An Early View of Executive Powers And Privilege: The Trial of Smith and Ogden

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In 1806, William Smith and Samuel Ogden were tried in a federal court in New York for violating the Neutrality Act.[1] As part of their defense, they claimed that their acts had been authorized by President Jefferson and the cabinet, and they subpoenaed the cabinet secretaries to prove it. The administration resisted the subpoenas and thereby precipitated the first judicial dispute over, and precedent concerning, the power of the executive to withhold evidence in a criminal proceeding.

During the Watergate tapes litigation, considerable attention was given to Chief Justice Marshall's rulings in the 1807 trials of Aaron Burr.[2] Yet the rulings by Justice William Paterson in the trial of Smith and Ogden went completely unnoticed.[3] An examination of this earlier precedent, considered along with the documented attitudes of Jefferson

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1. T. LLOYD, THE TRIALS OF WILLIAM S. SMITH AND SAMUEL G. OGDEN, FOR MISDEMEANOURS, HAD IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NEW-YORK DISTRICT, IN JULY, 1806 (1807). This is a complete stenographic transcript of this case. Excerpts from this record are reproduced in United States v. Smith and Ogden, 27 F. Cas. 1186, 1192 (Nos. 16,341a, 16,342, 16,342a, 16,342b) (C.C.D. N.Y. 1806). Subsequent citations to this case will be to the Lloyd transcript, hereinafter cited as TRIAL OF SMITH AND OGDEN.

2. 1 & 2 D. ROBERTSON, REPORTS OF THE TRIAL OF COLONEL AARON BURR (De Capo ed. 1969). This report is a stenographic transcript of the Burr trials. Excerpts from this and other reports are in United States v. Burr, 25 F. Cas. 1, 55, 187 (Nos. 14,692, 14,693, 14,694) (C.C. Va. 1807). Subsequent citations to the Burr trials will be to the Robertson transcript, hereinafter cited as TRIAL OF BURR.

3. This case is not discussed (or even cited) in any of the briefs or opinions in the tapes litigation, or, so far as I am aware, in any case, book, article or other work dealing with executive privilege. For some references, *see* notes 74-76 *infra*.

and Madison, more fully illuminates the Framers' original views about "executive privilege."

The significance of the decision in *United States v. Smith and Ogden*[4] goes beyond the problem of executive privilege. In resolving the dispute over the subpoenas, the court was obliged to rule directly both on the power of the president to authorize military actions against foreign countries without congressional sanction, and on the power of the president to dispense with or suspend criminal statutes. The court's disposition of these issues sheds light on fundamental but rarely litigated principles of the separation of powers.

Although the legal issues which were adjudicated in *Smith and Ogden* look like Vietnam and Watergate revisited, the case arose out of an incident even more reminiscent of the Bay of Pigs. Our story begins in late 1805, with a South American revolutionary and some friends.

Miranda's Expedition

Francisco de Miranda was a native of Venzuela who dreamed of freeing South America from Spanish domination.[5] For years he had incessantly sought aid from America and England to launch a military expedition against Spanish America.[6] Although he had powerful supporters in each country (Hamilton, Pitt and others), each of his grandiose schemes was ultimately rejected by those governments.[7]

Having spent a frustrating seven years in England between 1798

4. TRIAL OF SMITH AND OGDEN, *supra* note 1.

5. The most complete and objective biography of Miranda is W. ROBERTSON, FRANCISCO DE MIRANDA AND THE REVOLUTIONIZING OF SPANISH AMERICA (1909) [hereinafter cited as W. ROBERTSON]. *See also* I. NICHOLSON, THE LIBERATORS 57-95 (1969) [hereinafter cited as I. NICHOLSON]. For an idolatrous contemporary account of Miranda's exploits, see H. FLINTER, A HISTORY OF THE REVOLUTION OF CARACAS (1819).

6. W. ROBERTSON, *supra* note 5, at 309-60. The earliest reference to Miranda's plans having been considered seriously by the American government is found in Secretary of State Jefferson's diary entry of February 20, 1793. *See* G. CHINARD, THOMAS JEFFERSON 288 (1939).

7. He was close to success a few times. In 1798, Pitt gave tentative approval to allying with Miranda in a major military expedition against Spanish America, but this was vetoed by the cabinet. W. ROBERTSON, *supra* note 5, at 318-22. Later that year, Hamilton advocated a similar proposal backed by the United States, but President Adams could not be persuaded. *Id.* at 325-33. In 1801, the British Cabinet carefully considered another of Miranda's proposals but rejected it because it was not then militarily feasible. *Id.* at 351-52. And in early 1805, the British government actually agreed to ally with Miranda in a military campaign against the Spaniards, but the plans were discovered by the Spaniards and the campaign aborted. *Id.* at 355-58.

and 1805, and finally realizing that the English were too preoccupied with Napoleon to give him substantial military assistance, Miranda returned to the United States in November of 1805. The time seemed propitious for American assistance. American merchant vessels were being seized with some regularity by the Spaniards; the two countries vehemently disagreed over the correct boundaries of Louisiana; Spain rejected offers to purchase Florida and instead increased its border fortifications in that territory; and diplomatic relations between the two countries were so strained that Jefferson was considering the expulsion of the Spanish ambassador.[8]

In New York, Miranda began plotting with two old friends, Rufus King and Colonel William S. Smith. The former was a United States senator, and the latter was John Adams' son-in-law., who held the position of surveyor of the port of New York and had considerable military experience. They planned to recruit mercenaries, outfit armed ships in New York harbor, and attack some forts in Venezuela in the hope of triggering a widespread indigenous revolt.[9]

Miranda then left for Washington to discuss his designs with the administration.[10] Carrying glowing letters of introduction from the King and Benjamin Rush, he met with Secretary of State Madison at least twice and dined with President Jefferson twice in December.[11] What was said at those meetings is shrouded in controversy, and the conflicting allegations will be examined later in this article.[12] But, regardless of what actually happened in Washington, Miranda returned to New York and told his friends that the administration had approved his expedition but could not provide overt assistance. Buoyed by this report, Smith began recruiting troops and persuaded a sympathetic New York

8. *Id.* at 361-62. *See also* D. MALONE, JEFFERSON THE PRESIDENT: SECOND TERM, 1805-1809, at 65-80 (1974) [hereinafter cited as D. MALONE]; 2 N. SCHACHNER, THOMAS JEFFERSON 789-99, 801-16 (1951).

9. W. ROBERTSON, *supra* note 5, at 362, 366-67. Both King and Smith had been deeply involved in Miranda's earlier plots. *Id.* at 257-64, 321-26, 328-41, 341-54. *See also* I. BRANT, JAMES MADISON: SECRETARY OF STATE 1800-1809, at 325 (1953) [hereinafter cited as I. BRANT]. Smith, incidentally, had been an aide to General Washington during the Revolutionary War. W. ROBERTSON, *supra* note 5, at 249.

10. On his way to Washington, Miranda met with Aaron Burr. But he got no assistance from Burr, who apparently viewed him warily as a rival. W. ROBERTSON, *supra* note 5, at 363; I. BRANT, *supra* note 9, at 326. Several of Burr's followers who aimed for the liberation of South America from the Spaniards did, however, independently assist Miranda. W. ROBERTSON, *supra* note 5, at 366.

11. W. ROBERTSON, *supra* note 5, at 363-64; I. BRANT, *supra* note 9, at 326; 4 LIFE AND CORRESPONDENCE OF RUFUS KING 580-81 (C. King ed. 1897).

12. *See* text accompanying notes 131-44 *infra*.

merchant, Samuel Ogden, to fund the enterprise. Ogden provided one of his ships, the *Leander*, and purchased substantial military equipment; the total investment exceeded $70,000. With about 200 armed men under Miranda's command, the *Leander* sailed publicly and unmolested from New York harbor on February 1, 1806.[13]

This expedition was a complete failure. The Spaniards had discovered Miranda's plans; and he was intercepted and defeated, although he himself escaped capture.[14]

But the matter did not rest there. Spain protested in threatening terms against alleged governmental connivance with Miranda, and these protests were joined by its powerful ally France. Jefferson and Madison denied any collusion with Miranda, and the United States Attorney for New York was ordered to prosecute all responsible American citizens.[15] Early in April 1806, Smith and Ogden were indicted by a federal grand jury in New York for the high misdemeanor of violating the Neutrality Act of 1794.[16] This law prohibited any person within the jurisdiction of the United States from beginning, setting on foot or providing the means for a military expedition against any country with which America was at peace.[17]

The Trial: Subpoenas to the Cabinet

Shortly after their indictment, Smith and Ogden applied to District Judge Tallmadge for trial subpoenas for each of the four members of Jefferson's cabinet (Madison, Henry Dearborn, Robert Smith and Albert Gallatin). The defendants alleged in an affidavit that the secretaries' testimonies "will be material" to their defense. Tallmadge issued the subpoenas and set the trial for July.[18]

The United States Attorney, Nathan Sanford, wrote to Gallatin to urge the cabinet members to testify at the trial. Madison's testimony was particularly important: "If he should not attend, inferences the most injurious, however unjust, will be made out and they will perhaps be of a nature well calculated to catch popular prejudice."[19]

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13. W. ROBERTSON, *supra* note 5, at 364-69; TRIAL OF SMITH AND OGDEN, *supra* note 1, at 95-128, 248-49; I. BRANT, *supra* note 9, at 328-29.

14. W. ROBERTSON, *supra* note 5, at 369-70, 375-92; I. NICHOLSON, *supra* note 5, at 77-79.

15. W. ROBERTSON, *supra* note 5, at 371-74; I. BRANT, *supra* note 9, at 329-34.

16. TRIAL OF SMITH AND OGDEN, *supra* note 1, at vi-xi.

17. Act of June 5, 1794, ch. 50, § 5, 1 Stat. 384.

18. TRIAL OF SMITH AND OGDEN, *supra* note 1, at xvi-xvii, 6-7, 71.

19. Quoted in I. BRANT, *supra* note 9, at 336.

The cabinet then considered what course to follow. They advised Jefferson that they saw no probable way to avoid testifying and realized that, even if they were somehow successful in ignoring the subpoenas, an improper acquittal might then result. Nevertheless, the decision was made to resist the spectacle of having the secretaries held to public ridicule and "examined as so many culprits."[20]

The outcome of these deliberations was sent by Gallatin to Sanford in a confidential letter. Gallatin wrote that while no "exception or privilege be claimed for the heads of Departments" the enforced attendance of the secretaries would create a dangerous precedent which could allow persons charged with crimes "to vex if not to arrest the whole administration . . . ."[21] Gallatin then advised Sanford as to the strategy to pursue. He predicted that Smith and Ogden would move for an attachment of the witnesses and postponement of the trial. Sanford should respond by seeking an order that the defendants state in an affidavit not merely that material witnesses are absent but the exact facts to be proven by their testimony; he should then argue that the evidence sought was irrelevant to the trial. Alternatively, if a postponement were granted, Sanford should make "every effort" to have their testimony taken in Washington by commission, which would involve responses under oath to specified written questions. And, Gallatin warned: "If a commission is issued, particular care will be necessary in framing the interrogatories . . . ."[22]

Consistent with the strategy outlined in Gallatin's letter, the three subpoenaed secretaries (Gallatin was missed by the process-server) wrote a joint letter to the trial judges, stating that the president had instructed them to refuse attendance because their official duties could not be dispensed with in light of "the state of our public affairs." The letter continued that it was uncertain that there was any subsequent

20. *Id.* at 335-36.

21. Letter from Gallatin to Sanford, July 9, 1806, in 1 THE WRITINGS OF ALBERT GALLATIN 302-04 (H. Adams ed. 1960).

22. Gallatin added that his own testimony would be altogether irrelevant: "I never saw Miranda or had any direct or indirect communications with him. Of course I know nothing but by hearsay . . . ." *Id.* at 304. However, in an earlier letter to Jefferson, Gallatin had strongly urged that Smith be removed from his post as surveyor of the port of New York even before indictment or trial because "the facts are as fully in the possession of the Executive at this time as they will be after the trial . . . ." Gallatin then recited those facts in detail. Letter from Gallatin to Jefferson, March 11, 1806, *id.* at 293. Jefferson was reluctant to remove Smith before any convictions, *see id.* at 293, but yielded to Gallatin's entreaties and ordered the removal about a week later. *Cf.* Letter of John Quincy Adams to Smith, 3 THE WRITINGS OF JOHN QUINCY ADAMS 138 (W. Ford ed. 1914).

time when their absence from Washington would not equally interfere with their public duties and suggested that the court might therefore issue a commission to take their respective testimonies.[23]

The Motions for Attachment and Postponement and the Court Rulings

The trial began on July 14, 1806; and, as Gallatin had predicted, Smith and Ogden's lawyers immediately moved for an attachment against the three secretaries to enforce compliance with the subpoenas. They also moved to postpone the trial until the secretaries' attendance could be coerced through the attachment process.[24]

The trial was presided over by Supreme Court Justice Paterson and District Judge Tallmadge. Smith's supporters had sound reason to expect favorable rulings from Paterson.[25] A staunch Federalist,[26]

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23. Their letter to the court is as follows:

To the Honorable Judges of the Circuit Court of the District of New York.

We have been summoned to appear, on the 14th day of this month, before a special circuit court of the United States for the district of New York, to testify on the part of William S. Smith and Samuel G. Ogden, severally, in certain issues of traverse between the United States and the said William S. Smith, and Samuel G. Ogden. Sensible of all the attention due to the writs of subpoena issued in these cases, it is with regret we have to state to the court, that the president of the United States, taking into view the state of our public affairs, has specially signified to us that our official duties cannot, consistently therewith, be at this juncture dispensed with. The court, we trust, will be pleased to accept this as a satisfactory explanation of our failure to give the personal attendance required. And as it must be uncertain whether, at any subsequent period, the absence of heads of departments, at such a distance from the scene of their official duties, may not equally happen to interfere with them, we respectfully submit, whether the object of the parties in this case may not be reconciled with public considerations by a commission issued, with the consent of their counsel and that of the district attorney of the United States, for the purpose of taking, in that mode, our respective testimonies.

We have the honor to be
With the greatest respect,
Your most obedient servants.
JAMES MADISON
H. DEARBORNE
R. SMITH

City of Washington,
8th of July, 1806.

TRIAL OF SMITH AND OGDEN, *supra* note 1, at 6-7, 27 F. Cas. at 1194.

24. TRIAL OF SMITH AND OGDEN, *supra* note 1, at 2-6, 27 F. Cas. at 1192-94.

25. *See, e.g.*, letter of John Quincy Adams (Smith's brother-in-law) to his wife, July 13, 1806, in 3 THE WRITINGS OF JOHN QUINCY ADAMS 152-53 (W. Ford ed. 1914).

26. Ironically, Paterson had been the principal author of the New Jersey Plan at the Constitutional Convention. This plan had been offered as a substitute for the Virginia Plan and was the most strongly "states-rights-weak-central-government" proposal offered in the Convention. For the Convention's consideration and rejection of the New Jersey Plan, see 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240-13 (1911). Paterson's basic fear was that the smaller states, including his own

Paterson had not hidden his disdain for the Jeffersonians in the 1798 Sedition Act trial of Representative Matthew Lyon.[27] And there seemed little risk in issuing an attachment against the secretaries. A large part of the public already believed that the administration had conspired with Miranda and was now offering Smith and Ogden as convenient scapegoats.[28] Should the secretaries defy an order of attachment this belief would be reinforced; moreover, the court could thereupon dismiss the prosecution, which could cause even greater embarrassment to the administration. But, as will be seen, Paterson quickly dispelled the speculation that he would treat this case in a partisan manner.

Following the strategy outlined in Gallatin's letter, Sanford objected to any postponement of the trial. He denied that the testimonies of the cabinet members were material to the defense and urged that only a particularized showing of relevancy and materiality could justify a continuance.[29] As for the attachment, Sanford's co-counsel, Judge Pierpont Edwards,[30] told the court explicitly that the government placed no reliance on any grounds of "privilege."

New Jersey, would be at the mercy of the larger states under the Virginia Plan. As one observer notes, after the Convention assured the smaller states of an equal vote in the Senate, the chief proponents of the New Jersey Plan "exceeded all others in zeal for granting powers to the central government . . . . Paterson of New Jersey was for the rest of his life a federalist of federalists." 2 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION 88 (1882).

27. Lyon's Case, 15 F. Cas. 1183 (No. 8646) (C.C.D. Vt. 1798). Lyon was a vociferous supporter of Jefferson and the first person tried under the Sedition Act. Lyon was indicted by the grand jury, which was supervised by Paterson, for publishing two "seditious" letters. The first accused President Adams of having "an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice;" and the second reprinted a communication from France containing charges of stupidity in the nation's policy toward France. At the time of the indictment and trial, Lyon was a candidate for re-election to a House of Representatives equally divided between Federalists and Anti-Federalists.

Paterson set the trial date for only three days after the indictment. Lyon's counsel, the chief justice of Vermont, withdrew because he did not have adequate time for preparation, so Lyon, who was ignorant of the law, was forced to defend himself. Paterson charged the jury that Lyon was guilty if he had authored the publications (which was not denied) with "seditious" intent, which Paterson defined as "bad intent". Paterson never mentioned the defense of truth, the propriety of legitimate political opposition, or even the possibility of acquittal. Lyon was convicted and sentenced by Paterson to four months' imprisonment and a fine of $1,000.

The best account of this trial is J. SMITH, FREEDOM'S FETTERS 221-46 (1966).

28. *See, e.g.*, W. ROBERTSON, *supra* note 5, at 374.

29. TRIAL OF SMITH AND OGDEN, *supra* note 1, at 8-9, 27 F. Cas. at 1195.

30. Apparently Jefferson thought the trial to be so important that he asked Edwards, who had been appointed to the Federal District Court earlier that spring, to assist Sanford in the prosecution. Edwards was a stalwart Jeffersonian who had just secured common-law seditious libel indictments against Federalist publishers in Connecticut;

> [W]e shall not take the ground of privilege for the executive government. I know the district attorney would disdain to rest himself on such a *pretext*. We shall require of the defendant to show that they are material witnesses, by affidavit and proof; if they cannot make out this point, their application fails.[31]

The defense lawyers protested that the general affidavit, already offered, was sufficient; a more particular statement of materiality would require them prematurely to disclose their defense. But Paterson agreed with the government and held that no postponement would be proper unless the defense made a detailed showing that the testimonies of the absent witnesses were relevant. He said that the particularized affidavit must be filed by the next day, and the court would then rule on the motions.[32]

When the proceedings resumed on July 15, the defense offered a new affidavit from Smith, stating that he expected to prove from the testimony of the Cabinet members:

> [T]hat the expedition and enterprise to which the said indictment relates, was begun, prepared and set on foot with the knowledge and approbation of the president of the United States, and . . . of the secretary of state of the United States . . . that the prosecution against him . . . was commenced . . .by order of the president of the United States [and] that the [witnesses] are prevented from attending by the orders or interpositions of the president of the United States. . . .[33]

The groundwork was now laid for the arguments of counsel on the motions for postponement and continuance. These arguments were very elaborate and consumed two full days of debate.[34] It is possible here to present the positions of the parties only in telescoped form.

The defense lawyers began by arguing eloquently and at length that executive officials had no privilege to refuse to disclose confidential communications in a criminal trial. The Sixth Amendment's guarantee

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Edwards had told the grand jury that libel against the government would, unless restrained, "more effectually undermine and sap the foundations of our Constitution and Government, than any kind of treason that can be named." L. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 61 (1963). These indictments ultimately led to the Supreme Court's holding that the federal courts did not have common-law jurisdiction in criminal cases. *Id.* at 66; United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

31. TRIAL OF SMITH AND OGDEN, *supra* note 1, at 10, 27 F. Cas. at 1196 [emphasis added].

32. *Id.* at 9-11, 27 F. Cas. at 1195-96.

33. *Id.* at 12, 27 F. Cas. at 1196-97.

34. The complete arguments are recorded *id.* at 12-80, 128-47, 186-90. Excerpts are in 27 F. Cas. at 1197-1228.

of compulsory process was absolute, and the demands of justice were paramount.[35]

> No obligations of secresy [sic] or confidence however sacred; no connections of blood or ties of friendship can interpose in the administration of justice . . . . I do not expect to hear the counsel for the prosecution contend . . . that any obligations of confidence interpose to shield the defaulting witnesses from the process which in the name of the constitution we demand. Nor will I suppose that the learned counsel who are opposed to us mean to say that that there is anything in the official dignity with which the witnesses are clothed which saves them from the operation of the laws.[36]

The defense was willing to concede *arguendo* that "state secrets" did not have to be revealed. But this did not excuse the witnesses from testifying. They should make specific objections to questions and "the court must judge and not the witnesses, whether they shall or shall not answer," a principle said to be established by *Marbury v. Madison*.[37]

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35. *Id.* at 13-16; *see* 27 F. Cas. at 1197-98.

36. *Id.* at 14, 27 F. Cas. at 1197-98.

37. 5 U.S. (1 Cranch) 137 (1803), cited in TRIAL OF SMITH AND OGDEN, *supra* note 1, at 15, 27 F. Cas. at 1197-98.

Smith's lawyers also cited (*see id.*) Justice Chase's issuance of defense subpoenas to members of Congress in one of the Sedition Act trials, United States v. Cooper, 25 F. Cas. 626, 631 (Nos. 14,861, 14,865) (C.C.D. Pa. 1800). They neglected to point out, however, that Chase refused to issue a subpoena to the president. Thus, in United States v. Nixon, 418 U.S. 683 (1974), counsel for President Nixon cited *Cooper* for just the opposite proposition—as support for the claim of executive testimonial privilege.

Actually, Chase's rulings in the *Cooper* case are of little or no precedential value on the issue of "executive privilege." First of all, it appears that Chase did not base his refusal to subpoena President Adams on any grounds of privilege. When Cooper suggested that this was the basis of the ruling, Chase replied, somewhat heatedly:

> [Y]ou have totally mistaken the whole business. It is not upon the objection of privilege that we have refused this subpoena: this court will do its duty against every man however elevated his situation may be.—You have mistaken the ground. . . . It was a very improper and very indecent request.

T. COOPER, ACCOUNT OF THE TRIAL OF THOMAS COOPER OF NORTHUMBERLAND 10 (1800) [*as cited in* Reply Brief for the United States 49, United States v. Nixon, 418 U.S. 683 (1974)].

It appears that Chase refused to issue the subpoena because he thought that requiring Adams' testimony would be improper and irrelevant to the charge of seditious libel. *See* Reply Brief for the United States 48-49, United States v. Nixon, 418 U.S. 683 (1974). But, since Cooper was charged with a seditious libel against the president, and since truth was a defense under the Sedition Act, the holding that Adams' testimony would be irrelevant is clearly erroneous, even verging, legally speaking, on the absurd. This brings up a second, and more cogent, reason for disregarding the case as a precedent: Chase's behavior in the Sedition Act trials was blatantly partisan (and, indeed, formed the basis for the articles of impeachment against him); and in the 1800's, lawyers and judges rightly declined to view his rulings in those cases as law. Thus, after citing *Cooper*, the defense counsel in *Smith and Ogden* stated, apologetically, "I should be sorry to find that case received as law in all its points . . . ." TRIAL OF SMITH AND OGDEN 15; 27 F. Cas. at 1198. And the next year, in the *Burr* case, when government

Here, the cabinet members gave no valid excuse for refusing to testify. Their letter to the court intimated that they would always be too busy with their public duties to attend the trial. The defense counsel referred sarcastically to their months' long vacations and commented: "It is hard [to believe] that they cannot devote a few days to the fate of a fellow-citizen."[38]

The defense then asserted that testimony that the president authorized Miranda's expedition would be material as a complete justification for what Smith and Ogden did. It is true, went the argument, that the warmaking power is vested by the Constitution in Congress, but there are limited circumstances when the president can authorize hostilities without congressional declaration of war. In light of the military actions by the Spaniards against our commerce, the president could conclude that a *de facto* war existed. It is absurd to suppose, they said, that the Constitution deprived the president of taking effective and secret military action against the enemy, both offensive and defensive.[39] Furthermore, even if technically the president had exceeded his authority, individuals were still justified in obeying the orders of the commander-in-chief.

> [W]ill it be said that the individual acting under the order or sanction of the chief magistrate of the country, who might have had authority to give that sanction, shall be answerable criminally for what he has done pursuant to that order. Must he inquire whether the chief magistrate was or was not authorised to give the order, and must the defendant be punished if it turns out that the president has acted illegally. No; it would be an oppressive and tyrannical doctrine to say the defendant may be charged with a crime under such circumstances. The defendant had only to inquire whether the president gave him an order which might be within the scope and limits of his constitutional functions, and if it was so, the defendant cannot be punished for his obedience.[40]

Transposing the argument into more familiar legal terminology, they

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counsel resisted a defense subpoena to President Jefferson, he refused to rely on *Cooper* because "strong as that opinion is in our favour," he "disdained to shelter . . . under this abominable precedent." 1 TRIAL OF BURR, *supra* note 2, at 132. When Burr's counsel suggested that this was really a backhanded way of relying on *Cooper*, the government counsel was even more blunt, saying that he "scorned" to avail himself of that case as a precedent. *Id.* at 135. Both Paterson's ruling in *Smith and Ogden* and Marshall's in *Burr* are conspicuous in their failure even to advert to the Cooper trial. See *id.* at 181 (Marshall, C.J.) ("If in any court of the United States, it has ever been decided, that a subpoena cannot issue to the president, that decision is unknown to this court.")

38. TRIAL OF SMITH AND OGDEN, *supra* note 1, at 16, 27 F. Cas. at 1198.

39. *Id.* at 18-20, 22-23, 186-90, 27 F. Cas. at 1199-1201.

40. *Id.* at 18-19, 27 F. Cas. at 1199.

asserted that proof that the defendants had acted under the instructions of the chief executive would negate the "criminal intent" necessary for conviction.

Finally, the defense asserted that even if presidential authorization could not justify Smith and Ogden's conduct, it was certainly relevant to the issue of mitigation. The argument essentially was that one who in good faith obeys an illegal order of the president should suffer at most a nominal punishment.[41]

In responding to these various arguments, government counsel again explicitly disclaimed reliance on any privilege:

> The counsel opposed to us, have argued as if we meant to insist that the absent witnesses, are entitled to some peculiar privilege or special exemption from giving testimony. We do not contend for any such exemption . . . .[42]

They said nothing more about privilege.

The government's principal argument was that, assuming everything alleged in Smith's particularized affidavit were true,[43] the testimonies of the secretaries would still be irrelevant to the trial.[44] If the president had authorized Miranda's expedition against the Spanish, then Jefferson had acted unconstitutionally.[45]

> For in the congress of the United States *solely* and *exclusively* did [the framers] place the power of *making war*. As it is the people who are to endure the fatigues and calamities, and sustain the waste of blood and treasure inseparable from war, they have confided the power of making it to their immediate representatives.[46]

Congress had not declared war on Spain, and no amount of hostilities by the Spaniards short of actual invasion could authorize the president to declare the country to be in a state of *de facto* war. This was settled as well by the interpretation of the Constitution given by Congress and the two former executives. The problem was not new, on many oc-

41. *Id.* at 24-26, 27 F. Cas. at 1201-02.

42. *Id.* at 32, 27 F. Cas. at 1205.

43. Before making his argument, Sanford executed and filed an affidavit stating that he did not believe that any of the secretaries had "any personal knowledge of the offences charged in the . . . indictments, or of the facts which will be given in evidence . . . ." He then hastened to add that this was not at variance with the facts stated in Smith's affidavit. *Id.* at 26; 27 F. Cas. at 1203. Since neither the indictment nor the evidence to be introduced by the government dealt with possible collusion between Miranda and the administration, Sanford was correct that there was no inconsistency. The remainder of the arguments proceeded accordingly on the assumption that the administration did know about and approve Miranda's expedition.

44. *Id.* at 27, 27 F. Cas. at 1203.

45. *Id.* at 29-31, 43-46, 27 F. Cas. at 1204-05, 1210-11.

46. *Id.* at 45, 27 F. Cas. at 1211 (emphasis in original).

casions since 1789 foreign countries had attacked our commerce and had committed other acts of aggression. Yet the actions of Congress and the executive[47] had settled the propositions:

> 1st That acts of hostility committed by a foreign power against the U.S. or their citizens, do not necessarily place the country in a state of war. 2. That acts of hostilities, though "outrageous, in violation of the laws of nations, and in contravention of existing treaties," had been committed upon the U.S. by a foreign nation, yet presidents Washington and Adams never entertained an opinion, that by declaring to congress the existence of these facts, they thereby placed this country in a state of war. 3. That congress have always considered the power of declaring war to be invested exclusively in them. 4. And that such as always been the understanding of the nation.[48]

Since the president could not constitutionally authorize the expedition, the contention that Smith and Ogden were legally justified in following the president's direction to disobey the Neutrality Act must be rejected. "It proceeds altogether upon the idea that the executive may dispense with the laws at pleasure; a supposition as false in theory as it would be dangerous and destructive to the constitution in practice."[49] The

47. Judge Edwards, arguing for the government, relied on a series of acts of Congress which recited in their preambles that certain states had taken hostile action against American commerce and authorized certain offensive and defensive actions short of war. Included were acts passed in 1793 rescinding treaty obligations with France and authorizing the president to order the navy to seize French naval vessels; an act of 1794 declaring the United States "not at peace" with the regency of Algiers, increasing the navy and authorizing the president to take all necessary steps to protect commerce until peace was restored; and acts of 1797, 1798 and 1799, augmenting the army and navy, authorizing the president to use the navy for self-defense, and authorizing more drastic conduct "in the event of a declaration of war against the United States, or of imminent invasion . . . or of actual danger of such an invasion" before Congress again convened. *Id.* at 46-51, 27 F. Cas. at 1211-13.

48. *Id.* at 50, 27 F. Cas. at 1213.

49. *Id.* at 27, 27 F. Cas. at 1203.

50. *Id.* at 28, 27 F. Cas. at 1203.

The arguments of counsel, and Paterson's subsequent rulings, concerning the "dispensing" and "suspending" powers may better be understood by recalling the background of English law with which the lawyers of that period were familiar. The "dispensing power" and "suspending power" refer to two discredited prerogatives of the English monarchy. Prior to the accession of the Stuarts, it was a generally recognized tenet of English constitutional law that the King could not act in contravention of the laws of Parliament. Nevertheless, the Crown had frequently granted "dispensations" to individuals which authorized them to violate specific criminal statutes and had even, on occasion, declared certain criminal statutes to be "suspended" by royal will. Before the great conflicts with the Stuarts, the assertions of these prerogatives had not precipitated a constitutional crisis. *See* T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 250-52 (6th ed. 1905); A. POLLARD, THE EVOLUTION OF PARLIAMENT 275-76 (1964). However, when Charles II declared the ecclesiastical laws suspended in 1672, the response in the House of Commons was so vehement that he rescinded the declaration

president is under a duty "to take care that the laws be faithfully executed":

> He cannot suspend [the law's] operation, dispense with its application, or prevent its effect . . . . If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature, and become paramount to the other branches of the government.[50]

Since the president could not suspend the laws, it followed that his knowledge and approval of a crime could not be heard as a justification. And the judiciary would sanction a gross violation of the most basic principle of the Constitution—"that ours is a government of laws, and not of men"—if it held that any person could justifiably prefer the orders of the executive to the laws of Congress.[51]

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and acknowledged it to be illegal. *See* SELECTED STATUTES, CASES AND DOCUMENTS 389-90 (9th ed., C.G. Robertson ed. 1949). But in 1687, and again in 1688, James II published a Declaration of Indulgence declaring it to be his "royal will and pleasure that . . . the execution of all and all manners of penal laws in matters ecclesiastical . . . be immediately suspended . . . ." *Id.* at 389-90. This led to the celebrated *Seven Bishops Case*, in which two judges of the King's Bench stated that James' declaration was illegal. Case of the Seven Bishops, 12 How. St. Tr. 183, 377 (1688) (Powell, J.).

Following the exile of James II, the Bill of Rights of 1689 was enacted. The first grievance of the Bill of Rights was that James II had endeavored to subvert the laws and liberties of the kingdom "[b]y Assuming and Exercising a Power of Dispensing with, and Suspending of Laws, and the Execution of Laws, without Consent of the Parliament." W. & M., Sess. 2, c. 2 (1689). Corresponding to this grievance was the first article of the Bill of Rights: "That the pretended Power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal." *Id.* This provision thereby guaranteed the force of legislative enactment. *See* Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1134-35 (1973).

The framers of our Constitution were, of course, deeply influenced by the constitutional principles established in seventeenth century England. *See, e.g.*, E. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 102 (1934); Goebel, *Constitutional Theory and Constitutional Law*, 38 COLUM. L. REV. 555, 563 (1938). Thus, most of the provisions of the English Bill of Rights were placed in our own Constitution, some in verbatim form. *Compare* Section 4 of the Bill of Rights *with* U.S. CONST. art. I, § 8, cl. 11, § 9, cl. 7 (appropriations power exclusively in legislature); Section 5 *with* U.S. CONST. amend. I (right of citizens to petition the government); Section 6 *with* U.S. CONST. art. I, § 8, cl. 12 (raising of army a legislative power); Section 8 *with* U.S. CONST. art. I, § 4, cl. 1 (elections of legislators controlled by law); Section 9 *with* U.S. CONST. art. I, § 6, cl. 1 (legislative privilege of speech and debate); Section 10 *with* U.S. CONST. amend. VIII (excessive bail and fines, cruel and unusual punishment prohibited); Section 11 *with* U.S. CONST. art. III, § 2, cl. 3 and amend. VI (trial by jury in criminal cases); and Section 13 *with* U.S. CONST. art. I, § 4, cl. 2 (legislature to convene frequently). It seems reasonable to conclude that the abolition of the suspending power, in section 1 of the Bill of Rights, is mirrored in our Constitution's command that the president "shall take care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

51. TRIAL OF SMITH AND OGDEN, *supra* note 1, at 28, 27 F. Cas. at 1204.

Nor could even good faith reliance on the erroneous opinion of the president as to the scope of executive authority be heard either in justification or mitigation. Ignorance of the law is no defense. Every person is bound to know and give obedience to the laws; if he violates them, he does so at his peril.[52] And if the president and a private person conspire to violate the laws, the answer is not to forgive the latter, or to impose only nominal punishment; on the contrary, each should be held fully accountable.

> If the president has acted improperly, or failed in the execution of his duty, his conduct may be the subject of inquiry before another tribunal. If he has been guilty of crimes or misdemeanors, he is answerable upon an impeachment. The defendant is answerable for his conduct before this court, and a jury of his country.[53]

In addition, the illegal behavior of the president could not be relevant as mitigation at this stage of the trial since the jury could decide only on guilt or innocence. Evidence of mitigation could be heard by the court before sentencing, but only if and when the jury returned a verdict of guilty.[54]

As to the attachment for contempt of Madison and the other secretaries, the government raised some technical arguments against this form of procedure and its applicability here.[55] More basically, however, the government argued that whether or not the contempt route should be followed was a matter of the court's discretion. This was not a fit case for attachment because the witnesses had intended no contumacious disregard of the court's authority and their testimonies would be immaterial and inadmissable.[56]

The defense's rebuttal arguments involved an even more lengthy restatement of their earlier positions[57] and need not be summarized here. One point must be mentioned, however. The defense asserted that government counsel had "insinuated rather than explicitly expressed" that the witnesses could not be coerced to testify because they enjoyed some "peculiar privilege of office."[58] The defense then began

52. *Id.* at 29-30, 27 F. Cas. at 1204.

53. *Id.* at 28, 27 F. Cas. at 1204.

54. *Id.* at 31-32, 27 F. Cas. at 1205.

55. Government counsel argued that the witness fees offered to the secretaries were inadequate; that an attachment could not issue to compel testimony but only to punish for contempt; and that a rule to show cause had to issue before an attachment. *Id.* at 34-42, 52-54. For defense counsel's responses to these technical arguments, see *id.* at 56-60, 72-74.

56. *Id.* at 33, 27 F. Cas. at 1205-06.

57. *Id.* at 54-80; *see* 27 F. Cas. at 1215-28.

58. *Id.* at 60, 27 F. Cas. at 1218.

to argue once more against the existence of any such privilege. But Judge Paterson interrupted and summarily disposed of this matter:

> You may save yourself the trouble of arguing that point; *the witnesses may undoubtedly be compelled to appear.*[59]

On July 17, Paterson issued a lengthy written opinion for the court.[60] He viewed the issues of postponement and attachment as involving separate considerations. In order for the trial to be postponed, the defense had to show that the testimony of the absent witnesses was material. The court held that it was not, either for justification or for mitigation.

Judge Paterson stated first the general proposition that no person could justifiably violate a criminal law passed by Congress, even when ordered to do so by the president. He then continued:

> Supposing then that every syllable of the affidavit is true, of what avail can it be on the present occasion? Of what use or benefit can it be to the defendant in a court of law? Does it speak by way of justification? The president of the United States cannot controul the statute, nor dispense with its execution, and still less can he authorise a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure . . . . [T]he law is paramount. Who has dominion over it? None but the legislature . . . .[61]

The Constitution, Paterson observed, imparts no dispensing power to the president. "Far from it; for it explicitly directs that he shall 'take care, that the laws be faithfully executed.' "[62]

Since the president possessed no dispensing power, his authorization of Miranda's enterprise would be legal only if he had warmaking powers under Article II. Paterson held that he did not.

> Does he possess the power of making war? That power is exclusively vested in congress. For by the 8th section of the 1st article of the constitution it is ordained, that congress shall have power to declare war, grant letters of marque and reprisal, raise and support armies, provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.[63]

Short of an actual invasion, which the president as commander-in-chief would be duty bound to repel, no amount of hostilities by a foreign enemy could allow the president to substitute his judgment for

59. *Id.* (emphasis added).
60. *Id.* at 80-89, 27 F. Cas. at 1228-33.
61. *Id.* at 84, 27 F. Cas. at 1230.
62. *Id.* at 83, 27 F. Cas. at 1229.
63. *Id.* at 84, 27 F. Cas. at 1230.

Congress' as to whether a war did or should exist. Nor could the president decide unilaterally what steps to take in response to these hostilities.

> [I]t is the exclusive province of congress to change a state of peace into a state of war. A nation . . . may be in such a situation as to render it more prudent to submit to certain acts of a hostile nature, and to trust to negotiation for redress, than to make an immediate appeal to arms. Various considerations may induce to a measure of this kind; such as motives of policy, calculations of interest, the nature of the injury and provocation, the relative resources, means and strength of the two nations, &c. and therefore, the organ entrusted with the power to declare war, should first decide, whether it is expedient to go to war, or to continue in peace; and until such a decision be made, no individual ought to assume an hostile attitude; and to pronounce, contrary to the constitutional will, that the nation is at war, and that he will shape his conduct, and act according to such a state of things. This conduct is clearly indefensible, and may involve the nation . . . in all the calamities of a long and expensive war.[64]

Paterson concluded this holding by observing that Congress did not choose to go to war with Spain. "[A]nd where is the individual among us, who could legally do so without their permission? Whoever violates the law becomes liable to its penalities . . . ."[65] The defense of justification was thus rejected.

Paterson had little trouble with the defense's mitigation argument. He held that the jury could consider only evidence relevant to the guilt or innocence of the defendants. Evidence which might operate in mitigation of punishment may be presented only to the court after the jury verdict. To permit the jurors to hear evidence that the president authorized the expedition "may warp their opinion, may mislead their judgment, and induce them to find an erroneous verdict."[66]

Since the secretaries' proposed testimonies were found immaterial, the motion for postponement was denied. On this, the two judges were agreed. The motion for attachment was another matter. Paterson believed that the absent witnesses should be ordered to show cause why an attachment should not be issued against them. Tallmadge disagreed. Since the two judges held opposite opinions, according to the custom of the time Paterson merely stated their disagreement without elaboration.[67] It is reasonable to infer, however, that Paterson thought

64. *Id.* at 85, 27 F. Cas. at 1230-31.

65. *Id.* at 86, 27 F. Cas. at 1231.

66. *Id.* at 86, 27 F. Cas. at 1231.

67. Inasmuch as the two judges could not agree, the motion for attachment was denied. Paterson noted that under the jurisdictional statutes then in force, either party

the secretaries had without justification disobeyed the compulsory process of the court and were in contempt, even though their testimonies would be irrelevant. Tallmadge was either persuaded by one of the government's technical arguments or felt that the contempt process should not be invoked against witnesses whose testimonies would be inadmissible.

Because of the obvious relevance of the major issues in this case to our time, it may be helpful at this point to summarize the court's rulings and to consider them briefly against the background of the positions of the parties.

First, the court did not doubt its power to compel the attendance and testimony of high executive officials in criminal cases. The judges did not recognize any generalized doctrine of "executive privilege" premised on the need to preserve confidentiality. Indeed, it seems clear that not even the government lawyers—nor Jefferson's administration—advocated such a doctrine.[68]

Second, the court held that the warmaking power was vested exclusively in Congress. It is noteworthy that even the defense conceded that the president had no general warmaking powers; they argued for a limited exception to allow the president to deal with the exigencies of hostile behavior by foreign countries. The court refused to recognize even this exception: the president could not act contrary to the "constitutional will" and unilaterally lead the country into "all the calamities of a long and expensive war."

Third, the court ruled that the maxim that this is a government of laws and not men applies to the president and those acting in his behalf. The president cannot suspend a law or authorize its violation; and those who follow a contrary executive policy are accountable before the law. In short, there is no "plumbers' defense" in this country.[69]

Justice Paterson thus expressed his views on three issues concerning the separation of powers[70] which are as important now as they were

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could take this issue to the Supreme Court. *Id.* at 89, 27 F. Cas. at 1232. In the trial transcript, Paterson does not identify which judge held which opinion. *Id.* at 89, 27 F. Cas. at 1232. However, in the *Burr* trial Chief Justice Marshall identified Paterson as the judge in *Smith and Ogden* who favored attachment. *See* 1 TRIAL OF BURR, *supra* note 2, at 185.

68. This is particularly noteworthy inasmuch as the testimony sought by the defendants involved confidential discussions, between Miranda and the president and secretary of state, which directly implicated this country's foreign policy.

69. *See* part (c) of note 71 *infra*.

70. In gauging the authoritativeness of Paterson's interpretation of these basic constitutional principles, it should be recalled that he was a delegate to the Constitutional

to the young republic in 1806.[71] Immediately after delivering his

Convention, participated in all the deliberations, and signed the Constitution. See note 26 *supra*, and 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 177-79, 240-352, 509-20; 2 *Id.* at 664 (1911). On Paterson's constructive role in the convention, *see* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 18-19, 200 (1921).

71. Since this is a historical note, it is not the place to examine the extent to which Paterson's three constitutional rulings have been followed by the courts, or whether they ought to be followed now. Those issues could be dealt with fully only in an article at least as long as this. I would, however, sketch the following basic points:

(a) As will be seen in the next section of the paper, Paterson's approach to "executive privilege" was followed in the *Burr* case, where Marshall held that the executive could not withhold material evidence from a criminal proceeding. *See* text accompanying note 97 *infra*. This same *result* obtained in United States v. Nixon, 418 U.S. 683 (1974). Although the Court in *Nixon* stated that "the protection of the confidentiality of presidential communications has . . . constitutional underpinnings, . . ." *id.* at 705-06, it held that this interest was insufficient to overcome the needs of the criminal justice system for the disclosure of admissible and relevant evidence. *Id.* at 707. Putting the dictum about the "constitutional underpinnings" of executive privilege to one side, the final standard utilized in *Nixon* (that material evidence must be disclosed) is the same as that employed by Paterson and Marshall, who saw no such "constitutional underpinnings." Although this dictum had no practical effect in *Nixon*, it is still very troubling. In opining that the Constitution says something favorable about "executive privilege" (albeit not much), the Court rather casually disregarded history and the text of the document and relied wholly upon dubious policy grounds. *See* Berger, *The Incarnation of Executive Privilege*, 22 U.C.L.A. L. REV. 4, 7-12 (1974).

To be sure, it is often not possible to deduce the intent of the Framers with reasonable certainty on given issues. Particularly in the area of individual rights, it is commonplace to find that the Framers disagreed among themselves about the specific meanings of constitutional guarantees; and, even when a consensus is found on specific provisions, the Framers' intentions may be further clouded by their sometimes inconsistent desires to accomplish both immediate and long range objectives. Vaguely worded provisions such as the equal protection and due process clauses are familiar examples. But fundamental issues concerning the separation of powers do not ordinarily fall within this framework. The Framers gave considerable thought to (indeed, were preoccupied with) the kind of government they wanted and the basic powers and prerogatives to be entrusted to each branch. When it is clear that the Framers made a deliberate decision about a fundamental issue concerning the separation of powers, courts should be bound to honor that decision and not feel at liberty to "policy out" the distribution of powers and prerogatives anew.

(b) Paterson's ruling that the president has no unilateral warmaking power against a foreign country except to repel an invasion is consistent with language in The Prize Cases 67 U.S. (2 Black) 635 (1863):

> The Constitution confers on the President the whole Executive Power. He is bound to take care that the laws be faithfully executed. . . . He has no power to initiate or declare a war either against a foreign nation or a domestic State. . . .
>
> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.

Id. at 668.

In modern times, the Supreme Court has studiously avoided ruling on the scope of

opinion, Paterson complained of ill health and left the bench.[72] This was to be his last case; Paterson died two months later. He is now portrayed by biographers as having been a mediocre judge and is remembered chiefly for his conduct in Lyon's trial.[73] In view of his rectitude and discernment in his last case, perhaps he deserves better.

Sequel: The 1807 Trial of Burr

During the trials of Aaron Burr for treason and high misdemeanor, Chief Justice Marshall issued two subpoenas *duces tecum* to President Jefferson to obtain letters in his posession from the chief prosecution witness, General Wilkinson. Marshall's rulings in the *Burr* trial have been a source of "perennial debate" among legal scholars,[74] and this debate became even more heated during the recent controversy over executive privilege in the Watergate tapes litigation. Since the *Burr*

presidential warmaking power. *See, e.g.*, Mora v. McNamara, 389 U.S. 934 (1967) (Douglas and Stewart, JJ., dissenting from the denial of certiorari). Several viewpoints were expressed, however, in the Cambodia bombing case, Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y.), *stay of court of appeals not vacated*, 414 U.S. 1304 (Marshall, J.), *stay vacated*, 414 U.S. 1316 (Douglas, J.), *stay reinstated* 414 U.S. 1321 (Marshall, J.), *rev'd on merits* 484 F.2d 1307 (2d Cir. 1973). Although the effect of Justice Marshall's orders was to stay the District Court's injunction against the continued bombing of Cambodia, he indicated at least tentative agreement with the District Court and Justice Douglas that the president's authorization of military operations was unconstitutional. *See* Holtzman v. Schlesinger, 414 U.S. 1304, 1311-12 (1973).

(c) Paterson's ruling on presidential "dispensing" and "suspending" powers has never been tested in the Supreme Court in a criminal case. It has generally been held in civil cases that the president cannot validly authorize a subordinate to act in contravention of a law of Congress. *See* Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See also* National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974).

A criminal case arising out of Watergate and very close on its facts to *Smith and Ogden* is now being litigated in the lower Federal courts on the "dispensing power" issue. In one of the prosecutions of "the plumbers," United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974), *appeal pending*, the defendants were convicted for conspiring to violate the Fourth Amendment rights of Dr. Daniel Ellsberg's psychiatrist. The defense had moved in pretrial discovery for all evidence in the possession of the Special Prosecutor which showed that President Nixon approved or authorized the breakin of Dr. Fielding's office. Ehrlichman and his co-defendants argued that such evidence would be relevant to a defense of justification. The court rejected this argument in an opinion which parallels (but does not cite) Paterson's in *Smith and Ogden*. Judge Gesell held, first, that the President could not authorize anyone to violate the law and, second, that Ehrlichman could not plead good-faith reliance on an illegal order of the President because ignorance of the law is no defense. *Id.* at 34-35.

72. TRIAL OF SMITH AND OGDEN, *supra* note 1, at 90.

73. *See, e.g.*, Kraus, *William Paterson*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 163 (L. Friedman & F. Israel eds. 1969).

74. *See* Berger, *The President, Congress and the Courts*, 83 YALE L.J. 1111 (1974).

case was viewed as the only previous instance in which a president claimed the right to withhold information in a criminal prosecution, an understanding of that precedent was of great importance. However, respected commentators and judges drew opposite conclusions from *Burr*. Some argued that Marshall had explicitly rejected the claim of executive privilege,[75] while others maintained that he tacitly upheld that claim.[76]

A more complete analysis of the historical treatment of executive privilege must take into account the *Smith and Ogden* case. Even standing alone, the ruling of Justice Paterson and the posture of the Jefferson administration in that case lend support to the position that there was little or no recognition of a generalized doctrine of executive privilege during the formative period of our constitutional history. The *Smith and Ogden* case is also important, however, in understanding the *Burr* trial. Burr was tried only one year after Smith and Ogden had been acquitted, and all of the participants in *Burr* viewed the earlier case as a direct precedent.[77] Both the government and the defense structured their argument over the Jefferson subpoena on this precedent, and Marshall relied heavily on it in his rulings.

Burr was committed on the misdemeanor charge on April 1, 1807, and on the treason charge on May 26, 1807.[78] While the grand jury was deciding whether to indict him, Burr requested, on June 9, that the court issue a subpoena to Jefferson in order to obtain one of General Wilkinson's letters.[79] Although the subpoena in form would demand Jefferson's attendance and production of the letter, Burr stated that Jefferson's personal appearance was unnecessary if the letter were

75. *E.g., id.* at 1111-22; R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 187-93, 356-61 (1974); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1385, 1392 (1974); Wills, *Executive Privilege*, The New York Times (Book Review), May 5, 1974, at 1, col. 1; Nixon v. Sirica, 487 F.2d 700, 710 (D.C. Cir. 1973).

76. *E.g.*, Rhodes, *What Really Happened to the Jefferson Subpoenas*, 60 A.B.A.J. 52 (1974) [hereinafter cited as Rhodes]; N.Y. Times, Nov. 26, 1973, at 30, col. 5 (letter of Dumas Malone); E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 113 (4th ed. 1957); Nixon v. Sirica, 487 F.2d 700, 748 (MacKinnon, J., dissenting); 786 (Wilkey, J., dissenting).

77. The similarities between the cases went even beyond the subpoena issue. The misdemeanor indictment in both cases charged that the defendants had violated the Neutrality Act by setting on foot an expedition against the dominions of Spain. The rulings in *Smith and Ogden* on the evidence necessary to prove such an indictment also constituted a direct precedent in *Burr*. *See* United States v. Burr, 25 F. Cas. 187, 195-96 (No. 14,694 (C.C.D. Va. 1807).

78. 1 TRIAL OF BURR, *supra* note 2, at 11-18, 79-81.

79. *Id.* at 113-14.

produced.[80] The United States attorney (Hay) immediately promised that he would try to obtain a copy of the letter, and of other documents "if the court will but say they are material."[81] But he "hoped that the court would not issue the subpoena *duces tecum,* until they were satisfied that they had the authority to issue it, and that the information required was material in the present case."[82] On the next day, Burr filed an affidavit stating that the Wilkinson letter "*may* be material in his defence."[83]

Hay initially opposed the subpoena by arguing that it was premature. He asserted that the defense could not use compulsory process before the trial began.[84] Burr's lawyers responded that the subpoena to the cabinet in *Smith and Ogden* had issued before trial, and Marshall expressed the tentative opinion that Burr's application was not premature.[85]

The defense then began to argue, as in *Smith and Ogden,* that the executive enjoyed no privilege against the compulsory process of the Court.[86] And the government's response was identical to its position in the earlier trial: it labelled privilege a false issue and conceded that a subpoena could issue against the president "as against any other man."[87] The government's principal objection to the issuance of the subpoena was that Burr had not made a sufficient showing of materiality. Burr's affidavit had stated only that the letter "*may* be material." But, argued government counsel, "[o]n this subject it is not merely sufficient to advance some precarious conjectures; the party must *explicitly* state his belief, not that they *may* be, but that they *are* material."[88] The government then relied directly on *Smith and Ogden,* a case of which Hay declared "almost as much clamour was excited as in this."[89]

> [I]n the case of the United States against Smith, a particular affidavit was required by Judge Paterson, setting out what it was ex-

80. *Id.* at 116, 17, 21.
81. *Id.* at 117.
82. *Id.* at 115.
83. *Id.* at 119 (emphasis in original).
84. *Id.* at 122.
85. *Id.* at 125, 127. Marshall finalized this ruling in his written opinion of June 13. *Id.* at 177-79.
86. *Id.* at 128-30. For the same argument in *Smith and Ogden, see* text accompanying notes 35-38 *supra.*
87. 1 TRIAL OF BURR, *supra* note 2, at 131. For the same response in *Smith and Ogden, see* text accompanying note 42 *supra.*
88. 1 TRIAL OF BURR, *supra* note 2, at 132 (emphasis in original).
89. *Id.* at 150.

> pected to prove by the witnesses; and although it was objected in that case, that by demanding such an affidavit, he compelled the accused to unmask his defense, he nevertheless demanded the affidavit. And in that case . . . the court determined against its materiality, and the cause went on without it . . . .[90]

During the course of argument over the next three days, the government reiterated several times that it opposed the subpoena because the materiality of Wilkinson's letter had not been shown.[91] Only in one ambiguous passage, made almost as an aside, did government counsel argue that the letter might contain "confidential communications" which the court had no authority to order divulged, and there the reference seemed to be to "state secrets."[92]

Marshall's written opinion was delivered on June 13, 1807. Even though government counsel had conceded that the president was not generally immune from compulsory process, Marshall deemed it important to address the issue directly. There followed Marshall's conclusions that the Sixth Amendment guarantee of compulsory process is unqualified, that the president did not hold the prerogatives of a king, and that he could perceive no legal objection to issuing a subpoena *duces tecum* "to any person whatever, provided, the case be such as to justify the process."[93]

Having established the court's general power, Marshall then turned to the propriety of issuing a subpoena in this case. He immediately stated the government's principal contention:

> The counsel for the United States . . . insist, that a motion for process to obtain testimony should be supported by . . . full and explicit proof of the nature and application of that testimony . . . . In favour of this position has been urged the opinion of one, whose loss, as a friend, and a judge, I sincerely deplore; whose worth I feel, and whose authority I shall at all times greatly respect. If his opinion were really opposed to mine, I should certainly revise, deliberately revise, the judgment I had formed: but I perceive no such opposition.
>
> In the trials of Smith and Ogden, the court, in which judge Paterson presided, required a special affidavit in support of a motion, made by the counsel . . . for a continuance and for an attach-

90. *Id.* at 143.

91. *See also id.* at 137-41, 149-52. At one point in the argument, Marshall asked the defense whether the phrase "may be material" in Burr's affidavit could not be changed to "will" be material. Government counsel responded that the objection to materiality would still remain. *Id.* at 162.

92. *See id.* at 133-34. This is how both the defense and Marshall understood the "confidentiality" argument. *See id.* at 186-87, 246, and notes 97, 101 *infra* and accompanying texts.

93. 1 TRIAL OF BURR, *supra* note 2, at 180-84.

> ment against witnesses who had been subpoenaed and had failed to attend.[94]

But, said Marshall, Paterson's holding had been misunderstood by government counsel. The subpoenas to the cabinet secretaries in *Smith and Ogden* had issued on an affidavit stating only that their testimonies "will be material," and Marshall noted (correctly) that Paterson had demanded a more stringent showing of materiality because the defense had sought to postpone the trial.[95] Marshall therefore held that a particularized showing of materiality was unnecessary. He added that Burr had not seen the letter and could not be expected to make such a showing at this preliminary stage.[96]

Marshall then disposed quickly of the suggestion that "the letter contains matter which ought not to be disclosed." By such "matter" Marshall meant "state secrets."

> There is certainly nothing before the court which shows, that the letter in question contains any matter the disclosure of which would endanger the public safety . . . . If it does contain any matter, which it would be imprudent to disclose, which is not the wish of the executive to disclose; such matter, *if it be not immediately and essentially applicable to the point*, will, of course, be suppressed. . . . . Everything of this kind, however, will have its due consideration, on the return of the subpoena.[97]

So far, the proceedings in *Burr* had tracked *Smith and Ogden.* The focus of the debate over the subpoena to Jefferson concerned the issue of materiality, and not privilege. Indeed, government counsel did not contend in either case that a generalized doctrine of executive privilege existed. Their brief allusion in *Burr* to "confidentiality" appears to have been a reference to national security secrets, and that is how it was understood by Marshall. And even with respect to this

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94. *Id.* at 184. This passage follows immediately Marshall's statement:

> [I]f they [the documents] may be important in the defence; if they may be safely read at the trial; would it not be a blot in the page, which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them?

Id. at 183-84. This statement was paraphrased by Judge Sirica in In re Subpoena to Nixon, 360 F. Supp. 1, 14 (D.D.C. 1973).

95. 1 TRIAL OF BURR, *supra* note 2, at 184-86. See text accompanying note 32, *supra.* Marshall observed that Paterson was in favor of a rule to show cause against Madison and the others for an attachment. This, Marshall said, showed conclusively that Paterson had required a special affidavit of materiality only because a continuance was sought. 1 TRIAL OF BURR, *supra* note 2, at 185.

96. *Id.* at 186. Marshall also hypothesized how the letter, if it contained certain information, could be material to Burr in impeaching Wilkinson's testimony. *Id.* at 188-89.

97. *Id.* at 186-87 (emphasis added).

much narrower claim, Marshall indicated that the need to keep state secrets confidential would have to yield if the material were essential to the defense.

The notion that Jefferson was asserting, at this stage of the proceedings, the general right to withhold "confidential communications" seems to be based on certain language in his June 12, 1807, letter to Hay, which was received and read to the court three days after Marshall's opinion.[98] In that letter, Jefferson agreed to furnish the Wilkinson letter and stated that he had already given it to the attorney general and assumed that it was in Hay's possession. But Jefferson also stated gratuitously:

> Reserving 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 permits to be communicated, and to whom, I assure you of my readiness, under that restriction, voluntarily to furnish, on all occasions, whatever the purposes of justice may require.[99]

In light of the broad assertions by recent presidents, it is tempting to read into this sentence a generalized claim of executive privilege. But there are sound reasons to caution against this. First, we should recall that only a year earlier, in the trial of Smith and Ogden, Jefferson had not entertained the belief that he had a right generally to withhold confidential communications from a criminal proceeding;[100] it is not very reasonable to suppose that such a belief suddenly would have crystallized. Second, Jefferson never explained precisely what kinds of documents he thought the "public interest" required him to suppress. If, as is likely, he meant only "state secrets" and "immaterial statements,"[101] his contention that he had the sole power to determine whether they should be made public creates a much narrower disagree-

98. *Id.* at 210-11. This communication was sent in response to Hay's request to Jefferson that the Wilkinson letter be furnished voluntarily. *See* D. MALONE, *supra* note 8, at 320.

99. 1 TRIAL OF BURR, supra note 2, at 210.

100. *See* text accompanying note 42 *supra.*

101. It is possible to read Jefferson's letter as being entirely consistent with Marshall's view that the executive was obligated to produce all relevant evidence. While, as pointed out in the text, Jefferson did not identify what documents he thought he could withhold, his June 12 letter does contain the following passage:

> But as I do not recollect the whole contents of [the Wilkinson] letter, I must beg leave to devolve on you, the exercise of that discretion *which it would be my right and duty to exercise, by withholding* the communication of any parts of the letter which are *not directly material* for the purposes of justice.

1 TRIAL OF BURR, *supra* note 2, at 210 (emphasis added). This suggests that the touchstone to Jefferson was materiality, which is the same standard that Marshall was willing to apply on the return of the subpoena.

ment with Marshall, which is not one of legal obligations but of which branch should ultimately decide.[102] Given Jefferson's antagonism toward *Marbury v. Madison*,[103] it would be consistent for him to reserve that power to himself. Third, in a subsequent letter to Hay, Jefferson opposed personally attending and giving testimony *solely* because that would interfere with his duties in Washington; but he nevertheless

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102. Although widespread acceptance of *Marbury* has accustomed us to equate constitutional principles with judicial opinions, to Jefferson and others of his persuasion the two issues were separable. Thus, for example, Jefferson and Madison were able to argue forcefully that the Alien and Sedition Laws were unconstitutional while denying the authority of the federal courts to make a final decision on the matter. *See* Madison, *Report on the Virginia Resolutions*, 4 J. ELLIOT, ELLIOT'S DEBATES 546, 548-50 (1881); Jefferson, *Kentucky Resolutions of 1798 and 1799*, *id.* at 540, 545. *See also* note 103 *infra*.

103. 5 U.S. (1 Cranch) 137 (1803). Jefferson's well-known and fundamental disagreement with *Marbury* was expressed in sharp terms shortly before the dispute over the subpoena arose. Early in the *Burr* proceedings, *Marbury* had been cited by defense counsel as authority for the principle that courts could order executive officials to conform their ministerial acts with the court's view of their legal obligations. 1 TRIAL OF BURR, *supra* note 2, at 33. Jefferson was being furnished regular copies of the transcript of the proceedings; and when he read this citation of *Marbury*, he promptly wrote a strongly-worded letter to Hay:

> I observe that the case of *Marbury v. Madison* has been cited, and I think it material to stop at the threshold the citing that case as authority, and to have it denied to be law. . . . The Constitution intended that the three great branches of the government should be co-ordinate, & independent of each other. As to acts, therefore, which are to be done by either, it has given no controul to another branch. . . .
>
> On this construction I have hitherto acted; on this I shall ever act, and maintain it with the powers of the government, against any control which may be attempted by the judges . . . . I presume, therefore, that in a case where our decision is by the Constitution the supreme one, & that which can be carried into effect, it is the constitutionally authoritative one, and that by the judges was *coram non judice*, & unauthoritative, because it cannot be carried into effect. I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, & denounced as not law; & I think the present a fortunate one, because it occupies such a place in the public attention.

Letter from Jefferson to Hay, June 2, 1807, in 9 THE WORKS OF THOMAS JEFFERSON 53-54 (P. Ford ed. 1898).

Jefferson's letter to Hay concerning the subpoena for the Wilkinson document was written only ten days later. Jefferson's statement that the executive should decide the subpoena issue "independently of all other authority" fits squarely within his view of *Marbury*. In other words, Jefferson seemed to be saying that (1) he recognized his legal obligation to furnish the subpcenaed documents and was in fact furnishing them, but (2) that he was doing so voluntarily, according to his construction of the law, and not as a result of judicial compulsion. Consider also Jefferson's reaction to Marshall's opinion on the subpoena:

> I did not see till last night the opinion of the Judge on the *subpoena duces tecum* against the President. Considering the question there as *coram non judice*, I did not read his argument with much attention.

Letter from Jefferson to Hay, June 20, 1807, *id.* at 59.

offered to testify by commission.[104] This was, of course, the exact position taken by the administration the year before in *Smith and Ogden.*[105] At no time did Jefferson make an argument for "executive privilege" akin to that made by President Nixon—that confidential executive communications may be withheld because secrecy in deliberations was necessary for the effective functioning of the executive.[106]

The treason trial began on August 3, 1807.[107] Burr was acquitted on September 1, largely because of Marshall's restrictive construction of the treason clause in the Constitution.[108] The misdemeanor trial began the next day, and Burr promptly demanded the production of a second letter from Wilkinson, which also had been subpoenaed from Jefferson.[109] Burr moved for a continuance until this second letter was produced. Hay stated immediately that the letter had been sent to him by Jefferson but that in Hay's opinion it contained some irrelevant material which he thought should be excised in the public interest. Nevertheless, Hay offered to show the letter to Burr's counsel and to allow the court to decide whether the challenged parts were material. Perhaps because Burr was intoxicated with victory, this compromise was rejected and Burr demanded production of the full letter in public.[110]

Since this matter now came up on a defense motion for continuance, the case procedurally was an exact parallel with *Smith and Ogden.* Accordingly, the government counsel opposed the motion on the grounds that Burr had not established the materiality of the parts of the letter which the government desired to excise.[111] Although the

104. This letter followed Jefferson's receipt of the subpoena and was read to the court by Hay. 1 TRIAL OF BURR, *supra* note 2, at 254-55. In this letter, Jefferson reiterated his desire to cooperate with the court by furnishing voluntarily the documents sought by Burr.

105. *See* text accompanying notes 20-23 *supra.*

106. Brief for Respondent at 53-68, United States v. Nixon, 418 U.S. 683 (1974).

107. 1 TRIAL OF BURR, *supra* note 2, at 362-63; *see* Rhodes, *supra* note 76 at 53.

108. 2 TRIAL OF BURR, *supra* note 2, at 446. Marshall's opinion on the treason clause is reported *id.* at 401-45; United States v. Burr, 25 F. Cas. 55, 159-81 (No. 14,693) (C.C.D. Va. 1807). Marshall held, in effect, that the government had to prove that Burr had personally participated in an assembly of force designed to levy war against the United States. It was not sufficient to show that Burr had conspired to produce that result and that overt acts of force had been taken in furtherance of the conspiracy. In line with this holding, Marshall excluded the evidence of over one hundred government witnesses, who were to testify about the conspiracy only. *See also* D. MALONE, *supra* note 8, at 334-39. For a criticism of Marshall's holding that persons who conspire to commit treason are not guilty of treason, *see* E. CORWIN, JOHN MARSHALL AND THE CONSTITUTION ch. IV (1919).

109. 2 TRIAL OF BURR, *supra* note 2, at 504.

110. *Id.* at 509-19.

111. This is a motion for a continuance . . . . The affidavit which the defend-

government's position seems entirely sound, particularly in light of Paterson's requirement of a special affidavit of materiality,[112] Marshall side-stepped the issue by ruling that any objection to production should be made directly by the president and not by his lawyer.[113] Marshall added that if the president did personally object to producing any parts of the letter, the Court would then require Burr to file a special affidavit of materiality, and only then would the Court rule on the president's objections. This is essentially the procedure followed earlier by Paterson in *Smith and Ogden.*[114] A new subpoena *duces tecum* was issued to Jefferson on September 4, 1807. However, Marshall denied the continuance when Hay indicated that a copy of the letter would be produced voluntarily, and the jury was impaneled on September 9.[115]

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ant has made is, *that it is his belief* that the letter which his counsel have called for *may be material*, not *that it is material*, or that *he believes it to be material*, in his cause. . . . The return which has been made by the attorney [Hay] shews that the letter was delivered to him on certain conditions; to be used under certain restrictions of secrecy; and that those parts of the letter which he has produced are all that can be considered as material for the defence or pertinent to the issue. The attorney for the United States [Hay] has expressly declared that the parts excepted, the disclosure of which the public interest forbids, are in his judgment not only not material for the purposes of justice or the defence of the accused, but are not pertinent to the issue. . . . The only question is, whether this letter . . . is material to [Burr's] defence against this accusation or not? . . .

. . . .

. . . I hope, that in consideration of all the circumstances . . . the court will be convinced that the attorney [Hay] may be confided in as to the nature and effect of this letter; especially as he has manifested every disposition to give the defence every aid, consistently with his views of the public interest, by submitting the original letter to the inspection of the court, by referring to the honour and candour of the counsel themselves, whether there ought to be a disclosure of the parts which we think the public good requires to be concealed.

Id. at 519, 523. For a further argument by government counsel along these lines, see *id.* at 528, 530.

112. *See* text accompanying note 32 *supra.* Marshall had earlier endorsed Paterson's ruling; *see* text accompanying notes 93-95 *supra.*

113. [I]t is a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it . . . . The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused. But on objections made by the president to the production of the paper, *the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case* . . . .

In no case of this kind would a court be required to proceed against the president as against an ordinary individual . . . . But to induce the court to take any definitive and decisive step with respect to the prosecution, founded on the refusal of the president to exhibit a paper, for reasons stated by himself, the materiality of that paper ought to be shewn.

2 TRIAL OF BURR, *supra* note 2, at 536 (emphasis added).

114. *See* text accompanying notes 31-32 *supra.*

115. Robertson reports this as follows:

In my opinion, it is almost impossible to deduce support for the claim of a generalized executive privilege from anything that happened so far in the *Burr* trials. Materiality, and not privilege, was at the core of the dispute at each stage. However, proponents of executive privilege rely also on what happened *after* the September 4 subpoena was received by Jefferson. On September 9, Hay read into the record the return from Jefferson that he had deleted passages from the letter which were "irrelevant to any issue which can arise out of the charges and could contribute nothing towards [Burr's] acquittal or conviction."[116] Nothing more happened, and some scholars and judges infer from this an "assertion" by Jefferson and at least "tacit recognition" by Marshall of some form of "executive privilege."[117]

Raoul Berger opposes these inferences by arguing: "Such statements overlook the mechanics of litigation. The letter had been subpoenaed by Burr; thus it would be his counsel who would introduce it in evidence. There is no mention of an offer in evidence of the letter by anyone."[118]

Actually, the real explanation appears even more straightforward. Jefferson had done nothing more than comply with Marshall's ruling that he personally identify the portions of the letter which he desired withheld. In so doing, Jefferson relied, as before, on grounds of immateriality, and not on a generalized privilege of executive confidentiality. The reason the matter was not litigated further—with Marshall having to rule on Jefferson's objections and Jefferson having to decide whether to comply with an adverse ruling—is quite simple: Burr never filed the special affidavit of materiality which Marshall had held to be a prerequisite for the court's consideration of Jefferson's objections.[119] Burr's failure to press the matter is readily understand-

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> Mr. Hay stated that he would consult general Wilkinson and if he consented, he would produce the letter under the restrictions ordered by the court; preferring that to a continuance of the cause.

2 TRIAL OF BURR, *supra* note 2, at 537. The "restrictions" which had been stated in Marshall's opinion were that Burr personally could see the letter but could not copy it nor exhibit it publicly.

116. T. CARPENTER, 3 TRIAL OF COLONEL AARON BURR 45-46 (1907) [hereinafter cited as T. CARPENTER]. Carpenter's report, like Robertson's, is a stenographic transcript of the trial. Robertson's report does not include the proceedings between September 9 and 14.

117. *See* Nixon v. Sirica 487 F.2d 700, 748 (D.C. Cir. 1973) (MacKinnon, J., dissenting); Rhodes, *supra* note 76; D. MALONE, *supra* note 8, at 344-45.

118. Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1119 (1974).

119. *See* note 113 *supra* and accompanying text concerning Marshall's holding that if Jefferson stated any personal objection on the return of the subpoena, "the court would

able, since the government's case on the misdemeanor charge collapsed before it had a chance to get underway. Marshall again rendered very restrictive evidentiary rulings; and almost all of the government's evidence was excluded.[120] The government was so desperate that it requested a *nolle prosequi,* but Marshall sent the case to the jury, which returned a not guilty verdict on September 16.[121]

This examination of *Burr,* along with *Smith and Ogden,* lends strong support to Raoul Berger's thesis that a generalized doctrine of executive privilege was not recognized, nor even asserted, during the important early years of our history. In neither case did the court recognize such a doctrine. And in neither case did the Jefferson administration assert it. On the contrary, Jefferson contended in each case that: (a) the personal attendance of the president and other high executive officials could not be compelled when it interfered with the performance of their public duties;[122] and (b) that the executive could

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not proceed further in the case without such an affidavit as would clearly shew the paper to be essential . . . ."

120. Marshall's opinion on this point is reported in United States v. Burr, 25 F. Cas. 187, 193-201 (No. 16,694) (C.C.D. Va. 1807). *See* D. MALONE, *supra* note 8, at 342, 345, who suggests that this outcome was a "foregone conclusion"; that Hay had asked Jefferson for permission to dismiss the misdemeanor charge; and that Jefferson had refused because further proceedings would at least keep Burr out of circulation for a time.

121. Robertson reports the denouement as follows:

> The attorney of the district finding in the progress of the cause, that this decision excluded almost the whole of his testimony, on the 15th of September, moved the court to discharge the jury. This was objected to by the defendant, who insisted upon a verdict. The court being of the opinion that the jury could not in this stage of the case be discharged without mutual consent, and that they must give a verdict, they accordingly retired; and not long after returned with a verdict of "NOT GUILTY."

2 TRIAL OF BURR, *supra* note 2, at 539.

The same scenario was repeated during the final proceedings in the *Burr* case, which Jefferson's biographer characterizes as "anticlimactic and verg[ing] on the farcical." D. MALONE, *supra* note 8, at 342. Following the September 15 acquittal, Jay moved for Burr's commitment on the misdemeanor charge in another district, thinking that this might cure some of the problems raised by Marshall's evidentiary rulings. *See id.* at 345. During the commitment proceedings, Wilkinson testified that he had shown the November 12 letter to the grand jury, and Burr demanded its production. Marshall followed his earlier ruling by holding that, in light of the President's objections, the letter would not be ordered produced "without a sufficient evidence of their being relevant to the present prosecution." 3 T. CARPENTER, *supra* note 116, at 280-81. Again, Burr did not file the requisite affidavit of materiality, and again the reason is obvious. Marshall ruled that at this preliminary stage Burr could supply any inferences he wished from the omissions and that the court would accept those inferences. *Id.* at 281-82. This put Burr in a more advantageous position than would have possession of the letter. There the dispute ended. Burr was committed on bail on this new charge, but he was not indicted since the administration made no effort to press what was obviously a hopeless case. *See* D. MALONE, *supra* note 8, at 345-46.

122. This was the formal objection to the personal appearance of the cabinet in

withhold evidence which was not material to the trial.[123] These reasonable positions hardly rise to a generalized claim of executive privilege. If Jefferson, Madison, or the government counsel in these cases believed that the executive had the right to withhold material evidence from the court because disclosure would jeopardize the confidentiality necessary to perform executive functions, they certainly kept this to themselves.

* * * *

When I was working on the first draft of this historical note, I intended to close with the above examination of the *Burr* case in light of *Smith and Ogden*. But my friends persuaded me that this would leave some interesting questions hanging: What happened to Smith and Ogden? And to Miranda? Did Jefferson and Madison really authorize the expedition? So, I have included brief postscripts to satisfy their curiosity.

The Outcome of the Trial

The government's case against Smith and Ogden was overwhelming. Witnesses testified that they were brought into Miranda's expedition by the defendants and were either misled or told that its purpose was to liberate South America by force. The government showed, to the minutest detail, how the defendants participated in the recruitment and training of mercenaries and in the purchase of arms. And witnesses told how they were induced into the enterprise by allurements of patriotic duty, military honors and rapid fortune.[124]

In charging the jury, Judge Tallmadge reviewed the evidence and showed how each charge in the indictment had been proven beyond any doubt.[125] He instructed the jurors to disregard as irrelevant the allegations that the administration had authorized the expedition. He charged that the only possible legal defense open to the defendants was that the purpose of the expedition was commercial and not military. He then observed, with dry understatement, that "there is some reason to doubt the correctness of this position" and to "suspect" that the 200

Smith and Ogden, and of the president in *Burr*. And in both cases, the administration offered to have the testimonies of the executive officials taken by the commission process in Washington. See notes 23, 104 *supra* and accompanying text.

123. *See* notes 22, 31, 44, 56, 88-91, 99-104, 111, *supra* and accompanying text.

124. The government's evidence is set forth in TRIAL OF SMITH AND OGDEN, *supra* note 1, at 95-128, 248-49.

125. The charge with respect to Smith is in *id.* at 236-42; for the charge with respect to Ogden *see id.* at 287.

armed and trained men on the *Leander* did not intend their 1200 soldiers' uniforms, 34 land cannons, 600 swords, 300 muskets, pistols and ammunition as "articles of commerce."[126] He told the jury that their judgment ought not be clouded by sympathy; the laws must be enforced; their duty was to decide only upon the facts in evidence, and under those facts, the defendants' guilt was "clear and decisive."[127]

The jury retired, returned shortly, and announced their verdict: Not Guilty.

Why? The defense made almost no attempt to refute any of the government's evidence. Indeed, the defense presented almost no evidence at all.[128] The defense lawyers simply made a moving and persuasive plea that justice demanded an acquittal regardless of what the court might say about the law, for the defendants were patriots who were being persecuted by the executive.[129] The theme at which they hammered over and over was that the president had authorized Miranda's expedition; that it was a noble enterprise worthy of Americans who believed in their own revolution; that had the expedition succeeded, the defendants would have been heroes; that because it failed, they were now offered as scapegoats to satiate the Spaniards; that the administration's culpability was proven beyond question by the refusal of Madison and the other secretaries to testify; and that the jurors should follow their sense of justice rather than "technical rules of law, so opposed to humane feeling."[130] With the kind permission of the editors of this Quarterly, excerpts from this successful plea for jury nullification are reproduced in the Appendix.

Did They Do It?

To those of us conditioned by a seemingly unbroken line of presidential deception, from the Bay of Pigs to Vietnam to Watergate, it is natural to conclude, with Smith and Ogden's jury, that Jefferson

126. *Id.* at 239-40.

127. *Id.* at 242, 287.

128. The defense attempted to call Rufus King and other voluntary witnesses to prove that the expedition was authorized by Jefferson and Madison, but Judge Tallmadge followed Paterson's earlier ruling that this evidence would be legally irrelevant and refused to allow the witnesses to take the stand. *Id.* at 147, 249.

129. The arguments of defense counsel are transcribed in *id.* at 152-217, 249-287. During this period, federal judges permitted defense counsel to argue to the jury that it had the rights to determine both the facts and the law and to acquit for any reason whatsoever. Judicial antagonism toward allowing defense counsel to plead before the jury for nullification appears to have originated in the middle 1800's. *See* J. VAN DYKE, OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURIES, ch. 19 (forthcoming 1975).

130. TRIAL OF SMITH AND OGDEN, *supra* note 1, at 172.

and Madison secretly approved Miranda's expedition and then threw Smith and Ogden to the wolves. There is historical evidence which supports such a conclusion, both direct and circumstantial, but this evidence is far from dispositive.

The direct evidence consists entirely of Miranda's version of his conversations with Jefferson and Madison. Upon leaving Washington, Miranda told Rufus King that he had fully informed the administration of the proposed expedition and was told that the government could not overtly sanction it but would gladly "wink" at it.[131] Miranda told Smith that the government had given its "tacit approbation and good wishes" and would allow private citizens to take part in the expedition so long as American laws were not openly violated.[132] And when the *Leander* sailed on February 2, 1806, Miranda wrote to Madison thanking him for the government's support and stating that he had taken care to act in strict conformity with the administration's intentions.[133]

But one must hesitate before accepting Miranda's version of these conversations. It was clearly in his interest to claim administration support for his venture in the recruitment of American mercenaries, and the Venezuelan patriot had many times in the past exaggerated the extent of British and American governmental assistance for just such purposes.[134]

The circumstantial evidence looks stronger. First of all, there is the timing of the meeting. When Miranda left for Washington, at the end of November, 1805, the United States seemed on the verge of war with Spain. Jefferson's efforts at a negotiated settlement had been rebuffed by Spain and on December 3, Jefferson delivered a belligerent public message to Congress. On December 6, he asked Congress to deliberate in secret and requested an appropriation of $2,000,000 to raise an army and another $2,000,00 for him to use, in his discretion, in his dealings with Spain.[135] It was at this crucial juncture that Miranda arrived in Washington, was received with extreme cordiality,

131. 4 LIFE AND CORRESPONDENCE OF RUFUS KING 530, 579-81 (C. King ed. 1897).

132. W. ROBERTSON, *supra* note 5, at 364.

133. 4 LIFE AND CORRESPONDENCE OF RUFUS KING 530 (C. King ed. 1897).

134. Miranda's biographer states:

> It is likely that the sanguine disposition of Miranda and his ardent desire to secure aid for the undertaking caused him to misinterpret or to deliberately falsify some of the statements made to him by Jefferson and Madison. This is in harmony with what we know of his previous activity.

W. ROBERTSON, *supra* note 5, at 365.

135. *See* D. MALONE, *supra* note 8, at 69-71; 1 THE WRITINGS OF ALBERT GALLATIN 264-84 (H. Adams ed. 1960).

and met with Madison on December 11.[136]

Moreover, the administration was well aware of Miranda's history and desires. In light of the anxious state of affairs at that very moment between the United States and Spain, one would think that Jefferson and Madison would at least have asked the ardent revolutionary specifically what he intended to do, a question which Miranda gladly would have answered. And one would also think that the administration would keep informed about Miranda's activities after he returned to New York. For if Jefferson and Madison did not approve of Miranda's expedition and really desired peace with Spain, the last thing they wanted would be Miranda using the United States as a base of operations against Spain. Miranda in fact began to prepare for his expedition over the next six weeks and did not bother to keep his preparations very secret; the *Leander* then sailed, fully armed, from New York harbor on February 2. Miranda's indiscretions had allowed the Spanish ambassador to learn of the expedition before that date, but Jefferson and Madison claimed that they first learned of it after the *Leander* sailed.[137]

This circumstantial evidence is certainly supportive of Miranda's claim that the administration "winked." But Jefferson's and Madison's biographers hotly dispute this conclusion.[138] They argue that the administration wanted to avoid a war with Spain; that Jefferson's private message to Congress was much more conciliatory than his public stance; that Miranda was bound to be received warmly by men sympathetic to liberty and revolution; and, probably most significantly, that they ordered the United States attorney to institute prosecutions almost immediately, and before any diplomatic protests were received from the Spaniards and the French. The administration's failure to keep well informed about Miranda's activities in New York is attributed to a combination of gullibility and gross negligence.[139]

136. Congress was in secret session considering the Spanish problem from December 6, 1805, through the time when the *Leander* sailed. D. MALONE, *supra* note 8, at 70-75.

137. *See* W. ROBERTSON, *supra* note 5, at 365-70.

138. *See* D. MALONE, *supra* note 8, at 80-86; I. BRANT, *supra*, note 9 at 326-35.

139. They also point out that Miranda's parting letter to Madison was mailed after the *Leander* sailed and is a masterpiece of ambiguity and innuendo, I. BRANT, *supra* note 9 at 328-29, and that Madison wrote a footnote "not true" below Miranda's statement in the letter that he had "observed exactly" the intentions of the government. *Id.* at 329. The problem with relying on the footnote is that it probably was not written until well after the Miranda affair had exploded diplomatically. Although the exact date on which the footnote was written is not certain, Madison did write on the letter next to Miranda's signature, "July 22, 1806." W. ROBERTSON, *supra* note 5, at 368-69.

Neither Jefferson nor Madison spoke publicly in detail about this embarrassing incident. Their few private letters on this matter tend to compound the uncertainty. In a letter of March 22, 1806, Jefferson denied approving Miranda's expedition but stated, somewhat enigmatically, that "To know as much of it as we could was our duty, but not to encourage it."[140] On March 15, Madison wrote a letter to the American ambassador to France in order to spell out the position to be taken with the French government on the Miranda affair.[141] Madison recounted that Miranda had outlined his general aims, and that he had promptly told Miranda that any infraction of United States law involving hostility towards Spain would be punished. Madison claims that he was reasonably certain that Miranda would try to export arms to South America, but that:

> This particular admonition was suggested by an apprehension that he might endeavor to draw into his enterprize individuals adapted for it, by their military experience and personal circumstances. It was never suspected that the enlistment of a military corps of any size would be thought of.[142]

And Madison denied learning of the expedition until shortly after the *Leander* sailed.

Finally, in 1809, when in retirement, Jefferson wrote a private letter to the new Spanish Ambassador to the United States, and he protested "solemnly, on my personal truth and honor . . . that there was neither co-operation, nor connivance on our part." He added that although there were many reasons for hostility with Spain, the United States would never resort to such "petty means." The rest of the letter generally follows Madison's earlier explanation.[143]

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140. Jefferson to William Duane, in 10 THE WORKS OF THOMAS JEFFERSON 242 (P. Ford ed. 1905). Equally inscrutable is Jefferson's immediate reaction to the acquittal. On August 15, 1806, he wrote to Gallatin as follows:

> The skill and spirit with which Mr. Sandford [*sic*] and Mr. Edwards conducted the prosecution give perfect satisfaction, nor am I dissatisfied with the result. I had no wish to see Smith imprisoned: he has been a man of integrity and honor, led astray by distress. Ogden was too small an insect to excite any feelings . . . . We have done our duty, and I have no fear the world will, do us justice.

1 WRITINGS OF ALBERT GALLATIN 306 (H. Adams ed. 1960). Among the many questions raised by this brief passage are: *Who* led Smith "astray by distress"? Is the last sentence in this passage a grammatical error?

141. Letter from Madison to John Armstrong, in 7 THE WRITINGS OF JAMES MADISON 200-04 (G. Hunt ed. 1908).

142. *Id.* at 203.

143. Letter from Jefferson to Don Valentine de Foronda, October 4, 1809, in 11 THE WORKS OF THOMAS JEFFERSON 117-20 (P. Ford ed. 1905). There are two inconsistencies between the versions. Jefferson said that the administration "had no suspi-

All that is certain from this evidence is that Miranda did inform Jefferson and Madison of his general plans, and that they knew at least that he was going to buy war-related goods in this country. Beyond that, we shall probably never know whether the administration knew (or, perhaps, wanted not to know) that Miranda was recruiting men for an expedition and gave its tacit approval. Jefferson's biographer observes that most people at the time drew conclusions according to their own predilections, that is, their faith in or distrust of the administration.[144] In drawing our own conclusions, we have as well our own skeptical predilections based on recent events. Is it naive to believe that our early presidents did not subscribe to the same code of ethics as was held by the recent occupants of the White House?

What Happened to . . . . ?

It would not seem appropriate to conclude this historical note without adverting at least briefly to the fates of the chief actors in this case. Smith and Ogden were momentary celebrities. Their trial had attracted great public attention, and the courtroom was packed each day with notable observers, including the vice-president.[145] But they, and their trial, faded into obscurity when the even more spectacular trial of Aaron Burr took place only one year later.[146]

Francisco de Miranda went from defeat to fleeting glory, and then to a tragic end. Between 1807 and 1810, he continued to propagandize and plan new projects for the liberation of South America. In the latter year, a revolt in Venezuela impelled him to return to his native country, where he was welcomed as a hero. He helped draft a declaration of independence for Venezuela and became the dictator of that country in 1811. A year later, however, he capitulated to a Spanish army and was captured and imprisoned in Spain. He died in

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cion" that Miranda expected to recruit men, while Madison admitted to such an apprehension but thought that the number recruited would not be large. And while both men admitted that they knew Miranda was going to buy and ship arms, Jefferson said that the administration had no authority to stop this because it was not illegal, whereas Madison said that the administration expected a prohibitory law to be passed before Miranda could ship his arms to Venezuela. *Compare id.* at 119 *with* 7 THE WRITINGS OF JAMES MADISON, 203 (G. Hunt ed. 1908).

144. D. MALONE, *supra* note 8, at 81-82.

145. TRIAL OF SMITH AND OGDEN, *supra* note 1, at 64 n.*, 236; W. ROBERTSON, *supra* note 5, at 374-75.

146. No, this is not the Ogden of Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824). Nor is this the Ogden who participated in Burr's intrigues.

a Spanish dungeon in 1816, not living to see his vision fulfilled by the man who was once his lieutenant, Simon Bolivar.[147]

> "The last great age foretold by sacred rhymes
> Renews its finished course; Saturnian times
> Roll round again, and mighty years, begun
> From this first orb, in radiant circles run."

147. *See generally* W. ROBERTSON, *supra* note 5, at 437-90; I. NICHOLSON, THE LIBERATORS 84-95 (1969); D. O'LEARY, BOLIVAR AND THE WAR OF INDEPENDENCE 23-40 (McNerney ed. 1970).

Appendix

Following are excerpts from the successful plea for jury nullification by Smith's counsel. TRIAL OF SMITH AND OGDEN 152, 153, 154, 172, 175, 178-79, 186, 190, 192, 193-94, 195-96, 200 (emphasis in original transcript).

This, gentlemen, is avowedly a state prosecution; and the defendant you are now to try, is brought before you as a criminal, in consequence of a special order of the president of the United States. This circumstance, of itself, ought to awaken your most watchful and jealous attention, and should you discover that a measure, so much out of the common course of criminal proceedings has been dictated by any other motives than a due regard to the administration of justice; should you find that the officers of the executive government, who have instigated this prosecution, have an interest in the conviction of the accused, you will doubtless deliberate with the utmost caution, before you pronounce a verdict of guilty.

. . .

Miranda's countrymen have long looked to him as their deliverer. He has undertaken the emancipation of millions of men, to plant the standard of liberty on his own native soil . . . and shall we, who have just burst the bondage of infinitely less galling chains, call this an audacious enterprise? No gentlemen, an American ought not to reproach Miranda, and under other circumstances, the government or its officers would not have done it. Had things turned out differently; had our affairs with Spain taken the course that was expected when Miranda was at Washington, this would have been called a glorious and generous enterprise, and the executive officers of our country, would have challenged the approbation and applause of the world for having given it their sanction and encouragement.

But though Spain or France may require the sacrifice of this individual, and threaten us with their vengeance unless it be made; however willing our government may be to offer up the victim, I trust in God that they will find that they in vain seek in a court of justice an altar, or in jurors the sacrificers.

. . .

In every criminal case, gentlemen, you are the judges, both of the law, and of the fact. . . . If the opinion of a judge was to be binding and conclusive on you in a criminal case, where would be the advan-

tages of this boasted trial by jury; how would it be a protection or safeguard against oppression? If the judge may say, and bind you by saying the law condemns, where is the use of calling on you to deliberate on the guilt or innocence of the accused? It would be a solemn mockery to do so, and it would be infinitely better at once, to let the executive hand the accused over to the discretion or mercy of a judge.

. . .

A jury completely on their guard against the machinations of power or party, unbiassed in their judgments, invincible in their integrity, will always remain the dignified supporters of public justice, the firm palladium of private safety. In vain may a pusillanimous executive seek to cast the opprobrium of its unworthy or ill advised projects, on the head of an unoffending individual. In vain may it attempt, under the specious semblance of justice, to appease the injured laws and insulted dignity of its country, by immolating the innocent as a peace offering. In vain may governmental judges pronounce venal decrees in our forums. You, gentlemen, rise up, inflexible in right, omnipotent in justice, to protect the innocent, to shelter the persecuted, and to check the aggressions of unprincipled authority.

. . .

Do not imagine that my client seeks his acquittal on the defective nature of the proofs, or on any nice construction of the statute. He demands a verdict on grounds more elevated and dignified . . . . He expects not a mere negative justification, barely screening him from punishment, but an honorable vindication . . . .

. . .

You are to render your verdict according to evidence—But what is evidence? . . . Are you limited to conclusions drawn from mere testimony admitted by the court? If so, half of your value is lost—You are no longer a barrier between the arbitrary mandates of a court and the liberty of the citizen. No gentlemen, there is one species of testimony, which no executive can interdict, no rule of law suppress. Testimony, resting in your own knowledge . . . of public notoriety. . . .

. . .

This cause, gentlemen, is doubly interesting, as it implicates the reputation of our executive government, and involves the first principles of criminal justice. The president of the United States, *countenancing* the offence for which colonel Smith was indicted . . . the president of the United States, *ordering* this prosecution; and . . . the pres-

ident of the United States *interdicting* the attendance of witnesses, essential to the justification of the defendant. . . . Is there a man possessing the independence of thought . . . whose indignation has not been aroused on considering this prosecution?

. . .

[Colonel Smith] acted under the conviction, that his proceedings were legally sanctioned by the chief magistrate of the union. WAS SUCH CONVICTION WELL FOUNDED? Did the president of the United States and the secretary of state approve of and countenance this expedition? The man who can doubt it, after hearing this trial must be obstinate indeed in prejudice. . . . General Miranda brings to this country a letter explaining his whole plan. . . . This letter is forwarded to the secretary of state. . . . The heads of department then are acquainted—*fully acquainted* with general Miranda's projects and his ultimate views. . . . General Miranda arrives at the city of Washington—is he there received as the outcast of society. . . ? Quite the reverse—his reception is highly flattering—official communications ensue between him and the government—his society is courted—his departure retarded by the pressing solicitations of the secretary of state—the topic of his discourse is the emancipation of his oppressed countrymen—the theme is listened to with complacency—policy forbids government publicly to extend an aiding hand, but private or individual assistance, obtained and used with discretion, is patronized and encouraged.

. . .

Happily you are thus possessed of the very facts, which his prosecutors studied to suppress . . . . [I]f you, gentlemen, believe them true, you are to consider the facts they state, as legally proved.

. . .

BELIEVE THEM TRUE—Where are the witnesses whose testimony would have dissipated every doubt, and dispersed the clouds which have been permitted to obscure these proceedings? Where is Mr. Madison, the *confidential* minister, the favourite *repository* of the sentiments and secrets of the president? Why is he not produced *in your presence* to exculpate his friend and himself, from the stigma of this prosecution? . . . IF THE TRUTH COULD HAVE BORNE THE LIGHT . . . *the witness would have attended* . . . . THEY DO NOT ATTEND.—The president prohibits their attendance, and the public prosecutor insists on the trial without their presence.—This, gentlemen, speaks loudly to you in the eloquence of *fact*.

. . .

Should you pronounce [Smith] guilty, you condemn him to years of close imprisonment. . . . And what hope can he have of mercy from those by whom he has been seduced, betrayed, and prosecuted; who hope to expiate their own own errors by his punishment. . . .

Finally gentlemen, I trust you will never suffer yourselves to be persuaded that there are certain technical rules of law, so opposed to humane feeling, and common sense, as to oblige you to pronounce a verdict against the defendant. . . . If you believe that he did not intend to offend against the laws, but on the contrary, that he thought he was rendering service to the state, under the approbation and sanction of its chief officers; in a word, if you believe in your hearts that he is innocent, you will say that he is not guilty—and your verdict shall be approved by the world—your names shall be handed down to posterity, as the guardians of the sacred rights of trial by jury. But above all, you will have the approbation of your own consciences.

. . .

To your patriotism as citizens—to your honour as men—to your consciences as jurors, I make a solemn appeal. I present my client to you, an upright—an innocent—an honorable man. Such let him be found in your verdict—test his conduct on the strict and immutable principles of justice, and you can never consign him to the *tender mercies of the court* . . . . His property—his character—his liberty are safe in your hands; because you are an *American jury*, and because you love justice and detest persecution.