The President's Evidence

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It is uncanny how many modern constitutional controversies were prefigured by legislative, executive, and judicial debates during the Presidency of Thomas Jefferson. From impeachment of judges to congressional term limits, from the Vietnam War and Congress's ill-fated attempt to redefine religious freedom to Senator Goldwater's right to retain his commission in the Air Force Reserve, the records of the Jefferson years tell us most of what we need to know. The constitutional question was not always definitively resolved, but the arguments were all there; and despite the paucity of exceptional individuals in Congress, the quality of argument was generally high.

The same is true of President Clinton's claim of immunity from judicial harassment, which the Supreme Court recently rejected.[1] Presidential immunity was one of the many constitutional conundrums posed by the mysterious Western adventures of the irrepressible Aaron Burr.[2]

Precisely what the former Vice-President and his puny band of thugs had in mind as they floated down the Mississippi in January 1807 has never been made clear. In his initial proclamation urging loyal citizens to intervene, President Jefferson had described their goal as an attack on Spanish territory;[3] when he told Congress what had happened after it was basically over, he said their original aim

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1 Clinton v Jones, 117 SCt 1636 (1997).

2 Thorough accounts of the whole sordid business include Thomas Perkins Abernethy, The Burr Conspiracy (Oxford, 1954); Henry Adams, History of the United States of America during the Administrations of Thomas Jefferson 754-839, 907-28 (Library of America, 1986) (first published in 1889-91); Dumas Malone, Jefferson the President: Second Term, 1805-1809, chs XIII-XX (Little, Brown, 1974); and Nathan Schachner, Aaron Burr, chs XIX-XXVI (Stokes, 1937). For a useful brief introduction see Marshall Smelser, The Democratic Republic, 1801-1815 at 111-24 (Harper & Row, 1968).

3 James D. Richardson, 1 A Compilation of the Messages and Papers of the Presidents 404 (US Congress, 1900) (Nov 27, 1806).

had been to detach the Western states from the Union.[4]

Brought before Chief Justice Marshall and Judge Cyrus Griffin in the Circuit Court in Richmond on charges of treason and of setting in motion an expedition against Mexico, Burr sought production of a letter that General James Wilkinson, Commanding General of the armies and Governor of the Louisiana Territory, had written to the President about the alleged conspiracy. Wilkinson was expected to testify for the prosecution; Burr thought it might be useful for impeachment purposes to compare his testimony with his earlier letter on the same subject.[5]

The prosecution objected that the letter might contain "confidential communications" or "state secrets" that ought not to be disclosed and protested more generally that a subpoena duces tecum could not be directed to the President of the United States.[6] The court rejected the objections and issued the subpoena.

The objections based on what we might call executive privilege were quickly dispatched. Mere confidentiality was no ground for withholding evidence essential to the defense; if disclosure of anything in the letter would endanger the public safety, the President need only say so in his return, and his claim would be duly considered.[7]

The question of presidential immunity from judicial process received more attention. In Great Britain, said Marshall, only the King was immune from process; unlike the King, the President was a citizen whom the impeachment clause recognized as capable of committing wrongs. He was more like the Governor of a state than a King, and no one had suggested that a Governor could not be served with an order to produce evidence.[8] The prosecution had conceded that the President could be summoned as a witness, and the concession was correct:

> If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting; and, if it should exist at the time when his attendance on a court is required, it would be shown on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court than a reason against its being issued.[9]

Once it was established that the President could be summoned to testify, the court concluded, there was no reason he could not be required to bring along any papers that might be useful to the defense.[10]

Responding to notification by District Attorney George Hay that Burr had requested Wilkinson's letter, Jefferson said he had already given it to the Attorney General (former Congressman Caesar Rodney) and asked Hay "voluntarily" to make it available – leaving it to Hay to withhold, on his behalf, "any parts of the letter which are not directly material for the purposes of justice" and, more important, "[r]eserving the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as president the public interest

4 Id at 412; 16 Annals of Congress at 39 (Jan 22, 1807).
5 United States v Burr, 25 F Cas 30, 32, 36-37 (No 14,692d) (CCD Va 1807).
6 Id at 31, 34.
7 Id at 37.
8 Id at 34.
9 Id.
10 Id at 34-35.

permits to be communicated . . . ."[11]

A few days later Hay read to the court a second letter the President had written him after receiving the subpoena itself. Delighted to do "anything our situation will permit in furtherance of justice," Jefferson indulged the presumption that receipt of Wilkinson's letter and other papers Burr had requested would "have substantially fulfilled the object" of the subpoena and politely but firmly intimated that surely the court would not be inclined to press it further:

> As to our personal attendance at Richmond, I am persuaded the court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case, as it would should we receive a similar one to attend the trials of Blennerhassett and others in the Mississippi territory, those instituted at St. Louis and other places on the western waters, or at any place other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency is understood to be so constantly necessary that it is the sole branch which the constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any co-ordinate authority.[12]

Thus in meeting the substance of Marshall's demand Jefferson challenged his basic conclusion, and the District Attorney's incautious concession, that the President could be summoned as a witness in a judicial proceeding outside the seat of government. He also reiterated his insistence that the President must be "the sole judge" of which of his papers "the public interest" would permit to be disclosed[13] and added that he would be prepared, if asked, to provide further information "by way of deposition" in Washington.[14]

Some months later, as trial began on the misdemeanor charge respecting an expedition against Mexico, Burr demanded the controversial letter and another that Wilkinson had subsequently written to the President. Hay produced them but sought to delete "some matters which ought not to be made public," in pursuance of Jefferson's instructions.[15] Burr argued that Hay's recalcitrance had placed the President in contempt of court.[16]

Marshall was inclined to be conciliatory. The President might indeed receive letters "which it would be improper to exhibit in public," and "much reliance must be placed on the declaration of the president" in such a case. "Perhaps," he conceded, "the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on it, unless such letter could be

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11 Jefferson to Hay, Jun 12, 1807, 10 The Writings of Thomas Jefferson 398, 399 (Paul L. Ford ed, G.P. Putnam's Sons, 1899); United States v Burr, 25 F Cas 55, 65 (No 14,693) (CCD Va 1807).

12 Jefferson to Hay, Jun 17, 1807, 10 Jefferson Writings (Ford ed) at 400, 400-01; 25 F Cas at 69. See also Jefferson to Hay, Jun 20, 1807, 10 Jefferson Writings (Ford ed) at 403, 404 (also inquiring rhetorically whether "all the judges of the Supreme Court" would "abandon their posts" if summoned to testify in Orleans or Maine):

> But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

13 Congress, Jefferson added, had always respected the President's discretion in this respect; the House's recent request for papers regarding this very conspiracy expressly excepted "those which he may deem the public welfare may require not to be disclosed." 10 Jefferson Writings (Ford ed) at 401; 25 F Cas at 69.

14 10 Jefferson Writings (Ford ed) at 400; 25 F Cas at 69.

15 United States v Burr, 25 F Cas 187, 189-90 (No 14,694) (CCD Va, 1807).

16 Id at 190.

shown to be absolutely necessary to the defence." But the President must make such a determination himself; he could not delegate that authority to anyone else, as he had attempted to do in this case. Absent an objection from the President, either the letter must be produced or the case must be continued – that is to say, the prosecution could not proceed.[17]

Hay fired off a letter seeking instructions. Jefferson replied by sending a copy of General Wilkinson's letter, excepting certain "confidential" passages he described as "irrelevant" to the case, "and which my duties & the public interest forbid me to make public."[18] Burr was apparently satisfied; the report makes no further reference to the effort to obtain evidence from the President.

Thus the confrontation between Jefferson and Marshall ended in a draw. The Chief Justice got basically what he wanted but did not press his luck by insisting on the President's appearance at the trial[19] or by rejecting his reasons for censoring the Wilkinson letter. Neither yielded an inch on the important issues of principle. The Circuit Court flatly held the President was subject to subpoena; the President just as firmly insisted he could not be required to attend. Each claimed to be ultimate judge of the independent question whether the President could withhold particular information on grounds of the public interest, and Jefferson's concept of the reasons that would justify withholding was broader.

It is striking how little the succeeding two centuries have added to our basic understanding of these important issues. The silence of the Constitution with regard to presidential immunities and privileges has not inhibited the courts from finding implicit those which the nature of the office required – any more than from discovering analogous intergovernmental immunities from taxation, regulation, and suit.[20] The competing considerations were identified in the brief exchange between Marshall and Jefferson in the *Burr* case: on the one hand the search for truth, on the other the functioning of the Presidency.

Where to draw the line between them is obviously a question on which reasonable minds may differ. The Supreme Court has since concluded that a President is not immune from judicial process entirely; that he may be required to produce physical evidence in an appropriate case; that he enjoys a privilege of confidentiality in executive communications that may be overridden by defense needs in a criminal proceeding; that the court and not the President ultimately decides whether particular evidence is privileged; that the President may not be sued personally for damages arising out of his official conduct.[21] Most recently, in *Clinton v Jones*, the Court rejected a fervent argument that he should not be distracted from his responsibilities by being required during his term of office to defend himself against an action for damages unrelated to his duties.[22]

Thus, as the twentieth century comes to a close, the views Jefferson expressed on presidential immunities at the beginning of the nineteenth are largely in a state of eclipse. It

17 Id at 191-92.

18 Jefferson to Hay, Sep 7, 1807, 10 Jefferson Writings (Ford ed) at 409; see 25 F Cas at 192-93.

19 The subpoena itself had said that receipt of Wilkinson's letter would suffice, "without the personal attendance of any or either of the persons therein named." Abernethy, Burr Conspiracy at 238 (cited in note 2).

20 McCulloch v Maryland, 17 US 316 (1819); Johnson v Maryland, 254 US 51 (1920); Hans v Louisiana, 134 US 1 (1890).

21 United States v Nixon, 418 US 683 (1974); Nixon v Fitzgerald, 457 US 731 (1982).

22 117 SCt 1636 (1997).

seems clear enough that District Attorney Hay got it backwards. It is hard to see why the President should be relieved from the delegable obligation to produce physical evidence that is demanded for trial; President Nixon did not even argue in the Watergate tapes case that he was immune from every order to produce evidence. Whether a particular disclosure will be so damaging to legitimate presidential interests as to justify suppression can be determined case by case, as the Court has decided – and as both Jefferson and Marshall acknowledged.

With his acute instinct for the jugular, Jefferson went immediately to the essence of the problem: Because of the President's unique position at its helm, there was a real risk that the Government could not function if he were required to attend a trial. It was all very well for Henry Adams in his snide way to point out that Jefferson had leisure to spend his summers playing gentleman farmer at Monticello;[23] he was on call while doing so, and he rightly called attention to the fact that the Richmond trial might well be only one of many in which his presence was desired.[24]

What is perhaps most noteworthy is that Marshall *conceded* Jefferson's principal point: If the President could not get away, he need only say so. Whether the press of business was "a reason for not obeying the process," as he contended, or "a reason against its being issued," as Jefferson might have preferred, was not crucial; either way the needs of the office would be respected. In the event, the President presented his argument of necessity, and he was not required to attend.

It helped, of course, that there was no reason to insist on his presence; what the defense needed was the letter, which the President supplied. Whether Marshall would really have accepted the President's excuse at face value in a case dependent upon his actual testimony – even if the claim had been based upon allegations that the President at the moment was fully occupied – we cannot of course determine. But the accommodating language he employed in acknowledging that the President's schedule might justify relieving him from the relatively trivial inconvenience of appearing at someone else's trial contrasts sharply with the lack of concern displayed by a unanimous Supreme Court over subjecting one of his successors to the continuing burden of defending a personal tort action that endangered both his reputation and his fortune. Arguably the President should be put to the task of asserting, or more doubtfully of convincing the court, that the demands of the office preclude his devoting the requisite attention to the individual proceeding;[25] but surely Jefferson and Marshall were right that there must be some means of ensuring that the President is not distracted from doing his job. GB

23 See H. Adams, Jefferson at 914 (cited in note 2).

24 See Jefferson to Hay, Jun 20, 1807, 10 Jefferson Writings (Ford ed) at 403, 405: "I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing."

25 This was the position taken by Justice Breyer in his sensitive concurring opinion in *Clinton*, 117 SCt at 1652-59.