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Presidents and Former Presidents are Subject to
Subpoenas

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The 1807 treason trial of Aaron Burr, lost in the mists of early American legal history, stirs, at most, only faint recollections among members of the Bar, let alone the general public. But Chief Justice John Marshall's landmark ruling that the president is required to obey subpoenas represents a principle that is fundamental to American Constitutionalism and the rule of law.

Marshall's ruling is a grand reminder of the resonance--in the fanatical politics of our time--of the American ideal that all men are equal in the eyes of the law. The principle that the president is subject to the rule of law was succinctly stated by James Wilson, one of the heavyweights in the Constitutional Convention and a Supreme Court Justice at the dawn of the republic: "Not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment." It hardly needs to be mentioned that the law applies equally to sitting and former presidents alike.

At the time of his trial, the disgraced former vice-president of the United States had few allies. He had been shunned by fellow Jeffersonian Republicans for opportunistically opposing the leader of their party, Thomas Jefferson, during the House of Representatives' presidential runoff in the 1800 presidential election. And he was exiled by Federalists for killing Alexander Hamilton in their famous duel in 1804.

A grand jury indicted Burr on the charge of treason for instigating war against Spain. The indictment against Burr focused on his activities at Blennerhasset's Island in the Ohio River on December 10, 1806.

Chief Justice Marshall presided at the trial since his duties as a Supreme Court Justice included assignment as a federal judge for the U.S. Circuit for Virginia. Marshall instructed the jury on the meaning of the Treason Clause—Article III, Section 3—of the Constitution, which provided, "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

The government's case against Burr was weak. The prosecution offered no evidence that Burr had instigated war against Spain, and it produced not a single witness, let alone two, to testify that Burr had engaged in an overt act of levying war against the United States. Burr was acquitted on all charges.

At trial, Burr's stellar defense team, which included Luther Martin and John Randolph, both delegates to the Constitutional Convention, asked Chief Justice Marshall to subpoena President Jefferson to testify and submit letters that it believed would exonerate Burr. Jefferson replied that personal attendance at a trial would interfere with his duties as president, particularly if he could be hauled to far-off St. Louis, to one court after another. But he offered to testify by deposition, if Burr should "suppose there are any facts within the knowledge of the heads of departments or of myself to give him the benefit of it."

Jefferson's plea rested on a serious administrative inconvenience, not a claim of immunity from judicial process. Indeed, Jefferson's attorney made no such claim. As Marshall stated, "the attorney for the United States avowed his opinion that a general subpoena might issue to the president."

Marshall left no doubts on this score. "In the provisions of the constitution, and of the statutes, which give the accused the right to compulsory process of the courts, there is no exception whatever." He rejected the practice in England of protecting the King from testimony on grounds that it was incompatible "with his dignity," because the "principle of the English constitution that the king can do no wrong" was inapplicable to our Constitution, under which, "the president may be impeached and removed from office." Marshall emphasized that "the president may be subpoenaed and examined as a witness, and required to produce any paper in his possession, is not controverted."

Marshall acknowledged that a president might have "sufficient motives for declining a particular paper," but the court would be the final authority on any presidential claim to withhold documents. In the end, the importance to the defense of the disclosure of a document would override presidential refusal to disclose.

Chief Justice Marshall was intent on placing beyond doubt that a subpoena could reach the president. His opinion reflected the conventional view of his time, and even Jeffersonian Republicans agreed. Jefferson, moreover, as an apostle of democracy, was not about to place the executive above the law.

To the end of his life, Marshall considered the Burr trial the most unpleasant experience in his 35 years on the bench. Like many, he was repulsed by

Burr's cynicism and opportunism, particularly after the death of Hamilton, but he took pride in affirming the subordination of the president to the rule of law. The equivalent treatment before the law of presidents and ordinary citizens, he believed, breathed life into the text of the Constitution and the most deeply held principles and values of the republic that he fought to preserve.

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