(^10\)

The Judiciary Act was a compromise between the Federalists and the Republicans and pleased no one, except Ellsworth.\(^11\) The bill especially upset those who feared the federal judiciary would suffocate the state courts; and these advocates were not necessarily ardent states-righters. Senator James Jackson of Georgia remarked that the Act “swallowed up every shadow of a state judiciary.” William Maclay warned that the design of the Act was to “draw by degrees all law business


\(^9\) Warren, 117-118. After much debate, the House decided to take evaluate the amendments before discussion of the bill itself. As Fisher Ames noted, the amendments “should not be trash, such as would dishonor the Constitution, without pleasing its enemies.” Ibid.

\(^10\) Analysis of the original handwriting of the sections reveals these primary authors. Letters written by witnesses attest to Ellsworth’s leadership. Beveridge, vol. 3, 60-61.

\(^11\) Ibid., 53. Beveridge claimed that only Ellsworth was satisfied.
into the federal court.”12 More restrictive than its original form, it was called a quick fix in order to complete the United States government. Both sides concurred that future alterations would be necessary. Proponents saw it as a “clever beginning” that would encourage other judicial reforms at a later time. Opponents decided to accept it until a more comprehensive solution formed.13 Because the Constitution provided few restrictions on judicial duties, the Federalists broadly interpreted Article III, and did not believe Congress should interfere with the court’s powers. Republicans wanted to take jurisdiction away from the federal courts and expand the state courts. The compromise created a restrictive and weak judiciary.14 Warren summed up the debate as Federalists who believed the “full extent of judicial power granted by the Constitution should be vested by congress in the federal courts and the view of those who feared the new government as a destroyer of the rights of states, who wished all suits to be decided first in the state courts and only on repeal by the federal court.”15

The composition and evaluation of the Act attracted attention from politicians and citizens alike. There are letters that exhibit differing opinions on the future of the Draft Bill. The Boston Gazette claimed that the bill would not vary too much from the original plan; however, another observer foresaw “considerable alterations” before it passed both Houses. James Madison remarked that during his travels from


13 Crosskey, vol. 1, 611.


15 Warren, 131.
New York to Virginia, people paid close attention to the debates in the first Congress. In New York, there were twenty-eight articles published in a four day span protesting the Republican arguments.\footnote{Warren, 64-65, quoting \textit{Boston Gazette}, June 29, July 6, 1789; Madison Papers, MSS., Alexander White to Madison, 17 August 1789.}

In its final form, the Judiciary Act of 1789 created a six-member Supreme Court and district and circuit courts. The nation was divided into three large areas, Eastern, Middle, and Southern circuits. Three judges were required to serve the circuit courts, two Supreme Court justices, and one district judge. The Supreme Court justices were required to ride circuit and preside over circuit sessions twice a year and hold two sessions at the capital as well. The Act granted state courts greater jurisdictional powers. Original jurisdiction was given to federal courts only in criminal cases against the United States or in diversity cases, suits involving different citizenship. In the later cases, at least one party had to be a citizen of the state where the case was brought and the value at stake had to be more than five hundred dollars.\footnote{Elkins and McKitrick, 64; Turner, 4-5.} The district courts were designated to only one or two places, not easily accessible to most citizens. Inevitable difficulties arose from this system. The judiciary was not a main concern of the developing nation as it was “still something of an abstraction.” The Federalists and the Republicans relied on the existing state courts to continue carrying out the necessary judicial duties.\footnote{Elkins and McKitrick, 64.}

As previously noted, there were hopes that the judiciary would undergo further examination and changes in the years following the passage of the 1789 Act.
Legal scholar, William Crosskey stated that reforms for a stronger, more central national judiciary were impossible because of the court’s original structure. First, the national courts were distant from the state trial courts. Appeals were allowed, but rarely attempted because the process was extremely time consuming. In fact, only three cases were appealed to the Supreme Court during the years 1789 to 1801 because of these deficiencies.\(^{19}\) The national courts were few and limited in their jurisdiction. These inadequacies prevented the national judiciary from making the reforms “the Framers intended.”\(^{20}\)

Immediately after the 1789 bill passed, certain problems arose with the federal judiciary. The requirement that caused the greatest distress was the circuit riding duty. It was nearly impossible for the justices to perform their obligations and in a sufficient manner as long as they were required to ride circuit. The Supreme Court justices presented two arguments against circuit court duty. First, presiding over the circuit courts required the justices to travel long distances over poorly marked roads that were impassible during harsh weather conditions. This often created delays or cancellations of the court sessions, an inconvenience for the justices as well as the lawyers and citizens. Moreover, the Supreme Court served as the appellate courts to the circuit courts, and often times the justices heard cases that they ruled on in the lower court. Riding circuit was thus not only an inconvenience for the judges and others, but it caused lack of continuity for the system.\(^{21}\)

\(^{19}\) These cases are cited in Crosskey, vol 2, 754: *Olney v. Arnold*, 3 Dallas 308 (1796); *Clarke v. Harwood*, ibid., 342 (1797); and *Calder v. Bull*, ibid. 386 (1798).

\(^{20}\) Ibid.

\(^{21}\) Beveridge, vol. 3, 56, vol. 1, chapter 6. Much criticism has been written about the ridiculous task of riding circuit, however, at least one article has defended the duty. Henry C. Clark,
President Washington encouraged comments on the judiciary. The responses implicate that the most pressing matter continued to be the required circuit riding for Supreme Court justices. In 1790, Attorney General Edmund Randolph sent a report to the House recommending that the circuit courts be led by district judges rather than Supreme Court justices. Crosskey regarded his report as worthless since Randolph was not an advocate for blending the state and national judiciaries into a single unitary system for justice. Randolph followed the recommendation of the justices on circuit duty, but he included suggestions solely from his agenda. He suggested that the Supreme Court no longer serve as the appellate court for the state court system and that the state courts and the federal court perform independently. This idea seemed so absurd that it was no surprise that Congress did not act on his recommendation and the justices continued riding circuit.

“Circuit Riding: A Former National Asset,” American Bar Association 8 (1922), 772-774. Clark contended that society and the legal profession have suffered great losses since the decline of riding circuit. He called it an “institution of our country” that was not fully appreciated until it was extinct. The greatest benefits of riding circuit included community involvement in the courts and camaraderie between the judges and lawyers. These may be plausible benefits to the system they do not overshadow the inconveniences often caused by unforeseeable weather or health related delays.

President Washington to the “Chief Justice and Associate Justices of the Supreme Court of the United States,” 3 April 1790, Correspondence and Public Papers of John Jay, vol. 3, 1782-1793, ed. Henry P. Johnston (New York: Lenox Hill Publication and Distributing Company, 1890), 396. Washington said, “I have always been persuaded that the stability and success of the national government, and consequently the happiness of the people of the United States, would depend on a considerable degree on the interpretation and execution of its laws. In my opinion, therefore, it is important that the Judiciary system should not only be independent in its operations, but as perfect as possible in its formation. As you are about to commence your first circuit, and many things may occur in such an unexplored field, which it wold be useful should be known, I think it proper to acquaint you, that it will be agreeable to me to receive such information and remarks on this subject as you shall from time to time judge expedient to communicate.” Washington to Jay, 19 November 1790, Ibid., 409. This letter expressed the president’s willingness to submit judiciary concerns to Congress in the upcoming third session.

Crosskey, vol.2, 757. During the Constitutional convention it was clear that they intended to have “one supreme court” so the idea of separating the state and federal courts was laughable to the
In August 1792 the justices wrote to President Washington and asked him to relay their message to Congress.\textsuperscript{25} Their letter stated:

That when the present judicial arrangements took place, it appeared to be a general and well-founded opinion, that the act then passed was to be considered rather as introducing a temporary expedient than a permanent system and that it would be revised as soon as a period of greater leisure should arrive. . . .

The ensuing sessions of Congress were so occupied by other affairs of great and pressing importance, that the judges thought it improper to interrupt the attention of Congress by any application on the subject.

That, as it would not become them to suggest what alterations or system ought in their opinion be formed and adopted, they omit making any remarks on that head; but they feel most sensibly the necessity which presses them to represent—

That the task of holding twenty-seven circuit courts a year, in the different States, from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which, considering the extent of the United States, and the small number of judges, is too burdensome.

That to require of the judges to pass the greater part of their days on the road, and at inns, and at a distance from their families, is a requisition which, in their opinion, should not be made unless in cases of necessity.

That some judges do not enjoy health and strength of body sufficient to enable them to undergo the toilsome journeys through different climates and seasons, which they are called upon to undertake; nor is it probable that any set of judges, however robust would be able to support, and punctually execute, such severe duties for any length of time.

The judges decline minute details, and purposely omit many considerations, which they are persuaded will occur whenever the subject is attentively discussed and considered.

They most earnestly request that it may meet with early attention, and that the system may be so modified as that they may be relieved from their present painful and improper situation.\textsuperscript{26}

\textsuperscript{25} Justices serving on the bench at the time included Chief Justice John Jay, William Cushing, James Wilson, John Blair, James Iredell, and Thomas Johnson. The letter begins, “Your official connexion with the Legislature, and the consideration that applications from us to them cannot be made in any manner so respectful to Government as through the President, induce us to request you attention to the enclosed representation, and that you will be pleased to lay it before Congress.” \textit{Annals of Congress}, Misc. 51-52.

\textsuperscript{26} Ibid.
The justices received partial relief as a result of their plea. In 1793, Congress reduced the number of Supreme Court justices from two to one in the circuit courts. The justices recognized this slight modification, but in 1794 they again reported that the system was still not providing as good of service as they believed was possible. Through these requests, it is obvious that the justices believed the Supreme Court should be considered the highest court in the nation, but their potential was impaired by the inefficiencies of the 1789 Act. In 1794 Chief Justice John Jay declined an appointment as minister to Great Britain and told President Washington that “if the judiciary was on the proper footing, there is not a public station that I should prefer to the one in which you have placed me.”

A year later the Court still had not made the progress Jay anticipated. For that reason, he resigned. He informed President Adams that “‘under a system so defective’ as the act of 1789, the Supreme Court of the United States ‘would not obtain the energy, weight, and dignity which [were] essential,’ in his opinion, ‘to its affording due support to the national government;’ and neither, he thought, would acquire, under that system, ‘the public confidence and respect which, as the last resort of justice of the nation, it should possess.’” Therefore, during the crucial time of laying the foundation for a strong national judiciary, the Court had no leader. Jay excused his absence of leadership in a letter to Rufus King, “The federal Courts have Enemies in all who fear their Influence on State objects. It is to be wished that

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28 Jay to Adams, [resignation letter], The Correspondence and Public Papers of John Jay (New York: 1893), IV, 9, quoted from Crosskey, vol. 2, 758.
their Defects should be corrected quietly. If these Defects were all exposed to public view in striking colors, more Enemies would arise and the Difficulty of mending them encreased."^{29} Therefore, during the time that the judiciary would be best understood, being not far removed from the original discussion of how the government should be set up, the judiciary lacked a leader to guide the court. Coupled with the poor guidelines of 1789, the Court never had an opportunity to gain equal footing.^{30} John Rutledge of South Carolina succeeded Jay for one year and then Oliver Ellsworth was appointed and served from 1796 to 1800. The lack of prestige and honor of the Court is evidenced in this quick turnover of chief justices between 1789 and 1801.

Recommendations for reform were first given to President Washington in 1790, but Congress nevertheless did not separate the circuit and Supreme Courts.^{31} Throughout the following decade the justices sought reforms, but received little congressional assistance. While Federalists and Republicans debated the amount of power the federal courts should have, both were willing to let the state courts continue their precedent of judicial duties since the judiciary was not a primary concern. The political debate rooted in the judicial controversy erupted during the Adams administration as the Republicans felt threatened by the Federalist support of the extremely partisan Alien and Sedition Acts. In early 1799, as the Republicans gained strength, the Federalists decided to push for the modifications that the justices

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^{29} Turner, 6-7, quoting Jay to Rufus King, 22 December 1793, in Charles R. King, ed. The Life and Correspondence of Rufus King . . . (New York, 1894-1900), I, 509.

^{30} Crosskey, vol. 2, 754.

^{31} Turner’s article discusses the various reform proposals that were discussed between 1790-1801.
had been requesting for a decade. Once the Federalists made the judiciary reforms an important issue, adjustments were finally seriously considered.\(^{32}\)

On December 3, 1799, in his message to the Sixth Congress, President Adams suggested that Congress assemble committees to evaluate the judiciary. Adams argued that the enactment was “indispensably necessary.”\(^{33}\) These committee members were mostly Federalist and included John Marshall as a Representative from Virginia.\(^{34}\) The committee made extensive recommendations about judiciary reform, primarily focusing on the organization and jurisdiction. Senator Oliver Wolcott observed that the “steady men” in Congress were in favor of reforms because “there is no other way to combat the state opposition [to National action] but by an efficient and extended organization of judges.”\(^{35}\)

The bill called for a total of twenty-nine districts and nine circuits. Each circuit would have a federal circuit judge and these courts would serve as the only trial courts in the circuits.\(^{36}\) These federal circuit courts would have greater jurisdiction, thus giving more power to the federal court system. When the bill was presented to the House on March 31, 1800, Republicans immediately opposed increasing federal courts and a compromise reduced the numbers to nineteen districts

\(^{32}\) Turner, 7-8.

\(^{33}\) Adams to Congress, Dec 3, 1799; Annals, 6\(^{th}\) Congress, 1\(^{st}\) session, quoted in Beveridge, vol. 2, 547-548. One year later, Adams again addressed Congress and gave a speech primarily written by Marshall, his acting secretary of state. In this speech Adams (Marshall) stressed even stronger need for judiciary reforms. Beveridge, vol. 2, 548.

\(^{34}\) Beveridge did not include Marshall’s participation on the committee in his work. Turner, 12-13, note 48.

\(^{35}\) Adams to Congress, Dec 3, 1799; Annals, 6\(^{th}\) Congress, 1\(^{st}\) session, quoted in Beveridge, vol. 2, 548.

\(^{36}\) Turner, 11.
and six circuits. Debate ensued and the Republicans voted to postpone discussion until the next session. When Congress met the following year, the lame duck session, most people were focused on the close presidential election between Jefferson and Aaron Burr. Jefferson, then serving as vice president and leader of the Senate, anticipated that the judiciary issue would not be resolved until after the election.\(^{37}\)

However, after much debate about the bill, it passed the House on January 20, 51 to 43, with only Federalists voting in favor of it. The same day, Marshall’s appointment for chief justice was sent to the Senate for approval.\(^{38}\)

The Federalists in the Senate recognized the urgency of passing the judiciary bill. Senator William Bingham from Pennsylvania reminded his party of the necessity of passing the bill before the Republicans took office. “Such is the critical state of the Votes in the House, arising from the accession of Several Members, who are adverse to the Bill, that it is Supposed it will be in imminent danger, if it Should return to the House and be placed within their Power—The Committee therefore to whom it was referred, altho desirous of introducing Several Modifications, have reported the Bill without Amendment, and I am inclined to believe that we shall be compelled to take it,—for better and for worse—or totally reject it . . . the federal Party wish the appointments to be made under the present administration . . . the Importance of filling these Seats with federal characters, must be obvious.”\(^{39}\)

The bill indeed passed the Senate on February 7, 1801 with a vote of 16 to 11, without

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37 Ibid., 15.

38 Ibid., 19.

amendments. As leader of the Senate, Jefferson signed the bill, but Thomas Truxton noted that he reluctantly did so. Truxton's recollection of the signing was triggered after Jefferson awarded him with a medal for his naval duties, with which Jefferson did not approve. Truxton told Alexander Hamilton that he believed Jefferson “felt as much rancor” in awarding him a medal, "as he did (when Vice-President) at signing the late Judiciary bill as President of the Senate.”

Gouverneur Morris excused the seemingly partisan maneuver by the out-going Federalists, they “are about to experience a heavy gale of adverse wind; can they be blamed for casting many anchors to hold their ship through the storm?”

February 13, 1801 the bill was signed into law with less than a month until the inauguration of Thomas Jefferson as President. Finally, the Supreme Court justices were completely relieved of riding circuit and were only required to hold two sessions a year at the capital. Previously, the Court had met in February and August, but the Act changed them to June and December sessions. The bill established six new circuits, each led by three newly appointed circuit judges, except in the rural Kentucky and Tennessee area. This Sixth Circuit was led by only one circuit judge and two district judges. Thus, sixteen new positions were created and filled by Federalists.

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The number of Supreme Court justices was reduced from six to five at the next absence. Federalists presented this adjustment as a means to prevent possible ties between the justices in order to promote solidarity. However, Republicans perceived this as a way to stifle their influence since it would prohibit Jefferson nominating a justice at the next vacancy. In addition to accommodating the justices’ requests and creating new justiceships, the bill expanded the jurisdiction of the national courts. On February 27, 1801 Congress passed another judiciary reform measure. The Organic Act for the District of Columbia established new courts for the capital, and those justices were called the “midnight appointments.”

None of the alterations created by the Judiciary Act of 1801 appeased the Republicans. The bill was perceived as a last-minute move by the Federalists to secure a position in the government. This idea was not without substance. It was not until early 1799 that the Federalists whole-heartedly considered the judicial adjustments. Only the month before Jefferson took office did they urgently push the bill through the Senate. While it was convenient for the Federalists to create new justiceships, and change the court system to their liking, these adjustments did not dramatically develop in the last few days of the Adams administration. These reforms were proposed immediately after the Judiciary Act of 1789 passed. The lawmakers realized the inadequacies of the bill, but relied on time to modify them. But the distraction of other seemingly more important government matters diverted attention from the judiciary requests.

43 Turner, 21-31; Crosskey, vol. 2, 760.

44 See preceding chapter on Marbury v. Madison.
The judiciary was brought to the forefront when the parties disputed over expanding the government. Federalists advocated a strong national judiciary to support a strong national government. Republicans on the other hand wanted to confine the federal judiciary in order to allow greater privileges to the state courts. After the 1801 Act passed, Republican newspapers expressed the party’s outrage. The overall theme was, “Mr. Adams is laying the foundation of future faction and his own shame.” Other Republican comments included, “The Judiciary bill has been crammed down our throats, without a word or a letter being suffered to be altered.”

True, the Federalist agenda was passed in their final and usually inactive session of Congress. Because the positions were life-time appointments, they would be difficult for the Republicans to replace. However, just as the Federalists rallied their party, the Republicans managed to return the judiciary to its original form.

When the Seventh Congress met in December, 1801, the Republican Party held the majority for the first time in the nation’s history. Regardless of the Republicans' secured power in the executive and legislative branches, they feared the Federalist dominated judiciary. Newly elected President Jefferson referenced the late majority party’s successful judiciary reform measures in April 1801, and said that it is “highly probable the law [would] be repealed at the next meeting of Congress.”

Jefferson assured T.N. Randolph that, “a few removals from office will be

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45 Quoted from Warren, 188.

46 In the Senate Republicans held the majority, 18 to 13; in the House, 69 to 36. Smith, 615, note 1.

47 Jefferson to Monroe, 25 April 1801, Thomas Jefferson Manuscripts Division, Library of Congress, quoted from Haskins and Johnson, 152. Warren’s account of the judiciary overlooked this letter indicating that early on Jefferson considered early on changing the judiciary, instead, Warren noted that changes were not considered until December. Warren, 204.
indispensable. They will be chiefly for real mal-conduct, and mostly in the offices connected with the administration of justice. I shall do as little in that way as possible. . . . the prostitution of justice by packing of juries cannot be passed over.”

In August of the same year, Jefferson said to Levi Lincoln that “the removal of excrescences from the judiciary is the universal demand.”

However, if the judiciary were such an important issue to Jefferson, he disguised it in his State of the Union address to Congress in December 1801. The President referenced the judiciary very little saying that, “The judiciary system of the United States, and especially that portion of it recently erected, will of course present itself to the contemplation of Congress.” This Congressional consideration would be supported by Jefferson’s estimation of judicial costs that did not legitimize expanding the court system as the Federalists had done the previous year. Whether or not his numbers were accurate is unknown and probably did not matter to Jefferson. It may easily be thought that Jefferson distorted the numbers in order to provide a significant


50 Jefferson deleted an entire paragraph of his speech about the three government branches, believing that it was “capable of being chicaned, and furnishing something to the opposition to make a handle of. It was thought better that the message should be clear of everything which the public might be made to misunderstand.” The omitted section largely discussed the Sedition Act that had prosecuted many Republicans. Jefferson said that “our country has thought proper to distribute the powers of it’s government among three equal and independent authorities, constituting each a check on one or both of the others, in all attempts to impair it’s constitution.” The entire omitted passage is in Beveridge, vol. 3, 605-606.

51 Quoted from Haskins and Johnson, 154, Thomas Jefferson Manuscripts Division, Library of Congress. Jefferson said, so that Congress may “be able to judge of the proportion which the institution bears to the business it has to perform, I have caused to be procured from the several States, and now lay before Congress, an exact statement of all the causes decided since the first establishment of the courts, and of those which were depending when additional courts and judges were brought in to their aid.”
argument for the repeal of the Federalist judiciary act. The costs that were included in the judiciary report from the District of Kentucky were underestimated, which gives suspect to other reported findings. In February 1802, Jefferson submitted a corrected report to Congress, but delivered it after the battle lines were already drawn.52

Senator John Breckenridge of Kentucky introduced a bill to repeal the National Judiciary Act of 1801 on January 6, 1802. Considered one of the most heated debates in Congress, the lawmakers devoted two months to defending their partisan positions.53 In the Senate, the Republicans were led by Breckenridge and Stevens Thompson Mason54 and Gouverneur Morris headed the Federalists. Morris’s argument against the repeal was based on the Constitutional reasoning that judges can only be removed by “impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”55 Therefore, it was unconstitutional to remove the judges named by the Judiciary Act by any means other than impeachment.

Breckenridge had received assistance from John Taylor of Caroline in preparation for the argument in favor of the repeal. In a letter dated December 22, 1801, Taylor addressed the conflict. He noted that the Constitution states that judges may only hold their offices “during good behavior,” but pointed out that it says that

52 Ibid.

53 Warren, 206; Smith, 304.

54 Malone, Jefferson and His Time, vol. 3, Jefferson and the Ordeal of Liberty (Boston: Little, Brown and Company, 1962), 401-402, 405. Mason was the Senate majority leader. Breckenridge was Jefferson’s mediator during the presentation of the Kentucky Resolutions in 1798 and Mason was a personal friend and fellow Virginian. Breckenridge and Mason’s attack on the judiciary is intriguing in itself and subject to debate.

55 U.S. Constitution, Article 3, section 1; Article 2, section 4.
they may receive a salary “during their continuance in office.” This specification
indicated to Taylor that removal from office was not the only way to be removed
from a position or else the Constitution would have stated that “judges should hold
their offices and salaries during good behavior.”56 The Republicans argued that the
expansion of the judiciary was unnecessary because business was actually decreasing
in the courts. They feared the expansion of the national courts. Senator James
Jackson from Georgia was relieved at the repeal measurements because “I am more
afraid of an army of judges, . . . than of an army of soldiers.”57

Federalist Senators Jonathon Mason of Massachusetts and Morris made
substantial arguments against the repeal. Mason remarked, “This was one of the most
important questions that ever came before a legislature.” And the duty of the
judiciary was “to expound not only the laws, but the Constitution also; in which is
involved the power of checking the Legislature in case it should pass any laws in
violation of the Constitution.” Morris regretted that the check “established by the
Constitution” would be obsolete if the repeal passed and the remaining judges would
be “subject to your [Congress’s] will and pleasure.” Morris remarked that if the old
system of riding circuits was reinstated, the qualifications for appointment to the

56 Taylor to Breckenridge, 22 December 1801, quoted from Beveridge, vol. 3, 607-610.
Taylor told Breckenridge that he was not certain how far Jefferson would want to go in revising the
judiciary. But he had confidence that Jefferson “will see and the people will feel, that his
administration bears a distinct character, from that of his predecessor, and of course discover this
shocking truth, that the nature of our government depends upon the complection [sic] of the president,
and not upon the principles of the constitution.”

57 Jackson alluded to the pending case of Marbury v. Madison as he said, “That we are not
under dread of the patronage of judges, is manifest, from their attack on the Secretary of State.” The
Marbury case was not essential to the discussion. It was only alluded to twice, once by Jackson and
the other by Mason. Mason mentioned it only when discussing the removal of the judges. Smith 304,
note 67.
bench would be “less the learning of a judge than the agility of a post boy.” Stevens Mason showed no sympathy for the judges of the Supreme Court. “What have they got to do?” he questioned, and then replied, “To try ten suits, [annually] for such is the number now on their docket.”

The bill passed its second reading in the Senate with Vice President Aaron Burr casting the tie breaking vote. The Federalists urged for further discussion of the bill and on its third reading, Burr sided with the Federalists and voted to send it to committee. Two days later, on February 3, 1801, with the help of a late-arriving Republican, the bill passed by one vote.

In the House, the Republicans held a larger majority and were led by William Branch Giles from Virginia. Giles was “a large, robust, ‘handsome’ Virginian” and had served in the House since 1790. From the beginning, he had infuriated the Federalists with his “powerfully condensed” language. His speech during the debates for the Repeal was considered “by far his most brilliant display.” Giles immediately attacked the Federalist maneuver to “entrench themselves” and “continue to support those favorite principles of irresponsibility which they could never consent to abandon.” According to Giles, the Federalists chose the judiciary “because they held their offices by indefinite tenures, and of course were further removed from any responsibility to the people than either of the other departments.” He continued by saying that the major difference between Federalists and Republicans was “the

58 Beveridge, vol. 3, 60.
59 Ibid., 64.
60 The Republicans never forgave Burr. Smith, 304.
61 Beveridge, vol. 3, 75, note 2 and 76.
doctrine of irresponsibility against the doctrine of responsibility . . . The doctrine of despotism in opposition to the representative system.” Giles made it a point to attack Chief Justice Marshall for the show-cause order to Secretary of State Madison.62

James A. Bayard of Delaware, the Federalist with oratorical skills comparable to Gouverneur Morris, took the floor to respond to Giles’s attack. Bayard clarified Giles’s criticism of Marshall, and reminded him that the show cause was only a preliminary proceeding and did not necessarily indicate the Court would accept the case or issue a *mandamus* to Madison.63 Bayard argued that if the judges “have offended against the Constitution or laws of the country, why are they not impeached? The gentleman now holds the sword of justice. The judges are not a privileged order; they have no shelter but their innocence.” Bayard defended Adams’s appointments as men who were capable and responsible to perform their duties. He denied that Adams had appointed Federalist Congressmen to judgeships for their loyalty, and reminded the House that Jefferson had rewarded his supporters from the election with revered positions.64 Bayard’s oration received praise from his party and the *Washington Federalist*. Federalist John Adams told Bayard, “Yours is the most comprehensive masterly and compleat[e] argument that has been published in either house and will have, indeed . . . has already had more effect and influence on

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62 Beveridge, vol. 3, 77-78; Smith, 305. The Supreme Court had yet to hear *Marbury v. Madison* since the Repeal Act abolished the Court for fourteen months.

63 Smith, 305.

64 It is unconstitutional to fill a position with members of Congress who served during the position’s creation. Adams did appoint members of Congress, but they were to vacancies created by the Judiciary Act of 1801; therefore, not technically unconstitutional. Beveridge listed some of the offices filled by Jefferson supporters. Charles Pinckney cast the deciding vote for Jefferson in his state of South Carolina and was later appointed Minister to Spain. William Claiborne of Tennessee decided the election.
the public mind than all other publications on the subject.” The party’s newspaper reported Bayard’s speech was “far superior, not only to . . . the speeches of Mr. Morris and Mr. Tracy in the Senate, but to any speech of a Demosthenes, a Cicero, or a Chatham.”65

Bayard’s speech caused another prominent Republican in the House to negate the Federalist cry of innocence. There was hardly a discussion during this period that John Randolph of Roanoke did not vigorously and dramatically defend the Republican Party, and the Repeal Act was no exception. Randolph’s appearance was quite striking for a member of the House. He was usually clad in riding coat and breeches with boots and spurs. He carried a riding whip that he snapped during the passionate speeches he gave in his high, but dominating voice.66 “Here is a new power,” Randolph alleged, “of a dangerous and uncontrollable nature. . . .” He continued, “The decision of a Constitutional question must rest somewhere. Shall it be confided to men immediately responsible to the people, or to those who are irresponsible? . . . From whom is a corrupt decision most to be feared? . . . The power which has the right of passing, without appeal, on the validity of your laws, is your sovereign. . . .” Randolph questioned, “Are we not as deeply interested in the true exposition of the Constitution as the judges can be? Is not Congress as capable of forming a correct opinion as they are? Are not its members acting under a responsibility to public opinion which can and will check their aberrations from

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65 Adams to Bayard, 10 April 1802, Bayard Papers, Donnan, 152, quoted from Beveridge, vol. 3, 82.

Randolph’s inquiries were clearly understood by the majority of the House that voted on March 3, 1802 to repeal the Judiciary Act of 1801.68

The Federalists claimed that they were the champions of the people’s rights. Alexander Hamilton believed that “the sovereignty of America will no longer reside in the people, but in the Congress, and the Constitution is whatever they choose to make it.” Federalists wanted the judiciary to be a coordinate part of the government, not a subordinate or dependent branch.69 But the Federalists distrusted the people to make the right decisions. However, Republicans argued that the Federalist judiciary system was not an effective means for the people since a handful of judges interpreted the laws for the nation. But even Jefferson conceded that the Court did have the right to refuse to enforce an act of Congress as a way to protect their powers.70 This was evidence that neither party truly had the citizen’s best interest in mind because they were primarily concerned with furthering their own party’s agenda.

The Republicans were most angry about the Federalists expanding the national courts and filling the positions with Federalists, indeed, a relevant part of the 1801 Judiciary Act. However, circuit riding was the primary grievance the justices had with the original judiciary system. The Supreme Court justices on the circuits were not an effective means to broaden justice since the sessions were often disrupted by uncontrollable circumstances. In the simplest terms, and without putting the plan

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67 Ibid., 85-86; Haines, 234.

68 The vote was 59-32.


70 Ibid., 236-237.
into action, the idea of Supreme Court justices serving on the circuit courts was logical. At that time their docket was not filled by any means and the government could not foresee increasing the national budget to pay more judges. When the Sedition Act expired, there were fewer cases in the courts. But even with the few cases the Supreme Court heard, the system was not functioning the way it was intended and hindered justice. This complaint was scarcely mentioned in the Congressional debates.

The major Republican argument for riding circuit was that it gave justices the opportunity to familiarize themselves with the local laws and customs. Federalists reasoned that the justices did not benefit from riding “rapidly from one end of the country to another” and the neighborhood laws did not greatly benefit their education of the law since most federal cases relied on common law. Republicans were outraged at the use of common law in the court system and argued against it throughout the debate. Breckenridge said in later years that he did not wish, “to see all possible subjects drawn into the great vortex of federal legislation and adjudication. I do not, in short, wish, as some gentlemen may do, to see one mighty and consolidated sovereignty collected from and erected on the ruins of state sovereignties.” The common law debate was relevant to the debate over the judiciary’s future; however, the greatest issue the justices personally had with the system was not really considered. The little debate on the matter was

71 Ibid., 237.
72 Ibid.
73 Ibid. Breckenridge made this comment several years later.
turned into a discussion over use of common law, moving away from the completely valid point that the circuit riding hindered the circuit courts and the people’s faith in the system more than it benefited the justices’ knowledge of the law.

The debate of the Repeal was the most widely reported Congressional activity to date and immediately after the debate began, the “press took sides . . . and the political temperature rose accordingly.” After the repeal was announced, the Republican *National Intelligencer* rejoiced, “Judges created for political purposes, and for the worst of purposed under a republican government, for the purpose of opposing the National will, from this day cease to exist.” The *Independent Chronicle* exclaimed, “The Judiciary! The Judiciary! Like a wreck on Cape Cod is dashing at every wave. . . . we are sailing by the grace of God in the Washington *Frigate*—our judges are as at first and Mr. Jefferson has thought fit to practice the old navigation and steer with the same compass by which *Admiral Washington* regulated his log book. . . . every true Washington American will step on board in full confidence of a prosperous voyage. Huzza for the *Washington Judiciary*—no windows broke—no doors burst in—free from leak—tight and dry.”

The Federalist papers were just as dramatic and mourned that the Constitution was now a “mere old woman’s story . . . its evanescent authority will soon be forgotten.” One paper declared that the “judicial system had received its death warrant,” and yet another claimed that “by this vote the Constitution has received a

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74 Beveridge, vol. 3, 92; Smith, 304.

75 *National Intelligencer*, March 5, 1802, quoted from Warren, 209, note 3.

76 "Bowling" in the *Independent Chronicle* of April 26, 1802, quoted from Beveridge, vol. 3, 99-100. Beveridge noted that this is evidence of “Jefferson’s amazing skill” of guiding the public into believing he “was following in Washington’s footsteps.” Ibid., 100, note 1.
wound it cannot long survive.” Some papers predicted a horrible future for the nation. The *Gazette of the United States* provided a story from their Washington correspondent that foretold of civil war, “The holders of city lots seem much alarmed. Not a lot had been sold for many days, and the prospect of a dependent Judiciary and of Judges who are to be the creatures and puppets of the Virginia party prevents the sale of landed property here. Many of the sober-minded men of Virginia are endeavoring to sell their lands and slaves and contemplate moving to New England. From the violation of the Constitution, disunion, they think, must ensue; and when it shall, they mean to be on the safe side of the boundary.” Further evidence of disruption throughout the union was found in a letter to John Rutledge dated April 27, 1802. “The effect of the Judiciary repeal and the enormous Acts of the Party here, have had a wonderful effect to depreciated property here. [A] gentleman in Phila[delphi]a was about to purchase a plantation of Gov[ernor] Lee, but the repeal of the Judiciary, and the talk of negroe [sic] insurrection broke off the bargain. [Benjamin] Stoddert was about to make a sale of city lots here, but the same reason operated also and he has been much injured.”

Civil war did not ensue, but the Republicans realized the Federalists could try to undo the repeal in the Court the next session. A *Washington Federalist* editorial titled, “Farewell, a Long Farewell, to All Our Greatness” indicated that not all Federalists were willing to abide by the newly passed legislature. The passage

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77 *Gazette of the United States*, quoted in *National Intelligencer*, February 3, 17, 1802, quoted from Warren, 210-211.

78 [Illegible] to John Rutledge, 27 April 1802, *The John Rutledge Papers, Manuscripts Division, Library of Congress* (original is in the *Southern Historical Collection, Chapel Hill*), quoted from Haskins and Johnson, 166-167.
remarked that “The judges will continue to hold their courts as if the bill had not passed. ‘Tis their solemn duty to do it; their country, all that is dear and valuable, call upon them to do it. By the judges this bill will be declared null and void.” The Republicans were aware of a possible instruction, and instigated changes to the Court’s terms in order to prevent any disturbance by the Supreme Court at the next session. Prior to the 1801 Act, the Supreme Court held two sessions a year, in February and August. The Judiciary Act of 1801 had changed the terms to June and December. However, “An Act to Amend the Judicial System of the United States” passed on April 29, 1802. This measure abolished the June and December terms, restored the February term, but cancelled the upcoming August session. Therefore, the Court would not meet again for fourteen months.

Federalists were outraged at another successful attempt to hinder justice. James Bayard asked, “Are the gentlemen afraid of the judges? Are they afraid that they will pronounce the repealing law void?” James Monroe questioned the righteousness of canceling the term. He wrote to Jefferson and noted that this action “may be considered as an unconstitutional oppression of the Judiciary by the Legislature. . . . Suppose the Judges were to meet according to the former law,

79 *Washington Federalist*, March 3, 1802, quoted from Beveridge, vol. 3, 92. Beveridge said that this particular editorial is extremely important and likely represents the majority of Federalist beliefs in the capital. Ibid., 93, note 1.

80 Smith, 305. Instead of two two-week sessions, the 1802 Act changed it to one four-week session in February. It reinstated the circuit riding duty. This was the action that completely spurred the plan for the New England states to succeed from the Union. One Federalist paper declared in March, before the Repeal passed, that “whether the rights and interests of the Eastern States would be perfectly safe when Virginia rules the nations is a problem easy to solve but terrible to contemplate. . . . As ambitious Virginia will not be just, let valiant Massachusetts be zealous.” Quoted from Beveridge, vol. 3, 97. Beveridge detailed the discussion on possible succession. Ibid., 97-100.

81 Annals of Congress, 7th Congress, 1st session, 1229, quoted from Haskins and Johnson, 168; Smith, 621, note 76.
notwithstanding the postponement, and make a solemn protestation against the repeal and this postponement, denouncing the whole proceedings as unconstitutional. . . . I am of opinion that this postponement would give new colour to their pretensions, new spirits to their party and a better prospect of success.**82  The 1802 Act established six circuit courts with one Supreme Court justice assigned to each that would meet twice a year.

The Federalists were determined to test the constitutionality of the Republican maneuver that destroyed their partisan judiciary.83  Bayard and John Marshall were friends who met in Alexandria in April 1802 to discuss unfinished matters from Marshall’s time as secretary of state.84  Bayard questioned Marshall’s position on the matter, but Marshall said he could offer no official advice.  The chief justice did say that he believed that the legislation was constitutional.  However, Marshall was not certain if the circuit courts should be resumed under the direction of the Supreme Court justices. Marshall decided to write his colleagues to get their opinions on the matter.  Their opinions are best illustrated by their words.85  On April 6, Marshall

**82 Ibid., quoted from Smith, 621, note 76.


85 Smith, 306-307.  Haines remarked that Marshall did not want to resume riding circuit because he wanted to devote more time to writing his biography of George Washington, a task he had taken on after Washington’s nephew asked him to compose such a work.  Haines, 224-225.  Haskins and Johnson provided full detail of Marshall’s letters to Justices Cushing and Paterson requesting their opinion on the judiciary matter.  Justice Chase’s letter is printed in full.  Haskins and Johnson, 168-177.
wrote to Justice Paterson. This was before the bill passed, while it was being considered in the Senate. Marshall remarked that

although the duties would be less burdensome than theretofore, or than he had expected, I confess I have some strong constitutional scruples. I cannot well perceive how the performance of circuit duties by the Judges of the supreme court can be supported. If the question was new I should be willing to act in this character without a consultation of the Judges; but I consider it as decided and that whatever my own scruples may be I am bound by the decision. I cannot however but regret the loss of the next June term. I could have wished the Judges had convened before they proceeded to execute the new system.  

After the bill passed, Marshall again wrote Paterson as well as Justice Cushing on April 19. Marshall probably wrote to the other justices, but letters to them have not been preserved. In his letter, Marshall emphasized that the judges should communicate with one another in order to behave “understandingly and in the same manner.” The Chief Justice conveyed the significance of the matter:

I hope I need not say that no man in existence respects more than I do those who passed the original law concerning the courts of the United States, and those who first acted under it. So highly do I respect their opinions that I had not examined them and should have proceeded without a doubt on the subject, to perform the duties assigned to me if the late discussions had not unavoidably produced an investigation of the subject which from me it would not otherwise have received. The result of this investigation has been an opinion which I cannot conquer that the constitution requires distinct appointments and commissions for the Judges of the inferior courts from those of the supreme court. It is however my duty and my inclination in this as in all other cases to be bound by the opinion of the majority of the Judges and I should therefore have proceeded to execute the law so far as that task may be assigned to me, had I not supposed it possible that the Judges might be inclined to distinguish between the original case of having the duties marked out before their appointments and of having the duties of administering justice in new courts imposed after their appointment. I do not myself state this because I am myself satisfied that the distinction ought to have weight, for I am not—but as there may be some thing in it I am inclined to write to the Judges requesting the favor of them to give me their opinions which opinions I will afterwards write to each Judge. My own conduct shall certainly be regulated by them. This is the subject not to be lightly resolved on. The consequences of refusing to carry the law into effect may be very serious. For myself personally I disregard them, and so I am persuaded does every other Gentleman on the bench when put in competition

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86 Marshall to Paterson, 6 April 1802, Papers of John Marshall, vol. 6, 105-106.
with what he thinks his duty, but the conviction of duty ought to be very strong before the measure is resolved on. The law having been once executed will detract very much in the public estimation from the merit or opinion of the sincerity of a determination, not now to act under it."87

This letter was quite similar to the one Marshall sent to Cushing, and it is assumed letters to the others held comparable statements. Marshall wanted to express his commitment to the law and ask for the support of his fellow justices.

Justice Bushrod Washington wrote to Marshall and the contents of his letter are assumed by the content of Marshall’s letter to Paterson on May 3. Marshall told Paterson that Washington firmly stated that the question of the justices riding circuit should be “considered as settled and should not again be moved.” Justice Cushing agreed, and said the justices must “be consistent . . . we must abide by the old practice.”88 Washington referred to the fact that the justices rode circuit under the 1789 Act, therefore indicating that the justices should resume riding circuit. Justice Chase, on the other hand, wanted the justices to meet in Washington in July or August to discuss what action should or should not be taken on the issue rather than correspond by letter.89 Chase strongly believed that the Repeal was unconstitutional and the Supreme Court justices should not ride circuit because the positions were already filled by circuit court judges created, appointed, and confirmed in 1801. Chase was the minority and Justice Cushing said that, “we must leave brother Chase to exercise his Singular Jurisdiction in August.”90 Marshall concurred with the

88 Smith, 308, quoting, Hannah Cushing to Abigail Adams, 25 June 1802.
89 Chase’s letter is printed in full in Haskins and Johnson, 172-176, note 182.
90 Cushing to Paterson, 25 May 1802, the original is held by the New York Historical Society and a copy is available in the New York public library, quoted from Haskins and Johnson, 174.
majority’s decision, and Court was not held again until February 1803 and the justices presided over circuit courts.

When the Court convened for its 1803 session, the justices heard a case that directly questioned the constitutionality of the Repeal and right of Congress to force justices to serve on the circuit courts. The circuit court in Virginia that had decided the case, *Stuart v. Laird* was declared unconstitutional by the 1802 Repeal, and the case was transferred to another circuit court. Marshall heard the case on the circuit and ruled against the defendant who claimed the Repeal Act unconstitutional. The case was taken to the Supreme Court on a writ of error. Charles Lee, counsel for the plaintiff, argued that the Repeal Act was unconstitutional and Supreme Court justices could not be required to serve as circuit judges. On March 2, 1803, Justice Paterson denounced Lee’s claim that the Repeal was unconstitutional:

> Congress have constitutional authority to establish such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.
>
> The present is a case of this kind. It is nothing more than the removal of the suit brought by Stuart from the court of the fourth circuit to the court of the fifth circuit, which is authorized to proceed upon and carry it into full effect.

Adjourning the Supreme Court for over a year did not prevent the justices from deciding on the constitutionality of the Repeal Act. Furthermore, from the responses of the justices, it is not probable that the justices would have ruled against the Repeal, regardless of when they held court. Historian Charles Warren commended this

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91 Haskins and Johnson, 181. Marshall abstained from arguments because he had heard the case on circuit.

92 *Stuart v. Laird*, 1 Cranch 298, 308 (1803).
alleged self-restraint, “No more striking example of the non-partisanship of the American Judiciary can be found than this decision by a Court composed wholly of Federalists, upholding, contrary to its personal and political views, a detested Republican measure.”

Some historians have interpreted both Marshall and Jefferson’s behavior as their attempt to remain non-partisan in the debate over the judiciary. Jean Edward Smith translated Marshall’s correspondence with his colleagues as evidence that he wanted to “minimize the possibility of future recriminations.” He repeated several times that Marshall wanted to keep the court out of partisan politics, and Jefferson “pursued a policy of cautious moderation.” It is quite illogical to believe that Marshall, or Jefferson, would put aside ideological beliefs in order to pacify the opposing party. Because the justices had rode circuit in the years prior to 1801, they did not have a case against resuming the practice. Marshall followed a careful method in asking for the other justices’ opinions on the Repeal and went along with the majority. It is probable that Marshall did not want to return to circuit, but followed the majority. This was a wise decision especially because the judiciary had just suffered an attack from the Republicans, and Marshall was cautious not to disturb.

Jefferson has been deemed a moderate because of the way he and his party altered the judiciary. Historian Charles Haines commended Jefferson for restoring

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93 Warren provided another cites comment on the Stuart decision, William Rawle’s View of the Constitution in 1825, quoted from Warren, 272. Rawle said that “party taint seldom contaminates judicial functions.”

94 Smith, 307.
the judiciary to its pre-1801 ways. Haines cited historian Edward Corwin who argued that the Republicans had the opportunity to amend the Constitution and change the tenure of the justices. Another alteration the Republicans could have done would be to increase the number of justices and fill them with favorable appointments.95 Because the Republicans chose the so-called moderate course, Jefferson is perceived as wanting to stay out of the judiciary argument. Jefferson biographer, Dumas Malone, believed that Jefferson was completely innocent of any plan to attack the judiciary, and have accused Breckinridge and Mason of developing the debate in Congress.96 Jefferson worked with Breckenridge to develop the Kentucky resolutions, and arranged to have his name absent from those states rights arguments and orchestrated a similar maneuver with the repeal. This was merely a clever way to hide Jefferson in the shadows of a full-fledged attack on the judiciary and the Federalists who filled the positions with men unfavorable to the Republicans.

The Repeal of the Judiciary Act of 1801 certainly can be interpreted as partisan or unbiased as an author pleases. However, the implications that Jefferson and Marshall wanted to remain out of the center of the storm are completely artificial.97 Jefferson entered the presidency after defeating the Federalists who had held the majority for twelve years. The outgoing party’s merciless attempts to maintain any position of power was not favorable to the incoming Republicans. It is irrational to think that the new president would have allowed the Federalist’s last act

95 Haines, 224.
96 Malone, First Term, 115-117.
97 Smith's chapter on the repeal is entitled, "The Gathering Storm" and Haskins and Johnson first used the reference to the repeal as a storm on page 151 of their work.
to continue unchallenged. The Judiciary Act of 1801 certainly appeared to be a partisan maneuver, and it was to the Federalists who pushed for its passage. However, it originated from the justices who had legitimate concerns, personal and judicial, that needed to be addressed. The 1801 Act did in fact consider these issues and came closer to a reasonable judicial system that was set back a year later by the Republicans.\textsuperscript{98} The 1801 Act passed at an inopportune time but only came to the forefront and passed after the Federalists latched a hold of it. Jefferson and Marshall were not immune to these events, nor did they declare indifference. The Repeal of the Judiciary Act of 1801 was another encounter between two leaders involved in the highly partisan struggle. While some historians call them champions of impartiality who only wanted peace between the branches of government, this is a flawed interpretation of men who intended to preserve their party’s principles and uphold their own ideas of government.

\textsuperscript{98} Crosskey, vol. 2, 750-764.
The enduring Federalist judiciary alarmed the Jefferson administration, especially with the uniformity and strength it gained under Chief Justice Marshall’s leadership. In a short time, Marshall inspired the tradition of the court speaking with one voice through opinions “of the court” rather than the traditional *seriatim* opinions. After *Marbury v. Madison*, the Republicans realized the judiciary would not shy away from questions concerning the executive or other controversial issues that might conflict with the Republican Party. This decision stirred even more fear of the Supreme Court because it exhibited unity that Marshall hoped would develop into a new respect for the Court. Prior to the *Marbury* decision, Jefferson had felt threatened and instigated plans for the demise of the Federalist dominated judiciary. He led the call for a revised judiciary and Breckinridge and Mason accomplished the task. The Repeal of the Judiciary Act of 1801 succeeded, eliminating sixteen judgeships and requiring the Supreme Court justices to resume riding circuit.

Jefferson motivated the Republicans behind another judicial attack in 1803 as he sought to impeach Federalist judges he believed were not acting in the best interest of the people. The Constitution says that judges may “hold their offices during good behavior.” These judges can only be removed by “Impeachment for, and conviction
of, treason, bribery, or other high crimes and misdemeanors.”¹ These were pliable instructions for impeachment and possible removal of an officer from his life appointment. The Republicans chose three judges to test the impeachment process in hopes of replacing them with men more suited to their political position.

Those who faced impeachment charges, Alexander Addison, John Pickering, and Samuel Chase, were all Federalists who exerted their Federalist beliefs and denounced Republicans in their instructions to the grand juries. It was common practice for judges to give political speeches in their deliveries to the grand juries and the Federalists did not believe this behavior justified impeachment. These tirades increased after the Republican victory in 1801 and grew stronger after the Repeal Act passed in 1802. Adding to the Republican discontent with these particular judges, Pickering and Chase habitually presided over court intoxicated, inspiring boisterous and outrageous court procedures along with their anti-Republican lectures. Unrestrained judges were not effective contributions to the judicial system, but the Federalists did not encourage their retirement for fear of Jefferson appointed successors. The Federalists felt justified for leaving the deranged men on the courts because the Republican strategy for removal was questionable and strictly meant to purge the courts of Federalists. Once again, President Jefferson disguised himself, this time behind a band of radical Republicans in the House, in another attempt to rearrange the judiciary by removing unfavorable judges. Chief Justice Marshall cautiously observed the proceedings, and was legitimately concerned that Jefferson would soon attempt to remove him and the other Supreme Court justices.

¹ U.S. Constitution, Article 3, section 1; Article 2, section 4.
The impeachment trial of Samuel Chase, Supreme Court associate justice, was the prominent issue in the House of Representatives for the year 1803 to 1804. Courtesy of Vice President Aaron Burr, the trial was transformed into a theatrical performance and John Randolph was the lead entertainer. The Chase trial may be the most prominent of the impeachment proceedings; however, it was prefaced by attacks on two other judges. The Republican strategy was to begin with charges against a state judge, observe the method, proceed to a district judge, and then attack a Supreme Court justice.

On January 11, 1802, shortly after John Breckenridge introduced the Repeal Act to the Senate, “enraged Republicans of Alleghany County, Pennsylvania” signed and sent a petition to the state lawmakers with complaints against Alexander Addison, Pennsylvania county judge. On March 23, 1802, the Pennsylvania House of Representatives sent the state senate a list of high crimes and misdemeanors performed by Addison, the “able, but arrogant” judge. Addison was a devoted Federalist and often made political speeches during his addresses to the juries. Beveridge says these were “no more appropriate than sermons,” but were masterfully written. Addison was known to bully counsel and “browbeat witnesses” and once he prohibited an Associate Justice from addressing the jury. Addison’s trial began in early January 1803, and he defended himself against enemies who abused the

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3 Beveridge found similarities between Addison’s speeches and political pamphlets. Some titles were: “Causes and Error of Complaints and Jealousy of the Administration of the Government;” “The Liberty and Speech of the Press;” “Rise and Progress of Revolution.” Ibid., 46, note 2.

4 Beveridge recorded the incidents. Ibid., 26-27.
guidelines of impeachment, which intended to remove only those guilty of indictable offenses. However, the Republican’s theory of removing judges for incompatible views of the legislature triumphed, and he was convicted on January 26, 1803.

Addison’s removal provided the spark that Jefferson and the Republicans needed to carry out their attack on a higher ranking judge. New Hampshire Judge John Pickering’s impeachment was discussed as early as December 1802, before Addison was convicted. Secretary of the Treasury Albert Gallatin told New Hampshire Senator Plumer that the government had already lost several suits because of Pickering’s abilities. He threatened that although he had “not laid the papers before the President,” he “thought that the Judge ought to be removed from office and intimated, that unless he resigned, measures would be taken to remove him.” Jefferson soon read the complaints about Pickering, and on February 4, 1803, President Jefferson sent a message to the House granting his approval for an attack on Pickering. “The inclosed [sic] letters and affidavits exhibiting matter of complaint against John Pickering District Judge of New Hampshire which is not within executive cognizance [sic], I transmit them to the House of Representatives to whom the constitution has confided a power of instituting proceedings of redress, if they

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5 Beveridge commented that Addison’s defense is significant to understanding the Federalist concerns with the independence of the judiciary and how wrong it was for a judge to be impeached for an offense that was not indictable. Ibid., 164, note 1.

6 George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall 1801-1815*, vol. 2, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan, 1981), 214. Haskins and Johnson pointed out that the Pennsylvania legislature was so confident after Addison’s impeachment that they later sought to remove three of the four State Supreme Justices in 1804. The fourth, a Republican, Hugh A. Breckenridge, asked to be impeached with the others. This greatly concerned the prosecutor in the Addison case, and he instead defended the justices. The Pennsylvania Senate voted 13 to 11 in favor of their innocence. Ibid., 215.

7 Quoted from Haskins and Johnson, 212.
shall be of opinion that the case calls for them.” Jefferson forwarded statements from Republican officeholders in Portsmouth, New Hampshire confirming Pickering’s inability due to “habitual intoxication.”

Simply stated, it was obvious why Pickering should have been removed from the Bench. However, Historian Lynn Turner revealed how Pickering was blatantly misinterpreted in an early biography of Thomas Jefferson when John T. Morse called him “a worthless fellow morally and mentally.” Morse reluctantly corrected his 1883 slander with an appendix in a later version, saying he had done “an unintentional injustice to the memory of a worthy man.” Later historians did not yield to this correction, and continued to condemn the much maligned judge. Pickering’s contemporaries, mostly Federalists, commended him for his “intellectual greatness, sobriety and moral integrity.” He was the author of his state’s constitution and a distinguished citizen. After devoting his entire life to public service in New Hampshire and serving on the bench for five years, his mental health started failing him at age sixty-three. He became a mentally unbalanced hypochondriac, and in 1802 lost his prosperity when a fire destroyed the majority of his property.

Regardless of his instability, neither his family nor the Federalists encouraged him to resign from the bench. His family could not aid the poverty stricken judge; and the Federalists were wary of whom Jefferson would appoint to replace him. With the passage of the Judiciary Act of 1801, Pickering and the judiciary were granted

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8 Jefferson letter quoted from Haskins and Johnson, 212-213.


10 Turner, 488.
some relief. The Federalist backed plan allowed the circuit judges to appoint a replacement if a district judge was incapable of performing his duties. In April 1801, Judge Jeremiah Smith was named to take over Pickering’s duties. However, when the Judiciary Act was repealed in 1802, Pickering was again required to preside over the circuit court.¹¹

Pickering’s habitual drunkenness created many unusual circumstances in the courtroom, but the Republicans used a particular incident in October 1802 for ammunition. While presiding over the case United States v. Eliza,¹² Pickering exhibited intoxicated behavior. Pickering entered the courtroom drunk and ordered the Republican deputy-marshal to go up and sit beside him on the bench on account of him “feeling lonely.” After several disruptions, Pickering declared he could decide the case in four minutes. Both counsel agreed to move for a postponement. Turner said that Pickering instantly brightened, and told the Federalist lawyer, “My dear, I will give you to all eternity,” and postponed the trial until the following day when he said he would be sober.¹³

The next day Pickering returned in the same condition and the proceeding was similar to the previous day. The judge easily tired of the attorneys arguing about the competence of a witness. Without hearing any witnesses, he restored the property in


¹² Turner provided a brief explanation of the trial and concludes that it was really a “case of Republican surveyor, collector, marshal, clerk, and district attorney v. Federalist claimant, attorney, and judge.” Turner, 489.

¹³ Ibid., 490.
question to the claimant, declaring, “We will not sit here to eternity to decide on such
damn’d paltry matters.” When the Republican attorney pleaded for his witness to be
heard, Pickering responded, “Very well, we will hear everything—swear every
damned scoundrel that can be produced—but if we sit here four thousand years the
ship will still be restored.” The witness proceeded, but after a few minutes Pickering
cut him off, and adjourned the court. The Republican attorney said he would appeal
and Pickering said, “Yes, appeal, and let old wig try it, but by God he shan’t alter the
decree, for I will be alongside of him.” By the time Pickering declared the case over,
the on-lookers were thoroughly entertained by the judge’s behavior, but his friends
were concerned and lamented his prior wisdom.14

Based on this court room experience, the Republicans sent complaints to the
House and a committee was formed to draw up the articles of impeachment. Joseph
Nicholson and John Randolph headed the managers of the prosecution and presented
the articles to the Senate. Vice President Aaron Burr conducted the court proceeding
with grand splendor. After nine days of debate, it was decided the case should go to
trial. On January 25, the summons was delivered to Pickering. The trial date was set
for five weeks later, March 2, 1804. This gave the old judge only a few weeks to
assemble a defense, his witnesses, and travel from New Hampshire to Washington, a
twelve day trip in the middle of winter. An ordinary man would have had difficulty
traveling and preparing for this trial, but contributing to Pickering’s troubles, his
illness created a fear of traveling by ferry.15

14 Ibid.

15 Ibid., 495.
Needless to say, Pickering did not appear at his trial. Instead, his son, Jacob Pickering, hired Robert Goodloe Harper to serve as his representative, arrived as petitioner in the case. Harper sent a letter to the court stating his purpose in the trial and asking to be heard. This exemplified the extreme partisanship of the trial. Harper was despised by the Republicans and a member of the Chase defense team. He was there to “confound the House politicians with his legal skill.” Burr ordered a secretary to read Harper’s letter that stated he did not represent Pickering because the judge’s mental condition prevented him from retaining counsel. Jacob Pickering argued that his father was insane, and could not be responsible for his actions that the Republicans labeled high crimes and misdemeanors. Pickering’s son then pleaded for a postponement so his father would be able to make arrangements for his case and be present at the proceedings. This move was unexpected, and the Senate debated for three days whether or not Harper should even be allowed to represent Jacob Pickering. Finally, the Senate voted 18 to 12 to hear Harper’s evidence.

The four articles of impeachment “all but proclaimed in writing that Pickering was to be sacrificed to political expediency.” Each article pertained to the Eliza case and never used the term insane to describe Pickering’s behavior. The prosecution did not want to be perceived as trying a crazy man because that sounded

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17 Turner, 497. During the John Adams administration, Harper left the Republican Party to be majority floor leader.

18 Ibid., 497-498, 500. The Federalists did nothing to help Pickering in his case. His poor relatives could not compete with the prosecution funded by the federal government. Ibid., 496.

19 Ibid., 495.
less pleasant than removing a judge for improper behavior. Their wording however, alluded to his insanity. The first three articles addressed his refusal to follow judicial procedure.\textsuperscript{20} The third article described the judge as “wickedly meaning and intending to injure the revenues of the United States, and thereby to impair their public credit.”\textsuperscript{21} Article Four condemned his drunken behavior during the proceeding and said that “being a man of loose morals and intemperate habits” he lacked “essential qualities in the character of a judge.”\textsuperscript{22}

Throughout the two-week debate, Harper adamantly contested the Republican attempt to impeach a man who was not guilty of an indictable offense. He argued that Pickering was a victim of his own state of mind, and awkward and unfortunate circumstances forced him to remain on the bench. The prosecution argued that impeachment did not necessarily imply criminality, but rather, the trial was an “inquest of office in judicial form.”\textsuperscript{23} In this way, the Republicans could dismiss any evidence concerning Pickering’s alleged insanity. In addition to their strategy, they described the Senate not as “a court of justice, but part of the constitutional machinery for making appointments and removals.”\textsuperscript{24} This redefinition relieved the Republicans from the uncomfortable position of proving Pickering’s mental illness as a criminal offense. Therefore, the Republicans who were traditionally strict

\textsuperscript{20} Haskins and Johnson, 234.

\textsuperscript{21} This statement referred to Pickering’s refusal of Sherburne to appeal to the circuit court. Turner, 496.

\textsuperscript{22} Ibid.

\textsuperscript{23} Ibid.

\textsuperscript{24} Ibid., 235-236.
interpreters of the Constitution decided instead to utilize the document's implied meanings in order to support their impeachment charges.

Pickering commented shortly before he was found guilty, "The demon of party governed the decision." He continued, "All who condemned were Jeffersonians, and all who pronounced the accused not guilty were Federalists."\(^{25}\)

Pickering may have been a deranged man, but he recognized who was delivering the assault. When the voting commenced on March 12, 1804, all Senators voted according to party, but only twenty-nine out of thirty-four Senators were willing to attach their names to the first "judicial purge" in the United States.\(^{26}\) The others were ashamed that the Senate would even consider trying an insane man. Three Republican Senators and two Federalists refused to vote and left the chamber.\(^{27}\) Regardless of the small outcry from both parties, Pickering was found guilty of high crimes and misdemeanors by a vote of 19 to 7. The Senators voted 20 to 6 to remove him.\(^{28}\)

The trial angered and troubled the Federalists. Similar to the announcement of the Repeal of the Judiciary Act, the Pickering impeachment was evidence of a full-fledged attack on the judiciary since the judge's behavior was ignored until now. The trial was not a fair trial. The defendant was not present, and the prosecution

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\(^{26}\) Turner, 505.

\(^{27}\) Beveridge, vol. 3, 168. Beveridge listed the Republican senators who left, John Armstrong, NY; Stephen R. Bradley, VT; David Stone, NC. He noted from Plumer’s journal that Vice President Aaron Burr left the proceedings to “attend to his candidacy for the governorship of New York.” Ibid., note 1.

\(^{28}\) Turner, 505; Beveridge, vol. 3, 167.
uncontrollably molded the Constitutional guidelines for an impeachment procedure to support their out-right attack on the Federalist dominated judiciary. In the Boston Repertory, Senator William Plumer anticipated the demise of a balance of the governmental branches. “How far these proceedings will form a precedent to establish the doctrine, that when requested by a majority of the House, two thirds of the Senate can remove a Judge from office without a formal conviction of high crimes and misdemeanors, time alone can develop. I really wish those in New England who are boasting of the independence of our Judiciary would reflect on what a slender tenure Judges hold their offices whose political sentiments are at variance with the dominant party.” 29 Federalist suspicions about biased Republican motives were confirmed with the appointment of Pickering’s replacement. As expected, Jefferson nominated a Republican to the open district judge position, but his choice was quite sinister. John Samuel Sherburne, the leading figure behind Pickering’s trial, “the man who advised and promoted as far as he was able,” was named to Pickering’s position. 30

The Pickering trial gave the Republicans motivation to proceed with the Chase impeachment scandal and provided the procedural experience the Republicans needed. With two successful impeachments behind them, the Republicans were

29 Plumer to John Park March 13, 1804, quoted from Turner, 505; Beveridge, vol. 3, 168, note 2.

30 Ironically, Sherburne experienced the same mental breakdown as Pickering twenty years later. Turner cites the Massachusetts Historical Society records that state the people of Portsmouth “considered it to be the judgement of God visited upon him for his part in Pickering’s removal.” Sherburne was removed, but still collected his salary until he died in 1830. Two other witnesses, Jonathan Steele and another were appointed to vacant positions created by Sherburne’s nomination. Steele rejected the position of district attorney, claiming he was under the impression he would be
confident in their plan to attack Chase. However, two particular events in the spring of 1803 further motivated their attack. The House impeached Pickering in 1803, but his trial did not begin until 1804. During this interlude, the Supreme Court announced its decision on the *Marbury v. Madison* case. Chief Justice Marshall’s opinion annoyed the Republicans, especially Jefferson, who despised Marshall’s lecture concerning judicial appointments. Virginia Senator William Branch Giles complained that if

the judges of the Supreme Court should dare, AS THEY HAD DONE, to declare an act of Congress unconstitutional, or to send a mandamus to the Secretary of State, AS THEY HAD DONE, it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them.31

Even though the opinion angered Republicans, Marshall was too conscious of the ongoing debate between the Republicans and the judiciary to compose and deliver an address that would leave the Supreme Court wide open for an attack. However, this should not imply that Marshall and the associate justices were not leery of another Jefferson led attack.32

Another incident during the interlude before Pickering’s trial contributed to

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31 Haskins and Johnson noted that *Marbury* was “too careful in its language, too guarded in its scope, to furnish an open ground for impeachment of any one or all of the Supreme Court judges . . .” Haskins and Johnson, 215-216.

32 This will be explained further during the discussion of Marshall’s testimony in the Chase trial.
the Republican assurance. Judge Samuel Chase delivered a highly anti-Republican speech to a grand jury in Maryland. Chase’s controversial lecture included the following complaint,

Where Law is uncertain, partial or arbitrary, where Justice is not impartially administered to all; where property is insecure, and the person is liable to insult and violence without redress, by Law; the people are not free; whatever may be their form of Government. . . . You know, Gentlemen, that our State, and national Institutions were framed to secure to every member of the Society equal Liberty and equal rights, but the late alteration of the federal Judiciary, by the abolition of the office of the sixteen Circuit Judges, and the recent change in our State Constitution by establishing universal suffrage; and the further alteration that is contemplated in our State Judiciary, (if adopted,) will, in my Judgment, take away all security for property, and personal Liberty.—

The independence of the National Judiciary is already shaken to its foundation; and the virtue of the people alone can restore it. The independence of the Judges of this State will be entirely destroyed, if the Bill for abolishing the two Supreme Courts, should be ratified by the next General assembly.—The change of the State Constitution, by allowing universal suffrage, will, in my opinion, certainly and rapidly destroy all protection to property, and all security to personal Liberty; and our Republican Constitution will sink into a Mobocracy, the worst of all possible Governments. . . .

[T]he modern Doctrines, by our late reformers, that all men in a State of Society are entitled to enjoy equal Liberty, and equal rights, have brought this mighty mischief upon us: And I fear that it will rapidly progress, until peace and order, freedom and property, shall be destroyed.33

This served as the preeminent ammunition the Republicans used to complete allegations against him. Jefferson was greatly distressed by Chase’s words, and did not believe that any government official should have such an enormous amount of freedom of speech. The President wrote to Nicholson on May 13, 1803, after he heard about Chase’s tirade.

You must have heard of the extraordinary charge of Chase to the grand jury at

33 This was taken from a document hand-written by Chase; quoted from Haskins and Johnson, 218. Parts are quoted in Henry Adams, vol. 2, 148-149.
Baltimore, ought this seditious and official attack on the principles of our constitution, and on the proceedings of a state, to go unpunished? and to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration. As [?] for myself, it is better that I should not interfere.34

Historian Henry Adams contemplated Jefferson’s claim of non-interference and remarked that, “The event proved that non-intervention was wise policy.” However, Adams continued that “Jefferson was somewhat apt to say that it was better he should not interfere in the same breath with which he interfered. The warning that he could not officially interfere seemed to imply that the quarrel was personal; for in the case of Pickering, he had interfered with decision. If this was his view, the success of any attack upon Chase would be a gain to him, and he was so ordering as to make failure a loss only to those who undertook it.”35 This is an excellent summary of Jefferson’s behavior and tradition of hiding in the shadows, but still instigating an attack on the judiciary. His actions in the Chase trial further support this argument. Nicholson, the recipient of Jefferson’s letter, was then serving as the coordinator for the Pickering impeachment and had a great interest in the Chase impeachment. However, his colleague Nathaniel Macon warned him about taking charge of the Chase debate because if the impeachment were successful, Nicholson, being from Maryland, would be a logical successor to Chase.36


35 Adams, vol.2, 150. Adams quoted a definition of non-intervention recorded by Talleyrand. The Frenchman concluded that “Non-intervention is a word used in politics and metaphysics, which means very nearly the same thing as intervention.”

36 Macon to Nicholson, 6 July 1803, quoted from Haskins and Johnson included correspondence between Macon and Nicholson regarding the Chase impeachment. Haskins and Johnson, 200.
In the summer of 1803, John Randolph was chosen to lead the House committee that brought charges against Chase. This Virginia Republican was known for his passionate speeches in the House, but he was a poor choice to lead the prosecution team in a case concerning judicial matters. Randolph had no experience in legal arguments; in fact, his regularly brilliant oratorical skills hindered him in the trial. Randolph was short-tempered and ill at the time of the trial. His lack of legal ability was not the only noteworthy aspect of his participation. At the time of the Chase impeachment, Randolph, the radical Republican, was personally outraged with President Jefferson and the moderate course he had taken. Randolph criticized Jefferson’s closest advisors, James Madison, Albert Gallatin, and Levi Lincoln. Randolph commented that these were the men “whose Republicanism has not been the most unequivocal.”

The split between Randolph and Jefferson inspires a variety of interpretations about Randolph’s involvement in the Chase trial. Historian Henry Adams contended that President Jefferson did not encourage anyone, especially not Randolph, to bring up impeachment charges. Adams believed that Jefferson would not have appointed Randolph because “little sympathy existed” between the two men. Randolph had separated himself from a branch of his family with whom Jefferson maintained close relations. In addition to exclusive allies, Randolph annoyed Jefferson by aligning himself with men who “owned no personal allegiance to Jefferson.”

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37 Ibid., 223.


Adams argued that Jefferson played a part in the impeachment, he was not behind appointing Randolph to the leadership position. Jefferson historian, Dumas Malone agreed with Adams, and wrote “there is no evidence that Jefferson tried either to guide or restrain John Randolph in he procedure.”40

Historian Jean Edward Smith agreed that Jefferson did not direct Randolph, but he exonerated Jefferson from participating in any manner. Smith quoted a passage from William Plumer’s Memorandum dated February 3, 1804 that read:

Senator William Plumer, who dined with Jefferson that evening, reports that the president was surprised to hear what Randolph had done, inquired what the grounds were for impeaching Chase, and then, speaking in a disgruntled tone, dismissed the subject, saying, “this business of removing Judges by impeachment is a bungling way.”41

Plumer recorded the evening that Smith is referring on January 5, 1804, the same day that Randolph recommended an inquiry into Chase’s conduct. Smith included the beginning and the end of the journal entry, but excluded the key section that supports Jefferson’s involvement in the impeachment proceeding. Plumer’s entry reads in its entirety:

“In the evening, I dined with President Jefferson—I was at his house near an hour before the other gentlemen—Speaking of the impeachment of Pickering, I observed I had no doubt that the judge was insane, and asked him whether insanity was good cause for impeachment and removal from office. He replied, “If the fact of his denying an appeal and of his intoxication, as stated in facts of his denying an appeal and of his intoxication, as stated in the impeachment are proven, that will be sufficient cause of removal without further enquiry.”

I then observed to him that I understood the House of Representatives were then debating the question whether a Committee should be raised to enquire [sic] into the expediency of impeaching Judge Chase of the Supreme Court—He replied, I have heard so, and asked me what facts had been stated—I answered I had not been in the House during the day—Just at this moment Mr. Harvie, his private

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41 Smith, 631, note 65.
secretary, returned from the Capitol. The President asked him what particular part of Judge Chase’s conduct had been referred to as the ground of Impeachment. Mr. Harvie said “He understood the case of Cooper.”—The President, turning round to me said, “there are three cases to which I suppose the House would refer, Fries, Cooper and Callender—but the conduct of Judge Chase was, perhaps the most extraordinary [sic] in the trial of Callender—he there refused to admit Col [sic] Taylor, late one of your senators, as a witness for Callender, because he could not prove the whole of the case.—This business of removing Judges by impeachment is a bungling way.”42

The February 3 notation that Smith cited was word for word the introduction and the conclusion of the January 5 entry. This was evidence that Smith was biased and intended to portray Jefferson blameless in the impeachment preparation. Smith continuously claimed that Jefferson, and Marshall, tried relentlessly to remain non-partisan. This was an attempt to make a hero out of the President and prove his innocence in the attack on the judiciary. It was impossible for these politically driven men to sit out of political issues that affect their careers and their political positions. However, Jefferson continuously used a third-party approach to accomplish his political goals in order to stay clear of the blame. As Jefferson told Nicholson in May of 1803, “it is better that I should not interfere.”43

A history of the Supreme Court that was written before Smith interpreted Plumer’s January 5 entry correctly. Supreme Court scholars, George Lee Haskins and Herbert A. Johnson noted that Jefferson’s son-in-law later voiced the evidence Jefferson suggested to be used. “I was surprised to find Mr. Eppes, the son-in-law of the president, in debate in the House on this subject—state the very ideas of


Jefferson—the very same that he mentioned to me in private conversation."\textsuperscript{44}

Haskins and Johnson used this passage in particular to verify Jefferson’s close involvement in the case.\textsuperscript{45}

Randolph had recommended that Congress investigate Chase’s behavior on the circuit court. Federalists and even some Republicans insisted that the Republicans present evidence for their charges against Chase. Pennsylvania Republican representative Joseph Clay, who expressed support for Randolph’s inquest, justified their charges. “The House was responsible,” Clay declared, “for the morality of the judiciary, an inquiry could be instituted at the slightest suspicion of judicial misconduct.”\textsuperscript{46} William Branch Giles, Republican leader of the Senate, told John Quincy Adams, “We want your offices.” He justified this command with, “for the purpose of giving them to men who will fill them better.”\textsuperscript{47}

On January 20, 1804, the day of his arraignment, Chase asked for a postponement until the next session of Congress to better prepare for his defense. The Republicans postponed for one month and during that time, a controversial issue in the House crystallized the separation between Randolph and Jefferson. In February 1804, Randolph vehemently disagreed with Jefferson and the administration’s handling of the Yazoo land fraud in Georgia. Randolph introduced a resolution that attracted enough support to postpone further discussion until the

\textsuperscript{44} Plumer, 102.

\textsuperscript{45} Haskins and Johnson, 224-225.

\textsuperscript{46} Quoted from Haskins and Johnson, 225.

following year. Jefferson was disappointed with Randolph’s opposition to the administration, causing the moderate president to distance himself from this extreme party member.

After a month-long break from the trial, Randolph introduced a resolution to the House to impeach Chase on March 6, 1804. Six days later, the same day and one hour after the Senate convicted Pickering, the House approved 73 to 32 to impeach Chase of high crimes and misdemeanors. A House committee was immediately arranged to draw up the impeachment articles. Seven articles of impeachment were presented on March 26. Articles one and two dealt with Chase’s alleged misconduct in the Fries treason trial in Philadelphia in 1800. The Callender trial, held in Richmond in 1800, was the subject of the next three articles. The Republicans condemned Chase for refusing to excuse a juror who confessed he already determined that Callender was guilty of libel. Included in these articles was the complaint that Chase rejected the testimony of Colonel John Taylor who intended to speak on behalf

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48 The Yazoo case dated back to 1795 when the crooked Georgia legislature sold over 35 million acres of Indian land in present day Alabama and Mississippi, called Yazoo lands, to speculators for a penny and a half an acre. The citizens of Georgia overthrew the legislature and replaced their lawmakers with honest men who rescinded the land sale. However, the lands had already been sold to people who were not aware of the initial fraudulent sale. In 1798 the federal government contested the Yazoo boundary line. The issue was finally resolved in 1802 when Georgia sold its western lands, provided that the government would resolve the claims of the various parties involved in the purchase of Yazoo lands. Jefferson suggested setting aside five million acres in order to appease the claimants. Randolph disagreed with acknowledging the initial sale because it was “so evil.” The Yazoo debate was settled by the Supreme Court in the case *Fletcher v. Peck* in 1805. Marshall ruled that even though the initial sale was corrupt, it was still a contract that had to be honored. Adams, vol. 2, 218-220; Beveridge, vol. 3, 74.

49 Haskins and Johnson, 234; Turner, 506.

50 The tradition of impeachment was unfounded in the United States at this time. The Republicans decided that the best example to follow was the recent impeachment trial of English judge Warren Hastings. In this case, a member of the House of Commons moved for an impeachment inquiry without any substantial support for his charges. Many agreed, but one James Elliot contended that the House of Representatives should base its charges on credible information. Haskins and Johnson, 225-226. Members included Randolph, Early, Nicholson, Clay, and Boyle.
of the defendant. The fifth article claimed Chase’s behavior in the Callender trial was marked by “manifest injustice, partiality, and intemperance.” The sixth article recalled Chase’s speech to a Delaware grand jury in June of 1800. In this case, Chase refused to dismiss the jury “before indicting a seditious printer.” The final article emerged from the most recent of Chase’s tirades, the anti-Republican discourse to the Baltimore grand jury. All of the charges were from cases concerning Federalist supported laws, such as the sedition laws, that had made the Republicans leery of the judiciary. Chase’s unattractive behavior only contributed to the Republican hostility toward the Federalist judges. Congress adjourned before the trial began and during the summer Chase prepared for the trial.

Chase formed a strong defense team led by Luther Martin from Maryland. Martin was a close friend of Chase and despite his constant inebriation in the courtroom was highly respected for ability as a trial lawyer. Assisting Martin were other reputable lawyers, Robert Goodloe Harper, James A. Bayard, Joseph Hopkinson, Philip Barton Key, Charles Lee, and Philip Wickham. These astute attorneys faced the assembled prosecution in November 1804.

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53 The articles addressed Chase’s behavior in the district courts; he was not charged with wrongdoing while serving as Supreme Court justice.

54 Smith, 343. Henry Adams said that “In the practice of his profession he [Martin] had learned to curb his passions until his ample knowledge had time to give the utmost weight to his assaults.” Adams, vol. 2, 232.

55 Smith, 633, note 101. All of these men served Chase without demand for compensation. Smith, 343.
On December 3, the Republicans slightly altered the grounds for
impeachment. Randolph combined two original articles and added two new ones, totaling eight conditions under which Chase was to be tried. The new articles dealt again with the judge’s shortcomings in the Callender trial. Chase was accused of purposely making an error in the law and not following judicial precedent. Previously in Virginia, cases were not tried in the same term in which they had been indicted. Chase had gone against this standard in the Callender trial. The Supreme Court had ruled that federal courts did not have to follow the traditional state court proceedings. John Quincy Adams related to his father that, “These articles contained in themselves a virtual impeachment not only of Mr. Chase, but of all the Judges of the Supreme Court from the first establishment of the national judiciary.”

Therefore, it was obvious that the Republicans were making preparations to expand their attacks to other high ranking judges.

Vice President Aaron Burr opened the Chase impeachment trial in February 1805, with thirty-four senators in attendance, twenty-five Republicans and nine Federalists. The months preceding the trial had been filled with drama. The Pickering impeachment and the Yazoo racket occupied Congress. The House managers and Chase’s lawyers prepared strategy for the major impeachment event. The man leading the proceedings had shot Alexander Hamilton in a duel and two

56 At the first instigation of impeachment proceedings, federal district judge Richard Peters was accused of wrongdoing. Peters had served on the Pennsylvania bench. Haskins and Johnson, 226.


58 Haskins and Johnson, 242.
states had recently indicted him for the murder of Hamilton.\textsuperscript{59} Plumer was disgusted at Burr’s presence and commented

Mr. Burr, the Vice President, appeared and took his seat in the Senate the very first day of the session. It has been unusual for the Vice President to take his seat the first day of the session. But this man, though indicted in New York and New Jersey for the murder of the illustrious Hamilton, is determined to brave public opinion. What a humiliating circumstance that a man who for months has fled from justice—and who by the legal authorities is now accuse of murder, should preside over the first branch of the National Legislature!

I have avoided him—his presence to me is odious—I have merely bowed and spoken to him—Federalists appear to despise neglect and abhor him. The democrats, at least many of them, appear attentive to him—and he is very familiar with them—What line of conduct they will generally observe to him is yet uncertain.\textsuperscript{60}

“Nothing in the bearing of this playwright character indicated in the smallest degree,” as historian Albert Beveridge describes Burr’s composure, “that anything out of the ordinary had happened to him.”\textsuperscript{61} Burr, who had been constantly at odds with Jefferson since their election to office, was suddenly welcomed back to the administration. The Republicans were determined not to let the quarrel among them diminish their efforts in the impeachment trial. Jefferson showered Burr with invitations to dinners, and appointed men who were close to him to prominent offices. Burr’s stepson and brother-in-law were named Judge of the Superior Court at New Orleans and Secretary of the Louisiana Territory to govern St. Louis, respectively.\textsuperscript{62} Burr’s close friend, James Wilkinson was named governor of the Louisiana Territory.


\textsuperscript{60} Plumer, 185.

\textsuperscript{61} Beveridge, vol.3, 180.

\textsuperscript{62} Adams, vol. 2, 220.
Wilkinson was the army commander-in-chief, and this particular appointment went strictly against Jefferson’s ideas “about the union of civil and military authority.”

Through these actions, it was obvious Jefferson was involved in the trial. The extent that he went to insure Burr would support the Republican cause demonstrated how opportunistic Jefferson could be to get his way. It is undeniable that Jefferson was a major player in the trial, regardless of his relationship with Randolph. Throughout these obvious acts of bribery, Burr accepted, but refused to be affected by them. A Washington newspaper usually unsympathetic to the vice president declared, “He conducted with the dignity and impartiality of an angel, but with the rigor of a devil.”

The atmosphere of the trial did not disappoint those who had labored numerous hours in preparation for the event and those who had come to watch. Historians Henry Adams and Albert Beveridge provided detailed descriptions of the Senate chamber that “was aglow with theatrical color,” and included “the placing of the various seats was as if a tragic play were to be performed. To the right and the left of the President’s chair were two rows of benches with desks,” an expected transformation of the room that would be used to seat the congressmen. However, Burr added his own touch of flair, “in accordance with his ideas of what suited so grave an occasion.” The benches were “covered with green cloth and occupied by the members of the House of Representatives. Upon their right an enclosure had been

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64 Beveridge provided numerous comments on Burr’s leadership in the trial. The Federalists at this time were generally upset with Hamilton’s death, and blamed Burr. Beveridge, vol. 3, 183, especially note 1.

65 Beveridge, vol. 3, 179.
constructed, and in it were the members of Jefferson’s cabinet.”  Crimson colored cloth was draped over a temporarily built section for the Senators. The comfortable seats in this enclosure were marked with green material. The boxes for the House managers and the defensive lawyers were draped with blue cloth. Another temporary gallery was built for the “ladies dressed in the height of fashion,” the wives and families of the public officers. The gallery was open for the public to view the proceedings and was filled throughout most days of the trial. 67 William Plumer later admitted that “when the gallery was fitting up for this trial . . . I then thought the expence [sic] unnecessary; but I now own my mistake. A vast many people daily attend, and without the new gallery, many hundreds of them could not have been accommodated so as to hear the arguments. Many of these people are from distance places—the arguments have informed them—and through them much information will be communicated to many others who have not been present—and have and will, in fact make an impression favorable to the accused.”

The trial opened on February 9, 1805 and Randolph introduced the articles of impeachment. Randolph thoroughly explained each of the articles, emphasizing how Chase had wrongfully presided over court and exhibited partisan and inappropriate behavior. He had an enormous task to prove that these offenses were impeachable, high crimes and misdemeanors in the sense of the Constitution. He sidetracked his


argument by “declaring the theory of the defence [sic] to be monstrous.” His
inexperience with legal proceedings created numerous mistakes from which the well-
trained defense benefited.68

Much of Randolph’s speech consisted of condemnation of Chase’s behavior in
the Callender trial, and compared it with Chief Justice Marshall’s actions in the recent
United States v. Thomas Logwood case. In June 1804, Marshall presided over the
circuit court in Richmond, and heard the case in which Longwood was indicted for
counterfeiting. Randolph found this particular case useful for comparison because
“The government was as deeply interested in arresting the career of this dangerous
and atrocious criminal, who had aimed his blow against the property of every man in
society, as it could be in bringing to punishment a weak and worthless scribbler
[Callender].”69 Randolph had been at the trial and attested to Marshall’s conduct.
The chief justice was praised for allowing the admittance of all evidence, including
Longwood’s, unlike Chase who refused to allow Colonel John Taylor to testify.
Randolph commended Marshall for giving “the accused a fair trial according to law
and usage, without any innovation or departure from the established rules of criminal
jurisprudence in his country.”70

Randolph’s tactic was peculiar because of its highly biased implications. It
was quite unfair to compare Chase and Marshall and their court procedures because
of their completely different personalities and actions. Chase was over the age of

70 Ibid., 187-188.
sixty, constantly in pain from gout, and an alcoholic. On the contrary, Marshall was in his thirties and well-known for his good natured spirit. Chase’s illnesses do not excuse his unprofessional behavior, but it was illogical for Randolph to discredit judges who did not measure up to Marshall. Although Randolph disliked Marshall’s extreme nationalism, he held the utmost respect for him. By naming Marshall the definitive legal mind, Randolph was able to insult Jefferson who detested the chief justice’s actions.

The court gathered testimony from fifty-two witnesses, including Marshall who was questioned on the judge’s behavior in the Callender trial. “Friendly eye-witnesses record that the chief justice appeared to be frightened” when he took the stand, said Beveridge.71 Marshall followed the defense’s questions and acknowledged that Chase and the attorneys for Callender often did not agree during the trial. Marshall recalled how several times Chase prohibited the defense from discussing the constitutionality of the sedition laws and repeatedly told them that the question would not go to the jury. Marshall agreed that it was common practice to hear arguments of counsel, but there were no steadfast rules. He explained that a judge was at liberty to determine whether or not a subject needed further discussion, and Chase had ruled in this instance that the constitutionality of the law Callender was being tried under was understood to be legal. Marshall’s testimony mostly appeased the defense, but the High Federalists complained that he should have argued about the grounds on which Chase was being tried. Senator Plumer recorded his impression of Marshall’s testimony on February 16:

I was much better pleased with the manner in which his brother [James Marshall]

71 Ibid., 192.
testified than with him. The Chief Justice really discovered too much caution—too much fear—too much cunning—He ought to have been more bold—frank and explicit than he was. There was in his manner an evident disposition to accommodate the managers. That dignified frankness which his high office required did not appear. A cunning man ought never to discover the arts of the trimmer in his testimony.\(^72\)

Marshall’s behavior was seen as modest, but the chief justice held significant reasons for wanting to stay low key in the trial. Chase had written to Marshall at the beginning of the ordeal, asking the chief justice to recall the events of the Callender trial. Marshall responded on January 23, 1804, and his opinion on the impeachment charges was clear. Regardless of the fact that Colonel Taylor’s was admissible, Marshall wrote, “it certainly constitutes a very extraordinary ground for an impeachment. According to the antient \([sic]\) doctrine a jury finding a verdict against the law of the case was liable to an attain; and the amount of the present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment.” Marshall then continued with a recommendation in direct contrast to the idea of an independent judiciary that Marshall had worked so hard to achieve. “I think a modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the judge who has rendered them unknowing of his fault.”\(^73\)

\(^{72}\) Plumer, 291.

Beveridge attributed Marshall’s comments to the fact that the chief justice was greatly alarmed with the impeachment charges against Chase. His fears were legitimate as it was a “well-known intention of Jefferson to appoint Spencer Roane as Chief Justice when Marshall was ousted. . . .” Roane was a Virginia Republican, close to Jefferson with high judiciary aspirations. The animosity between Marshall and Roane ran deep and the historical legend says that after Jefferson won the election of 1801, he had anticipated appointing Roane to the chief justice ship; however, Adams thwarted his plan by nominating Marshall.\textsuperscript{74} Therefore, Marshall’s anxiety over the possible removal of a Supreme Court justice from the bench was completely justified and evidenced in his testimony during the trial.

On February 20, arguments in the impeachment trial began.\textsuperscript{75} Randolph’s colleagues opened the debate with monotonous speeches that drove out everyone not required to listen to them. The defense capitalized on their shortcomings and their renowned talents did not disappoint. Joseph Hopkinson immediately obliterated the core of the prosecution’s argument in a passionate speech that was commended by Federalists as well as Republicans. He argued that no judge could be impeached or removed without being found guilty of an indictable offense. Previously, Randolph had determined that Chase’s behavior qualified as a high crime or misdemeanor. Hopkinson however, maintained that the definition of an impeachable offense was “a technical term well understood and defined, which meant the violation of a public law, and which when occurring in a legal instrument like the Constitution, must be

\textsuperscript{74} Beveridge, vol. 3, 176-178; Haskins and Johnson, 208.

\textsuperscript{75} Chase was quite ill from gout and asked for permission to leave for the rest of the trial. He stayed in Washington and attended court on various days. Beveridge, vol. 3, 197, note 1.
given its legal meaning.” Philip Barton Key continued the defense and “cleverly
turned to Chase’s advantage the conduct of Marshall in the Longwood case.”76

On February 23, Luther Martin, who was called by Jefferson the
“unprincipled and impudent Federalist bulldog,”77 addressed the court. Martin’s
oration was highly anticipated and the galleries were filled with anxious listeners.78
Martin introduced his speech with a grave concern for the precedent established by
the trial for “future cases of impeachment.” He reiterated Hopkinson’s argument that
treason and bribery are the established grounds for impeachment and that judges
should only be removed for indictable offenses. He warned that if Chase were found
guilty and removed, then all other judges and officers would be left “at the mercy of
the prevailing party.”79 The charges against Chase for his behavior in the Callender
trial were “unusual, rude, and contemptuous expressions,” but Martin pointed out that
it was “rather a violation of the principles of politeness, than the principles of law;
rather the want of decorum, than the commission of a high crime and
misdemeanor.”80 The Federalist lawyer spoke the entire day with no food, and
requested that he continue the following day. Plumer commented that Martin “really

76 Ibid., 201.
78 Beveridge, vol. 3, 201. This particular day’s attendance inspired Plumer’s earlier noted
comments about the necessity of the expansion for the trial.
80 Ibid.
possesses much legal information and a great fund of good humour [sic]—keen satire and poignant wit.”

When Martin continued his defense, he once more addressed the Callender trial complaints. Martin used an argument from Benjamin Franklin who had spoke in favor of the laws similar to the ones Callender was indicted under. “Franklin himself a printer,” Martin recalled, was “as great an advocate for the liberty of the press, as any reasonable man ought to be.” However, Franklin had “declared that unless the slander and calumny of the press is restrained by some other law, it will be restrained by club law.” Using these words as justification for the Callender trial, Martin observed Chase was impeached for upholding the laws and convicting “one of the most flagitious libels ever published in America.” Indeed, the judge had used poorly chosen language, but this was not an indictable offense under the Constitution. Chase was described as a human being who was legitimately trying to uphold the laws by trying a libelous editor. As a result of Martin’s inspiring defense, Chase was finally presented to the House in an innocent light.

Robert Goodloe Harper closed the arguments for Chase. He focused on the remaining articles of impeachment, Chase’s lecture to the Baltimore grand jury. He relied mostly on the precedent of judges delivering political speeches to juries because “what law forbids [them] to exercise these rights by a charge from the bench?” Connecting to Jefferson’s complaint to Nicholson on May 13, 1803 that

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81 Beveridge said that Martin did not eat that day, “except two glasses of wine and water.” Beveridge, vol. 3, 204; Plumer, 300.

82 One of the most politically charged speeches Beveridge cited was one made in 1776 to a South Carolina grand jury appealing to the people to fight the British. Beveridge, vol. 3, 206-207.
judges had too much freedom of speech, Harper argued that the office did not hinder “the liberty of speech which belongs to every citizen.” “Is it not lawful,” Harper questioned, “for an aged patriot of the Revolution to warn his fellow-citizens of dangers, but which he supposed their liberties and happiness to be threatened?” The defense closed on a consistent line of reasoning that Chase did not break any laws; in fact, he followed the precedent set by Revolutionary judges. Chase’s inadequacies were briefly addressed, and the defense repeatedly contended that his behavior did not qualify as an impeachable offense.

The reply from the Republicans was extremely weak, especially compared to the defense. During Nicholson’s address, he accidentally abandoned the Republican theory and “contended that this is a criminal prosecution, for offenses committed in the discharge of high official duties.” The entire chamber was shocked and Nicholson uncomfortably made his correction back to the original argument. Caesar A. Rodney tried to salvage the closing arguments, but he too confused the argument. He agreed in the necessity for an independent judiciary, but said that “the poor hobby has been literally rode to death.” He contended that “the doctrine has been carried to such an extravagant length, that the Judiciary may be considered like a spoiled child.” Rodney continued in a “wretched performance, so cluttered with tawdry rhetoric and disjointed argument that it would have been poor even as a stump speech.”

Randolph made the closing arguments that only prolonged the distress of the prosecution. He was extremely ill, and accidentally left his notes, so he ranted for

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83 Ibid., 210-211.
over two hours roaming from incident to incident. He repeated his argument against Chase for not being as strong a judge as others, implying Marshall. Randolph was delirious, and realized that he and the other lawyers were bested by the defense. This rage and sense of public duty energized him and he cried, “It is the last day of my sufferings and of yours.”

On March 1, 1805, the Senate prepared to vote on the articles. Burr commanded complete silence in the chamber and the conditions for impeachment were read and the senators stated whether they believed Chase was guilty or not guilty of each. Two-thirds of the Senate, or twenty-two votes were needed to convict Chase. Fifteen senators, all nine Federalists and six Republicans, voted not guilty on all charges. The other Republicans wavered on their support on the various articles, and there was not a consistent vote on any of the other articles. The article concerning the grand jury charge in Baltimore received nineteen votes, the most of any charge.

Reasons behind the Republican driven acquittal vary. Like the Pickering trial, there was a legitimate concern for impeaching a judge for public intoxication and angry partisan outbursts. The defense’s message spoke clearly and in the end, most senators agreed that there needed to be an indictable offense to justify impeachment.

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84 Ibid., 215-216.

85 Senator Uriah Tracy had been ill for several days and was carried in to the chamber so he could cast his vote. He voted not guilty on all articles. Plumer recorded that “the appearance of a very sick man in the Senate added to the solemnity of a proceeding, which the great importance of the trial, had previously given.” Plumer, 308.

John Randolph had separated himself from the moderate Republicans and his obvious rage most likely alienated him further.\textsuperscript{87} This indeed separated Jefferson from the radicals. However, it is certain that Jefferson did not hesitate to play a role in the impeachment, only if he were able remain in the shadows. In addition to the Randolph curse, the menacing Alien and Sedition Acts had expired, and the Republicans no longer feared this method of Federalist oppression.\textsuperscript{88} Any of these reasons may account for so many Republicans voting to save Chase. Plumer noted that the public was in favor of Chase’s acquittal. “The removal of Judge Chase was deemed an imprudent measure.” Plumer continued, “public opinion so far as it could be collected was decidedly opposed to the measure. In this case a great point is gained in favor of the Constitution. A prosecution commenced with the rage of party has been arrested—and to the honor of the accused his political foes have acquitted him.”\textsuperscript{89}

Other possible explanations for Chase’s acquittal may have evolved from the developing judiciary. After the impeachment failed, the Republicans rested their assault on the judiciary. Chief Justice Marshall was determined to unite the Court and its authority was recognizable. Marshall’s hesitant testimony can be interpreted as his almost intimidation at the possibility of impeachment. However, the

\textsuperscript{87} According to Plumer, Randolph “appeared chagrined and much mortified” when the voting was finished. The same day Randolph moved to create an amendment adjusting the terms of impeachment. The revision would allow the president to request a removal with a majority of the House and the Senate. Nicholson proposed an amendment that would authorize the legislature to recall its senators at any time. Plumer, 310-311.

\textsuperscript{88} Haskins and Johnson, 245.

\textsuperscript{89} March 2, 1805, Plumer, 311-312.
Republicans were relieved that the court system had exhibited restraint and was capable of functioning without the threat of tyranny.\footnote{Ellis, 102.} After Chase’s acquittal, Henry Adams said Marshall no longer feared impeachment as a means to disrupt the judiciary.\footnote{Adams, vol. 2, 243.}

During the impeachment fiasco, the Electoral College was busy selecting the winner of the 1804 presidential election. On February 13, 1805, the Senate counted the results from the election. There was a short debate over whether or not the galleries would be open during the counting process. Previously, both Houses had met behind closed doors but “the motion to admit the people prevailed by the majority of one vote.” At noon, Vice President Aaron Burr “broke the seals of the electoral returns and handed them to the tellers.” After the 176 votes were tallied, Thomas Jefferson and George Clinton were named president and vice president.

Not only was Jefferson re-elected while the impeachment trial commenced, he had the opportunity to appoint his first Supreme Court justice. At the end of the 1804 term, Associate Justice Alfred Moore resigned, citing bad health. To replace him, Jefferson chose another South Carolinian to replace him. On March 22, 1804, William Johnson was nominated to the United States Supreme Court. At the time, he was the youngest appointment ever at thirty-two years of age.\footnote{When Joseph Story was appointed in 1808, he became the youngest ever appointed at thirty-two years and one month.} He had served on the state supreme court, and was praised by both Republicans and Federalists. Senator Plumer called him “a zealous Democrat” who “is said to be honest and capable. He
has, without the aid of family, friends, or connections, by his talents and persevering industry raised himself to office."\textsuperscript{93} Johnson would go on to be called “the first dissenter” from Marshall’s court; however, he angered Jefferson at times with his partiality for a strong national government.\textsuperscript{94}

The impeachment proceedings began with intensity and great opportunity for the party in power to overthrow the Federalist dominated judiciary. The Republicans were angry that they did not control the third and seemingly untouchable branch of their government. Their displeasure was justified by the way President Adams had packed the newly created positions before he left office. President Jefferson was especially concerned and loathed the “irremovable judges.”\textsuperscript{95} He was further outraged by Chase who had exhibited more freedom of speech than Jefferson believed should be allowed for a public officer. During the Pickering trial, Jefferson remarked that it would take years to convict the judge. For a brief moment, Jefferson suggested a different approach for removing judges. Like Randolph mentioned in the Chase trial, Jefferson recommended the president move for impeachment with removal approved by two-thirds vote from both houses. He soon realized that amending the Constitution would be a tedious ordeal and settled for the established, Republican revised method of impeachment. Regardless of how some historians choose to interpret Jefferson’s involvement in the trial, it is undeniable that he was up to date on the proceedings. Jefferson continuously advocated the impeachment of

\textsuperscript{93} Quoted from Warren, 288.

\textsuperscript{94} Warren, 286-288; Smith, 341-342.

judges who contradicted the party’s agenda. In addition to the rationalizations previously discussed, here is a final example of Jefferson’s interest in the trial. Jefferson had already chosen Chase’s successor--more evidence of how disingenuous Jefferson was.
CHAPTER 5
THE FINAL STRAW: TREASON DEFINED

The struggle between President Jefferson and Chief Justice Marshall climaxed in the Aaron Burr treason trial. The Burr trial was a unique arena where the government charged the former vice president with conducting treason against the United States and Chief Justice Marshall presided over the case in the Virginia district court. The trial was similar to present day celebrity trials with leading political figures taking center stage. This chapter introduces numerous characters who merit more attention than is possible. Significant figures with Burr in the development of his plan were General James Wilkinson and Harman Blennerhassett. Burr made connections along his travels in the west with the impression that Wilkinson was assisting him, but learned otherwise when he was arrested. Blennerhassett was an unsuspecting Irishman who was financially ruined after the trial since it was his island where the men and boats gathered. For his defense, Burr assembled a phenomenal team of attorneys that were no match for the prosecution, even though Jefferson led the attack. The battle between Marshall and Jefferson that publicly began with Marshall's nomination, climaxed at the Burr trial in 1807.
The foundation of the case, now known as the Burr conspiracy, revolved around the uncertainty of Aaron Burr's intentions in the western territories.\(^1\) The years in question were between 1804 and 1807. Burr left the vice presidency in 1805, at the age of forty-nine.\(^2\) He entered the public sphere facing outstanding arrest warrants in both New York and New Jersey for the murder of Alexander Hamilton. The duel with Hamilton caused many New Englanders to distrust him. People in the west, however, believed that dueling was a proper way to settle disputes and that Hamilton had been the enemy of democracy, thus they supported Burr.\(^3\) He took advantage of any remaining popularity he had in the west and set his sights on the western lands for new wealth.

Burr took advantage of his western supporters and developed plans against the United States government. The true conditions of his conspiracy remain unknown, but he allegedly had at least two ideas. First, Burr claimed that he would settle the Bastrop lands in the Washita River valley. This was as a speculative venture into lands that were questionably his, and under this premise, Burr recruited many men...

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\(^2\) Plumer, *William Plumer's Memorandum of Proceedings in the United States Senate, 1803-1807*, ed. Everett Somerville Brown (New York: Macmillan: 1923), March 2, 1805, 312; Albert Beveridge, *The Life of John Marshall*, vol. 3, *Conflict and Construction, 1800-1815* (Boston: Houghton Mifflin Company, 1919), 273-274. Plumer recalled that Burr's farewell address to the Senate on March 2, 1805 was a sentimental good-bye in which "he hoped that the constitution of the US would never be destroyed . . . this house is the last portion of the people, the last branch in the government that will abandon it." "As to his conduct in office," Plumer recalled, "he said he had with great care endeavored to know no party. . . . That it was with great consolation he could review his official conduct and with conscious pride could say he had not degraded the dignity of the Chair which he now resigned to his successor." Burr then "bowed and retired—several tears very plentifully." Plumer, 312-313.

\(^3\) Beveridge, vol. 3, 293-294.
who were anxious to acquire a stake in the west. The other part of his conspiracy was conditional. In the event of war between Spain and the United States for Mexican liberation, Burr planned to lead forces to help free the Mexican territory from Spanish occupation. There were more dramatic accounts that he intended to separate the western territory to create a new country over which he would rule as king and his daughter, Theodosia, would succeed him. Burr's real intentions remain uncertain, but in the fall of 1806, President Jefferson believed that he had evidence of treason and sought to bring Burr to justice.

The Burr trial was not only a major confrontation between Jefferson and Marshall, but between Jefferson and Burr. "The accidental tie between" Burr and

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4 Historians Abernethy and Nathan Schachner offer two different explanations of what was called the Bastrop venture. Abernethy explained that the part of the Bastrop lands that Burr allegedly purchased were originally owned by "Felipe Neri, Baron de Bastrop, a Hollander and also a refugee." In 1795, Bastrop received over a million acres from Governor Carondelet of Louisiana on the Washita (Ouachita) River and "Marquis de Maison Rouge, a French émigré" was given 100,000 acres. Both men were supposed to offer the land to refugees from the wars in Europe, but the "Intendant of Louisiana raised objections to the grants and the Governor was forced to suspend proceedings in 1797." Bastrop sold his tract to Abraham Morhouse in 1799, who then transferred parts of it to Edward Livingston and Charles Lynch. Burr bought half of Lynch's land, 350,000 acres, "though he [Burr] usually estimated it at 400,000." The entire land acquisition was questionable because Carondelet received the tract as a grant, under the condition that it would be settled. Because the settlement was suspended, the grant was never validated. After the United States acquired the Louisiana Territory, the grantees or Burr did not register their claims in the appropriate land offices and when claims were later registered, they were not approved by the Louisiana land office. Abernethy, 73-77; Nathan Schachner, Aaron Burr: A Biography (New York: F.A. Stokes, 1937), 89-93. Dumas Malone included a map that showed the Washita River and the Louisiana Territory. Dumas Malone, Jefferson and His Time, vol. 5, Jefferson the President, Second Term, 1805-1809 (Boston: Little, Brown and Company, 1974), 258.

5 The United States anticipated war with Spain over the area called West Florida, owned by the Spanish, and the waterways that were closed to Americans. There were rumors that Spain was going to relinquish those lands to the French, their ally in the war with Great Britain, who would then close the Mississippi River to American commerce. Abernethy, 6-7. The United States eventually purchased West Florida from the Spanish for five million dollars, which quieted the cry for war, but ruined the conspirators' plan for invasion of Mexico in the event of American war with Spain. Memos, 19 November 1806, The Writings of Thomas Jefferson, vol. 1, 1760-1775, ed. Paul Leicester Ford (New York: G.P. Putnam's Sons, 1892), 309.

6 Jefferson believed that the priority of the plans was reversed.
Jefferson in the presidential election of 1800 tainted their political relationship.\footnote{Jefferson and His Time, vol. 4, Jefferson the President, First Term, 1801-1805 (Boston: Little, Brown and Company, 1970), 5. The chaos of this election led to the twelfth amendment, which designates between candidates for president and vice president. Debate over the amendment was deferred until the fall of 1803. New York Republican Dewitt Clinton and other congressmen pushed for an immediate vote to insure its passage before the 1804 election. Senator Samuel Smith of Maryland recalled the "dreadful situation we were in at the last presidential election—IIt was carried into the House and we were on the eve of a civil war." Plumer, 20. The amendment was ratified on September 25, 1804, according to Article V of the United States Constitution which calls for approval from two-thirds of both houses of Congress and three-fourths of the states. Three states did not ratify it, Delaware, Massachusetts, and Connecticut. Malone, The First Term, 407.} Jefferson distanced himself from Burr during their term and chose George Clinton as his reelection partner.\footnote{Burr lost popularity with the New York Republicans. For details see, Malone, First Term, 405-407.} Jefferson temporarily changed his behavior towards Burr during the winter of 1804 when Burr presided over the impeachment trials of the federal judges. President Jefferson bestowed favors for Burr, his friends, and family members in an attempt to sway Burr's favor for the judicial impeachments.\footnote{See chapter 4 of this work.} Three of those appointments were in the recently acquired Louisiana Territory. In the end, Burr sided with the federal judges. This behavior likely fueled the flames of the treason trial.

Despite Burr's ultimate decision in the impeachment trial, Jefferson's appointments remained in office. The one that proved the most significant was the appointment of Burr's friend, General James Wilkinson as governor of the western military.\footnote{James Wilkinson was from Maryland, born in 1757. Even though his parents both died before he was seventeen, he had a "respectable upbringing." He studied medicine but joined the army during the Revolutionary War. This was where he first met Aaron Burr. Lomask, 13-14. For further details on Wilkinson, see James Wilkinson, Memoirs of My Own Times (Philadelphia: Abraham Small, 1816).} Wilkinson was an infamous character in the history of this time and that later research in the Spanish archives revealed that he was guilty of more treasonous
behavior than Burr. Wilkinson's double life began in 1788 when he aided the British and the Spanish in a British attempt to seize Louisiana from Spain. On the American front, as early as the Washington administration, there were rumors that Wilkinson was a pensioner of Spain, but Washington named him lieutenant colonel in 1791 and later promoted him to brigadier general. President Washington heard about the general's questionable allegiance and ordered a private investigation. Therefore, President Adams was aware of the suspicions that surrounded the general. Wilkinson became the central figure in the prosecution's case against Burr and Jefferson fully supported the general, despite the controversy.

Burr's plans needed funding and he played on the instability in New Orleans to meet his ends. Both the Spanish and the British governments had been present in the Louisiana Territory and historian Albert Beveridge said that they had always wanted to divide the United States. The United States government knew that the west was always seen as a place ripe for secession because the country did not possess the waterways that were fundamental to western life. President Washington first noted this in 1794 and by 1803, President Jefferson had accepted it. However, after the United States acquired the western territories and the free use of the Ohio and Mississippi Rivers, westerners were appeased. But the Creoles in New Orleans were not satisfied with the new ruling government. There was a lack of

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communication at this time, which Burr benefited from while he made plans. He convinced Merry, the British minister, and other individuals that he was backed by the United States government when in fact he was not. Burr traveled throughout the territories after he left Washington in 1805, and tried to gain support. Along the way, he was introduced to Harman Blennerhassett who provided the ideal island launching place.

The ultimate responsibility for the conspiracy and the intentions of the conspirators have never been revealed. Depending on the historian, Wilkinson's and Burr's influences and control of the incident vary. The intentions of the plot were never fully known, whether it was meant to liberate the west from the United States, or settle western lands. Burr believed that a partnership with Wilkinson would be beneficial since the general was capable of raising men and was familiar with the western lands. Wilkinson later double-crossed Burr, which should not have been too surprising since Burr knew about Wilkinson's double-role as a United States general and informant for the Spanish. At the time however, Wilkinson's involvement with the Spanish was a rumor. But Burr was certainly mixed up with Wilkinson, and his relationship with the general now makes his plans extremely suspect to the worst crime against the United States.

Treason is the only crime defined by the Constitution. Article III, section 3 states that, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the

15 Wilkinson's biography and involvement with the Spanish can be found in Lomask, 13-18.
same overt Act, or on Confession in open Court." President Jefferson publicly revealed Burr's suspicious plot on November 27, 1806 after he received information from a variety of sources. But Jefferson was aware of his plan for months before this address.

The first public notice of Aaron Burr's questionable activities appeared in the *Gazette of the United States*, a Federalist newspaper in Philadelphia, under the headline "Queries" in July 1805. The column posed eight questions concerning Burr's activity in the western territory:

How long will it be before we shall hear of *Col. Burr* being at the head of a revolution party on the western waters? Is it a fact that Col. Burr has formed a plan to engage the adventurous and enterprising young men from the Atlantic States to come into Louisiana? Is it one of the inducements that an immediate convention will be called from the states bordering on the Ohio and Mississippi to form a separate government? Is it another, that all the public lands are to be seized and partitioned among those states, except what is reserved for the warlike friends and followers of *Burr* in the revolution? Is it part of the plan for the new states to grant these lands in bounties to entice inhabitants from the Atlantic States? How soon will the forts and magazines in all the military ports at New Orleans and on the Mississippi be in the hands of Col. Burr's revolution party? How soon will Col. Burr engage in the reduction of Mexico, by granting liberty to its inhabitants, and seizing on its treasures, aided by British sips and forces? What difficulty can there be in completing a revolution in one summer, among the western states, with the four temptations. 1st of all the Congress land. 2nd. Throwing off the public debt. 3rd. Seizing on their own commercial revenues. 4th. Spanish plunder in conjunction with the British? 17

Other newspapers throughout the country reprinted the "Queries." William Duane, the editor of the *Aurora*, ardent Republican, and close friend of Jefferson, suspected the foreign ministers who resided in the United States were responsible for

16 US Constitution, Article III, section 3, clause 1. Treason was included in the Constitution because it was deemed as the preeminent threat to governmental stability.

17 Lomask included the entire article. Lomask, 75-76.

18 For example, the Kentucky Gazette and the Philadelphia Aurora.
the plots, but believed that Burr, "is exactly such a character as would be open to the *suspicions* of all parties . . . His fortune is destroyed as well as his political character, and disappointment is presumed to render him fit for any enterprize [sic], however desperate." The "Queries" probably reached Jefferson via the Richmond *Enquirer* during his stay at Monticello that summer. However, the newspapers simultaneously reported the outcome of the Justice Chase trial which overshadowed the suspicions about Burr.

After reading the allegations about Burr's scheme, Jefferson invited Burr to dinner when the former vice-president visited Washington in November 1805. Shortly after their dinner together, the president received two anonymous letters from Philadelphia that reported Burr's conspiracy against the government. This "lover of his country" refused to disclose his name, but accused Burr of not only wanting to overthrow the administration, but that "Burr's association with Anthony Merry," Great Britain's foreign minister. In the second letter, the unidentified correspondent said that Burr's intentions were the same as the Spanish conspirator, General Francisco de Miranda. For over a decade, Miranda had asked the United States and

19 Lomask, 77.

20 Malone, *Second Term*, 232. Thomas Ritchie, editor of the *Enquirer*, believed that the "Queries" allegation was similar to the Blount conspiracy in 1797 and that the Yazoo claimants were part of Burr's accomplices. Abernethy, 32-34; Malone, *Second Term*, 232.

21 These letters were dated December 1 and 5, 1805. Malone, 234. Merry was alarmed by the "Queries," and wrote to Lord Mulgrave that Burr had been betrayed and that "further secrecy [may be] impossible."August 4, 1805; Henry Adams, vol. 5, 226. The French minister Turreau acknowledged the report as well and asked if Burr's plan to separate the western states would "be really contrary to the interests of France?" Turreau to Talleyrand, February 13, 1806; Henry Adams, *History of the United States of America*, vol. 5, *The Second Administration of Thomas Jefferson* (New York: Scribner, 1898), 226.
Britain for assistance in a liberation movement in Venezuela against Spanish control.

After Jefferson received the anonymous letters, he was slightly more suspicious of Burr and almost positive that he was aligned with Merry in a some sort of plot. Jefferson focused on the Spanish minister, Marqués de Casa Yrujo, as well. Burr had approached these foreign ministers in hopes that their countries would finance a crusade for the separation of the western states. These connections produced little amounts of money from the Spanish and none from the British. Burr had convinced these ministers that separation was indeed his intention and it would benefit their countries. Jefferson was not certain about Burr's communication with these men and at this time, he did not express any concerns about Burr's western ventures.

In early 1806, Burr realized that foreign powers would not fund his schemes and his plan was not developing as he had hoped. Senator William Plumer noted

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22 At the time of the anonymous letters, Jefferson and Madison suspected Miranda's unlawful behavior, but his deception was not revealed until February. Malone cited Irving Brant as the preeminent source on the Miranda conspiracy and noted that Henry Adams did not have the complete record of the incident and therefore interpreted James Madison's behavior incorrectly. Malone 80-85. Brant presented an informative and concise account of how Miranda misled the administration. Irving Brant, *James Madison: Secretary of State, 1800-1809*, (Indianapolis and New York: The Bobbs-Merrill Company, Inc., 1953), 323-339.

23 According to Brant, Yrujo "was Spanish to the point of chauvinism" and although the administration no longer welcomed him, "he knew that the most exalted foreigner had rights equal to those of the lowliest American, and these included the right to tell the government to go to hell. The place to tell it was in the newspapers." Brant, 323. Senator Plumer recorded on January 18, 1806 that Yrujo was in Washington but that the heads of the departments refused to meet with him and he was "now considered more as a spy than a minister." Plumer, 383.


25 His meetings with William Eaton and Commodore Truxton, both men who he believed would support him, did not result in support for his unlawful venture. Abernethy, 41-44.
that at this time, the winter of 1805 to 1806, Burr frequented the capital. On February 22, Burr dined with the president and Plumer later recorded that there was discussion of Burr named as "Envoy Extraordinary and Minister plenipotentiary to Great Britain." Plumer remarked that this was not possible because, "Mr. Jefferson has no confidence in him. He knows him to be capable of the darkest measures—a designing dangerous man." Jefferson recalled the meeting with Burr in which Burr said "that he aided in bringing on the present order of things, that he supported the admn [sic], and that he could do me much harm: [but] he wished to be on differt. [sic] ground: [and that] he was now disengaged from all particular business, willing to engage in something." To Burr's statement, Jefferson replied that the public did not have confidence in him, which was a requirement for public office.

At the same time Burr volunteered as public servant, Jefferson received warning letters from Joseph Hamilton Daveiss. Daveiss wrote seven letters to President Jefferson between the months of January and July of 1806. The letters earned Daveiss little notice from the president, which was odd considering their important contents. Outraged, Daveiss published a pamphlet in 1806 entitled, *View of*

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26 Plumer, 436.

27 March 2, 1806, Plumer, 440. Plumer continued his declaration on Burr's inadequacies with information about the proposed union of the Clintonians with the Burrites in New York, both factions of the Democratic-Republicans. A union of the two factions sought to prevent the re-election of New York governor Lewis. Plumer remarked that Burr favored the union in hopes of promoting himself. On February 18, the Clintonians and the Burrites "vowed friendship to each other and drank much wine and many toasts." A week later, the Clintonians met and denounced allegations that the two groups had united.

Plumer emphasized the significance of this February 25 meeting which was the unanimous decision that Burr "does not and ought not to possess the confidence of the Republican party" Plumer 440-441.


29 Jefferson said that the proof was in the lack of support for Burr's reelection as vice president.
the President's Conduct, Concerning the Conspiracy of 1806. It was a collection of his letters to Jefferson and the president's limited responses. Daveiss considered Jefferson's behavior negligent and expressed his disgust in his publication. Jefferson probably ignored Daveiss because he was suspicious of the informant's motives. The editors of the pamphlet believed, "Certainly the political bias of Daveiss will explain much of the bitterness against Jefferson. . . ."\(^30\) Daveiss was one of Adams's last minute appointments as Kentucky territory's District Attorney and a Federalist in the Republican dominated area and closely associated with John Marshall.\(^31\) Marshall and Daveiss were acquainted in 1801 when Daveiss argued *Mason v. Wilson* before the Supreme Court. Allegedly, Daveiss impressed the chief justice with his oratory skills and in 1803 married Marshall's sister, Ann.\(^32\)

Jefferson was suspicious of Daveiss not only because of his ties to Marshall, but because of his connection with a publication entitled, the *Western World* first published in July 1806 in Kentucky.\(^33\) John Wood and Joseph M. Street edited the

\(^{30}\) Joseph Hamilton Daveiss, *A View of the President's Conduct Concerning the Conspiracy of 1806* (Frankfort, Ky, 1807), reprinted in *Quarterly Publications of the Historical and Philosophical Society of Ohio* 7 (1917), ed. Isaac Joslin Cox and Helen A. Swineford, 54.


\(^{32}\) The editors of the reprint provide some biographical information about Daveiss. He was born in Bedford County, Virginia on March 4, 1774. His family moved to the area known as the Kentucky territory in 1779. His mother educated him until age twelve, and after, he vigorously studied with several tutors in the subjects of English, Latin, Greek, history, law, chemistry, and anatomy. He began practicing law in 1795. After the Burr episode, from which he earned no public favor, Daveiss fought with the Kentucky militia led by Governor William Henry Harrison. He was "cut off by an Indian's bullet" in the Battle of Tippecanoe. Daveiss, 53-55.

\(^{33}\) Henry Adams dated the first publication on July 4 and Thomas Abernethy stated that it first appeared on July 7. Adams, vol. 5, 273; Abernethy, 92.
publication that lasted until October 1806. According to John Brown, a former senator and Jefferson supporter, claimed that John Marshall backed the newspaper and sent Wood, Daveiss, and Humphrey Marshall, the chief justice's brother-in-law and cousin, to expose Republicans who had been involved in conspiracies targeting the unity of the United States. John Marshall's involvement was never proven, but the publication was spurred by Federalist beliefs. However, Daveiss claimed in a letter to Secretary of State James Madison, that he was not involved with the newspaper. "A new press is opened at Frankfort, some of the papers you have probably seen," Daveiss reported. He continued, "I know not what may be the information of these men. I have been suspected to be a mover of this paper but I give you my word of honor, I have no hand whatever in it, nor is any of their information drawn from me." Daveiss may or may not have told Madison the truth, but the information that he sent to Jefferson and the reports from the Kentucky newspaper were comparable, which did not positively affect Daveiss's reputation with the president.

Daveiss's politics and connection with Marshall made him suspicious to Jefferson, but Daveiss sincerely expressed that he wanted the conspiracy squelched. This passion was probably driven by his hatred for Burr. Daveiss was extremely devoted to Alexander Hamilton, so much so that he inserted Hamilton into his legal

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34 Adams, vol. 5, 273. Brown was infamous for his history of the Adams administration "which was suppressed Aaron Burr." Beveridge, vol. 3, 315-316; Abernethy, 92-93.

35 For details on the Western World, see Adams, vol. 5, 273; Abernethy, 92-94; Beveridge, vol. 3, 315-316; Malone, Second Term, 238.

36 Daveiss, 94.
name, and despised Burr for killing him.\textsuperscript{37} Regardless of Daveiss's personal vendetta with Burr, Jefferson ignored the eight letters that warned of Burr's treasonous activity.

Daveiss wrote his first letter on January 10, 1806. He warned that there were "traitors among us," and "a separation of the union in favor of Spain is the object finally. I know not what are the means." Daveiss told the president that he felt that it was his duty to provide him with "timely hints whereby you [Jefferson] may forstal [\textit{sic}] the dangers, and bring the traitors to punishment in due season." The correspondent expressed his suspicions of General Wilkinson and the urgency with which the government should address the issue. He warned that "the plot is laid wider than you imagine. Mention the subject to no man from the western country, however high in office he may be."\textsuperscript{38} He stated that if the president wished, he would include a list of the suspects. Daveiss requested a reply to insure that the president received the letter.

A month later Daveiss had not heard from Jefferson and wrote to him again on February 10. He updated Jefferson on two points about Burr. First, he reported that he had learned that during Washington's administration there were reported conspiracies led by Wilkinson and the Spanish against the United States. Daveiss concluded that Washington became suspicious of Wilkinson and squelched the plans. Then, there were allegations from the previous year about Burr's excursion in the west. Daveiss reported that Burr ventured to Kentucky, Ohio, Nashville, and the


\textsuperscript{38} Daveiss, 68-71.
Orleans territory and suspected that his visits with Wilkinson were significant evidence of his treacherous plot. Daveiss was so determined "to see the end of this damnable plot" that he was willing to travel to St. Louis for further investigation.39

A month later, on March 5, Daveiss still awaited a reply and feared that the president had not received his letters. In his third letter, Daveiss expressed his determination "to raise money upon my own credit, and pursue my enquires into this matter—confident that if my government will give me no aid, it will throw no obstacles in my way." By this point, Daveiss realized that the president might not have been interested in his observations and warnings. He continued, "If you deem my information too trivial to be noticed by the chief of a great nation, you will surely nevertheless, be just enough to me to keep inviolably secret till I return from my present pursuit." Daveiss was determined to expose the conspiracy and prevent any harm to the union, with or without the help of the president. Uncertain of why Jefferson had not acknowledged his letters, he maintained hope that the president would heed the warnings and expose the traitors.

On March 27, Daveiss finally received word that his letters had safely arrived to Jefferson. The president requested "a full communication of every thing known or heard by you relating to it, and particularly of the names of all persons, whether engaged in the combination, or witnesses to any part of it. . . ." Jefferson's reply sparked another series of letters. On March 28, Daveiss thanked Jefferson for his reply and wrote him again on the following day. He included the names of those suspected persons and made corrections about some of the names. A month later he sent another letter he remarked that he felt "very deeply the want of your sanction . . .

39 Ibid., 72-74.
But still I feel a confident hope, that it must suit the government to be fully advised in this matter.\textsuperscript{40}

Daveiss's personal notes revealed how concerned he was that his letters were intercepted and what actions he took between his letters. He traveled to St. Louis and met with Wilkinson. He recalled their conversation, which fueled Daveiss's suspicions of both the general and the former vice president. Daveiss asked Wilkinson about Lieutenant Pike's expedition along the Mississippi River and the general showed him a map of the river probably prepared by Pike. Then Daveiss recalled that Wilkinson "took out a map of the country of New Mexico which I think was in manuscript; and after some conversation about it, tapping it with his finger, told me in a low and very significant tone and manner, 'that had Burr been president, we would have all this country before now.' This I remarked particularly, and it has appeared to me a very explanatory circumstance relative to that man's participation in this plot."\textsuperscript{41}

On July 14, Daveiss wrote the president yet again. At this point Daveiss was irritated that Jefferson had not acknowledged his letters, but held fast in his determination to be a good citizen and inform the president of the alleged treasonous plot. He shared that the conspirators expanded their original plan to "cause a revolt of the Spanish provinces, and a severance of all the western states and territories from the Union—to coalesce and form one government—to purchase great quantities of land in the Spanish settlements to ensure the desired influence when the crisis

\textsuperscript{40} Daveiss to Jefferson, 21 April 1806, Daveiss, 86.

\textsuperscript{41} Ibid., 89.
Daveiss concluded that, "I suspect this letter offended the president. He saw that I now understood him; and I most faithfully believe that he hates every man on earth who he thinks fully understands him. Being determined to write the president no more, after such disrespect as had been shown me," Daveiss penned a letter to the secretary of state on August 14.43

To Madison, Daveiss denied involvement in the Western World publication. He stressed the possibility of an impending war with Spain so that the traitors could achieve their goals in the west. Secretary of State Madison responded on September 18, and included a letter from Jefferson dated September 12. The president defended his decision not to respond to the letters from February 10, March 5, April 5 and 21. Jefferson said that Daveiss's letters did not warrant a response at that time. He further explained that he was waiting for more information from Daveiss's investigation and limited their correspondence as not to raise suspicions, advice given by Daveiss himself.44 The president guaranteed the secrecy of the letters. Daveiss was outraged at another brief and non-descript letter from the president. Daveiss's remarks were harsh, "Good God! Was ever anything so astonishing! so unaccountable! That in reply to a letter so distinct, the government should still keep me profoundly in the dark, never order me to do or forbear anything or give me one hint of their views! If I

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42 Ibid., 91.

43 Ibid., 92. With Daveiss's permission, Jefferson had already shown Daveiss's letters to Secretary of State, James Madison and Treasury Secretary, Albert Gallatin. Daveiss to Jefferson, 10 January 1806, Daveiss, 70.

44 Ibid., 95.
had possessed sufficient power, I should have taken the start of Mr. Jefferson by removing him from office."45

Jefferson's impeachment was not really plausible, but as district attorney, Daveiss sought justice through the courts. He brought Burr to court in early November for the first time in connection with the conspiracy.46 Burr recruited Henry Clay and John Allen to serve as his counsel.47 Burr promised that the allegations against him were false and that he had "neither issued nor signed nor promised a commission to any person for any purpose." Burr claimed that he did "not own a musket or a bayonet nor any single article of military stores nor does any person for me by my authority or with my knowledge." He sought Clay's assistance "to counteract the chimerical tales which malevolent persons have so industriously circulated."48

The accusations Daveiss brought were not solid, but rather, as Clay recalled, inspired by the district attorney's "admiration of Col. Hamilton and his hatred of Col. Burr."49 Despite Daveiss's passion-driven prosecution, there was not sufficient evidence, and the "grand jury returned the true bill of indictment not true."50 The crowd's response was unlike that ever witnessed by Clay, "There were shouts of applause from an audience, not one of whom, I am persuaded, would have hesitated

45 Ibid.

46 For few details on the trial, see Daveiss, 96-98; Adams, vol. 5, 277-278, 282-283; Beveridge, vol. 3, 317-319.


48 Aaron Burr to Henry Clay, 1 December 1806, Ibid., 256-257.


50 Clay to Pindell, 15 October 1806, Ibid.
to level a rifle against Col. Burr, if he believed that he aimed to dismember the Union, or sought to violate its peace or overturn its constitution." The town of Frankfort held a ball in Burr's honor and Judge Innes and John Brown attended. Daveiss's failure to convict Burr led to his own removal from office in the spring of 1807.

Daveiss's information did not have as great an impact as the other warnings that the president received months after Daveiss penned his first letter. Jefferson later recalled to Gideon Granger what information led the administration to react to the alleged conspiracy. Jefferson's letter, dated March 9, 1814, was a response to Granger's request for verification of events during the Jefferson administration.

Concerning the Burr conspiracy, Jefferson recalled that he had received word from Colonel George Morgan on September 15 and 18. Jefferson replied to Morgan on September 19, 1806. The president thanked him for the information on a possible conspiracy that "coincides with what has been learned from other quarters." Jefferson continued, giving Morgan the praise and instructions that Daveiss had anticipated.

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51 Clay to Pindell, 15 October 1806, Ibid. Clay's letter to Pindell was in response to allegations that Clay was involved in Burr's scheme. Clay assumed that the rumor was meant as a distraction from the charge that Andrew Jackson was connected with Burr.

52 Abernethy, 99.

53 Daveiss, 58, footnote 1, 105.

54 Granger served as postmaster general 1801-1814. Jefferson to Granger, 9 March 1814, The Writings of Thomas Jefferson, ed. Ford, vol. 9, 454. His letter to the former president requested recollection of various events. Jefferson opened his letter by saying, "Nothing is so painful to me as appeals to my memory on the subject of past transactions." He continued his lament, "From 1775-1809, my life was an unremitting course of public transactions, so numerous, so multifarious, and so diversified by places and persons, that, like the figures of a magic lantern, their succession was with a rapidity that scarcely gave time for fixed impression. Add to this the decay of memory consequent on advancing years, and it will not be deemed wonderful that I should be a stranger as it were even to my own transactions." As to his arrival of answers for Granger, Jefferson stated, "I have duly pondered the facts stated in your letter, and for the refreshment of my memory have gone over the letters which passed between us while I was in the administration of the government, have examined my private notes, and such other papers as could assist me in the recovery of the facts." Jefferson promised to "give the best account of them I am able to derive from the joint sources of memory and paper."
"Your situation and the knowledge you already possess," the president continued, "would probably put it in your power to trace the footsteps of this enterprise on the public peace with more effect than any other with whom I could communicate." His instructions followed, "Whatever zeal you might think proper to use in this pursuit, would be used in fulfillment of the duties of a good citizen," and requested any other communications that would be useful to their investigation.55

"A Mr. Williams of New York" made reference to the same "maneuvers of Colonel Burr" and on August 10, Charles Truxton sent him a letter about a possible conspiracy.56 These communications were not sufficient enough to engage a reaction, so Jefferson asked his sources for any new developments. Jefferson recalled that it was Granger's letter on October 16 that included vital information about General Eaton that "gave a specific view of the objects of this new conspiracy" and prompted Jefferson to take action.57

Through a series of cabinet meetings in late October, the administration developed a strategy to shut down the conspiracy. On October 22, the first of three meetings, Jefferson addressed the status of military presence in the Mississippi and Orleans territories. The department heads agreed that the emergency situation called for 500 volunteers from the two territories. The president expressed his conclusions

55 Jefferson to Morgan, 19 September 1806, The Writings of Thomas Jefferson, vol. 8, ed. Ford, 473-474. In a later letter, dated March 26, 1807, Jefferson recalled to Morgan, "Yours was the very first intimation I had of this plot, for wht it is but justice to say you have deserved well of your country." Jefferson to Morgan, 26 March 1807, The Writings of Thomas Jefferson, vol. 11, ed. Lipscomb and Bergh, 174.

56 Plumer, December 26, 1806, 541.

about the alleged plot. He first recalled that, "During the last session of Congress, Col. Burr who was here, finding no hope of being employed in any department of the govmt. [sic] opened himself confidentially to some persons on whom he thought he could rely, on a scheme of separating the western from the Atlantic States, and erecting the former into an independent confederacy." His accusations continued, "He had before made a tour of those states, which had excited suspicions, as every motion does of such a Catalinarian character." Jefferson referenced General Eaton's statement, recorded by Granger, as well as letters from John Nicholson, Mr. Williams, Colonel Morgan, "Nevill and Roberts near Pittsbg. [sic] and to other citizens thro' [sic] other channels and the newspapers." Not surprisingly, he omitted Daveiss's name from the list of informers.

Jefferson made it clear that he believed Burr was behind a scheme that threatened the stability of the union. In order to stop him, the executive leaders wrote letters to the governors of the western territories, "to have him strictly watched and on his committing any overt act unequivocally, to have him arrested and tried for treason, misdemeanor, or whatever other offence the Act may amount to." They included instructions to treat his accomplices with the same legal forces. Regarding General Wilkinson's suspected involvement, the administration was not certain how to respond because there was record that he disobeyed orders earlier that year. On October 24, the cabinet met again and confirmed a military strategy for Burr's arrest. They decided to wait to determine the Wilkinson question until they received more information.

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59 The orders were dated June 11. Wilkinson was to leave St. Louis for New Orleans and Natchitoches but did not leave until September. Ibid., 319.
information from the west. John Graham, Secretary of the Orleans Territory, was ordered to investigate Burr's activity in the west.

Graham was allegedly part of the plan, as told by Burr to Harman Blennerhassett, who then openly told Graham about the plot. Graham reported these revelations from Blennerhassett to the Ohio territory legislature in Chillicothe and recommended militia force against the conspirators. Historian Henry Adams concluded that had military force been approved three months earlier, "it would have put an end to Burr's projects before they were under way." Adams continued, asserting that it "would have saved many deluded men from ruin, and would have prevented much trouble at New Orleans."\(^{60}\)

However, the government's plans took a shocking turn the following day on October 25. Jefferson's memo provided insight into the government's decisions. Because "not one word is heard from that quarter of any movements by Colo. Burr," the president concluded, that "this total silence of the officers of the govmt. [sic], of the members of Congress, of the newspapers, proves he is committing no overt act against law." One day with no word about Burr's movements prompted the executive to retract his orders for military movements to the west. Instead, the administration would send letters to governors "to be on their guard." This radical reversal of policy was surprising, given that at the time, mail depended on horseback riders and carriages to transport correspondence over hundreds of miles. Jefferson's abrupt change of heart was questionable. He recalled to Granger that during October he was finally convinced that there was a necessity to take action against the possible corruption in the west, but then he changed his mind after one day of no word from

\(^{60}\) Adams, vol. 5, 282.
the mail. Although no evidence exists on this mysterious change of heart, historian Thomas Abernethy concluded that it may have been a way to protect General Wilkinson.\(^{61}\) Jefferson trusted Wilkinson, against numerous allegations that he was on the Spanish payroll while serving in the United States military. The president followed in the footsteps of the previous presidents who too had trusted Wilkinson. Jefferson's dislike and distrust of Burr may have influenced his decision to have faith in the general as well.

A month later, Jefferson finally made a public statement about the administration's concerns. On November 27, 1806 he warned against "sundry persons, citizens of the U.S. or residents within the same" who were "conspiring and confederating together to begin and set on foot, provide and prepare the means for a military expedition or enterprise against the dominions of Spain, against which nation war has not been declared by the constitutional authority of the U.S." These conspirators were "fitting out and arming vessels in the western waters of the U.S., collecting provisions, arms, military stores, and other means" as well as, "deceiving and seducing honest and well meaning citizens under various pretences to engage in their criminal enterprises." Jefferson called for those citizens who had been manipulated by these persons to "withdraw from the same without delay" and those persons who were responsible "to cease all further proceedings" at the threat of "prosecution with all the rigors of the law."

Continuing the warning, the president called for "all officers, civil or military, of the U.S. or of any of the states or territories and especially all governors, and other executive authorities, all judges, justices, and other officers of the peace, all military

\(^{61}\) Abernethy, 87; Daveiss, 77.
officers of the army or navy of the U.S., and officers of the militia, to be vigilant, each within his respective department and according to his functions in searching out and bringing to condign punishment all persons engaged or concerned in such enterprise and in seizing and detaining subject to the dispositions." Lastly, Jefferson called for the help of the citizens, "especially in the discovery, apprehension, and bringing to justice, of all such offenders, and in the giving information against them to the proper authorities."62 Some of those who had supported Burr and those western citizens who had honored him with dinners and balls were alarmed by this national call to save the country and separated themselves from him.

Senator Plumer remarked on the special message the following day.63 The senator was convinced that "there are many things reported agt [sic] Mr. Burr—some of them too foolish for him to be guilty off [sic]."64 He referenced Eaton's statement "that Burr told Eaton that Genl [sic] Wilkinson was second in command—and under him, and that Eaton should be third." Plumer was convinced that this was "not the language of the cunning cautious wily Burr. He would never use such language to a man so imprudent, wily, and raving as Eaton." His final thought recorded that day, "Burr is capable of much wickedness—but not so much folly."65

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63 Plumer, 515-516.

64 Plumer, 515.

65 Plumer, 516. Plumer later recorded information from William Branch Giles concerning Burr and Jefferson's special message. Giles alleged that Burr received a copy of the proclamation from a friend who delivered it to him in Kentucky quicker than it would have gotten to him by post. Burr immediately went to Nashville with the message and showed Andrew Jackson. Jackson had been one of Burr's biggest supporters, giving dinners in his honor, etc. However, when Jackson wrote to Jefferson that he would ready men for his service, the president explained that Burr did not have governmental support. Plumer remarked that Jackson was "again duped" by Burr when Burr rode to
The president delivered his sixth annual message to Congress on December 2 with little mention of the conspiracy. Historian Henry Adams asserted that Jefferson stifled the Burr conspiracy in order to "restore harmony to his party."66 This desire to unify, Adams said, "was the motive of his gentleness toward Randolph and the Virginia schismatics, as it was that of his blindness to the doings of Burr."67 Jefferson recalled the administration's knowledge that "a great number of private individuals were combining together, arming and organizing themselves contrary to law, to carry on military expeditions against the territories of Spain."68 The solution to these, "criminal attempts of private individuals to decide for their country the question of peace or war, by commencing active and unauthorized hostilities," the president guaranteed, would be "promptly and efficaciously suppressed."69

Jefferson tried not to make the conspiracy appear too big of a burden for the country, but he did maintain fears about "the designs of our Catèline."70 In a letter to Attorney General Caesar Rodney dated December 5, he said these designs "are as real as they are romantic, but the parallel he has selected from history for the model of his own course corresponds but by halves. It is true in it's [sic] principal character, but

Nashville, showed him the message and guaranteed that this was an arrangement between him and the president, but the president had released it earlier than expected. Plumer, January 17, 1807, 578.


67 Ibid.


69 Ibid., 489-490. Plumer remarked that the president's speech would "prove a popular one" because "the administration certainly deserve well of their country in their paying off so much of the public debt." 520.

the materials to be employed are totally different from the scourings of Rome."71  The president expressed confidence in authority of his messages, "because his strength was to consist of people who had been persuaded that the government connived at the enterprise."72  Concerning the adverse effects of the United States relationship with Spain, Jefferson remarked that while the two countries may "come to blows," he figured "it will accelerate the treaty instead of preventing it."73

Jefferson relied on the western citizens to repel Burr's military maneuvers. The conspiracy was to meet December 15 and if Burr's group was not stopped at Marietta, Cincinnati, or Louisville, then he would ask Congress for "naval equipment" and "20,000 militia (or volunteers) from the western states" to take New Orleans. He ordered Secretary of the Navy Robert Smith to prepare boats and men in New York, Washington, Norfolk, and Charleston.74

The president received questions from various people about the conspiracy and the administration's defense and Thomas Lieper sent one such letter. Jefferson replied to Lieper's "friendly and flattering address" that apparently sought answers that the president did not feel comfortable answering without risking the "harmony of the present session of Congress, and disturbing the tranquility of the nation itself.

71 Jefferson to Caesar A. Rodney, Ibid.

72 Ibid.

73 Ibid. The treaty regarding the disputed boundary in the west.

prematurely and injuriously." Jefferson praised Congress and emphasized his faith in the body that faced "new and great questions to decide and in the decision of which no schismatic view should take any part." The president specifically referred to the suspected Burr conspiracy and that Congress would have to decide on "serious national armament" if it were not eradicated. Jefferson concluded that "these schisms, small or great only accumulate truths of the solid qualifications of our citizens for self government." 

One particularly outspoken congressman was not content in waiting for the president to provide an update on the activity. On January 16, 1807, Representative John Randolph introduced two resolutions for the president to inform them about the administration's knowledge "relative to the conspiracy in the western world," and further, what counteraction was in place. Senator Plumer did not agree with the necessity of the resolutions. He trusted that Jefferson would provide information to the Congress whenever he believed it was safe to do so.

On January 22, Jefferson responded to the demand for information with a "Special Message on Burr." The president revealed that the sources were mainly "in the form of letters, often containing a mixture of rumors, conjectures, and suspicions, as render it difficult to sift out the real facts. . . ." Because of the uncertainty of some

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75 Jefferson to Lieper, 22 December 1806, Ibid., 502-503. Jefferson told Lieper that he was replying, evidently one of the many complementary letters, in order for Lieper to explain "in conversation a true solution to the fact of my giving no answer."

76 The Writings of Thomas Jefferson, vol. 8, ed. Ford, 503.

77 Annals of Congress, 9th Congress, 2nd session 334-359; Plumer, 576.

78 Plumer, 576-577.

of the persons involved, Jefferson only revealed the name of the "principal actor, whose guilt is beyond question."\textsuperscript{80} His message explained the progression of information that he had received since September. From the early correspondence, the president believed that he did not have significant information that called for drastic action, rather he asked his informers to update him immediately with new details. The "prime mover" was identified however, Aaron Burr.\textsuperscript{81} The president recalled, that in October, the "objects of the conspiracy began to be perceived, but still so blended and involved in mystery that nothing distinct could be singled out for pursuit."\textsuperscript{82}

Jefferson said he was entirely convinced that action was necessary when he received a letter from General Wilkinson on November 27. The letter, dated October 21, included details about Burr's conspiracy from communication, "partly written in cipher and partly oral, explaining his designs, exaggerating his resources, and making such offers of emolument and command, to engage him and the army in his unlawful enterprise, as he had flattered himself would be successful."\textsuperscript{83} Without questioning how Wilkinson would have been able to translate the cipher code had they not arranged this type of correspondence, Jefferson praised the general for his quick thinking in sharing the information with him.

The cipher letter, to which Jefferson referenced, was the subject of controversy at the trial and by later researchers. Senator Plumer, after reviewing the

\textsuperscript{80} Ibid., 14-15.

\textsuperscript{81} Ibid., 15.

\textsuperscript{82} Ibid.

\textsuperscript{83} Ibid., 15-16.
letter, remarked confidently that "the letter is not accurately stated—it sounds more like Wilkinson's letter than Burr's." Reasons for his suspicion included, "there are more things contained in it than is necessary—somethings [sic] quite irrelevant—e.g. *that his daughter would accompany him.*" He founded his suspicions on his familiarity of Burr's behavior. Plumer believed, "Burr's habits have been never to trust himself on paper, if he could avoid it—and when he wrote—it was with great caution." Plumer believed that "W[ilkinson] is not an accurate correct man." His suspicions were similar to those of many others at the time and historians who have studied the documents.

The president revealed the objects of Burr's scheme. He alleged that Burr had two goals, the first, was the disunion of the western states, and second, "an attack on Mexico." Jefferson noted that the order of these events was left to however "circumstances should direct." A third plot masked Burr's true intentions and allowed him to manipulate innocent citizens into believing that his plans were legal. This cover up plan, Jefferson assumed, was "the settlement of a pretended purchase of a tract of country on the Washita, claimed by a Baron Bastrop." Jefferson declared that the loyalty of the western states forced Burr to alter his plans, and attempt to seize New Orleans, the bank, the military there, and advance to Mexico.

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84 Plumer, January 22, 1807, 584.

85 Reasons why it was suspected to be forged are included in: *Political Correspondence and Public Papers of Aaron Burr*, vol. 2, ed. Mary-Jo Kline and Joanne Wood Ryan (Princeton, N.J.,: University of Princeton Press, 1983), 973-90. Kline and Ryan concluded that Burr's close friend Jonathan Dayton wrote the letter.

86 *The Writings of Thomas Jefferson*, vol. 9, ed. Ford, 17.

87 Ibid. Jefferson wrote to Ohio governor H.D. Tiffin on February 2, 1807 and praised the unprecedented loyalty of the Ohio legislature. Ibid., 21-22.
While certain westerners hindered Burr's original design, Jefferson concluded that Daveiss had in fact aided the conspirator. The president remarked that, "in Kentucky, a premature attempt to bring Burr to justice, without sufficient evidence for his conviction, had produced a popular impression in his favor, and a general disbelief of his guilt. This gave him an unfortunate opportunity of hastening his equipments." However, his "proclamation and orders" that "awakened the authorities of that State with the truth," made its decimation possible again. The president revealed that he received two letters from Wilkinson, dated September 14 and 18, which reported the arrest of three Burr's "principal emissaries." In an attempt to insure a fair trial, two of these men were transported out of New Orleans. Jefferson promised that upon arrival, these persons would stand trial.

On the same day as Jefferson's message, January 22, the two men arrested in New Orleans arrived in Washington. A military guard escorted Dr. Erick Bollman and Samuel Swartwout, in complete violation of their right to habeas corpus. In an effort to justify the government's illegal transportation of the accused, Senator William Branch Giles moved for a resolution to appoint a committee to "bring in a bill to suspend for a limited time the Habeas corpus Act." On January 23, Giles

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88 Ibid., 18.
89 These two men were Bollman and Swartwout.
90 The Writings of Thomas Jefferson, vol. 9, ed. Ford, 20. Jefferson updated the Congress with short messages on January 28 and February 10. On January 28, the president reported that Burr had passed Fort Massac on December 31 "with about ten boats, navigated by about six hands each, without any military appearance, and that three boats with ammunition were said to have been arrested by the militia at Louisville." Ibid., 21. The other message was a report on the gunboats that were set up to defend the harbors. Ibid., 23-27.
91 Habeas corpus is guaranteed by the U.S. Constitution, Article I, section 9, clause 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion of Public Safety may require it."
"moved that the doors of the Senate be closed" and the Senate secretly discussed the bill. Giles held that Burr's conspiracy and the president's message from January 22 justified the suspension. This was a precaution, in order "to prevent their escape, and to secure others who may be arrested in more distant parts of the Union." Plumer provided the most comprehensive record of the debate. Senator Bayard from Delaware disagreed, and said that the evidence for the rebellion was "inconclusive." Bayard did not believe that the situation called for that drastic measure because, "Individual liberty is not to be endangered but to preserve the security of the nation." Despite Bayard and three or four other senators' constitutional objections, the bill passed and sent to the House on January 26. Plumer recalled that the House "immediately took off the injunction of secrecy," and rejected it.

Attorneys Charles Lee and Robert Goodloe Harper represented Bollman and Swartwout and "applied to the Supreme Court for writs of habeas corpus." Lee opened the arguments on February 9 and Marshall's first opinion on February 13 determined that the Supreme Court could "issue writs of habeas corpus." On February 21, Marshall read the opinion on the charges treason and "levying war against the United States." Marshall opened the opinion by recognizing that "there

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92 Plumer, January 23, 1807, 585.
93 Plumer, 589, note 253.
94 Ibid., 585.
97 Opinion, 21 February 1807, Ibid., 487.
is no crime, which can more excite and agitate the passions of men than treason.”

The Constitution says that conviction required testimony of two witnesses or a
confession in court to "prevent the possibility of those calamities which result from
the extension of treason to offences of minor importance." The key to proving an act
of treason was to show that "war must be actually levied against the U. States."

Marshall expounded on the requirements for treason and reiterated that,
"however flagitious may be the crime of conspiring to subvert by force the
government of our country, such conspiracy is not treason." The chief justice stated
explicitly that there was a significant difference between conspiring to levy war, and
actually levying war. To levy war, however, a person did not have to actually have
weapons against the country. Marshall's explanation was the controversial excerpt in
the Burr trial. The chief justice concluded: "if war be actually levied, that is, if a
body of men be actually assembled for the purpose of effecting by force, a
treasurable purpose, 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 to be considered as traitors. But there must be an actual assembling
of men for the treasonable purpose, to constitute a levying of war." Marshall
explained, "Crimes so atrocious as those which have for their object the subversion
by violence of those laws and those institutions which have been ordained in order to
secure the peace and happiness of society, are not to escape punishment because they
have not ripened into treason." The Court concluded that there was not enough

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98 Ibid., 488.
99 Ibid., 488.
evidence to convict Swartwout of assembling, and even less to convict Bollman.100

Meanwhile, in the Mississippi Territory, Burr received word that Wilkinson betrayed him and the federal government sought to stop his plan. On January 10, Judge Peter Bryan Bruin provided Burr with a January 6 edition of the Natchez Mississippi Messenger. The paper included copies of Jefferson's November 27 proclamation along with the decoded letter provided by the general. In addition, there was a proclamation from the interim governor of Mississippi Territory, Cowles Mead, asking all military and civil persons to aid in the capture of and prosecution of the wrongdoers.101 Burr sent the small group of men that was with him across the Mississippi River into the Orleans Territory, and then he sent a letter to Mead.102

Burr's correspondence to Mead expressed disappointment that his actions had been "grossly misrepresented" and that his activity "has been made the subject of alarm to this country." He declared that he never intended "to interrupt the peace or welfare of my fellow citizens, and that I harbour [sic] (neither) the wish nor the intention to intermeddle with their government or concerns." Burr guaranteed that his desires were "not only justifiable, but laudable, tending to the happiness and benefit of my

100 Ibid., 493-495. Justices Washington and Livingston concurred with Marshall, Johnson dissented, and Cushing and Chase were absent due to illness. Ibid., 479. Unfortunately, comments from Jefferson and Marshall were not found. However, if Jefferson knew about Burr's plot, which he did from Daveiss, he probably anticipated using Bollman to his advantage. Marshall's feelings about the decision remain unknown due to the shortage of surviving letters. In a letter to Samuel Chase on 29 June 1807, Marshall requested Chase's advise about Bollman and indicated that he had contacted the other justices as well. See pages 157-158.

101 Proclamation on December 23.

102 Political Correspondence and Public Papers of Aaron Burr, vol. 2, 1007-1008. Mississippi governor Robert Williams was due to return to his office on January 27 after a trip to the east. The editors of Burr's papers remarked that Williams was constantly at odds with most of the leading men in the Mississippi Territory. Ibid., 1018.
country men and such as every good citizen and virtuous man ought to promote.\textsuperscript{103}

He asked the governor to "not suffer yourself to be made the instrument of arming citizen against citizen and of involving the country in the horrors of civil war, without some better foundation than the suggestions of rumor or," warning of Wilkinson's double-dealing, "the vile fabrications of a man notoriously the pensioner of a foreign government."\textsuperscript{104}

Because of Burr's claim of innocence, Mead promised him and his accomplices protection if he yielded to the civil authority.\textsuperscript{105} Burr asked for a guarantee of such an arrangement and said that he was willing to comply with a "prompt enquiry and decision on the spot."\textsuperscript{106} Mead replied that he would send aides to record "such information on this subject as you may please to make."\textsuperscript{107} Burr and Mead agreed to meet peacefully on January 16 in a house owned by Thomas Calvet on Cole's Creek.\textsuperscript{108} Burr surrendered to Mead, and the interim governor translated the meeting to President Jefferson in a letter dated January 19.\textsuperscript{109} Mead recalled that Burr "offered to surrender himself to the civil authority of the territory, and to suffer his boats to be searched."\textsuperscript{110} The "mighty alarms, with all its exaggerations," Mead remarked, "has eventuated in nine boats and one hundred men, and the major part of

\begin{footnotes}
\item[103] Burr to Mead, 12 January 1807, Ibid., 1008.
\item[104] Ibid., 1009.
\item[105] Thomas Fitzpatrick to Burr, 15 January 1807, Ibid., 1010-1011.
\item[106] Burr to Thomas Fitzpatrick, 15 January 1807, Ibid., 1012.
\item[107] Mead to Burr, 15 January 1807, Ibid., 1013.
\item[108] Agreement with Cowles Mead, 16 January 1807, Ibid., 1014.
\item[109] Mead to Jefferson, 19 January 1807, Annals of Congress, 9\textsuperscript{th} Congress, 2\textsuperscript{nd} Session, 1019.
\item[110] Ibid.
\end{footnotes}
these are boys, or young men just from school." Mead believed that they were "ignorant and deluded" and were "dupes of stratagem, in the asseverations of Generals Eaton and Wilkinson are to be accredited."\textsuperscript{111}

While Burr awaited trial in the Mississippi Territory, there was little restraint placed on his movements, but he suspected that his allies would not be able to protect him against Governor Williams who was scheduled to return January 27. Judges Thomas Rodney and Peter B. Bruin presided over the trial.\textsuperscript{112} Territorial attorney George Poindexter argued that the territory did not have the jurisdiction to try Burr, but rather, he should be tried in either the county's circuit court or the capital.\textsuperscript{113} Poindexter presented this argument at the trial, but the grand jury acquitted Burr. Burr's attorney ordered him "released from his recognizance," but the judges split on that decision and Judge Rodney ordered that the court supervise Burr. Burr learned that Governor Williams intended to "seize him" after his release and issued warrants against Burr, Blennerhassett, and two other suspects.\textsuperscript{114} Burr fled, fearing unlawful arrest and wrote to Governor Williams, avowing to remain a refugee as long as his safety was threatened.\textsuperscript{115} Williams did not recant his orders for Burr's arrest and proclaimed that Burr was a fugitive of the law.

\textsuperscript{111} Ibid.

\textsuperscript{112} For description of judges, see Malone, Second Term, 292.

\textsuperscript{113} Correspondence and Public Papers of Aaron Burr, vol. 2, 1018. The trial began on February 2 and February 4, the jury returned their decision. The jury's statement included a critique of Wilkinson's arrests; this did not pass without argument by the attorneys.

\textsuperscript{114} Ibid., 1020.

\textsuperscript{115} The editors of Burr's papers were not certain of the dates or location from which these two notes were written. One was probably on January 7, and the other January 12. Burr to Williams, Ibid., 1022-1023.
Burr attempted to seek refuge in Spanish Florida and made it as far as Wakefield.\textsuperscript{116} His precise movements for escape were undocumented because his benefactors were inconspicuous. Lieutenant Edmund P. Gaines arrested Burr and his accomplice, Major Robert Ashley, while they stayed in the home of Major John Hinson. Burr was held at Fort Stoddert until February 22, when Gaines decided to transport him to Washington. Nicholas Perkins, six civilians, and two soldiers escorted Burr through Alabama and Georgia. Burr attempted escape once in Chester, near the South Carolina border. He jumped off his horse, yelled to the bystanders to help him because they were holding him under illegal authority. Perkins threw him back on his horse and the party left the town before anyone could help. When they arrived in Fredericksburg, Virginia, they received a message from Washington to take Burr to Richmond, Virginia where they arrived on the evening of March 26.\textsuperscript{117} The meeting point of the conspirators was Blennerhassett Island, located in the Ohio River in Wood County, Virginia. Therefore, the jurisdiction fell to the Fifth U.S. circuit court in Virginia presided over by John Marshall.

While Burr was transported out of the territory, the president wrote at least three letters that mentioned Burr's anticipated arrival and expressed his dislike of him. Jefferson remarked to Robert Livingston, "Burr has indeed made a most inglorious exhibition of his much over-rated talents."\textsuperscript{118} On March 25, Jefferson commented

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\item \textsuperscript{116} Wakefield is in present day Washington County, Alabama. Ibid., Editorial note, 1025-1026.
\item \textsuperscript{117} Ibid., Editorial note, 1028-1029. Lomask detailed Burr's capture and attempted escape. Lomask, 218-225.
\end{itemize}
that, "No man's history proves better the value of honesty. With that, what might he not have been!"\textsuperscript{119} Jefferson emphasized to Colonel George Morgan that the burden of proof fell on the prosecution and if they were able to gather all of their witnesses, "there can be no doubt where his [Burr's] history will end." Jefferson, however, disapproved of the Federalists who "appear to make Burr's cause their own, and to spare no efforts to screen his adherents." He concluded that they were devastated that Burr's plan was disassembled and predicted that "had a little success dawned on him, their openly joining him might have produced some danger."\textsuperscript{120}

The hearing began in the Eagle Tavern, where Burr stayed, on March 30, but was later moved to the House of Delegates in the capitol to accommodate the crowd that had gathered to observe the proceedings. After months of proclamations and warning signals, the public was well aware of the alleged conspiracy and its perceived threat to the country. Burr was released on $10,000 bail and the court was adjourned until the summer circuit term began on May 22. This gave both sides over a month to prepare for the trial. Burr biographer, Milton Lomask, commented that "Burr put his seven weeks of freedom to good use."\textsuperscript{121}

Burr, an experienced lawyer himself, assembled a spectacular legal team of leading attorneys in the country, including, Luther Martin, Edmund Randolph, John Wickham, Benjamin Botts, and Charles Lee.\textsuperscript{122} Historian Albert Beveridge remarked

\textsuperscript{119} Jefferson to --------, 25 March 1807, Ibid., 172.

\textsuperscript{120} Jefferson to Morgan, 26 March 1807, Ibid., 174.

\textsuperscript{121} Lomask, 233.

\textsuperscript{122} Papers of John Marshall, vol. 7, Editorial note, 6.
that the defense's strategy was to "attack, attack, always attack" and "appeal to the people's hatred of oppression, fear of military rule, love of justice."123

District Attorney George Hay, a staunch Republican, led the prosecution and William Wirt and Alexander MacRae assisted him.124 However, Jefferson's correspondence with Hay proved that he was in fact the one who orchestrated the prosecution's strategy. The combination of great legal minds provided excellent arguments, and lengthy speeches.125 The details of the trial are intriguing, however, it would be impossible to include them all here.126 The importance of the Burr trial for this particular work lies in the interaction between the administration and the judiciary. The trial served as the climax of Marshall and Jefferson's governmental power competition.

Before the trial began, Marshall was the subject of controversy in the Republican press after his attendance of a dinner at the home of John Wickham. Wickham, one of Burr's lawyers, was Marshall's neighbor and allegedly, Marshall was unaware that Burr was invited to the affair. However, Marshall's "politeness required him to remain even after he had discovered the presence of the man upon

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124 Attorney General, Caesar A. Rodney, appeared only briefly at the beginning of the trial. Malone, Second Term, 296.

125 The Papers of John Marshall noted that "no lawyer spoke less than four hours." Luther Martin provided a memorable performance of fourteen hours in two days time. Papers of John Marshall, vol. 7, Editorial note, 7.

126 A few independent persons recorded the trial's proceeding that were printed by the Richmond papers, the Enquirer, edited by Thomas Ritchie, and the Virginia Argus, with Samuel Pleasants as editor. The Enquirer used David Robertson's record as did the editors of Marshall's papers. Ibid., 11.
whom he was to sit judgment.\textsuperscript{127} The story was printed in the Richmond \textit{Enquirer} on April 10, 1807 and of course, contributed to the drama of the entire incident.

Marshall reflected on the trial as "the most unpleasant case which has ever been brought before a judge in this or perhaps in any other country which affected to be governed by laws."\textsuperscript{128} He realized that \textit{Bollman} would be used to support the prosecution because Burr was not on Blennerhassett Island at the time of the gathering, he was in Kentucky, over three hundred miles away.\textsuperscript{129} Marshall's decision said that a person did not have to be at the scene to be convicted of treason and Marshall realized that it needed clarification.\textsuperscript{130}

Jefferson was determined to prove Burr's guilt. The president had declared Burr guilty of treasonous activity in his January 22 proclamation, which was against the court's ideal that the accused is innocent until proven guilty. The president was convinced that the Federalists sided with Burr and that the judiciary intended to set him free. "It is unfortunate," Jefferson remarked, "that federalism is still predominant in our judiciary system." He considered this unbalance the reason why the judiciary "is consequently in opposition to the legislative and executive branches, and is able to baffle their measures often."\textsuperscript{131} The president was even more outraged with the

\begin{footnotesize}
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\item \textsuperscript{127} Abernethy, 232.
\item \textsuperscript{129} Lomask, 226.
\item \textsuperscript{130} Ex Parte Bollman and Ex Parte Swartwout Opinion, 21 February 1807, "If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force, a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." \textit{Papers of John Marshall}, vol. 6, 488.
\item \textsuperscript{131} Jefferson to James Bowdoin, 2 April 1807, \textit{The Writings of Thomas Jefferson}, vol. 11, ed. Lipscomb and Bergh, 186.
\end{itemize}
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judiciary after Marshall ordered the prosecution to present evidence immediately.

"More than five weeks have elapsed," Marshall observed on April 1, "since the
opinion of the Supreme Court has declared the necessity of proving the fact, if it
exists. Why is it not proved?"  

The evidence, Jefferson told William Branch Giles, was "dispersed through a
line of two thousand miles from Maine to New Orleans." The president was
disgusted with "the tricks of the judges to force trials before it is possible to collect
the evidence." Jefferson was convinced that there was sufficient evidence from the
previous months to show Burr's treasonous intentions. "Is there a candid man in the
United States," Jefferson wondered, "who does not believe in some one, if not all, of
these overt acts to have taken place?" Jefferson's hostility toward the judiciary was
more colorful than before in this particular letter. Instead, he recalled the previous
attempts to remove federal judges and proclaimed, "impeachment is a farce which
will not be tried again." The president called for an amendment to provide for the
more expedient removal of judges, eliminating the "immunity" of "that class of
offenders which endeavors to overturn the Constitution, and are themselves protected
in it by the Constitution itself."

Jefferson's correspondence during the trial is the best evidence of the
antagonism between the executive and the judiciary. His letters to Hay were
primarily instructions about the prosecution's strategy and revealed his passion for

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134 Jefferson to Giles, April 20, 1807, Ibid., 190.

135 Ibid., 191.
proving Burr's guilt. One of his first orders referred to Dr. Erick Bollman's statement that was given to Jefferson and Madison upon his arrival for his trial in January. The president and the secretary of state promised Bollman that his words would never be used against him. Bollman provided copious amounts of information about Burr's plans, which included an invasion into Mexico, with the United States' sole interest at heart. He mentioned nothing about separation and spoke ill of Wilkinson.136 On May 20, Jefferson wrote to Hay, with complete disregard to his promise to protect Bollman, ordered Hay to use Bollman's statement against him if necessary. "If he should prevaricate," Jefferson said, "I should be willing you should go so far as to ask him whether he did not say so and so to Mr. Madison and myself."137 Jefferson, the proclaimed protector of freedom and liberty, ordered the district attorney in charge of the prosecution in the treason trial of Aaron Burr to directly and deliberately violate Bollman's civil liberties. In addition, Jefferson informed Hay that he would send blank pardons for the attorney in the event that he "should find a defect of evidence, and believe that his would supply it, by avoiding to give them to the gross offenders, unless it be visible that the principal will otherwise escape."138 Jefferson told him to "go into any expense necessary" in order to insure success.139

The president wrote to Hay and remarked that he had learned that the trial began "under very inauspicious symptoms by the challenging and rejecting two

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member of the grand jury." Jefferson did not want to believe this information and continued with explicit instructions about recording the testimony of their witnesses. He received a letter from Hay reporting that the grand jury may not "find a bill against Burr." In this event, the president told Hay not to use the pardon for Bollman since his testimony would not be necessary. If Bollman were needed though, Jefferson had more instructions on how Hay should force information from him. "On further reflection," said Jefferson, "if he prevaricates grossly, and show the paper to him, and ask if it is not his handwriting, and confront him by its contents." The president included other letters received from Bollman in order to prove that the statement was in his handwriting. Bollman refused the pardon on the stand.

Jefferson sent further recommendations about the prosecution's strategy on June 2. The president had learned that *Marbury v. Madison* was cited and he believed that the case should not be used for two reasons. First, "the judges, in the outset, disclaimed all cognizance of the case, although they then went on to say what would have been their opinion, had they had cognizance of it." Therefore, Jefferson considered *Marbury*, "an extrajudicial opinion, and, as such, of no authority." The second reason why Jefferson disagreed with the use of *Marbury*, was his distrust of

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140 Jefferson to Hay, 26 May 1807, Ibid., 209. "A person who left Richmond on the 22nd" relayed this report to him.

141 Jefferson to Hay, 28 May 1807, Ibid., 210-211.


the judiciary. Because he declared *Marbury* extrajudicial, he disagreed with Marshall's ruling that delivery was not necessary to confirm a commission to office.

He asserted that the Constitution sought to maintain the balance between the branches and that the delivery of judicial commissions was one way to keep the courts in check. This was possible because, the Constitution did not "intend to give the judiciary that control over the executive," and the issuance of commissions was to "remain in the power of the latter [executive] to do it or not." Jefferson believed that no arm of the government should have control over any other. He remarked that he had “long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law; and I think the present a fortunate one, because it occupies such a place in the public attention."\(^{144}\)

Coincidentally, the culmination of the Marshall and Jefferson struggle served as Jefferson’s opportunity to reiterate his supreme dislike of one of their earlier areas of disagreement.

The president and Hay constantly corresponded and these letters provide insight into how they alleged Burr recruited for his venture that he claimed to have governmental support for his gathering of men and supplies. They believed that in order to deceive those who questioned him, Burr used a forged letter from the Secretary of War that was made “to his express approbation,” and that the president was away from Washington, but when he returned, he too would approve of Burr’s

\(^{144}\) Jefferson to Hay, 2 June 1807, Ibid., 215.
maneuvers. Jefferson told Hay that General Dearborn, “never wrote a letter to Burr in his life” about his conspiracy.\textsuperscript{145}

On June 9, Burr moved for a subpoena \textit{duces tecum} to the president for the letter from Wilkinson dated October 21, 1806 and the messages that Jefferson sent to the secretaries of war and navy. The defense requested these particular documents because Jefferson cited the letter in his message and the defense alleged that the president's orders to the war and navy departments ordered illegal military action against Burr.\textsuperscript{146} The \textit{duces tecum} differed from the ordinary subpoena in that it summoned a witness with the order to bring certain papers with them.\textsuperscript{147} Debate immediately ensued, and continued for several days. The arguments on just this one issue were intense and evidence of how the trial was an exhibit of the eminent legal minds of the day.

Hay questioned the motion for the particular subpoena. Marshall stated that the subpoena \textit{duces tecum} would insure that if the papers were refused, the "the officer himself may be present to show cause." "This subpoena is issued," Marshall clarified, "only where fears of this sort are entertained."\textsuperscript{148} Hay then questioned if the defense could subpoena the president's personal letters. Luther Martin reminded the court that the president's proclamation on November 27 said the letter was "addressed

\begin{itemize}
\item \textsuperscript{145} Dearborn did write to Burr once, inviting him to dinner in Washington. Jefferson to Hay, 5 June 1807, Ibid., 218-219.
\item \textsuperscript{146} Robertson, vol. 1, 161 and previous.
\item \textsuperscript{148} June 9, Robertson, vol. 1, 116.
\end{itemize}
to him as president of the United States."

Because the district attorney disagreed with the issuance of the subpoena, arguments were held the following few days.

Wickham argued that "the object was not bring the president here, but to obtain certain papers which he had in his possession." Hay argued that the motion was premature because the prosecution had not made the bills yet, therefore the defense was not certain what evidence it would need. "An indictment must be first found," demanded Hay, "and a day set for the trial; and on that day this process may be returnable." But the prosecution was waiting for General Wilkinson until they could move forward.

Wickham and Martin refuted Hay's argument that Burr was not entitled to evidence at that time. "This is the first time I have heard, since the declaration of American Independence," Wickham argued, "that an accused man is not to obtain witnesses in his behalf." Martin elaborated on the motion for a subpoena for the president. First, he argued that the president "is no more than a servant of the people." He continued with a comparison of the English monarchy, "Even the British king may be called upon to give testimony to his people. If is true, he is not obliged to be subpoenaed, and to appear in a court of justice; but his testimony under his sign manual is received as authentic evidence." Marshall replied that the prosecution had acknowledged that the president could be subpoenaed.

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149 Ibid., 117-118.
150 Ibid., 119.
151 Ibid., 121.
152 Ibid., 121-123.
Martin proceeded with another question, "whether the president can be summoned to attend with certain papers." The letter from Wilkinson dated October 21 and the official orders to the secretaries of war and navy were requested because these were the documents that prompted Jefferson to declare Burr's undeniable guilt. Martin then elaborated on Jefferson's illegal accusation in which the president "assumed to himself the knowledge of the Supreme Being himself, and pretended to search the heart of my highly respected friend." Martin continued his rant about Jefferson's behavior, "He has proclaimed him a traitor in the face of that country, which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend. And would this president of the United States, who has raised all this absurd clamour [sic], pretend to keep back the papers which are wanted for this trial, where life itself is at stake?" The attorney reminded the court that every accused person has the right to evidence for their defense, and declared, "Whoever withholds, willfully, information that would save the life of a person, charged with a capital offence, is substantially a murderer, and so recorded in the register of heaven." MacRae criticized the defense for "indulging in defamation and abuse against the officers of the government," and reminded the court that the question was whether or not the court could approve of this motion for a subpoena for the president.

MacRae returned to the argument that the letter was part of Jefferson's private correspondence. He referred to Marbury v. Madison when the court supported Levi

\[153\] Ibid., 127.
\[154\] November proclamation by Jefferson.
\[155\] Robertson, vol. 1, 128.
Lincoln's objections to providing official information from his time as secretary of state or evidence that could be used to incriminate him. Then the prosecution argued that the defense should not subpoena the president because the secretary of state held the papers in the archives of the state. Wickham and Burr refuted the argument that the paper was in possession of the secretary of state because Wilkinson wrote the letter to Jefferson.

Hay remained firm in his argument that "the affidavit is truly farcical; because from any thing expressed in it, the letter of general Wilkinson may, or may not be material." The original documents, Hay contended, may include information that could compromise national security and told the defense to accept copies of the papers. The defense maintained that a copy of Wilkinson's letter would not suffice because the general could deny that it was his handwriting and that they intended to "confront James Wilkinson with himself." Randolph elaborated on this approach, "We wish to show, that James Wilkinson, in his official capacity, as commander of the army of the United States at New-Orleans, is not the same with James Wilkinson the correspondent of the president." Hinting to the general's double-life, they intended to show that the general "has varied from himself, and that he has varied in most essential points in the greatest degree." The defense realized that Wilkinson was the essential element to their plan, "the Alpha and Omega of the prosecution."
Marshall supported the defense, saying, that his letters may include "contradictory statements of guilt."\textsuperscript{161} The arguments for the motion of a subpoena for the president were intense. Hay asserted that "no opportunity was lost" by the defense, "to abuse the administration."\textsuperscript{162}

After days of arguments, Marshall upheld the request for the subpoena \textit{duces tecum} on June 13 and stated that “the law does not discriminate between the President and a private citizen.” “What foundation,” Marshall argued, “is there for the opinion, that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing?” The final opinion determined that there was “no legal objection to issuing a subpoena \textit{duces tecum}, to any person whatever, provided, the case be such as to justify the process.”\textsuperscript{163} Concerning the possibility that the papers may have included information not suitable for public knowledge, Marshall ruled that such material would be screened, but if not, it would be submitted to court.\textsuperscript{164}

Considering the subpoena, Jefferson wrote to Hay and reminded him that the attorney possessed all the letters that were necessary. Regarding his actual appearance, Jefferson said, “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.” If he were called to this case, he would inevitably be called to the trials of the other suspected persons. He argued, “To comply with such calls would leave

\textsuperscript{161} Ibid., 162.

\textsuperscript{162} Ibid., 170.

\textsuperscript{163} Opinion, \textit{Papers of John Marshall}, vol. 7, 43.

\textsuperscript{164} Ibid., 49.
the nation without an executive branch,” Jefferson argued, "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.” He continued with an explanation of the public and private liberties of the federal offices.

The prosecution faced the obstacle of proving Burr’s treasonous activity before they could bring witnesses to testify. All together, the administration had over 140 witnesses from various places in the country who had heard or seen parts of Burr’s plans. The “star witness” at the trial was General Wilkinson whose arrival was anticipated since the opening day of arguments. The general finally arrived on June 16 and Jefferson sung his praises in a letter dated June 21, 1807. The defense moved to attach Wilkinson to the charges for "attempting to obstruct the free course of justice by the oppression of the witnesses." Hay argued against the charges against their leading witness and on "June 24, to the disappointment of his enemies, Wilkinson escaped" the allegations.

Burr pleaded not guilty on June 26 and the trial was scheduled to begin on August 3. During the interval, Marshall wrote to his colleague, Justice William Cushing and sought his advice on the trial of a person "whose case presents many real intrinsic difficulties which are infinitely multiplied by extrinsic circumstances."

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166 Ibid., 248.
167 Robertson, vol. 1, 331-339.
169 Marshall to Cushing, 29 June 1807, Papers of John Marshall, vol. 7, 60. The editors of Marshall's papers noted that most of Marshall's letters no longer exist, therefore, his personal
He consulted Cushing on the doctrine of constructive treason and to what extent should the U.S. court systems rely on it. Marshall asked if Cushing thought the Bollman opinion should be revised. He asked for Cushing’s opinion on specific qualifications for treasonous activity and reported that he had asked the other justices for their opinions as well. Marshall resolved these questions and the question concerning the Bollman decision in his opinion delivered on August 31, 1807. He ruled that the part that a person plays in a treasonous activity must be an overt act.170

Jefferson was outraged and decided to charge Burr with a misdemeanor and that trial began on September 2, but the prosecution did not prove an overt act. As evidence of Jefferson’s exhaustive attempt to suppress Burr, he moved to try him in the Kentucky and Mississippi Territories. These trials never began. Jefferson was disgusted that the judiciary had protected Burr. In the fallout of the trial, Marshall, Burr, Blennerhassett, and Martin were burned in effigy in Baltimore on November 3. Jefferson’s sacrifice of civil liberties have inspired historians like Leonard Levy to question his integrity.171

The Burr trial was the climax in the power rivalry between Jefferson and Marshall because their aggression for power and control over the court escalated and exploded in the courtroom of one of the most controversial cases to date. Burr, the former vice president, was a suspected traitor and the chief justice and president were

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170 Ibid., 74-119.

the spotlight as well. Non-partisanship was not possible because of the power struggle between Jefferson and Marshall overreached justice. Jefferson controlled the prosecution and ordered that civil liberties be sacrificed in order for his accusations against Burr appear true. Marshall’s actions were questionable too. He attended a dinner at the home of one of Burr's attorneys, John Wickham. Historian Albert Beveridge claimed that "Nobody ever thought of declining an invitation to the house of John Wickham," evidently this was true because Marshall did not resist, even knowing that Burr would be there. Burr's guilt cannot be determined now, but the possibility of his guilt provided the ultimate opportunity for the chief justice and president to fight for control. Marshall may have strengthened the judiciary, but Jefferson refused to stand aside and watch.

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172 Beveridge, vol. 3, 394-395. Beveridge noted the fallout from Marshall's social outing. One example was from "A Stranger from the Country" who expressed outrage in the Richmond Enquirer and dubbed the event a "treason rejoicing dinner." Enquirer, April 10 and 28, 1807, quoted from Beveridge, vol. 3, 396.
CONCLUSION

The power struggle between Chief Justice Marshall and President Jefferson from 1801 to 1807 was evidenced through four events that showed how partisan politics shaped the judiciary and the executive office. The three coordinate branches of the United States were intended to be equal and included a checks and balance system to insure justice. This was not the case for the judiciary prior to 1801. There was no precedent of a strong leader, in fact, two previous ones served on diplomatic missions while serving as chief justice. The Court's power did not appear overnight, or immediately after Marshall's appointment, and it faced challenges from President Jefferson, who tried to preserved the Court's dependence on the executive and legislative branches.

Marshall's nomination as chief justice was the beginning of this look at the Jefferson and Marshall's power struggle. Adams's appointment was politically driven because he attempted to maintain Federalist control in judiciary and did so by appointing Marshall and filling the twenty-three judgeships created by the Organic Act for the District of Columbia. The first chapter introduced the setting of Marshall and Jefferson's inaugurations as leaders of the judiciary and the executive branches, respectively. Marshall's thoughts about his appointment were examined from his
autobiography as well as a few of his surviving correspondences, and Jefferson's letters provided a window into his mind about Marshall and the judiciary.

Jefferson's outrage with the judiciary was exemplified in chapter two, *Marbury v. Madison*. This case is one of Marshall's most famous opinions but mostly it is referred to as the foundation of judicial review. By using secondary research from legal historians, the real significance of the case is revealed. Judicial review was not the major concern of the day, but rather, this was the first opportunity Jefferson had to try to lessen the power of the Federalist judiciary. Jefferson argued that the commissions signed and sealed by the Adams administration were void because they were not delivered, thus he believed that delivery was the act that solidified an appointment. Adams and Marshall, who served as the former's secretary of state and sealed the appointments, argued that the signature and official seal finalized the appointments. The case was argued in the Supreme Court and Marshall's opinion sparked controversy because of the order that he addressed the questions. This seemingly small detail was significant to Jefferson who did not approve of the Court's power.

Interwoven with *Marbury* was the Republican repeal of the Federalist backed Judiciary Act of 1801. It was significant to realize that both of these events occurred at the same time and were directly connected because they were Republican strategies to diminish the power of the Federalist judiciary. The 1801 act passed in February and addressed major grievances the justices had about the Supreme Court duties. Granted, these complaints were issued at the request of President Washington but were pushed aside until the Federalists wanted to preserve their power under the
incoming Jefferson administration. This chapter utilized letters and documents to show how the Court functioned and the direction that both parties wanted its power directed.

Shortly following the *Marbury* decision, the Republicans targeted the Federalist judiciary with impeachment charges against three outspoken judges, including one Supreme Court justice. The timing of the issue was the key to showing how much partisan politics influenced this battle. After Jefferson's election, these three judges, Alexander Addison, John Pickering, and Samuel Chase, became even more vocal about their Federalist beliefs, which no doubt irritated the Republicans. However, they were impeached because of their behavior, primarily intoxication while presiding over the courts. The Congressional proceedings recorded by William Plummer provided excellent insight into the case that took center stage in the House of Representatives from 1803 to 1804. Vice President Aaron Burr presided over the trial and when its outcome did not satisfy Jefferson, he was even more devoted to diminishing the Court's power. However, the next opportunity to challenge Marshall and the judiciary did not come until Jefferson's second term.

The Aaron Burr treason trial was heard in Virginia's circuit court, presided over by Marshall, fulfilling his circuit court duties. The main issue was whether or not Burr was guilty of treasonous activity and because Jefferson had declared that Burr was guilty, he was driven by pride to show that he was guilty. The battle was just as much a Jefferson/Burr issue because there were underlying problems between the two of them, but it served as the climax for Jefferson and Marshall because the former directed the prosecution and the latter decided how his prior ruling on treason
would be interpreted in the Burr trial. Jefferson's letters to District Attorney George Hay served as first-hand insight into the drastic measures Jefferson was willing to go in order to prove he was right about Burr. Unfortunately, only a few of Marshall's letters survived to show how he felt about the case, but after evaluating the previous confrontations between him and Jefferson, he was probably determined not to let Jefferson have a victory.

Jefferson complained about the power of the judiciary after 1807, and Marshall continued to exert more power than the former believed was necessary. In three separate letters, Jefferson expressed concern about the unruly judiciary and how "impeachment is an impracticable thing, a mere scare-crow, they consider themselves secure for life; they skulk from responsibility to public opinion . . . ."\(^1\) He used the scarecrow analogy twice more over the following couple years. "That germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body," Jefferson charged. He continued, "for impeachment is scarcely a scare-crow, working like gravity by night and day . . . advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States."\(^2\) "We already see the power, installed for life," Jefferson cried, "responsible to no authority, for impeachment is not even a scare-crow."\(^3\)

The period that provoked these criticisms of the Court followed 1801 to 1807, which witnessed the landmark opinions of *Martin v. Hunter's Lessee* (1816),


\(^2\) Jefferson to Charles Hammond, 18 August 1821, Ibid., 331-332.

\(^3\) Jefferson to William T. Barry, 2 July 1822, Ibid., 388-389.
McCulloch v. Maryland (1819), and Cohens v. Virginia (1821) in which the Court established jurisdiction over the state courts when it involved a federal case. Jefferson's allies against Marshall in these battles were Thomas Ritchie, editor of the Republican organ, the Enquirer, and Spencer Roane, Virginia's court of appeals judge. They both attacked the judiciary and Marshall as vigorously as Jefferson did at the beginning of his first term. There has not been much written about Roane and his conflict with Marshall, which was highly publicized in the newspapers. After the McCulloch decision, Roane expressed his outrage, writing as "Hampden," and after Cohens, as "Algernon Sidney." Jefferson praised Roane as Hampden, saying that he "subscribe[d] to every title of them [the articles]." "They contain the true principles of the revolution of 1800," Jefferson continued, saying that "The Constitution . . . is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."5

Marshall remarked to his colleague, Joseph Story, about the "Algernon Sidney" essays, that Jefferson, "looks . . . with ill will at an independent judiciary." Marshall continued his thoughts on Jefferson, "He is among the most ambitious, and I suspect among the most unforgiving of men. His great power is over the mass of the people and this power is chiefly acquired by professions of democracy. Every check

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on the wild impulse of the moment is a check on his own power, and he is unfriendly to the source from which it flows.”

Jefferson's first opportunity to make an appointment to the Supreme Court came when Alfred Moore resigned in 1804. To fill the vacancy, Jefferson appointed William Johnson, a judge from South Carolina's Supreme Court. Johnson was thirty-two years old, the youngest justice appointed, until Jefferson appointed Joseph Story in 1811, who was younger than Johnson by only a couple months. These two appointments altered the complexion of the Court. Johnson was a staunch Republican and often referred to as the first dissenter in the Marshall Court. Jefferson believed that Story, an outstanding legal mind from Massachusetts, shared his political ideology; however, Story became one of Marshall's closest colleagues and friends.

The Marshall/Jefferson rivalry preceded and continued after 1801 to 1807; however, these years exemplify the power struggle that was a prominent part of their individual lives. This was only a glimpse into a sliver of judiciary history and the lives of the president and chief justice whose personal and political conflicts shaped the judiciary and its relationship with the executive office.

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