
ARTICLES

DECRYPTION ORIGINALISM:
THE LESSONS OF BURR

Orin S. Kerr

CONTENTS

INTRODUCTION	907
I. FACTS AND PROCEDURAL HISTORY	914
A. <i>The Charges Against Aaron Burr</i>	915
B. <i>The Role of Ciphers and the Disputed Letter</i>	917
C. <i>Bollman's Initial Assertion of the Fifth Amendment Privilege</i>	921
D. <i>The Prosecution's Initial Questioning of Willie</i>	922
II. THE LEGAL AUTHORITIES	924
A. <i>The First Source of Law: MacNally's Treatise</i>	925
B. <i>The Second Source of Law: The State Trials Cases</i>	930
C. <i>The Third Source of Law: The Early American Cases</i>	933
III. THE ARGUMENTS OF THE PARTIES	935
A. <i>Who Decides if an Answer Might Be Incriminating?</i>	936
B. <i>What Is the Standard for Whether an Answer Is Sufficiently Incriminating?</i>	938
C. <i>How Does the Incrimination Test Apply to the Facts?</i>	940
IV. CHIEF JUSTICE MARSHALL'S RULING — AND WHAT HAPPENED NEXT	941
A. <i>The Court Makes the Threshold Inquiry</i>	942
B. <i>The "Necessary and Essential Link in the Chain of Testimony" Test</i>	943
C. <i>Applying the Test: Why Marshall Required Willie to Answer</i>	944
D. <i>Subsequent Dicta on Production or Testimony from Burr</i>	945
V. THE ORIGINALIST LESSONS OF BURR	946
A. <i>The Originalist Value of Burr</i>	947
B. <i>Burr Permits Compelling a Defendant to Disclose the Password in Evidence Cases</i>	952
C. <i>Burr May Not Permit Compelling a Defendant to Disclose the Password in Contraband Cases</i>	957
D. <i>Whether Burr Permits Orders to Enter Passwords Likely Depends on the Choice of Analogies</i>	960
CONCLUSION	963

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The Supreme Court is likely to rule soon on how the Fifth Amendment privilege against self-incrimination applies to compelled decryption of a digital device. When the Court rules, the original understanding of the Fifth Amendment may control the outcome. This Article details an extraordinary case that illuminates the original understanding of the privilege and its application to compelled decryption. During the 1807 treason trial of Aaron Burr, with Chief Justice John Marshall presiding, the government asked Burr's private secretary if he knew the cipher to an encrypted letter Burr had sent to a co-conspirator. Burr's secretary invoked the privilege against self-incrimination, leading to an extensive debate on the meaning of the privilege and an opinion from the Chief Justice.

The Burr dispute presents a remarkable opportunity to unearth the original understanding of the Fifth Amendment and its application to surprisingly modern facts. The lawyers in Burr were celebrated and experienced advocates. The Chief Justice allowed them to argue the Fifth Amendment question in exhaustive detail. And an attorney recorded the entire argument in shorthand, including dozens of legal citations to the specific pages of the authorities the lawyers invoked. The rich materials allow us to reconstruct for the first time precisely how the privilege was understood by leading lawyers and Chief Justice John Marshall soon after the Fifth Amendment's ratification. The Article presents that reconstruction, and it concludes by applying Burr's lessons to the modern problem of compelled decryption of digital devices such as cell phones and computers.

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INTRODUCTION

Lower courts recently have divided on how the privilege against self-incrimination applies to accessing encrypted digital evidence.¹ The issue usually comes up when the police seize a computer or cell phone and have a warrant to search it for evidence. The police can't execute the search, however, because the device is encrypted. Prosecutors get a court order compelling a suspect to unlock the device, either by disclosing the password or by entering it. The suspect then pleads the Fifth, forcing a court to determine whether entering or disclosing the password would force him to "be a witness against himself."²

The cases applying the Fifth Amendment to compelled decryption are all over the map.³ The confusion is understandable. Lower courts must follow Supreme Court precedent. But the Supreme Court's cases in this area are notoriously difficult, and none of the cases involve facts that resemble compelled decryption.⁴ The lower court disagreement makes Supreme Court review highly likely. And the prospect of Supreme Court review introduces an important new question to the debate: How should an originalist Justice decide such a case?

This is not just a hypothetical question. Three members of the Supreme Court, Justices Clarence Thomas, Neil Gorsuch, and Amy Coney Barrett, are committed originalists. Two of them have strongly suggested that they are prepared to reject current Fifth Amendment doctrine in favor

¹ State supreme courts have disagreed on the constitutional standards both for compelling password disclosure and for compelling password entry without disclosure. For the disagreement on the Fifth Amendment standard for compelled password disclosure, compare *Commonwealth v. Davis*, 220 A.3d 534, 550 (Pa. 2019), which held that a person has a Fifth Amendment privilege against compelled disclosure of his password and that the foregone conclusion exception cannot apply to permit the compulsion, with *State v. Andrews*, No. 082209, 2020 WL 4577172, at *18 (N.J. Aug. 10, 2020), which held that compulsion of a password "is presumptively protected by the Fifth Amendment" but that "its testimonial value and constitutional protection may be overcome if the passcodes' existence, possession, and authentication are foregone conclusions." For the disagreement on the Fifth Amendment standard for compelled password entry without disclosure, compare *Commonwealth v. Jones*, 117 N.E.3d 702, 711 (Mass. 2019), which held that a Fifth Amendment privilege against compelled password entry can be overcome under the foregone conclusion doctrine with a finding that the person "knows the password to decrypt an electronic device," with *Seo v. State*, 148 N.E.3d 952, 958 (Ind. 2020), which held that a Fifth Amendment privilege against compelled password entry cannot be overcome if unlocking the device would "provide the State with information that it does not already know."

² U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

³ See generally Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 *FORDHAM L. REV.* 203, 207 (2018) (describing the Fifth Amendment law of compelled access to encrypted data as a "fundamental question bedeviling courts and scholars" (footnote omitted)).

⁴ The major cases have involved the production of documents by subpoena or its equivalent. See generally *United States v. Hubbell*, 530 U.S. 27, 30 (2000); *Fisher v. United States*, 425 U.S. 391, 393 (1976).

of whatever an originalist approach might reveal.⁵ Several other Justices are influenced by originalism and might do the same.⁶ When compelled decryption reaches the Supreme Court, the outcome may very well hinge on the original understanding of the Fifth Amendment and how it applies to entering or disclosing a password.

At first blush, this sounds impossible to know. The Framers did not have cell phones. They did not have computers. Can we ever know how the eighteenth-century Constitution would have been understood to apply to the latest twenty-first-century facts? The question calls to mind Justice Alito's criticism of Justice Scalia's originalist decision in *United States v. Jones*,⁷ which held that it was a Fourth Amendment search to attach a hidden GPS device to a car.⁸ According to Justice Alito, it was "almost impossible to think of late-18th-century situations that are analogous" to those facts.⁹ Justice Alito derided the majority's originalist approach with a rhetorical question: "Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?"¹⁰

But historical coincidences can happen. This Article is about one of them. It turns out that a remarkable historical case exists on how the Fifth Amendment applies to compelled decryption. It's not just a case, but a whopper of a case: An opinion written by Chief Justice John Marshall himself.¹¹ In 1807, Chief Justice Marshall presided over the treason trial of former Vice President Aaron Burr.¹² Burr had written his alleged co-conspirators in cipher, encrypting his letters to avoid their contents being understood by nosy interlopers.¹³ During its investigation, the grand jury wanted to learn the contents of one of Burr's encrypted letters to better understand Burr's plot. The prosecution called

⁵ See *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring) (stating that the Fifth Amendment act of production doctrine "may be inconsistent with the original meaning of the Fifth Amendment's Self-Incrimination Clause" and that he "would be willing to reconsider the scope and meaning" of the clause in a future case); *Carpenter v. United States*, 138 S. Ct. 2206, 2271 (2018) (Gorsuch, J., dissenting) (stating that although existing Fifth Amendment precedent treats the privilege against self-incrimination as "applicable only to testimony, not the production of incriminating evidence[,] . . . there is substantial evidence that the privilege . . . was also originally understood to protect a person from being forced to turn over potentially incriminating evidence").

⁶ See, e.g., *Confirmation Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan) ("Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

⁷ 565 U.S. 400 (2012).

⁸ *Id.* at 404.

⁹ *Id.* at 420 (Alito, J., concurring in the judgment).

¹⁰ *Id.*

¹¹ See *United States v. Burr (In re Willie)*, 25 F. Cas. 38, 39 (C.C.D. Va. 1807) (No. 14,692e).

¹² See *infra* section I.A, pp. 915–17.

¹³ See *infra* section I.B, pp. 917–20.

Burr's private secretary to the stand and asked him whether he understood the letter's cipher.¹⁴ The secretary refused to answer, citing the privilege against self-incrimination. In *United States v. Burr*,¹⁵ Chief Justice Marshall ruled that Burr's secretary was required to answer the government's questions.

Viewed in isolation, Chief Justice Marshall's opinion offers a fascinating lens for an originalist approach to compelled decryption. Scholars have disagreed on the original understanding of the Fifth Amendment privilege.¹⁶ Yet here we have an opinion on the privilege, written by the celebrated Chief Justice just sixteen years after the Fifth Amendment's ratification, that has not been closely studied. The opinion specifically addresses how the privilege applies to efforts to learn about the contents of an encrypted letter. Given the date of the decision, the similarity of the facts to the present, and the prominence of John Marshall, a close reading of *Burr* can offer unique insights into the original public meaning of the privilege and its application to modern facts.

But a skeptical originalist may be unconvinced. How can we know that Marshall's 1807 opinion reflects the understanding of 1791? The decision does not include a close textual reading of the Fifth Amendment. It mentions only one precedent in passing.¹⁷ And John Marshall's originalist bona fides are the subject of some controversy in the originalist literature.¹⁸ In an ideal world, we could learn not only

¹⁴ See *infra* section I.D, pp. 922–24.

¹⁵ 25 F. Cas. 38.

¹⁶ Much of the disagreement focuses on what role the Fifth Amendment privilege was understood to serve and when modern concepts of the privilege were established. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION*, at vii–viii (1968) (arguing that the privilege as known today was largely and firmly established at common law); Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235, 240 (1998) (arguing that the modern privilege developed in the nineteenth century); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048 (1994) (contending that the notion of the privilege as enabling a defendant not to testify at trial was a relatively modern development); Eben Moglen, *Essay, Taking The Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1087 (1994) (arguing that the privilege became more established and less contentious in the nineteenth century); John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 831 (1999) (similar); John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 HARV. L. REV. 610, 610, 623 (1902) (arguing that the privilege originated in the ecclesiastical courts, notably the Star Chamber, and was then continued by early common law courts).

¹⁷ Chief Justice Marshall refers to “Goosely, in this court.” *Burr*, 25 F. Cas. at 39. As detailed at *infra* notes 202 to 208 and accompanying text, the case is *United States v. Goosely*, 25 F. Cas. 1363 (C.C.D. Va.) (No. 15,230).

¹⁸ Compare Mike Rappaport, *Chief Justice Marshall's Textualist Originalism*, LAW & LIBERTY (Mar. 21, 2019), <https://www.lawliberty.org/2019/03/21/chief-justice-marshalls-textualist-originalism> [<https://perma.cc/S3XT-53JN>] (arguing that John Marshall “had a general approach, which was a

how Marshall ruled, but also how the finest legal minds of the era might have framed the question. In a perfect world, we would want to know: What did lawyers of the Founding era think the privilege meant and how might it apply to a compelled decryption case?

Remarkably, it turns out that we can know this, too. Burr's trial drew intense public scrutiny.¹⁹ An attorney, David Robertson, attended most of the proceedings and wrote down in shorthand what was said.²⁰ The next year, Robertson published a two-volume report of the trial that included a "full and correct statement of all the testimony and documents."²¹ Critically for us, Robertson reported the legal arguments in glorious detail. He reprinted the "arguments of the counsel on all points of importance" in the proceeding "*verbatim* as uttered,"²² including the citations to "the authorities referred to" by counsel.²³

Robertson's report is a remarkable resource for those seeking the original understanding of the privilege against self-incrimination. Chief Justice Marshall allowed the lawyers to debate the Fifth Amendment question at what one historian has called "tedious" length.²⁴ The result is an oral argument transcript that likely reflects hours of in-court advocacy solely about the privilege and its application to compelled decryption. It thoroughly details the arguments and counterarguments for how the relevant precedents and principles might apply. It also includes dozens of legal citations, all of which are to sources that can be found and read today to reconstruct the materials the lawyers and the court

form of originalist textualism"), with D. A. Jeremy Telman, *John Marshall's Constitution: Methodological Pluralism and Second-Order Ipse Dixit in Constitutional Adjudication*, LEWIS & CLARK L. REV. (forthcoming) (manuscript at 54), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461874 [<https://perma.cc/E94X-8B47>] (arguing that Marshall was a constitutional eclectic).

¹⁹ See 1 DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR, FOR TREASON, AND FOR A MISDEMEANOR, at preface (Philadelphia, Hopkins & Earle 1808). During the nineteenth century, Robertson's report was regularly cited in federal courts, including by the U.S. Supreme Court, as "BURR'S TR." See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 81 (1849). I adopt that citation practice in this Article.

²⁰ See 1 BURR'S TR. at preface.

²¹ *Id.*

²² *Id.* One note of caution is that Robertson states that he did not record the early parts of the proceeding at the time and had to reconstruct them later:

The proceedings previous to the trials, before and while the grand jury were in deliberation, are also detailed, but the first part of them not so *fully* as the rest of the report; because it was the middle of June, before the reporter was prevailed on to undertake the publication. He has however consulted the best sources of information, in order to enable him to present to the public a correct statement of those preliminary proceedings

Id. The Burr proceedings on the Fifth Amendment occurred on June 16–18, 1807, see *id.* at 209–12, 227, 242, about the time that Robertson began his full report. The extraordinary detail of the material presented in Parts II and III suggests to me that Robertson's verbatim reporting likely had begun by this time.

²³ *Id.* at preface.

²⁴ R. KENT NEWMYER, THE TREASON TRIAL OF AARON BURR 104 (2012).

had at their disposal. And all of this is waiting to be explored for the first time. Although Robertson's report is known to historians, its exhaustive arguments about the privilege against self-incrimination have not been closely examined either by historians or by lawyers.²⁵

The usefulness of Robertson's report is bolstered by the outstanding lawyering in the *Burr* case. The three prosecutors and four defense attorneys were among the finest advocates of their era.²⁶ Prosecutor William Wirt is still considered "one of the greatest Supreme Court advocates of all time."²⁷ Wirt's 170 Supreme Court arguments included "virtually all of the landmark cases of the first third of the nineteenth century."²⁸ Defense lawyer Edmund Randolph had served as the first Attorney General of the United States.²⁹ Defense lawyer Luther Martin had recently served twenty-eight years as Maryland's Attorney General,³⁰ and he was considered "the undisputed head of the profession" in his home state.³¹ Aaron

²⁵ I suspect this is true for two reasons. First, the dispute has no importance for historians because Willie's testimony ultimately went nowhere. Willie eventually testified that he did not know the cipher, and the issue never arose in the *Burr* trial again. See *infra* p. 945. Second, the Federal Cases reporter excludes the discussion, making the arguments hard for lawyers to access. The abbreviated summary of the argument begins with the argument that introduced the question, leading up to when Chief Justice Marshall indicates that he would like to hear additional argument. But then the reporter simply notes: "The point was argued at some length on the two following days by Mr. Botts, Mr. Williams, Mr. Martin, and Mr. Wickham on one side, and by Mr. MacRae and Mr. Hay on the other." *United States v. Burr (In re Willie)*, 25 F. Cas. 38, 39 (C.C.D. Va. 1807) (No. 14,692e).

This does not mean that the Chief Justice's opinion in *Burr* has been ignored. To the contrary, the Supreme Court has frequently relied on it as an important Fifth Amendment precedent. See *infra* notes 344–348 and accompanying text. Further, some scholars (including myself) have noted in passing that *Burr* may be relevant for constitutional debates on decryption today. See, e.g., Orin S. Kerr, *The Fourth Amendment in Cyberspace: Can Encryption Create a "Reasonable Expectation of Privacy?"*, 33 CONN. L. REV. 503, 528–29 (2001) (using *Burr* to argue that modern encryption does not present a "latent ambiguity" that could justify translation under the Fourth Amendment); Jeffrey Kiok, *Missing the Metaphor: Compulsory Decryption and the Fifth Amendment*, 24 B.U. PUB. INT. L.J. 53, 65 (2015) (noting *Burr*). But Marshall's opinion in *Burr* is brief, and, viewed in isolation, cryptic. It is the discovery and exploration of Robertson's report that now opens the door.

²⁶ See PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR* 147 (2008) (describing the defense team as arguably "the finest legal talent assembled in any trial in the history of the young nation").

²⁷ PROCEEDINGS IN COMMEMORATION OF THE 200TH ANNIVERSARY OF THE FIRST SESSION OF THE SUPREME COURT OF THE UNITED STATES, 493 U.S., at x (1990) [hereinafter PROCEEDINGS IN COMMEMORATION] (speech of Solicitor General Rex Lee).

²⁸ *Id.* at xii (quoting Joseph C. Robert, *The Hon. William Wirt: The Many-Sided Attorney General*, SUP. CT. HIST. SOC'Y Y.B. 51, 52 (1976)); see, e.g., Daniel A. Farber, Endnote, *The Story of McCulloch: Banking on National Power*, 20 CONST. COMMENT. 679, 692 (2003).

²⁹ PROCEEDINGS IN COMMEMORATION, *supra* note 27, at x. Randolph was also "the most active of [the Supreme] Court's early practitioners." *Id.*

³⁰ See William Reynolds II, Essay, *Luther Martin, Maryland and the Constitution*, 47 MD. L. REV. 291, 292 (1987).

³¹ SAMUEL TYLER, *MEMOIR OF ROGER BROOKE TANEY, LL.D.* 65 (Baltimore, John Murphy & Co. 1872).

Burr participated actively in his defense, and he was not just a brilliant lawyer but also the former Attorney General of New York.³²

Several advocates in *Burr* did not just know the new Constitution but had participated in its creation. Two had been delegates to the Constitutional Convention in Philadelphia.³³ Edmund Randolph had helped secure Virginia's ratification of the Constitution while serving as Governor of Virginia.³⁴ He also had served with James Madison and John Marshall on the Virginia committee that proposed a Bill of Rights for the U.S. Constitution that included a privilege against self-incrimination.³⁵ Randolph had been in close contact with Madison as he introduced in Congress the constitutional amendments that became the Bill of Rights.³⁶ Defense lawyer Luther Martin had served as a delegate to the Constitutional Convention and was "one of the leaders of the Anti-Federalist revolt that led to the ratification of the Bill of Rights."³⁷ These were stellar advocates intimately familiar with the new Constitution that they asked Chief Justice Marshall to interpret.

This Article reconstructs the *Burr* proceedings to shed light on the original public meaning of the Fifth Amendment privilege and its application to compelled decryption. It explores the legal materials in *Burr* in depth to understand how the privilege against self-incrimination was conceived and interpreted shortly after the Fifth Amendment's ratification in a case with striking similarity to modern-day facts. The rich materials on how the participants in a leading case understood the privilege provide unique insights that so far have gone unmined. Studying *Burr* answers open questions such as: What did lawyers with experience with the enactment of the Bill of Rights think the privilege meant? What sources did they examine to shed light on its meaning? How did

³² Burr had served as New York's Attorney General from 1789 to 1791. See NANCY ISENBERG, *FALLEN FOUNDER: THE LIFE OF AARON BURR* 104–06 (2007).

³³ The two were Edmund Randolph and Luther Martin. See generally JOHN J. REARDON, *EDMUND RANDOLPH: A BIOGRAPHY* 96–120 (1975); Reynolds, *supra* note 30, at 294–305.

³⁴ See REARDON, *supra* note 33, at 137–50 (detailing Randolph's role).

³⁵ JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 142 (1996). The privilege against self-incrimination included in their proposal stated that "in all criminal and capital prosecutions, a man . . . [cannot] be compelled to give evidence against himself." 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 658 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1888). In addition to Madison, Marshall, and Randolph, the committee members included Patrick Henry, George Mason, and James Monroe, among others. *Id.* at 656.

³⁶ For example, in Randolph's letter to Madison upon Madison's introducing the Bill of Rights, Randolph writes: "The amendments, proposed by you, are much approved by the *strong* federalists here and at the Metropolis; being considered as an anodyne to the discontented." "I am still in hopes to see reported from your mouth some review of the various amendments proposed, and reasons against the fitness of such, as appeared improper for adoption." Letter from Edmund Randolph to James Madison (June 30, 1789), NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-12-02-0169> [<https://perma.cc/9U4H-9AU8>].

³⁷ Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIR. REV. 1, 14 (2011); see also BILL KAUFFMAN, *FORGOTTEN FOUNDER, DRUNKEN PROPHET: THE LIFE OF LUTHER MARTIN* 36 (2008). See generally Reynolds, *supra* note 30.

the Chief Justice's opinion fit with that understanding? And specifically, how did they think the privilege applied to efforts to decipher encrypted letters?

Understanding *Burr* illuminates the original understanding of the privilege in two distinct ways. First, the lawyers' arguments can explain how the privilege was understood. The dispute over the Fifth Amendment was hotly contested and vigorously argued. The Founding-era experience of the lawyers, plus their celebrated legal talents, inspire confidence that they presented the best arguments for their sides based on the Framing-era understanding of the privilege. Understanding their common ground and the interpretive sources they relied on — all in a case specifically about access to encrypted documents — reveals a shared understanding of what the privilege meant. It's not the same as having a time machine, going back to 1791, and asking how the privilege should apply to unlocking an iPhone. But it's a lot closer than we would normally expect to get.

Second, Chief Justice Marshall's opinion can also yield originalist insights. The advocates in *Burr* could frame but not resolve the debate. In contrast, Chief Justice Marshall's opinion in *Burr* grapples thoughtfully and carefully with the issues. Granted, Marshall's specific reasoning in 1807 did not necessarily reflect settled understandings from 1791. The 1791 materials may not establish the precise answers that Marshall needed to provide. Nonetheless, Marshall's well-reasoned decision working with the arguments of counsel may be the closest we can come to understanding how the privilege would have been understood to apply to compelled decryption.³⁸

The Article offers three conclusions about how the original understanding of the Fifth Amendment applies to modern compelled decryption. First, the privilege ordinarily should not bar requiring a person to disclose a password to enable a search for digital evidence. Doing so will not normally be incriminating in the sense recognized in *Burr*.³⁹ Second, the opposite is typically true when the government searches for contraband. Password disclosure often will be incriminating in a contraband search case because it admits control of the encrypted file.⁴⁰ Finally, whether the privilege bars compelled entry of the password (as opposed to its disclosure) depends on a choice of analogy. If compelled entry is analogized to admitting knowledge of the password, the rules on compelled entry should mirror those for compelled disclosure. On the other hand, if compelled entry is analogized to compelled production, the Fifth Amendment may bar the act entirely.⁴¹

³⁸ See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 61–62 (2019) (discussing the originalist value of post-ratification understandings).

³⁹ See *infra* section V.B, pp. 952–57.

⁴⁰ See *infra* section V.C, pp. 957–60.

⁴¹ See *infra* section V.D, pp. 960–62.

The Article has five parts. Part I presents the facts and procedural history of the Fifth Amendment question in *Burr*. It starts by detailing the criminal charges considered against Aaron Burr. It then explores what we know of the encrypted letter and focuses on the government's strategy of authenticating and decrypting the letter using the testimony of Burr's secretary Charles Willie and his co-conspirator Erick Bollman. It concludes by discussing Willie's appearance in court, including the specific questions the government asked and how Willie asserted the privilege.

Part II details the legal authorities relied on by the lawyers in *Burr* to interpret the privilege against self-incrimination. Willie's assertion of privilege led to extensive argument. This section shows that all of the lawyers in *Burr* understood the Fifth Amendment privilege as the common law privilege from England. The lawyers all relied on the same basic sources to understand the privilege: an English evidence treatise, a handful of English cases primarily from the *State Trials* report, and American cases from 1799 and 1806 that had already interpreted the privilege.

Part III presents the arguments of counsel based on the authorities of Part II. It explains that the lawyers in *Burr* diverged on three questions. First, who determines when a valid privilege exists, the witness or the court? Second, how much evidence of a crime must an answer reveal for it to count as incriminating? And third, how did the test apply to the questions posed to Burr's secretary? This section details the arguments of both sides on all three questions.

Part IV details Chief Justice Marshall's opinion. It explains how he picked among the arguments of counsel, ultimately siding with the defense on the second question but with the government on the first and third questions. The section also uncovers a postscript to Marshall's ruling, when he briefly considered how the privilege might apply to compelling a different letter directly from Burr.

Part V draws originalist lessons from *Burr* for modern facts of compelled disclosure or entry of a password. Extrapolating from the *Burr* arguments and ruling, it concludes that compelled disclosure of a password should ordinarily be permitted when the government seeks evidence but not contraband. The rules for compelled entry of a password should depend on whether the facts are analogized to compelled disclosure of the password or compelled production of the files.

I. FACTS AND PROCEDURAL HISTORY

This Part explains the facts and procedural history of the *Burr* decision. It starts with the charges against Aaron Burr. It then introduces the role of ciphers and the disputed letter at the heart of the legal controversy. Next it discusses the Fifth Amendment arguments raised by Erick Bollman and the role of Burr's secretary, Charles Willie. The Part

concludes by detailing the questions the prosecution asked that Willie refused to answer.

A. *The Charges Against Aaron Burr*

Aaron Burr is probably best known today for the events portrayed in the blockbuster musical *Hamilton*.⁴² As *Hamilton* teaches, Burr and Alexander Hamilton were friends who became political rivals.⁴³ When the election of 1800 produced a tie between Burr and Thomas Jefferson, Hamilton supported Jefferson over Burr.⁴⁴ Jefferson became President, and Burr became Vice President. Burr challenged Hamilton to a duel. During the duel, Vice President Burr shot and killed Hamilton.⁴⁵

The criminal case against Burr related to what happened soon after, when Burr departed the Vice Presidency and became a private citizen. Burr devised plans to lead a small army to the American frontier.⁴⁶ Exactly what Burr planned to do with his army remains unclear.⁴⁷ Some believed that Burr planned to conquer land in the western United States and to become the leader of a new country there.⁴⁸ Burr claimed that he merely was traveling to Texas to farm land that the Spanish government had leased to him.⁴⁹ When President Jefferson learned of Burr's activities, however, Jefferson became convinced that Burr was planning to levy war against the United States.⁵⁰

President Jefferson ordered Burr's arrest for treason. Burr was arrested by the authorities in what is now Alabama in February 1807.⁵¹ Burr was brought to Richmond, Virginia, to face possible indictment and trial.⁵² The proceedings were held in Richmond because the launching point for his army was Blennerhassett's Island, a private island on the Ohio River.⁵³ In 1807, Blennerhassett's Island was part of Virginia,⁵⁴ and the entire state of Virginia was assigned to one federal

⁴² LIN-MANUEL MIRANDA, *HAMILTON: AN AMERICAN MUSICAL* (Atl. Recording Corp. 2015).

⁴³ See *The World Was Wide Enough*, on *HAMILTON*, *supra* note 42.

⁴⁴ See *The Election of 1800*, on *HAMILTON*, *supra* note 42.

⁴⁵ See *The World Was Wide Enough*, *supra* note 43.

⁴⁶ See, e.g., BUCKNER F. MELTON, JR., *AARON BURR: CONSPIRACY TO TREASON* 61 (2002).

⁴⁷ See generally *id.* at 55–80.

⁴⁸ This was the prosecution's theory. See *id.* at 203. See generally *id.* at 150–222.

⁴⁹ See *id.* at 61–62.

⁵⁰ 16 ANNALS OF CONG. 39–43 (1807) (documenting a message from President Thomas Jefferson to the Senate and House of Representatives of the United States dated January 22, 1807).

⁵¹ See JAMES E. LEWIS JR., *THE BURR CONSPIRACY: UNCOVERING THE STORY OF AN EARLY AMERICAN CRISIS* 272–73 (2017) (detailing Burr's arrest).

⁵² See *id.* at 291.

⁵³ See CHARLES F. HOBSON, *THE AARON BURR TREASON TRIAL* 4 (2006), <https://www.fjc.gov/sites/default/files/trials/burrtrial.pdf> [<https://perma.cc/Y2BD-RZFY>] (“Because Blennerhassett's Island lay inside Wood County, Virginia (now West Virginia), Burr's case fell within the jurisdiction” of the District of Virginia.).

⁵⁴ See *id.*

judicial district, the District of Virginia, with its nearest seat in Richmond.⁵⁵

Chief Justice Marshall presided over the proceedings because of the peculiarities of the Judiciary Act of 1802.⁵⁶ Under that law, federal criminal prosecutions were ordinarily held before a two-judge panel of a local federal district judge and a Supreme Court Justice riding circuit.⁵⁷ The Chief Justice was the designated circuit justice for the territory that included Virginia.⁵⁸ Because Burr was facing proceedings in Virginia, Chief Justice John Marshall presided and was joined by Virginia's sole district judge, Cyrus Griffin. As it turns out, Judge Griffin remained almost completely silent during the *Burr* proceedings.⁵⁹ As a practical matter, then, the case was held only before Chief Justice Marshall.

The government empaneled a grand jury in Richmond in May 1807 and asked them to consider two criminal charges against Burr.⁶⁰ The Fifth Amendment questions debated in *Burr* all occurred during the grand jury's assessment of the evidence before it indicted Aaron Burr. The first charge the grand jury considered, and by far the most serious, was the capital offense of treason against the United States.⁶¹ The Constitution states that treason against the United States "shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."⁶² The Crimes Act of 1790⁶³ enacted a treason offense that reflected this definition:

[I]f any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.⁶⁴

⁵⁵ See Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73 (creating the District of Virginia); *id.* § 3, at 74 (stating that the District Court of Virginia shall sit "in the district of Virginia, alternately at Richmond and Williamsburgh").

⁵⁶ Ch. 31, 2 Stat. 156.

⁵⁷ See HOBSON, *supra* note 53, at 9.

⁵⁸ See § 4, 2 Stat. at 157–58 ("The districts of Virginia and North Carolina shall constitute the fifth circuit In the fifth circuit, the circuit court shall consist of the present chief justice of the supreme court, and the district judge of the district where such court shall be holden").

⁵⁹ See NEWMYER, *supra* note 24, at 108 (describing Judge Griffin as a "silent partner on the bench"). Judge Griffin spoke only two times during the proceedings: the first was to say only that the facts of an earlier case that he had ruled on were not as counsel had stated, and the second was to clarify the issue in another earlier case. See 1 BURR'S TR. 209, 370 (statements of Griffin, J.).

⁶⁰ See 1 BURR'S TR. 31 (convening the grand jury on May 22, 1807).

⁶¹ See *id.* at 4 (statement of Hay) (discussing treason liability).

⁶² U.S. CONST. art III, § 3.

⁶³ Ch. 9, 1 Stat. 112.

⁶⁴ *Id.* § 1, 1 Stat. at 112.

The Crimes Act also enacted the crime of misprision of treason, which punished a person who, “having knowledge” of a treason, concealed and did “not as soon as may be disclose and make known the same to the President of the United States” or some other designated official.⁶⁵

The second charge sought against Burr was for violating the Neutrality Act of 1794.⁶⁶ The Neutrality Act was designed to prevent U.S. citizens from becoming embroiled in foreign wars.⁶⁷ The relevant section of the Act still exists today in only slightly modified form.⁶⁸ As it existed at the time of *Burr*, the law punished those who, within the “territory or jurisdiction of the United States[,] begin or set on foot or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace.”⁶⁹ Violations could lead to a maximum punishment of three years in prison.⁷⁰

B. The Role of Ciphers and the Disputed Letter

We now turn to the encrypted letter. Some context is useful. In the late eighteenth and early nineteenth centuries, it was common for American statesmen to send and receive sensitive communications using the encryption method known as ciphers.⁷¹ A cipher is “a method of transforming a text in order to conceal its meaning.”⁷² Many ciphers work by replacing a letter or word with a different letter or a symbol using a master code chart known as a cipher alphabet.⁷³

Ciphers were often used in diplomatic or other sensitive communications in the eighteenth and nineteenth centuries in light of the insecurity of postal letters.⁷⁴ To ensure the privacy of written communications, two communicants would agree on a way to encode parts or all of their

⁶⁵ *Id.* § 2, 1 Stat. at 112. The punishment for misprision of treason was up to seven years imprisonment and up to a \$1,000 fine. *See id.*

⁶⁶ Ch. 50, 1 Stat. 381; *see id.* § 5, 1 Stat. at 384; *see also* 1 BURR’S TR. 4 (statement of Hay) (stating that “the first offence” sought against Burr was “a violation of the fifth section of an act of congress, passed on the 5th of June, 1794”).

⁶⁷ *See* United States v. Yasith Chhun, 513 F. Supp. 2d 1179, 1182–83 (C.D. Cal. 2007) (summarizing the Neutrality Act).

⁶⁸ *See* 18 U.S.C. § 960.

⁶⁹ § 5, 1 Stat. at 384; *see also* 1 BURR’S TR. 4 (quoting statute).

⁷⁰ § 5, 1 Stat. at 384.

⁷¹ *See generally* RALPH E. WEBER, UNITED STATES DIPLOMATIC CODES AND CIPHERS, 1775–1938, at 22–191 (1979) (discussing the cipher systems used by American diplomats and statesmen in the period).

⁷² *Cipher*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cipher> [<https://perma.cc/Y7QF-NCCC>].

⁷³ *See* JOHN F. DOOLEY, HISTORY OF CRYPTOGRAPHY AND CRYPTANALYSIS: CODES, CIPHERS, AND THEIR ALGORITHMS § 1.4, at 8 (2018).

⁷⁴ *See* WEBER, *supra* note 71, at 97–98.

communications using various symbols or keys.⁷⁵ The sender would use the cipher alphabet to write the letter, and the recipient would use the same cipher alphabet in reverse to read it.⁷⁶

Framing-era history is replete with examples of statesmen using ciphers. Thomas Jefferson was a particularly skilled cryptographer who invented several innovative ciphers.⁷⁷ Leading figures such as Jefferson, George Washington, John Adams, James Monroe, James Madison, John Jay, and Benjamin Franklin regularly used ciphers in their letters.⁷⁸ One of Burr's defense lawyers, Edmund Randolph, used ciphers to communicate with James Madison and Thomas Jefferson during the Revolutionary War.⁷⁹

Aaron Burr was no exception. In fact, Burr had used ciphers for decades before he led his expedition. Burr frequently wrote ciphered letters to his sister while still a college student at Princeton.⁸⁰ Much of Burr's correspondence with his best friend was in cipher.⁸¹ Writing a letter in cipher "was a habit which he had adopted and pursued for thirty years preceding" his alleged conspiracy.⁸² It was thus no surprise that evidence in *United States v. Burr* derived in part from a series of letters written in cipher that Burr had sent to his claimed co-conspirators.⁸³

The Fifth Amendment issues in *Burr* involved just one of the letters. The disputed letter was thought to have been dictated or written, at least in its original form, by Burr himself.⁸⁴ The letter was addressed to "Henry Wilbourn,"⁸⁵ a name that the prosecution believed was an alias for co-conspirator Dr. Erick Bollman.⁸⁶ Bollman had been arrested for treason in 1806 for his role in the Burr plot.⁸⁷ By the time of the

⁷⁵ See *id.* at 4–5.

⁷⁶ See *id.*

⁷⁷ See, e.g., DAVID KAHN, *THE CODEBREAKERS* 184–85, 192–94 (1966).

⁷⁸ See John A. Fraser III, *The Use of Encrypted, Coded and Secret Communications Is an "Ancient Liberty" Protected by the United States Constitution*, 2 VA. J.L. & TECH. 2, ¶¶ 22–40 (1997).

⁷⁹ See WEBER, *supra* note 71, at 88–89, 95–97, 101.

⁸⁰ 1 MATTHEW L. DAVIS, *MEMOIRS OF AARON BURR* 44 (New York, Harper & Bros. 1836).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *id.* at 43–44.

⁸⁴ 1 BURR'S TR. 206 (statement of Hay).

⁸⁵ *Id.* (statement of Hay) (stating that the letter "is addressed to Henry Wilbourn *alias* Erick Bollman"). Elsewhere Robertson refers to the letter as having been addressed to "Winbourn" or "Winburn," instead of Wilbourn. See *id.* at 227 (statements of Hay and Wilkinson) ("Winburn"); *id.* at 330 (referring to the grand jury returning "a cyphered letter, addressed to H. Winbourn").

⁸⁶ *Id.* at 206 (statement of Hay). Bollman is today best known for the Supreme Court decision on habeas corpus that bears his name. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (opinion of Marshall, C.J.).

⁸⁷ See *Bollman*, 8 U.S. (4 Cranch) at 75.

grand jury proceedings, however, Bollman had confessed his full involvement to the government.⁸⁸

There was considerable dispute in the *Burr* proceedings about how the prosecution obtained the letter. Burr's counsel contended that the government stole it illegally from the postal mail.⁸⁹ According to counsel, the theft was an unreasonable seizure that violated Burr's Fourth Amendment rights and justified the letter's suppression.⁹⁰ The government denied the accusation.⁹¹ The prosecution eventually produced a letter from the government's chief witness, General James Wilkinson, claiming that a lawyer in New Orleans had given the letter to him.⁹² Chief Justice Marshall never resolved this dispute, possibly because it was unclear that the Fourth Amendment of the day provided a remedy for the allegedly unlawful seizure.⁹³

What the Wilbourn letter looked like remains unclear. We can get a rough sense of what the letter probably looked like, however, by examining a different ciphered letter attributed to Burr. Here is an image of the most famous letter from the *Burr* trial, the so-called "treason letter" that Burr allegedly wrote to Wilkinson, together with a cipher alphabet that Wilkinson provided⁹⁴:

⁸⁸ See 1 BURR'S TR. 190 (statement of Hay) (noting that Bollman "has made a full communication to the government of the plans, the designs, and views of Aaron Burr").

⁸⁹ *Id.* at 207 (statement of Botts); *id.* at 213–14 (statement of Botts).

⁹⁰ See *id.* The transcript incorrectly refers to the right to be free from unreasonable searches and seizures as guaranteed under the Eighth Amendment. See *id.* at 207.

⁹¹ *Id.* at 217–18 (statement of Mac Rae) (dismissing Burr's accusation as "all conjecture," *id.* at 217, and claiming that the evidence "repels their insinuations," *id.* at 218).

⁹² *Id.* at 227.

⁹³ *Id.* at 235 (statement of Marshall, C.J.) ("Unless these allegations affected some testimony that was about to be delivered, how can you introduce this subject?").

The letter was apparently "annexed" to an affidavit obtained from a Judge Toulmin, *id.* at 205, 216, who was a federal judge in the Mississippi territory at the time, see *Harry Toulmin*, in 18 DICTIONARY OF AMERICAN BIOGRAPHY 601–02 (Dumas Malone ed., 1936). Defense counsel suggested that Wilkinson took depositions of witnesses "ex parte at the point of the bayonet." See 1 BURR'S TR. 241 (statement of Wickham). Further, there is some discussion in the proceedings that Willie had already stated, perhaps in his affidavit, that he did not understand the cipher in the letter. See *id.* at 208 (statement of Wirt) (referring to statements of Willie made in a "deposition"). However, the affidavit was separated from the letter early in the discussion of Willie's testimony at the request of defense counsel. See *id.* at 205. The affidavit apparently was never read or used as evidence.

⁹⁴ Figure 1 is provided courtesy of the Newberry Library, Chicago (VAULT folio Graff 503). Figure 2 is reprinted from the REPORT OF THE COMMITTEE APPOINTED TO INQUIRE INTO THE CONDUCT OF GENERAL WILKINSON (Feb. 26, 1811), and is provided courtesy of the American Antiquarian Society. For a detailed look at the ciphers Burr and Wilkinson used, see WILLIAM H. SAFFORD, THE LIFE OF HARMAN BLENNERHASSETT 214–17 (Cincinnati, Moore, Anderson, Wilstach & Keys 1853).

C. *Bollman's Initial Assertion of the Fifth Amendment Privilege*

This brings us to the grand jury's effort to understand the Wilbourn letter and the Fifth Amendment issues it raised. The *Burr* grand jury consisted of leading Virginia politicians, lawyers, and other prominent citizens, and it played an active role in considering the charges.⁹⁸ During the grand jury's consideration of whether and how to charge Burr, the grand jury wished to see the letter and learn its contents to understand Burr's plot. The government believed that Burr had written the Wilbourn letter but that Burr's private secretary, Charles Willie, had copied it.⁹⁹ The government suspected that the copied letter was then forwarded to Burr's co-conspirator Bollman. The grand jury therefore had two ways to understand the letter: through testimony from Bollman and through testimony from Willie.

As noted earlier, Chief Justice Marshall's legal opinion in *Burr* focused on Willie's claim to Fifth Amendment privilege. But it is worth flagging that Bollman raised his own self-incrimination challenge just two days before Willie's objections.¹⁰⁰ Bollman had cooperated with the government after his arrest, making "a full communication to the government of the plans, the designs, and views of Aaron Burr."¹⁰¹ The government wanted Bollman to testify about what he knew before the grand jury, which presumably would include testifying about the contents of the Wilbourn letter. Because Bollman's testimony "might criminate" him "before the grand jury," President Jefferson had sent a pardon that the prosecution offered to Bollman.¹⁰²

But there was a catch. In open court, Bollman refused to accept President Jefferson's pardon.¹⁰³ Bollman's refusal prompted a Fifth Amendment question. Did a pardon that was offered but not accepted have legal effect, such that Bollman could be compelled to testify without a risk of self-incrimination? The prosecution argued it did. The offered pardon had "completely exonerate[d]" Bollman "from all the

⁹⁸ See MELTON, *supra* note 46, at 173 (describing the grand jurors as a "Who's Who of Virginia" that included "members of the federal Senate and House, congressional hopefuls, [and] other leading citizens"); *cf.* 1 BURR'S TR. 204 (statement of Hay) ("There are several good lawyers on the grand jury.").

⁹⁹ 1 BURR'S TR. 206 (statement of Hay) (stating that the letter "is all in the hand writing of Mr. Willie").

¹⁰⁰ Compare *id.* at 175, 190–91 (Bollman raising challenge on June 13th, 1807), with *id.* at 197, 208 (Willie raising challenge on June 15th, 1807).

¹⁰¹ *Id.* at 190 (statement of Hay).

¹⁰² *Id.* at 191 (statement of Hay).

¹⁰³ When asked if he would accept the pardon, Bollman responded: "No. I will not, sir." *Id.* (statement of Bollman).

penalties of the law," the prosecution argued, so that Bollman "cannot possibly criminate himself."¹⁰⁴

Bollman's counsel responded with a detailed argument for why Bollman had retained his Fifth Amendment privilege.¹⁰⁵ Parts of the argument were similar to the claims raised soon after by Willie, which we will study in detail below.¹⁰⁶ But Bollman's counsel also argued that a refused pardon was no pardon at all, and that President Jefferson's pardon was procedurally improper.¹⁰⁷ Burr's counsel joined in with additional authorities in support of Bollman's claim that he retained his privilege despite the offered pardon.¹⁰⁸

Chief Justice Marshall did not enter a ruling on Bollman's privilege. The court instead allowed Bollman to be sent to the grand jury to testify without a ruling, reserving "for future discussion and decision" the question of "how far he may be called upon to disclose all that he knows."¹⁰⁹ Bollman later decided to testify voluntarily before the grand jury without asserting his privilege,¹¹⁰ obviating the need for a ruling on the matter from Chief Justice Marshall.¹¹¹

D. *The Prosecution's Initial Questioning of Willie*

That brings us, finally, to the role of Charles Willie. Willie was a "young German" whom Burr had hired in New York as his private secretary.¹¹² Willie had traveled with Burr down the Mississippi River.¹¹³ Like Burr, Willie had been arrested down south and was then forcibly brought to Richmond for the Burr proceedings.¹¹⁴ The government believed that the copy of the letter that it had seized was in Willie's

¹⁰⁴ *Id.* (statement of Hay); *see also id.* at 195 (statement of Hay) ("I consider Dr. Bollman a pardoned man . . .").

¹⁰⁵ *See id.* at 193–94 (statement of Williams).

¹⁰⁶ *See infra* Part III, pp. 935–41. The similar arguments may reflect the likelihood that Bollman and Willie were represented by the same lawyer. Robertson refers to counsel for Bollman and Willie both as "Mr. Williams," raising the possibility that one lawyer named Williams represented both men several days apart. *Compare* 1 BURR'S TR. 193 (discussing the argument of "Mr. Williams, counsel for Mr. Bollman"), *with id.* at 215 (discussing the argument of "Mr. Williams, counsel for Mr. Willie").

¹⁰⁷ *See* 1 BURR'S TR. 194 (statement of Williams).

¹⁰⁸ *See id.* at 194–95 (statement of Martin).

¹⁰⁹ *Id.* at 196.

¹¹⁰ Bollman later wrote: "[B]efore the grand jury, during an examination of upward of two hours, I answered, *without a single exception, every question that was asked me.*" 2 DAVIS, *supra* note 80, at 391 (statement of Bollman).

¹¹¹ *See* *Brown v. Walker*, 161 U.S. 591, 613 (1896) (Shiras, J., dissenting) ("Nor does it appear that [Chief Justice Marshall] made any decision — probably because Dr. Bollman went voluntarily before the grand jury and testified.")

¹¹² Abernethy, *supra* note 97, at 17–18.

¹¹³ *Id.* at 18.

¹¹⁴ 1 BURR'S TR. 213 (statements of Botts) (detailing Willie's arrest and transfer to Richmond).

handwriting.¹¹⁵ With Bollman expected to testify voluntarily, the grand jury hoped that Bollman would decrypt the letter if he could.¹¹⁶ Willie's testimony was sought primarily to authenticate the letter and perhaps to shed light on its contents.¹¹⁷ Willie was brought into court two days after Bollman raised his Fifth Amendment challenge.¹¹⁸

The prosecution's questioning of Willie addressed whether Willie had copied the letter and whether he understood its contents. Willie forthrightly refused to answer the government's questions and asserted his privilege against self-incrimination. The prosecutor's first question was direct: "Did you copy this paper?"¹¹⁹ Willie's counsel objected that an answer could incriminate him.¹²⁰ The prosecutor agreed to reformulate the question and then asked Willie: "Do you understand the contents of that paper?"¹²¹ Willie's counsel stated that Willie again objected to answering.¹²² Counsel explained Willie's objection: "He says, that though that question may be an innocent one, yet the counsel for the prosecution might go on gradually, from one question to another, until he at last obtained matter enough to criminate him."¹²³

The prosecutor responded that he had not asked Willie to testify about the contents of the letter. If he had asked *that* question, the prosecutor stated, the government "might then propound a question to which [Willie] might object."¹²⁴ But merely asking Willie if he understood the contents could not be incriminating, the prosecutor insisted.¹²⁵

At this point counsel for Burr interjected. Asking Willie if he understood the contents of the letter was incriminating, Burr's counsel argued, because Congress had enacted the crime of misprision of treason.¹²⁶ That crime punished "knowledge of the treason, and concealment of it."¹²⁷ According to Burr's counsel, this made it improper to ask Willie if he understood the letter. If the letter contained treasonous content, forcing Willie to testify now that he understood it would establish part

¹¹⁵ *Id.* at 206 (statement of Hay).

¹¹⁶ *Id.* at 205 (statement of Hay).

¹¹⁷ *Id.* (statement of Hay) ("Mr. Willie, the reputed secretary of Mr. Burr, would prove the identity of the paper . . ."); *id.* at 225 (statement of Wirt) ("[T]he only way to authenticate this letter is by the evidence of this witness").

¹¹⁸ *See id.* at 175, 197.

¹¹⁹ *Id.* at 207 (statement of Mac Rae).

¹²⁰ *Id.* (statement of Williams) (stating that "if any paper he has written have any effect on any other person, it will as much affect himself").

¹²¹ *Id.* at 208 (statement of Mac Rae).

¹²² *Id.* (statement of Williams).

¹²³ *Id.* (statement of Williams).

¹²⁴ *Id.* (statement of Mac Rae) ("My question is not, 'Do you understand this letter, and *then* what are its contents?' If I pursued this course, I might then propound a question to which he might object; but unless I take that course, how can he be criminated?").

¹²⁵ *Id.* (statement of Mac Rae).

¹²⁶ *Id.* (statement of Botts).

¹²⁷ *Id.* (statement of Botts).

of the crime of misprision of treason by showing that he knew of the treason but concealed it.¹²⁸ Knowledge of the letter's contents was not a crime in isolation, but "other elements of the crime" could be "gradually unfolded" by the prosecution "so as to implicate" Willie.¹²⁹

The parties and Chief Justice Marshall went back and forth pondering the proper question, if any, that the government could ask Willie.¹³⁰ The Chief Justice then stated that he wished to consider the question the next day.¹³¹ "Burr's counsel promised to produce their authorities" in support of their view that "Willie could not be compelled to answer such questions."¹³² The case was adjourned until the next day when the parties debated the legal authorities in detail.¹³³

II. THE LEGAL AUTHORITIES

The *Burr* case is particularly illuminating because Robertson's report of the proceedings includes precise citations to the authorities that the lawyers invoked and debated in their arguments to the court. This Part presents an overview of the primary legal authorities the attorneys cited. Its goal is to understand how the lawyers in *Burr* understood the privilege against self-incrimination. These lawyers were among the finest of their era, and we can study the sources the lawyers cited to see how lawyers soon after ratification construed the privilege. What did they think the privilege meant? What sources of law did the lawyers consider legitimate to argue over its meaning?

Although the lawyers relied on a range of treatises and cases, they discussed three sources repeatedly and at length. The first source was an English treatise on evidence law, Leonard MacNally's *Rules of Evidence on Pleas of the Crown*.¹³⁴ The second source was cases from *State Trials*, a leading collection of criminal case reports from England.¹³⁵ The third source was the sparse existing American circuit court caselaw on the privilege against self-incrimination.¹³⁶ An overview of these sources, together with an initial assessment of their relative significance to the original public meaning of the Fifth Amendment, offers critical framing for the legal arguments the lawyers made.

¹²⁸ *Id.* (statement of Botts) (stating that the government could help to prove knowledge of a treason by showing that Willie "must have seen and understood the treasonable matter").

¹²⁹ *Id.* (statement of Botts).

¹³⁰ *See id.* at 208–09.

¹³¹ *Id.* at 209 (statement of Marshall, C.J.).

¹³² *Id.*

¹³³ *See id.* at 209–27.

¹³⁴ *See infra* section II.A, pp. 925–29.

¹³⁵ *See infra* section II.B, pp. 930–33.

¹³⁶ *See infra* section II.C, pp. 933–35.

Two lessons emerge. The first lesson is that all counsel involved understood the Fifth Amendment privilege against self-incrimination as the common law privilege against self-incrimination. A common law privilege had appeared in some English caselaw going back to the seventeenth century, and it was recognized in the leading English treatise, William Hawkins's *Pleas of the Crown*, published in relevant part in 1721.¹³⁷ All sides of the *Burr* case — the government, the defense, and the witness alike — treated the privilege as merely the English common law brought to a new shore.¹³⁸ Pre-Revolution English cases and English common law treatises were treated as authoritative. Only post-Revolution English authorities and preexisting American decisions were singled out by counsel for their uncertain precedential value.¹³⁹

The second lesson is that the sources of law that defined the privilege were a fairly specific set of treatises and cases. A handful of mostly seventeenth-century English rulings were recognized by the various authorities as the leading cases. Hawkins's 1721 statement about the privilege was copied by later materials. The lawyers disagreed at times about how to rely on post-Revolutionary War English materials and on early American cases.¹⁴⁰ But, for the most part, the privilege was understood to reflect a very small number of specific cases and summaries of those cases from treatises.

A. *The First Source of Law: MacNally's Treatise*

Perhaps the most frequently discussed source was a treatise on English evidence law, *The Rules of Evidence on Pleas of the Crown*, written by a Dublin lawyer, Leonard MacNally.¹⁴¹ The phrase "Pleas of the Crown" in English law essentially means major criminal laws and criminal proceedings — that is, causes of action brought by the King or

¹³⁷ See *infra* p. 926 and note 149.

¹³⁸ See 1 BURR'S TR. 215 (statement of Williams); *id.* at 217 (statement of Martin); *id.* at 220 (statement of Hay).

¹³⁹ See *id.* at 231 (statement of Martin) (The English case of *King v. Edwards* (1791) 100 Eng. Rep. 1108; 4 T.R. 440, discussed *infra* pp. 905–06, "was a decision in the year 1791, since the revolution. It may be no authority. We do not know, whether our courts of justice will adopt this law-rule or not."); *id.* at 229 (statement of Martin) (arguing that the 1806 case of *United States v. Smith & Ogden*, discussed *infra* pp. 911–12, "was wrong," and that the prosecution's failure to ask the court to enforce its ruling suggested that even the prosecution "thought [the ruling] erroneous or doubtful"). The reliance on the English common law raises the question of whether the lawyers in *Burr* understood that they were interpreting a distinct Fifth Amendment privilege. This possibility is discussed *infra* section V.A.1, pp. 948–50.

¹⁴⁰ See *infra* p. 941.

¹⁴¹ 1 LEONARD MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* (London, J. Butterworth & Dublin, J. Cooke 1802), <https://books.google.com/books?id=P4coAAAAIAAJ> [<https://perma.cc/X4JG-KM5EJ>].

Queen.¹⁴² The MacNally treatise therefore explained the rules of evidence that applied in major English criminal cases. The treatise was first published in London and Dublin in 1802, and it was republished in Philadelphia in identical form in 1804.¹⁴³

Although MacNally's treatise was published eleven years after the Fifth Amendment's ratification, the relevant cases and authorities from the treatise that the lawyers discussed predated the ratification of the Fifth Amendment.¹⁴⁴ Indeed, as we will see later, the evidence suggests that the cases and authorities MacNally discussed were already understood as the major materials on the privilege well before 1791.¹⁴⁵ MacNally took the recognized authorities and packaged them in a brief section that made the materials easy to find and understand.

Many of the citations to MacNally were to a short section, just over two pages long, specifically detailing the common law privilege against self-incrimination.¹⁴⁶ The section opens with this general rule: "A witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime."¹⁴⁷ MacNally cites as support the famous criminal law treatise by William Hawkins, *Pleas of the Crown*.¹⁴⁸ A comparison of the MacNally and Hawkins treatises shows that MacNally's statement of the rule simply quoted Hawkins's statement verbatim.¹⁴⁹ During the debate, the *Burr* attorneys also cited to Hawkins directly.¹⁵⁰

¹⁴² See generally *Crown Case*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "crown case" as a "criminal action" in English law).

¹⁴³ See 1 LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN (Philadelphia, P. Byrne 1804). I have consulted both editions, and I found them identical except with respect to the title page (in which they state different publishers and publication dates) and the typeface.

¹⁴⁴ One case was close: *King v. Edwards* was decided November 17, 1791, about a month before the December 15, 1791 ratification of the Fifth Amendment. As a practical matter, *Edwards* was a case after ratification, as it would have taken over a month for the news of the case to reach the colonies — and even then, it would at best have reached the colonies on the eve of ratification from the last state. Notably, the lawyers in *Burr* questioned whether *Edwards* was valid precedent given its late date. See 1 BURR'S TR. 231.

¹⁴⁵ See the extensive discussion *infra* pp. 909–10.

¹⁴⁶ 1 BURR'S TR. 220 (statement of Hay); *id.* at 230–31 (statement of Martin); see MACNALLY, *supra* note 141, at 256–58.

¹⁴⁷ MACNALLY, *supra* note 141, at 256 (capitalization omitted).

¹⁴⁸ *Id.*

¹⁴⁹ See *id.*; 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 609 (Dublin, Eliz. Lynch, 6th ed. 1788) [hereinafter HAWKINS (6th ed.)]. The only difference is that MacNally adds a comma after the word "question." The language from Hawkins first appeared when Volume 2 of the first edition of his treatise was published in 1721. See 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 433 (London, Eliz. Nutt, 1st ed. 1721) [hereinafter HAWKINS (1st ed.)]. The language appeared essentially unchanged through the various versions of Hawkins in the eighteenth century, changing only the word "Witnesses" to "A witness." See *id.* at 433; 2 HAWKINS (6th ed.), *supra*, at 609; see also *infra* note 196 (discussing sources cited by Hawkins in support of this rule).

¹⁵⁰ 1 BURR'S TR. 224 (statement of Wirt) ("It is laid down in *Hawkins*, 609, book 2, chap. 46, sect. 20. that 'it is a general rule, that a witness shall not be asked any question, the answering of

MacNally next discusses five cases that embodied the rule.¹⁵¹ The first two cases briefly set out the basic privilege and considered how it applied to witnesses testifying following a pardon by the King. In *Trial of Nathaniel Reading*, from 1679,¹⁵² the court had advised the defendant that he could not ask the witness a question “to make him accuse himself.”¹⁵³ And because the witnesses had been pardoned, “he should not be called upon to calumniate himself.”¹⁵⁴ The second case was *In re Earl of Shaftesbury*, from 1681, in which it was established that the King’s pardon puts a witness “in *statu quo*, and he is not to defame or accuse himself.”¹⁵⁵

The remaining three cases dealt with how the privilege applied to witnesses asked about Catholicism. This may seem strange to modern ears. But it is explained by the intense hatred of Catholics that was the norm in seventeenth- and eighteenth-century England.¹⁵⁶ It was widely believed that Catholics were disloyal subjects. For example, from 1678 to 1681, during the Popish Plot hysteria, it was widely (but falsely) believed that Catholics were planning to murder the Protestant King.¹⁵⁷

which might oblige him to accuse himself of a crime.”); *id.* at 220 (statement of Hay) (“The great rule of law, of which the cases cited are illustrations, is *this*, that a witness is not to give evidence to accuse himself of a crime, 1 *Mac Nally*, 256. *Hawk.* 609.”).

¹⁵¹ MACNALLY, *supra* note 141, at 256–58.

¹⁵² Citations in MacNally’s treatise can confuse the modern reader because they follow an unfamiliar format. The practice there is to state the case name, the court and session, and then the year both in terms of the king’s reign and the Roman calendar. At the end of the discussion, MacNally then provides the citation to pincites in the reporter. For example, in the case of *Reading*, MacNally first cites as follows: “King v. Nathaniel Reading, *Commission of Oyer and Terminer*, 31 *Car.* 2 for a misdemeanour, 1697.” *Id.* at 256. At the end he provides a citation to “2 *St. Tr.* 822, 1035.” *Id.* The first cite begins with the court session, *Commission of Oyer and Terminer*, which was a commission authorizing an English judge to hear criminal cases at the assizes. *Commission of Oyer and Terminer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/commission%20of%20oyer%20and%20terminer> [https://perma.cc/HG6U-P6KR]. “31 *Car.* 2” means the decision was in the 31st year of the reign of Charles II, who began his reign on January 30, 1649. See SWEET & MAXWELL’S GUIDE TO LAW REPORTS AND STATUTES 29–30 (4th ed. 1962). This places the year at 1679 — not, as MacNally wrongly transposes, 1697. Finally, “2 *St. Tr.* 822, 1035” are pincites to the relevant discussion in Volume 2 of Hargrave’s edition of *State Trials*, although only the first, to page 822, is to *Reading*. See 2 FRANCIS HARGRAVE, A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS 822, 1035 (London, T. Wright, 4th ed. 1776–81).

¹⁵³ MACNALLY, *supra* note 141, at 256 (citing *Reading*, 2 *St. Tr.* at 822). The actual language from *Reading* was that the pardon “doth so far set him right, that you shall not make him calumniate himself.” *Reading*, 2 *St. Tr.* at 822 (Hargrave’s Edition) (statement of North, L.C.J.).

¹⁵⁴ MACNALLY, *supra* note 141, at 256 (citing *Reading*, 2 *St. Tr.* at 822).

¹⁵⁵ *Id.* (citing *Shaftesbury*, 3 *St. Tr.* at 439). Consulting the original version of *State Trials* suggests that MacNally’s summary combines the Lord Chief Justice North’s comment with the comment of Papillon. See *Shaftesbury*, 3 *St. Tr.* at 439 (Hargrave’s Edition). But the slight discrepancy makes no difference for the relevant issues in *Burr*.

¹⁵⁶ See generally ARTHUR F. MAROTTI, RELIGIOUS IDEOLOGY AND CULTURAL FANTASY: CATHOLIC AND ANTI-CATHOLIC DISCOURSES IN EARLY MODERN ENGLAND (2005).

¹⁵⁷ See generally JOHN KENYON, THE POPISH PLOT (1972).

A large body of English law expressly discriminated against Catholics, imposing a range of criminal and civil penalties.¹⁵⁸ In that context, questioning a witness about whether he was Catholic or had associated with Catholics or Jesuits could be damning.

MacNally discusses three cases that considered how the privilege against self-incrimination applied to those questions. The first was *Trial of Titus Oates*, a 1685 perjury prosecution against the man behind the Popish Plot.¹⁵⁹ The defendant Oates had tried to ask a Catholic witness what business he had at the location of a Jesuit college, and whether his house there was “governed by priests and jesuits.”¹⁶⁰ The question was impermissible, the judge ruled, “because it might make the witness obnoxious to some penalty, and no man is to be made liable to punishment by ensnaring questions.”¹⁶¹

The next two cases were similar. In *Trial of John Friend*, from 1695, the government objected to the defendant’s asking a witness whether he was Catholic.¹⁶² The court ruled that the question was improper because answering “may subject him to several penalties,” including “prosecution upon several acts of parliament that are very penal.”¹⁶³ Because “no man is bound to answer any question that tends to make him accuse himself,” the witness was “not obliged to answer” the question.¹⁶⁴ Finally, in *Annesley v. Anglesey*, from 1743, counsel for the defendant asked a Catholic witness to identify his profession.¹⁶⁵ The court informed the witness that he did not need to answer the question if he thought it would incriminate him.¹⁶⁶

MacNally followed this discussion of the first rule on self-incrimination with a brief corollary: A person who had been punished for an infamous crime could be required to testify about his punishment. MacNally discussed one case in support of this rule, *King v. Edwards*,¹⁶⁷ from 1791, which it turns out was decided about a month before the

¹⁵⁸ No less an authority than William Blackstone justified the laws as needed to account for the Catholic threat. See 5 WILLIAM BLACKSTONE, COMMENTARIES *54–59 (“The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and perhaps necessary, severity.” *Id.* at *57.).

¹⁵⁹ MACNALLY, *supra* note 141, at 256–57 (citing *Oates*, 4 St. Tr. at 9, 10).

¹⁶⁰ *Id.* at 257.

¹⁶¹ *Id.* at 256.

¹⁶² *Id.* at 257 (citing *Friend*, 4 St. Tr. at 605, 606).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 257–58.

¹⁶⁶ *Id.* at 258. The exchange is recounted in full in *The Annesley Case*. THE ANNESLEY CASE 245 (Andrew Lang ed., 1912).

¹⁶⁷ (1791) 100 Eng. Rep. 1108; 4 T.R. 440.

ratification of the Fifth Amendment.¹⁶⁸ In *Edwards*, a defendant seeking to be released on bail asked the bailor if he had been punished for perjury.¹⁶⁹ The court ruled that the question was proper because the answer “could not subject him to any punishment.”¹⁷⁰

One intriguing aspect of MacNally’s treatise from today’s perspective is how unfamiliar its common law rules of evidence appear to the modern reader. Modern evidence law broadly allows testimony but then tests it with cross-examination.¹⁷¹ MacNally reflects the common law world in which there were significant limits on who could serve as a witness at all.¹⁷² The first page of his treatise provides a definition of “witness” quite different from our modern understanding:

Witness . . . is one that gives evidence in a cause; an indifferent person to each party, sworn to speak the truth, the whole truth, and nothing but the truth: and if he will be a gainer or loser by the suit, he is then incompetent and cannot be sworn as a witness; for the term witness includes *competence*, though it does not include *credit*.¹⁷³

Under this common law framework, a criminal defendant could not be a witness.¹⁷⁴ Indeed, the notion of sworn defendant testimony would not emerge until late in the nineteenth century.¹⁷⁵ MacNally’s treatise details the common law procedure under the Marian committal statute for a magistrate taking a prisoner’s confession: The prisoner would be questioned and any statement was admissible against him at trial so long as the statement was deemed voluntary,¹⁷⁶ although the confession had to be unsworn.¹⁷⁷

This common law context explains why MacNally’s treatment of the privilege of self-incrimination concerned the questioning of nonparties who might be asked questions that could incriminate them. They, not defendants, were the witnesses. This dynamic also helps to explain the strange procedural posture of the cases MacNally covers. The cases mostly involved judicial blocking of questioning by the defendant or defendant’s counsel of third-party witnesses, often on the government’s objection.

¹⁶⁸ See *supra* note 144.

¹⁶⁹ MACNALLY, *supra* note 141, at 258.

¹⁷⁰ *Id.*

¹⁷¹ See Witt, *supra* note 16, at 860–61. Professor John Langbein calls this the “testing the prosecution” theory of the criminal trial that arose with the arrival of defense counsel. Langbein, *supra* note 16, at 1048.

¹⁷² See generally Witt, *supra* note 16, at 849–59.

¹⁷³ MACNALLY, *supra* note 141, at 1.

¹⁷⁴ Witt, *supra* note 16, at 835; see also MACNALLY, *supra* note 141, at 47.

¹⁷⁵ See Langbein, *supra* note 16, at 1055.

¹⁷⁶ See MACNALLY, *supra* note 141, at 37–42; see also Langbein, *supra* note 16, at 1059–60.

¹⁷⁷ See MACNALLY, *supra* note 141, at 47 (“The confession of a prisoner taken upon *oath*, cannot be read in evidence against him. Of course, no prisoner brought before a magistrate ought to be sworn.” (citation omitted)).

B. The Second Source of Law: The State Trials Cases

The second source of authority for the counsel in *Burr* was English cases from *State Trials*. *State Trials* was a series of English reports about major criminal cases of particular interest to the English government from the twelfth century onward.¹⁷⁸ Many of the cases involved prosecutions for treason against the King.¹⁷⁹ Unlike modern judicial opinions, the *State Trials* reports presented observations of what happened in court during major trials. They reported broadly on the trial, rather than focusing specifically on the legal issues and legal rulings.

To understand exactly what materials the *Burr* lawyers discussed, it is necessary first to identify which version of *State Trials* they used. Different editors published different editions over time, and they included different cases with different pagination.¹⁸⁰ We can solve this problem, fortunately, by comparing the citations the *Burr* lawyers made, as recorded by Robertson, to the various editions of *State Trials*. This process indicates that the *Burr* lawyers were relying on the fourth edition of *State Trials*, which was an eleven-volume set published from 1776 to 1781 and edited by Francis Hargrave.¹⁸¹ This is not a surprise, as the Hargrave edition of *State Trials* was the current version both at the time of the Fifth Amendment's ratification and at the time of the *Burr* trial.¹⁸²

The cases from *State Trials* that are discussed in the *Burr* proceedings overlap significantly with the cases discussed in MacNally's treatise. For example, the lawyers extensively discussed *Annesley v. Anglesey*, the case in which a Catholic witness was asked his profession.¹⁸³ It ended up being potentially significant that the description of *Annesley* that appeared in *State Trials* differed in a key respect from its description in MacNally: MacNally's summary stated that the witness was a Roman Catholic priest, but the version in *State Trials* does not say so.¹⁸⁴ The lawyers also discussed cases such as *In re Shaftesbury*¹⁸⁵

¹⁷⁸ See 1 HARGRAVE, *supra* note 152, at preface.

¹⁷⁹ See *Legal History: England & Common Law Tradition: State Trials*, OXFORD LIBGUIDES, <https://libguides.bodleian.ox.ac.uk/law-histcom/str> [<https://perma.cc/TJP4-UA9L>] [hereinafter *Legal History*].

¹⁸⁰ Lindsay Farmer, *State Trials*, in *THE NEW OXFORD COMPANION TO LAW* (Peter Cane & Joanne Conaghan eds., 2009).

¹⁸¹ See *Legal History*, *supra* note 179.

¹⁸² See *id.*

¹⁸³ See 1 BURR'S TR. 214–15 (statement of Botts); *id.* at 218–19 (statement of Mac Rae).

¹⁸⁴ *Id.* at 231 (statement of Martin) (“*Mac Nally* [sic] has put in, that he was a roman catholic priest, but nothing appears (in the report of the same case in *State Trials*) to the court, of his being a priest.”).

¹⁸⁵ See *id.* at 225 (statement of Wirt) (citing *Shaftesbury*, 3 St. Tr. at 418).

and the *Reading* case,¹⁸⁶ both of which MacNally had covered,¹⁸⁷ in addition to some caselaw from *State Trials* that was not discussed by MacNally.¹⁸⁸

The lawyers' reliance on Hargrave's *State Trials* extended beyond the cases. Burr's counsel also invoked the index heading found at the end of the last volume of Hargrave's edition.¹⁸⁹ Published in 1781, the Index provided the reader with a way to find cases on particular topics. The relevant index entry appeared in the general heading for "Witness," and it stated: "A witness need not answer any questions that tend to make him accuse himself, and subject him to a penalty."¹⁹⁰ Burr's counsel argued that the particular phrasing of the index entry was relevant. "I refer the court to *Hargrave's Index to the State Trials*," counsel stated, "to show Hargrave's opinion."¹⁹¹

The overlap between the *State Trials* cases and the cases discussed by MacNally raises an important question about causality. Our goal is to understand how the privilege was understood when the Fifth Amendment was ratified in 1791. But MacNally's treatise came out eleven years later, in 1802. We may worry that MacNally's post-ratification formulation, and not the pre-ratification understanding, was the major driver of the lawyers' concept of the Fifth Amendment privilege in *Burr*. If so, we might be cautious about relying on their discussion of the privilege. Perhaps *Burr*'s discussion reflects the 1802 framing from MacNally, and not what lawyers would have understood the privilege to mean when the Fifth Amendment was proposed and ratified.

Fortunately, the evidence suggests that the causal arrow runs the other way. In 1802, MacNally was discussing the cases that had been recognized before ratification as the major decisions on the privilege. We have two major clues that this was the case. The first clue is the citations in the 1781 Index entry to Hargrave's *State Trials* discussed above. The Index entry for the privilege has five case citations, and they mostly align with what appeared in MacNally's treatise twenty-one years later. The Index cites *King v. Reading*, *King v. Oates*, and *King v. Friend*, all of which MacNally discusses, as well as *Trial of John*

¹⁸⁶ See *id.* (statement of Wirt) (citing *Reading*, 2 St. Tr. at 802, 806, 822).

¹⁸⁷ MACNALLY, *supra* note 141, at 256.

¹⁸⁸ See 1 BURR'S TR. 225 (statement of Wirt) (citing *Christopher Love's Case*, 2 St. Tr. at 123).

¹⁸⁹ *Witness*, 11 St. Tr. (index on unnumbered pages). It is an extensive index: It spans over 125 pages by my count, although the pages are not numbered.

¹⁹⁰ *Id.* Defense counsel Luther Martin quoted the Index as saying: "A witness is not compelled to answer where it *tends* to criminate him, nor where it does not relate to the issue." 1 BURR'S TR. 229 (statement of Martin).

¹⁹¹ *Id.* (statement of Martin). This appears to have been incorrect, as a later index claims that Hargrave did not write the index. See DAVID JARDINE, GENERAL INDEX TO THE COLLECTION OF STATE TRIALS COMPILED BY T.B. HOWELL AND T.J. HOWELL (1828) (first advertisement page) ("The General Index to Hargrave's State Trials . . . was not compiled by the learned Editor of the work.").

Tasborough, which MacNally cites but does not discuss.¹⁹² Even the pincites in MacNally's treatise are mostly identical to the pincites in Hargrave's Index.¹⁹³ It therefore seems likely that MacNally was following prominent understandings about the main cases from pre-ratification sources, such as Hargrave's Index, rather than offering a revisionist perspective post-ratification.

This conclusion is bolstered by the case citations about the privilege found in Hawkins's famous treatise, *Pleas of the Crown*, the relevant part of which first appeared in 1721.¹⁹⁴ Recall that MacNally opens with Hawkins's statement of the privilege before discussing his five cases.¹⁹⁵ But Hawkins cites cases, too. Hawkins's summary of the privilege is backed up with a footnote that cites six cases, five of which are from *State Trials*.¹⁹⁶ At first it is tricky to decode the citations, as looking up the pages in Hargrave's edition of *State Trials* goes to cases unrelated to self-incrimination. But that is because Hawkins first published the materials on the privilege in 1721,¹⁹⁷ when an earlier version of *State Trials*, with different pagination, was current.¹⁹⁸ A review of the then-current 1719 edition of *State Trials* brings us back to several familiar cases. Of the six cases that Hawkins cites, three are *Reading*, *Oates*, and *Friend* — three of the five cases that appear in Hargrave's

¹⁹² The citations provided in the Index are as follows: "ii. 822, 1035. iii. 540. iv. 9, 606." *Witness*, 11 St. Tr. (index on unnumbered pages). I interpret that as 2 St. Tr. 822, which is a pincite in *Reading*, discussed by MacNally, MACNALLY, *supra* note 141, at 256; 2 St. Tr. 1035, which is a pincite to *John Tasborough's Case*, named by MacNally but not discussed, MACNALLY, *supra* note 141, at 256; 3 St. Tr. 540, which is a pincite to a case MacNally doesn't cite, *The Trial of Ford Grey*, 3 St. Tr. 519 (1682); 4 St. Tr. 9, a pincite to *Titus Oates*, discussed by MacNally, MACNALLY, *supra* note 141, at 256; and 4 St. Tr. 606, a pincite to *John Friend*, discussed by MacNally, MACNALLY, *supra* note 141, at 257.

¹⁹³ Both the Index and MacNally cite to particular pages, and they provide identical pincites for *Reading*, *Tasborough*, and *Oates*. MACNALLY, *supra* note 141, at 256. The citations to *Friend* are almost identical: Hargrave's Index cites to 4 St. Tr. 606, while MacNally cites to 4 St. Tr. 605-06. MACNALLY, *supra* note 141, at 257.

¹⁹⁴ Volume I of the First Edition was published in 1716, and Volume II was published in 1721.

¹⁹⁵ MACNALLY, *supra* note 141, at 256.

¹⁹⁶ The citation sidenote in Hawkins reads as follows: "State Trials, Vol. 2. f. 268, 472, Vol. 3. f. 387, 1010, Vol. 4. f. 44, Cont. Rushw. Strafford, 605 & *ibid.* 558." 2 HAWKINS (1st ed.), *supra* note 149, at 433. The last of these citations refers to JOHN RUSHWORTH, THE TRYAL OF THOMAS EARL OF STRAFFORD, LORD LIEUTENANT OF IRELAND, UPON AN IMPEACHMENT OF HIGH TREASON 605, 588 (London, John Wright 1680). In the preface to the first edition of *State Trials*, the editor explains that Rushworth's report of Lord Strafford's case "is already in the hands of most gentlemen who are supposed to purchase these" and was excluded to avoid the added bulk and expense of including them. Preface to the First Edition, *reprinted in* 1 HARGRAVE, *supra* note 152.

¹⁹⁷ It appears in the First Edition, Vol II., Chapter 46, Page 433. 2 HAWKINS (1st ed.), *supra* note 149, at 433.

¹⁹⁸ See *Legal History*, *supra* note 179 (noting that the first edition of *State Trials* was published in 1719, edited by Thomas Salmon). Hawkins did not update his citations for subsequent editions.

Index sixty years later in 1781, and three of the five cases MacNally discusses two decades after that in 1802.¹⁹⁹

The evidence therefore suggests that Hawkins in 1721, and perhaps Hargrave's Index in 1781, was either establishing or reflecting the major cases on the privilege against self-incrimination. The cases appeared in their full form in *State Trials*. The usefulness of MacNally soon after ratification was likely its presentation of the recognized earlier cases in an easy-to-digest form rather than offering a new understanding of the privilege.

C. *The Third Source of Law: The Early American Cases*

The third primary source of authority in the *Burr* transcripts is early American cases on the privilege against self-incrimination. By 1807, federal courts had made rulings construing the privilege that the *Burr* lawyers treated as relevant but not authoritative precedent. The lawyers focused on two cases in particular: *United States v. Goosely*,²⁰⁰ a decision from the circuit court in Virginia; and *United States v. Smith & Ogden*,²⁰¹ an 1806 circuit court opinion from New York.

In *Goosely*, the defendant had been indicted for stealing bank notes from the postal mail.²⁰² The government also had sought an indictment for Goosely's suspected accomplice, Reynolds, but the grand jury had declined to indict him.²⁰³ The government called Reynolds to testify at trial and asked him if he knew of Goosely committing the crime.²⁰⁴ Goosely's counsel objected that an answer could incriminate Reynolds.²⁰⁵ In the brief account of the case that appears in the *Federal Cases* reporter (which was read in full during the *Burr* proceedings²⁰⁶), the report contains a brief comment from the court, which consisted of Justice Iredell riding circuit together with District Judge Griffin.²⁰⁷ In

¹⁹⁹ See *supra* pp. 931–32.

²⁰⁰ 25 F. Cas. 1363 (C.C.D. Va.) (No. 15,230). The year of the decision in *Goosely* is not entirely clear, as the report in *Federal Cases* states “Date Not Given.” *Id.* at 1363 n.1. However, the evidence suggests that *Goosely* was decided in 1796. See 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 850, 852 n.12 (Maeva Marcus & James R. Perry eds., 1985).

²⁰¹ THOMAS LLOYD, THE TRIALS OF WILLIAM S. SMITH, AND SAMUEL G. OGDEN, FOR MISDEMEANOURS (New York, I. Riley & Co. 1807). There is a reported case from the trial, *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342), but the discussion of counsel appears to be instead from Lloyd's 1807 published report. See 1 BURR'S TR. 229 (statement of Martin) (citing LLOYD, *supra*, at 95–96, 98).

²⁰² *Goosely*, 25 F. Cas. at 1363.

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ *Id.* at 1364.

²⁰⁶ 1 BURR'S TR. 222; see *id.* at 230. Robertson referred to it as “the manuscript report of Mr. Daniel Call, (a gentleman well known as an able lawyer and correct reporter).” *Id.*

²⁰⁷ *Id.*

response to the defense's objection, the judges observed that Reynolds "could not be compelled to answer a question leading to an implication of himself" that "might tend to criminate himself."²⁰⁸

The second American case was *United States v. Smith & Ogden*, a circuit court trial in New York from 1806.²⁰⁹ The facts of *Smith & Ogden* resembled those of *Burr*. The defendants were charged with violating the Neutrality Act for helping an independence movement against Spain in what is now Venezuela.²¹⁰ According to the government, Smith and Ogden helped arrange an armed expedition on a boat owned by Ogden to help the independence movement.²¹¹ Although Smith and Ogden were charged as having worked together, they were tried separately. Smith's trial went first.²¹²

During Smith's trial, Ogden was called to testify. Ogden was asked if he heard Smith say anything about the expedition.²¹³ Both Ogden and counsel for Smith objected that answering would incriminate Ogden.²¹⁴ As explained by counsel, such testimony would be incriminating for Ogden because both Smith and Ogden were charged with the same plot.²¹⁵ Requiring Ogden to say what Smith had told Ogden about the expedition would reveal what Ogden knew.²¹⁶ And when it came time to try Ogden, counsel argued, the government could then put on a witness who heard Ogden testify and repeat what Ogden had said in court against Smith.²¹⁷

The court, consisting of Justice Paterson riding circuit joined by District Judge Talmadge,²¹⁸ rejected the claim of privilege. Ogden "is only to say whether he has heard any confessions or admissions on the part of" Smith, the court concluded, "but he is not called on to say in what degree he may have been an accomplice."²¹⁹ Ogden defied the ruling. He refused to answer the question on self-incrimination grounds,

²⁰⁸ *Id.* Also note the overlap between the participants in *Goosely* and *Burr*: In both cases, Cyrus Griffin was the second judge, and Edmund Randolph and John Wickham served as defense counsel. See *Goosely*, 25 F. Cas. at 1364; 1 BURR'S TR. 31.

²⁰⁹ See LLOYD, *supra* note 201, at iii.

²¹⁰ See Mark Thorbarn, *William S. Smith and Samuel G. Ogden Trials: 1806*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/law/law-magazines/william-s-smith-and-samuel-g-ogden-trials-1806> [https://perma.cc/MTF8-FLN9].

²¹¹ See *id.*

²¹² See *id.*

²¹³ See LLOYD, *supra* note 201, at 95 (statement of Sanford).

²¹⁴ See *id.* at 96–97 (statements of Hoffman, Ogden, and Colden).

²¹⁵ See *id.* at 97 (statement of Colden).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See Thorbarn, *supra* note 210.

²¹⁹ LLOYD, *supra* note 201, at 98 (statement of court).

stating that “a mutual communication on the subject would imply that each of us knew” of the details of the expedition.²²⁰

The prosecution then asked Ogden if he had chartered a vessel to the leader of the independence movement.²²¹ Counsel again objected, stating that answering would “form[] a link in the chain of proof, which, if once obtained, fastens round the witness as well as the defendant” in violation of the Constitution.²²² “[B]y coupling” that answer with “other testimony” about the nature of the vessel chartered, the government could use Ogden’s answer to build a case against him at his trial.²²³

But the court again overruled the objection. “I cannot see how this question can tend to criminate himself,” the court stated, because Ogden’s answer could not be admitted in Ogden’s own trial.²²⁴ The compelled statement in Smith’s trial was not a voluntary confession, according to the court, and so it would not be admissible in Ogden’s trial.²²⁵ Ogden once again defied the court’s ruling and refused to answer the question.²²⁶ The prosecution reserved its right to “call on the court to enforce its decision” later in the trial, then moved on to other questioning.²²⁷

III. THE ARGUMENTS OF THE PARTIES

With the primary sources of authority now explained, we can turn to how the lawyers in *Burr* used those authorities to debate whether Willie could be forced to answer the questions posed to him. This Part details the lawyers’ arguments. It explores what claims they asserted, what the claims had in common, and where they diverged. It also shows what arguments were backed up by caselaw and where the existing caselaw ran out. The goal is to understand how leading lawyers around the time of the Fifth Amendment’s ratification evaluated an assertion of privilege by a witness questioned about their knowledge of an encrypted file.

As explained in Part II, the lawyers in *Burr* all saw the Fifth Amendment privilege as the common law privilege. They all agreed that the rule was stated in *Hawkins* and repeated by MacNally: “A witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime.”²²⁸ The disagreement was about how to implement the rule, not the rule itself.

²²⁰ *Id.* (statement of Ogden).

²²¹ *Id.* at 99 (statement of Sanford).

²²² *Id.* (statement of Emmet); *see id.* (“[W]e stand on the grounds of the constitution, and not the common law . . .”).

²²³ *See id.* (statement of Emmet).

²²⁴ *Id.* at 100 (statement of court); *see id.*

²²⁵ *Id.* (statement of court). This rule also appears in MACNALLY, *supra* note 141, at 41–42.

²²⁶ *See* LLOYD, *supra* note 201, at 100 (statement of Ogden) (deferring to his counsel’s view that he was not required to answer the question).

²²⁷ *Id.* (statement of Sanford); *see id.*

²²⁸ MACNALLY, *supra* note 141, at 256 (citing HAWKINS (6th ed.), *supra* note 149, at 609).

Specifically, the lawyers disagreed on three major questions. The first question was, who decides whether answering might oblige a witness to incriminate himself? The prosecution saw that as a question for the court to decide. In contrast, counsel for the defense and for Willie argued that the witness must make that decision and the court cannot second-guess the witness's sworn statement that an answer would be incriminating.

The second question was identifying the test for how directly a question must incriminate the witness to determine whether the privilege applies. The prosecution argued that an answer to the question must itself establish liability for the full crime. In contrast, the defense argued that there only needed to be a possibility that the answer would provide some amount of evidence of a crime.

Third, the lawyers disputed how these principles applied to the facts of Willie's objection. The government asserted that Willie was not being forced to incriminate himself because the question was if he currently understood the cipher, which could have many innocent explanations. The defense and counsel for Willie argued that requiring him to answer whether he understood the letter incriminated him because it could reveal that he knew the contents and had concealed them, amounting to misprision of treason.

A. Who Decides if an Answer Might Be Incriminating?

The first question the lawyers disputed is who decides whether a question calls for an incriminating response. Is that a question for the court or the witness to decide? How much should a court inquire into the circumstances of the witness's assertion that the answer could incriminate him? The problem is rooted in inherent information asymmetry when a witness invokes the privilege. The witness has been asked a question — that is, to divulge something he knows that others (including the judges) don't know. Should the court defer to the witness's assertion because only the witness knows the answer to the question?

Lawyers for Burr and Willie argued that the court must defer to the witness. "The witness himself is the judge" of "how far his answer may affect him," Burr's counsel argued.²²⁹ Whether an answer might incriminate a witness "cannot be perceived by the judges" without knowing all of the evidence.²³⁰ Willie's counsel agreed, arguing that "a witness is from necessity the best judge of the tendency of his answers."²³¹ "The witness only knows, what will be the answer to the

²²⁹ 1 BURR'S TR. 214 (statement of Botts).

²³⁰ *Id.* (statement of Botts).

²³¹ *Id.* at 215 (statement of Williams).

question. The court cannot know it.”²³² A court can know the answer only if the witness provides it.²³³ “Unless the witness be made the sole judge of answering, the benefit of the rule is lost to him,” which would nullify the privilege.²³⁴ Concerns that a witness would claim the privilege without basis were addressed by the witness being under oath: “His saying that he cannot answer without criminating himself is on oath, and if he were to perjure himself upon that point, he would be equally ready to perjure himself on every other point.”²³⁵

The prosecution responded that it was the court’s role to assess the claim of privilege. After the witness objects, the prosecution argued, “the court is to judge the tendency of the question” so it can “understand the grounds of the privilege claimed by the witness.”²³⁶ The prosecution invoked general principles of evidence: “A court has always a right to understand the ground on which a witness refuses to answer, and every man is liable to give testimony, unless he come within certain exceptions; and in those cases, he must show some law or authority to justify his refusal to answer.”²³⁷ If a lawyer refused to testify on the ground that an answer might violate attorney-client privilege, for example, the court would inquire about the circumstances in which the client made the statement to the lawyer before ruling.²³⁸ Merely deferring to the witness’s claim of privilege would in effect make the witness a judge.²³⁹

The most discussed case on this issue, *Annesley v. Anglesey*, was a case discussed earlier that appears both in MacNally and in *State Trials*.²⁴⁰ Recall that in *Annesley*, a Catholic witness was asked his profession, declined to answer, and had the assertion of privilege sustained. To the *Burr* defense, *Annesley* showed that a court must defer to the witness’s assertion of privilege. The court did not know the witness’s answer, after all, and asking a witness his profession was, “on its face,” a “harmless” question.²⁴¹ The court’s conclusion that the witness did not need to answer, the defense argued, reflected the court’s deference to the witness’s assertion of privilege.

The *Burr* prosecutors countered that *Annesley* was distinguishable. The judge had a “right of judging” about “whether the witness be in

²³² *Id.* at 215–16 (statement of Williams).

²³³ *Id.* at 216 (statement of Williams); *see also id.* at 228 (statement of Martin) (arguing that the witness must be the “sole judge” of whether an answer would incriminate him, as otherwise the privilege “would be nugatory”).

²³⁴ *Id.* at 215 (statement of Botts).

²³⁵ *Id.* at 216 (statement of Williams); *see also id.* at 227 (statement of Martin) (noting that the witness “must swear to the existence of this legal reason” for refusing to testify).

²³⁶ *Id.* at 219 (statement of Mac Rae).

²³⁷ *Id.* at 218–19 (statement of Mac Rae).

²³⁸ *See id.* at 219 (statement of Mac Rae).

²³⁹ *See id.* (statement of Mac Rae).

²⁴⁰ *See supra* notes 183–184 and accompanying text.

²⁴¹ 1 BURR’S TR. 215 (statement of Botts).

danger or not.”²⁴² In *Annesley*, the court “saw the danger of the witness” because the anti-Catholic laws were widely known.²⁴³ The court “did not press” the witness to answer, the prosecution argued, only because a particular answer to that question was incriminating in that case.²⁴⁴ The judge retained the role of determining whether the witness was in danger: The law did not make “the witness . . . alone the judge of the law and the fact.”²⁴⁵

*B. What Is the Standard for Whether an Answer
Is Sufficiently Incriminating?*

The second disputed issue was the standard for incrimination. Specifically, how direct must the prospect of criminal liability be for a question to trigger the privilege? This divided into two related sub-questions. First, how likely did it have to be that an answer would be incriminating? And second, how much evidence of crime did an answer have to provide for it to count? Counsel for Willie and Burr offered a broad view that the privilege extended to the mere possibility that an answer might provide just a link in the chain of evidence supporting liability. The prosecution responded with a narrow perspective that the privilege applied only when an answer to a specific question directly admitted liability.

According to the lawyers for Willie and Burr, a chance that evidence might be part of the basis of suspicion was sufficient. A witness “ought not to be compelled to answer,” counsel for Willie argued, “if it might *possibly* criminate him.”²⁴⁶ Counsel for Burr agreed: The mere “possibility of crimination is sufficient to excuse the witness from answering.”²⁴⁷ Further, the incrimination could be indirect and partial. The privilege applied to a question, Burr’s counsel argued, “[i]f the answer should tend to make a single link in the chain of testimony necessary to involve him in suspicion.”²⁴⁸ A witness was not required to answer even an innocent-seeming question, the defense argued, if the answer could be paired with other information to justify a conviction.

The government argued for a much narrower standard. A witness must answer, the prosecution contended, unless an answer would “directly criminate him; or, what is the same thing, subject him to punishment.”²⁴⁹ Recognizing the privilege when a question has merely an

²⁴² *Id.* at 218 (statement of Mac Rae) (arguing that the defense counsel was attempting to deny the court this right).

²⁴³ *Id.* (statement of Mac Rae).

²⁴⁴ *Id.* (statement of Mac Rae).

²⁴⁵ *Id.* (statement of Mac Rae).

²⁴⁶ *Id.* at 209 (statement of Williams).

²⁴⁷ *Id.* (statement of Botts) (emphasis omitted).

²⁴⁸ *Id.* at 214 (statement of Botts).

²⁴⁹ *Id.* at 220 (statement of Hay).

indirect tendency to incriminate was “boundless.”²⁵⁰ “*Tendency* unlimited,” the government argued, “brings the rule to nothing.”²⁵¹ Such a broad standard would allow any witness to “screen himself from giving evidence” too widely.²⁵² Instead, the government argued, the test should be whether each “precise question,” if answered, “must subject” the witness to prosecution.²⁵³ If “many links are wanting to make a chain to bind” the witness, the witness must answer the question.²⁵⁴

Both sides invoked authority in support of their claims. The defense relied on cases and statements suggesting that a mere tendency to incriminate was sufficient. In *United States v. Goosely*, for example, Justice Iredell and Judge Griffin had ruled that a witness who the grand jury had declined to indict did not have to testify when asked if he knew of the defendant’s crimes.²⁵⁵ The court commented that a witness “could not be compelled to answer a question leading to an implication of himself.”²⁵⁶ Under *Goosely*, the defense argued, a mere tendency to incriminate — an answer that was only “leading to implicate him” — was enough.²⁵⁷

The defense also relied on materials from *State Trials*. For example, in *Trial of Titus Oates*, discussed in Part II, the defendant had asked a Catholic witness if where he had lodged was governed by Jesuits and priests.²⁵⁸ Because this was an “an innocent question,”²⁵⁹ Burr’s counsel reasoned, the assertion of privilege must have been sustained because the answer “might be made a link in the chain of testimony, that would criminate him.”²⁶⁰ Counsel also invoked the phrasing of the relevant entry in Hargrave’s index to *State Trials*: “A witness is not compelled to answer where it *tends* to criminate him, nor where it does not relate to the issue.”²⁶¹ Mere tendency to incriminate was enough.

The government responded with cases of its own. The prosecution claimed that *King v. Edwards*, the 1791 decision discussed in MacNally,

²⁵⁰ *Id.* at 224 (statement of Wirt).

²⁵¹ *Id.* at 225 (statement of Wirt).

²⁵² *Id.* at 224 (statement of Wirt).

²⁵³ *Id.* at 224–25 (statement of Wirt).

²⁵⁴ *Id.* at 225 (statement of Wirt).

²⁵⁵ See *supra* notes 200–208 and accompanying text (discussing *Goosely*).

²⁵⁶ *United States v. Goosely*, 25 F. Cas. 1363, 1364 (C.C.D. Va.) (No. 15,230) (read to the court at 1 BURR’S TR. 222, 230).

²⁵⁷ 1 BURR’S TR. 234 (statement of Wickham); see also *id.* at 230 (statement of Martin) (describing *Goosely* as “a decisive authority that my position is correct, as far as the opinion of one very respectable judge (Judge Iredell) goes”).

²⁵⁸ See MACNALLY, *supra* note 141, at 256–57.

²⁵⁹ 1 BURR’S TR. 231 (statement of Martin).

²⁶⁰ *Id.* (statement of Martin).

²⁶¹ *Id.* at 229 (statement of Martin) (emphasis in Robertson, not in Hargrave); see also *supra* notes 189–193 and accompanying text (discussing Hargrave’s Index).

supported its position.²⁶² Recall from Part II that in *Edwards*, the witness was asked if he had been punished for perjury. The court allowed the question, as the answer “could not subject him to any punishment.”²⁶³ In *Burr*, the prosecution pointed out that the objection to the question had been on the basis that it “tend[ed] to criminate” the witness.²⁶⁴ The court’s rejection of the privilege, the prosecution weakly argued, had implicitly rejected the “tendency” test.²⁶⁵ (The defense replied that *Edwards* “was a decision in the year 1791, since the revolution. It may be no authority. We do not know, whether our courts of justice will adopt this law-rule or not.”²⁶⁶)

The parties also disagreed about the persuasiveness of the circuit court decision in *United States v. Smith & Ogden*.²⁶⁷ The “link in the chain” understanding of the privilege had been asserted by the defense in that case as well but the court had adopted a narrow view of the privilege and allowed the question.²⁶⁸ Burr’s defense counsel argued that “the court [in *Smith & Ogden*] was wrong,” and that the prosecution’s failure to ask the court to enforce its ruling in *Smith & Ogden* suggested that even the prosecution “thought [the ruling] erroneous or doubtful.”²⁶⁹

C. How Does the Incrimination Test Apply to the Facts?

The final dispute in the *Burr* proceedings was how the incrimination test applied to the specific context of questioning Willie.²⁷⁰ This depended in part on the answers to the previous two questions. But assuming incrimination was up to the court, and the test was whether an answer had a tendency to incriminate the witness, did the specific questions asked to Willie tend to incriminate him? As you might guess, counsel for Burr and Willie said it did, while the government claimed it did not.

²⁶² 1 BURR’S TR. 220–21 (statement of Hay); see *King v. Edwards* (1791) 100 Eng. Rep. 1108; 4 T.R. 440. The discussion of *Edwards* in Part II appears at pp. 905–06.

²⁶³ MACNALLY, *supra* note 141, at 258.

²⁶⁴ 1 BURR’S TR. 221 (statement of Hay) (emphasis omitted). The language is found in *Edwards*, 100 Eng. Rep. at 1108; 4 T.R. at 440.

²⁶⁵ See 1 BURR’S TR. 220–21 (statement of Hay).

²⁶⁶ *Id.* at 231 (statement of Martin).

²⁶⁷ For my discussion of *Smith & Ogden*, see notes 209 to 227 and accompanying text. The case was discussed in the *Burr* oral argument at 1 BURR’S TR. 229.

²⁶⁸ See 1 BURR’S TR. 229 (statement of Martin).

²⁶⁹ *Id.* (statement of Martin).

²⁷⁰ The lawyers also debated the application of the privilege to facts that would merely make the defendant look bad — in the argot of the day, that would “calumniate” or make him look infamous. See 1 BURR’S TR. 220 (statement of Hay); *id.* at 230 (statement of Martin). However, Chief Justice Marshall did not pick up this argument in his opinion. The discussion reflects the broader context of the period’s common law evidentiary privileges seen in MACNALLY, *supra* note 141. See generally *supra* p. 902.

Counsel for Burr and Willie argued that all of the questions posed to Willie tended to incriminate him largely as a result of liability for misprision of treason. We encountered this argument earlier.²⁷¹ Under the Crimes Act of 1790, one who “having knowledge” of treason did “not as soon as may be disclose and make known the same to the President of the United States” or some other designated official was guilty of misprision of treason.²⁷² If the letter contained evidence of a treason, Willie and Burr’s counsel argued, forcing Willie to say that he understood the letter would mean that he had knowledge of treason subsequently revealed.²⁷³ By admitting that he knew the letter’s contents, Willie would be admitting his “guilt[] of misprision of treason.”²⁷⁴

The government countered that knowing the key to the cipher did not imply Willie’s connection to the letter’s contents. That was true, the prosecution argued, because the prosecution only asked Willie if he *currently* knew the cipher. The government was asking only about Willie’s knowledge of the cipher at “the *present* time,” and not “how long he has known it.”²⁷⁵ “If the letter contained guilt, and [Willie] knew it from the beginning, it might implicate him,”²⁷⁶ the prosecution agreed. But asking Willie if he currently knew the code to decrypt the letter did not mean that he knew the letter’s contents before. “He may know the cypher without having any connexion with its contents,” the prosecution argued, or “he may have acquired a knowledge of the cypher long after the letter was written.”²⁷⁷ Because Willie “may know the key to the cypher very innocently,”²⁷⁸ answering if he understood the letter now would not tend to incriminate him.

IV. CHIEF JUSTICE MARSHALL’S RULING — AND WHAT HAPPENED NEXT

Chief Justice Marshall handed down his decision on the day after the lawyers’ arguments had concluded.²⁷⁹ He took the question to be whether Willie could be compelled to answer whether he currently knew the cipher and therefore understood the letter.²⁸⁰ Marshall ruled that

²⁷¹ See *supra* section I.C, pp. 921–22.

²⁷² Crimes Act of 1790, ch. 9, § 2, 1 Stat. 112, 112.

²⁷³ See 1 BURR’S TR. 215 (statement of Williams); *id.* at 216 (statement of Martin).

²⁷⁴ *Id.* at 215 (statement of Williams).

²⁷⁵ *Id.* at 221 (statement of Hay).

²⁷⁶ *Id.* (statement of Hay).

²⁷⁷ *Id.* at 219 (statement of Mac Rae).

²⁷⁸ *Id.* (statement of Mac Rae).

²⁷⁹ The argument on Willie’s privilege began on Monday, June 15th, including Willie’s taking the stand and asserting his privilege. The lawyers reconvened on Tuesday, June 16th, to discuss the authorities, and the debate continued on Wednesday, June 17th. See *id.* at 197–234.

²⁸⁰ *United States v. Burr (In re Willie)*, 25 F. Cas. 38, 39 (C.C.D. Va. 1807) (No. 14,692e).

Willie could be forced to answer: Willie's objection was therefore overruled.²⁸¹ Read in isolation, Chief Justice Marshall's opinion can be somewhat difficult to follow. Marshall refers to "[a]uthorities" that the lawyers "adduced" — and that Marshall "considered" — but he does not cite any cases.²⁸² At first blush, it can be tricky to understand exactly what law Marshall was following.

Fortunately, our study of the arguments of the lawyers and the cases and materials they cited in Parts II and III makes Marshall's opinion exceedingly easy to follow. Marshall's decision neatly chose among the options offered by counsel. On the first question, who decides, Chief Justice Marshall picked a middle ground between the two parties. On the second question, the standard for self-incrimination, Marshall essentially agreed with the defendant. And on the third question, applying the standard, Marshall adopted the government's position. This Part summarizes Marshall's opinion in *Burr*, adding a short discussion of intriguing dicta he added a few days later on how the privilege might apply to obtaining documents or testimony from Aaron Burr himself.

A. *The Court Makes the Threshold Inquiry*

Chief Justice Marshall ruled that both the court and the witness each have proper spheres of decisionmaking. On one hand, "[i]t is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness."²⁸³ The judge must make a threshold inquiry: "[W]hether any direct answer to the particular question propounded could be reasonably supposed to affect the witness."²⁸⁴ If the judge concludes that a "direct answer" cannot "implicate the witness" in context, then the court must overrule the objection and the witness must answer the question.²⁸⁵

On the other hand, if a direct answer "may or may not criminate the witness," depending on what the witness's state of mind may be, then the court must defer to the witness's claim that the answer would be incriminating.²⁸⁶ "The court cannot participate with him in this judgment," Marshall ruled, "because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims."²⁸⁷

²⁸¹ See *id.* at 40.

²⁸² *Id.* at 39.

²⁸³ *Id.* at 40.

²⁸⁴ *Id.* at 39.

²⁸⁵ *Id.* at 40.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

Marshall based this middle ground on his understanding of the cases. The cases suggested that the court had “the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness.”²⁸⁸ Although the defense argued that a court had to defer to the witness, Marshall concluded that the cases did not go that far. “In all of them,” Marshall concluded, “the court could perceive that an answer to the question propounded might criminate the witness, and he was informed that he was at liberty to refuse an answer.”²⁸⁹ Marshall stated that “Goosely, in this court, is, perhaps, the strongest that has been adduced” in favor of the view that the court must defer to the witness.²⁹⁰ “But the general doctrine of the judge” in *Goosely* “must have referred to the circumstances, which showed that the answer might criminate him.”²⁹¹

B. The “Necessary and Essential Link in the Chain of Testimony” Test

The next challenge was identifying the test for whether a question admitted enough liability to be legally incriminating. On this issue, Chief Justice Marshall essentially agreed with the defendant. The test, Marshall ruled, was whether the “answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime.”²⁹² According to Chief Justice Marshall, “the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.”²⁹³

Marshall expressly rejected the government’s argument that the test should be whether “that answer, unconnected with other testimony, would be sufficient to convict him of a crime.”²⁹⁴ According to Marshall, that test would render the privilege against self-incrimination “almost perfectly worthless.”²⁹⁵ The problem was that convictions often required a “chain of testimony” consisting of “[m]any links.”²⁹⁶ It was “not only a possible but a probable case” that the government would be able to prove all but a single link in the chain, and would then ask the witness the “single fact” that would “complete” the chain so that the witness “is exposed to a prosecution.”²⁹⁷ In such a case, the witness who

²⁸⁸ *Id.* at 39.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* This conclusion likely was made with the assistance or at least the acquiescence of Judge Griffin, who was one of the two judges in *Goosely*.

²⁹² *Id.* at 40.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

provided the single fact would “to every effectual purpose” have “accuse[d] himself as entirely as he would by stating every circumstance which would be required for his conviction.”²⁹⁸ According to Marshall, “the true sense of the rule” was “that no witness is compellable to furnish any one of [the links] against himself.”²⁹⁹

C. Applying the Test: Why Marshall Required Willie to Answer

The last part of Marshall’s ruling applied his test to Willie’s case. Marshall’s ruling hinged on the specific question the government had asked. Echoing the government’s position, Marshall ruled that Willie had to answer because he was only asked whether he currently understood the contents of the letter.³⁰⁰ Because forcing Willie to testify about his *present* knowledge of the cipher would not prove his *past* knowledge of it, the answer could not incriminate Willie and he was required to provide it.³⁰¹

Marshall started with the relevant criminal law. The federal law on misprision of treason criminalized knowing of and concealing a treason. Echoing the defense’s claim, Marshall noted that if the letter contained evidence of treason, and “if the witness were acquainted with that treason when the letter was written,” then “he may probably be guilty of misprision of treason.”³⁰² To ensure that the court did not compel Willie to “disclose a fact which would form a necessary and essential part of this crime” in violation of the privilege, questions about Willie’s past knowledge of the letter’s contents were improper.³⁰³ “[T]he court ought not to compel him to answer any question,” Marshall reasoned, if “the answer . . . might disclose his former knowledge of the contents of that letter.”³⁰⁴

But Marshall nonetheless ruled that Willie could be compelled to answer. That owed to how the government’s question was “particularly and precisely stated”: The government asked Willie only about his “present knowledge of the cipher.”³⁰⁵ Because the government merely asked Willie about his present knowledge, “the question may be answered

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* Marshall also suggested that if the letter were decrypted, and it was shown that the contents of the letter related to the Neutrality Act violation and not to treason, then Willie could be asked if he understood the letter because knowledge of the letter would not then incriminate him. *See id.*

³⁰⁵ *Id.*

without implicating the witness.”³⁰⁶ “[I]n a criminal prosecution,” showing Willie’s present knowledge “would not . . . justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact.”³⁰⁷

Willie was called into court after the Chief Justice finished reading his opinion.³⁰⁸ The prosecution asked Willie if he understood the contents of the letter.³⁰⁹ Willie responded that he understood the parts that were in German, but that he did not understand the parts in cipher.³¹⁰ The prosecutor next asked if the letter was written by or at the direction of Aaron Burr.³¹¹ Following an objection and an unrecorded discussion with the court, Willie answered: “By his direction. It was copied from a paper written by himself.”³¹² Shortly after, the Chief Justice sent the letter to the grand jury and adjourned for the day.³¹³ Willie’s testimony was over.

D. Subsequent Dicta on Production or Testimony from Burr

A postscript is needed. The Chief Justice addressed the privilege against self-incrimination one more time in the *Burr* case, a week after ruling on Willie’s testimony.³¹⁴ The discussion was brief, and it was ultimately dicta. But it may provide a helpful counterpoint to Chief Justice Marshall’s ruling about Willie. The issue came up when the grand jury sought production of another encrypted letter directly from the defendant, Aaron Burr, and it explores whether the defendant could be forced to turn over or testify about a document.

The grand jury came into court with a question for Chief Justice Marshall. The grand jurors had learned that Burr possessed a different ciphered letter, this one believed to be from General Wilkinson to Burr.³¹⁵ “The grand jury are perfectly aware,” the foreman explained, “that they have no right to demand any evidence from the prisoner under prosecution, which may tend to criminate himself.”³¹⁶ But the grand jury was wondering if Burr might consent to turn over the letter rather

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ 1 BURR’S TR. 242–45 (statement of Marshall, C.J.); *id.* at 246.

³⁰⁹ *Id.* at 246 (statement of Hay) (“Do you understand the contents of that letter?”).

³¹⁰ *Id.* (noting that Willie said he did not, but that afterwards he said “he understood the part of the letter which is written in Dutch”). Here, “Dutch” would be the same as German. *See supra* note 96.

³¹¹ 1 BURR’S TR. 246 (statement of Hay).

³¹² *Id.* at 246 (statement of Willie).

³¹³ *Id.* at 248–49.

³¹⁴ *Id.* at 327–28. This occurred on June 25th, *id.* at 312, one week after Marshall’s June 18th ruling, *see* United States v. Burr (*In re* Willie), 25 F. Cas. 38, 38 (C.C.D. Va. 1807) (No. 14,692e).

³¹⁵ 1 BURR’S TR. 327 (statement of Randolph).

³¹⁶ *Id.* at 327–28 (statement of Randolph).

than be compelled to do so. They asked the court for “its assistance, if it think proper to grant it, to obtain the letter with [Burr’s] consent.”³¹⁷

The Chief Justice’s response is intriguing. Marshall began by stating that “the grand jury were perfectly right in the opinion, that no man can be forced to furnish evidence against himself.”³¹⁸ But Chief Justice Marshall further inquired of the grand jury: Were the grand jurors wondering if they could ask Burr questions directly so long as the questions did not incriminate him?³¹⁹ Marshall then stated that he “knew not that there was any objection to the grand jury . . . examining any man as witness, who laid under an indictment.”³²⁰ One of Burr’s defense lawyers conceded that “there could be no objection,”³²¹ with another noting that the grand jury seemed to only want the letter itself and not Burr’s testimony.³²²

The prospect of a further Fifth Amendment ruling was dashed, however, by some apparent obstruction of justice by Burr. In response to the exchange above, Burr announced in court that he no longer possessed the letter.³²³ Burr had feared that the grand jury might want to see the letter, he explained, and he had taken the letter “out of [his] hands” to prevent it being produced so it could not be “used improperly against any one.”³²⁴ With the letter no longer in Burr’s possession, the grand jury no longer sought the court’s assistance.³²⁵

V. THE ORIGINALIST LESSONS OF *BURR*

The goal of this Article is to shed light on the original public meaning of the privilege against self-incrimination as it applies to compelled decryption. It uses *Burr* as a lens to see how top lawyers and a celebrated judge around the time of the Fifth Amendment’s enactment would approach the new amendment and apply it with facts quite similar to those that are vexing courts today. So far, the Article has been purely historical. It has excavated the facts, authorities, arguments, and the decision itself to help us understand the *Burr* decision in 1807.

The Article now turns to lessons for the present. It asks what *Burr* might teach us about how the original Fifth Amendment applies to modern compelled decryption. Both in *Burr* and today, the government has

³¹⁷ *Id.* at 328 (statement of Randolph).

³¹⁸ *Id.* (statement of Marshall, C.J.).

³¹⁹ *Id.* (statement of Marshall, C.J.).

³²⁰ *Id.* (statement of Marshall, C.J.).

³²¹ *Id.* (statement of Martin).

³²² *Id.* (statement of Randolph).

³²³ *Id.* at 329 (statement of Burr).

³²⁴ *Id.* (statement of Burr).

³²⁵ *Id.* at 330 (statement of Randolph).

an encrypted item in its possession. Both in *Burr* and today, the government seeks to use the person's knowledge as part of the process of understanding the item. And both in *Burr* and today, the court must decide whether compelling disclosure of the person's knowledge of the encryption system to help the government understand the item is compelling a person "to be a witness against himself."³²⁶

Of course, our modern facts are not identical to those in *Burr*. Willie was asked if he understood the cipher; modern subjects are asked to disclose passwords or enter them. Applying Burr's cipher required knowing a complex code; modern subjects need know only a single password, and the computer does the rest. This means that applying the lessons of *Burr* inevitably requires interpretation. This Part presents my best efforts to apply *Burr*. But I readily concede that others may look at it differently. I hope this will be the opening of a conversation, not the end of one.

The Part begins with a discussion of whether *Burr* can yield originalist insights and then offers three conclusions for how it may. It argues that *Burr* is a Fifth Amendment decision that can help reveal the original understanding in two ways: first, by framing the debate; and second, by viewing Marshall's opinion as the best existing lens on the question. It then offers three proposed rules. First, disclosing a password ordinarily is not incriminating, and therefore not prohibited by the Fifth Amendment, when the government seeks access to evidence. Second, disclosing a password will often be incriminating and therefore beyond the government's power to compel when the government seeks contraband instead of evidence. Third, whether forced entry of a password violates the privilege depends on whether it is analogized to compelled disclosure or compelled production.

A. *The Originalist Value of Burr*

The first question to consider is whether *Burr* sheds any light at all on the original understanding of the Fifth Amendment.³²⁷ Two concerns exist. First, recall that the parties in *Burr* treated the privilege against self-incrimination as the common law privilege.³²⁸ This raises the possibility that *Burr* was not a Fifth Amendment case at all, but rather a case involving only the common law privilege. Second, assuming *Burr* is a Fifth Amendment dispute, the ruling in 1807 may not shed light on the original public meaning sixteen years earlier in 1791. The lawyers

³²⁶ U.S. CONST. amend. V.

³²⁷ I use the phrase "original understanding" to refer to the original public meaning conveyed to the public when the Fifth Amendment was ratified in 1791. Although public meaning originalism is the dominant form of originalist constitutional theory, the originalist family also includes original intentions originalism, original methods originalism, and original law originalism. See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1251, 1253-54 (2019).

³²⁸ See *supra* Part II, pp. 924-35.

in the case were advocating for their clients, after all, and Chief Justice Marshall himself was a clever judicial tactician. It's fair to ask: Was *Burr* about the Fifth Amendment, and if so can it help reveal the original public meaning of the text from sixteen years earlier?

1. *Burr as a Fifth Amendment Dispute.* — The first question is whether *Burr* is a Fifth Amendment case at all. The absence of explicit constitutional debate is striking. For all of their arguments and discussion, none of the lawyers in *Burr* nor Chief Justice Marshall ever directly mentioned the Fifth Amendment or quoted its text. Instead, they debated the privilege against self-incrimination as if it were the common law privilege. They cited materials about the common law privilege, and they relied on common law treatises and cases.³²⁹ This raises the possibility that *Burr* can shed no direct light on the Fifth Amendment because it was a common law case instead of a Fifth Amendment case.³³⁰ I am unpersuaded, however. I think the lawyers in *Burr* debated the common law privilege because they saw the Fifth Amendment as merely recognizing the common law privilege. The two were the same, so there was no particular reason to cite one over the other.

Several clues point in this direction. First, the lawyers in *Burr* were steeped in the Constitution. Several of them had participated in its adoption, including the Bill of Rights and its state equivalents.³³¹ The *Burr* proceedings were chock full of constitutional arguments on a diverse range of topics, including the Treason Clause,³³² the separation of powers,³³³ the Fourth Amendment,³³⁴ and multiple parts of the Sixth Amendment.³³⁵ From this perspective, the absence of an explicit Fifth Amendment argument is like the dog that didn't bark.³³⁶ The lawyers surely knew of the Fifth Amendment's privilege. And the privilege debates in *Burr* were directly about what the text of the Fifth Amendment

³²⁹ See *supra* notes 134–140 and accompanying text.

³³⁰ For a suggestion that the *Burr* arguments were about the common law privilege and not the Fifth Amendment, see Hazlett, *supra* note 16, at 240. See generally Witt, *supra* note 16 (arguing that early applications of the privilege in federal court were not Fifth Amendment cases at all but instead cases about the common law privilege).

³³¹ See *supra* notes 33–37 and accompanying text.

³³² See, e.g., *United States v. Burr*, 25 F. Cas. 201, 205–07 (C.C.D. Va. 1807) (No. 14,649a).

³³³ See, e.g., *United States v. Burr*, 25 F. Cas. 30, 33–34 (C.C.D. Va. 1807) (No. 14,692d) (explaining the fair trial requirement of the ability to subpoena witnesses as applied to the U.S. President). This ruling was recently relied on heavily by the Supreme Court in *Trump v. Vance*, 140 S. Ct. 2412, 2421–23 (2020).

³³⁴ See, e.g., 1 BURR'S TR. 99–100 (statement of Marshall, C.J.); *id.* at 300–02 (statement of Botts).

³³⁵ See *id.* at 287 (statement of Randolph) (“We are told, that the bill of rights gives to the accused the right of being confronted with his accusers and witnesses.”); *id.* at 560 (statement of Wickham) (discussing the Vicinage Clause of the Sixth Amendment); *id.* at 387–89 (statement of Martin) (same).

³³⁶ See Arthur Conan Doyle, *Adventures of Sherlock Holmes: The Adventure of Silver Blaze*, 4 STRAND MAG. 645, 657 (1892).

prohibited: whether Willie was, in a “criminal case,” being compelled “to be a witness against himself.”³³⁷ The fact that no lawyers in *Burr* made a distinct Fifth Amendment claim suggests that they perceived the constitutional privilege and the common law privilege as the same. There was no advantage in pressing a distinct constitutional claim because the Constitution recognized the common law.

This reading is bolstered by *United States v. Smith & Ogden*, the 1806 case detailed in section II.C that the *Burr* lawyers debated at length.³³⁸ The full proceedings of *Smith & Ogden* were published in 1807,³³⁹ the same year as the *Burr* hearings, and we know from Robertson’s report that the *Burr* lawyers had read and digested the then-new report.³⁴⁰ This is useful because, in *Smith & Ogden*, defense counsel had tried to distinguish a common law precedent by explicitly invoking the constitutional privilege. “[O]ur objections go farther,” counsel had insisted, because “we stand on the ground of the constitution, and not the common law.”³⁴¹ But the court, with Justice Patterson presiding, had ignored the argument and ruled in the government’s favor.³⁴² A plausible inference from the fact that no lawyers in *Burr* made such an argument, despite their familiarity with the report on *Smith & Ogden*, is that they realized it would fail as it had in the earlier case.

This reading is also consistent with Justice Joseph Story’s *Commentaries on the Constitution of the United States* published in 1833. Justice Story explicitly equated the constitutional privilege against self-incrimination with the common law privilege. Noting the constitutional text prohibiting “any person from being compelled, in any criminal case, from being a witness against himself,” Justice Story explained it as “but an affirmance of the common law.”³⁴³

Finally, the Supreme Court has frequently described and relied on *Burr* as a Fifth Amendment precedent. The Court cited it as a constitutional authority as early as *Brown v. Walker*,³⁴⁴ in which a dissent from three Justices reviewed Robertson’s report and described *Burr* as

³³⁷ U.S. CONST. amend. V.

³³⁸ See *supra* notes 201–227 and accompanying text.

³³⁹ See LLOYD, *supra* note 201.

³⁴⁰ During the discussion of *Smith & Ogden*, counsel in *Burr* read from the *Smith & Ogden* proceedings, explained the specific statements of counsel, and cited specific pages on which various statements had been made. See 1 BURR’S TR. 229 (statement of Martin). The citations perfectly match Lloyd’s report, including the specific pages, indicating that the lawyers in *Burr* had Lloyd’s report. See *id.*

³⁴¹ LLOYD, *supra* note 201, at 99 (statement of Emmet).

³⁴² See *id.* at 100.

³⁴³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1782, at 660 (Boston, Hilliard, Gray & Co. 1833).

³⁴⁴ 161 U.S. 591, 595 (1896) (citing 1 BURR’S TR. 244 for the incrimination standard of the Fifth Amendment).

“[t]he first case in which there was any consideration of this constitutional provision.”³⁴⁵ Similarly, in *Blau v. United States*,³⁴⁶ Justice Black condemned the lower court’s rejection of a constitutional privilege by invoking *Burr*. “The attempt by the courts below to compel petitioner to testify,” he wrote, “runs counter to the Fifth Amendment as it has been interpreted from the beginning” — citing *Burr*.³⁴⁷ Other decisions offer similar descriptions.³⁴⁸ For all of these reasons, I feel confident that *Burr* is best understood as a Fifth Amendment precedent.

2. *Burr’s Two Originalist Lenses*. — With *Burr* established as a Fifth Amendment case, the next question is what originalist light it can shed given that it arose sixteen years after the Fifth Amendment’s ratification. In my view, *Burr* provides two distinct lenses on the original understanding.

The first lens is a general one. The lawyers’ positions in *Burr* can frame the debate. Counsel on both sides of *Burr* were brilliant and prominent,³⁴⁹ and several had personal experience with the enactment of the Constitution.³⁵⁰ Chief Justice Marshall allowed them to argue the privilege issue in extraordinary depth using the full range of legal authorities at their disposal.³⁵¹ Given the lawyers’ talents, experience, and resources, we would expect them to take any plausible arguments from the existing materials that were available for their side.

We can therefore use the range of the debate as a narrowing lens. Common ground among the lawyers likely reflects shared assumptions about the public meaning of the privilege when the Fifth Amendment was ratified.³⁵² Of course, we can’t know if any one lawyer was arguing

³⁴⁵ *Id.* at 612 (Shiras, J., dissenting, joined by Gray and White, JJ.). Justice Shiras took his extensive discussion of *Burr* “from the report of that case, as made by David Robertson, and published in two volumes by Hopkins & Earle, in Philadelphia, in 1808.” *Id.*

³⁴⁶ 340 U.S. 159 (1950).

³⁴⁷ *Id.* at 161 (citing *United States v. Burr (In re Willie)*, 25 F. Cas. 38 (C.C.D. Va. 1807) (No. 14,692e)).

³⁴⁸ See, e.g., *Hoffa v. United States*, 385 U.S. 293, 303–04 (1966) (stating that “[t]here have been sharply differing views within the Court” about the Fifth Amendment privilege, “[b]ut since at least as long ago as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion” (footnote omitted)); *California v. Byers*, 402 U.S. 424, 459 (1971) (Black, J., dissenting) (“Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment’s prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a ‘link in the chain of testimony’ needed to prosecute him for a crime.” (quoting *Burr*, 25 F. Cas. at 40)); *McKune v. Lile*, 536 U.S. 24, 57 (2002) (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.) (citing *Burr* for the view that “the language of the Amendment . . . encompasses the compulsion inherent in any judicial order overruling an assertion of the privilege”).

³⁴⁹ See *supra* notes 26–32 and accompanying text.

³⁵⁰ See *supra* notes 33–37 and accompanying text.

³⁵¹ See *supra* Part III, pp. 935–41.

³⁵² Of course, the public would not have a lawyer’s understanding of the privilege against self-incrimination. But the public could readily understand that the constitutional text was invoking a

the true original understanding. But we don't need to know that for the arguments to be useful. The dispute involved a narrow range of plausible inferences that could be drawn from agreed-upon materials. If a specific original understanding existed, it was likely somewhere in the range of views offered in *Burr*. This narrowing lens on *Burr* is useful because the lawyers agreed on a great deal. They agreed that the privilege was the common law privilege.³⁵³ They agreed on the specific sources that helped explain the privilege, such as the *State Trials* cases and the statement of the privilege from Hawkins.³⁵⁴

This shared understanding is noteworthy in light of how it might differ from other originalist approaches to the Fifth Amendment. Consider Justice Thomas's approach to Fifth Amendment originalism in his concurrence in *United States v. Hubbell*.³⁵⁵ As is common with modern originalist analysis, Justice Thomas began with a close reading of the constitutional text³⁵⁶: "No person . . . shall be compelled in any criminal case to be a witness against himself."³⁵⁷ Justice Thomas focused on the word "witness," looking to the understanding of that word at the time of the Founding based largely on contemporary dictionaries.³⁵⁸ Only after interpreting the word "witness" did he note the English cases interpreting the eighteenth-century common law privilege,³⁵⁹ which he suggested formed a "common-law backdrop" to state and then the federal constitutional privilege.³⁶⁰

Burr suggests a more direct link between the constitutional and common law privileges: The constitutional privilege and the common law privilege were seen as one and the same. *Burr* further suggests a Founding-era understanding rooted primarily in the Hawkins treatise and a specific set of cases from *State Trials*, several of which were cited in Hawkins. I discuss below what beyond that specific understanding

lawyer's term of art, so that the public meaning of the privilege is what informed lawyers would understand the privilege to be. See Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 430 (2009) (noting that ordinary citizens seeking to understand constitutional language can "recognize the meaningfulness of a term of art — even though they cannot themselves articulate even an approximate version of the criteria for correct application of the term").

³⁵³ See *supra* Part II, pp. 924–35.

³⁵⁴ See *supra* Part II, pp. 924–35.

³⁵⁵ See generally *United States v. Hubbell*, 530 U.S. 27, 49–56 (2000) (Thomas, J., concurring).

³⁵⁶ See *id.* at 49.

³⁵⁷ U.S. CONST. amend. V.

³⁵⁸ See *Hubbell*, 530 U.S. at 50–51 (Thomas, J., concurring).

³⁵⁹ See *id.* at 51.

³⁶⁰ *Id.* at 52.

might also have been included in the constitutional privilege.³⁶¹ But *Burr* suggests a specific shared understanding of the privilege.

A second originalist lens is offered by Chief Justice Marshall's resolution of the lawyers' arguments. The sources available in 1791, taken alone, do not provide a clear resolution of the correct standard to apply. In the absence of more precise materials, Chief Justice Marshall's 1807 opinion can serve as a second-best approximation of the unknowable answer from 1791. The *Burr* privilege dispute required Chief Justice Marshall to take sides. Our close reading of the lawyers' arguments in Part III and Marshall's decision in Part IV shows that Marshall deftly and thoughtfully worked his way through the lawyers' arguments.

Even if Marshall's answers reflect Chief Justice Marshall in 1807 and not established legal rules from 1791, Marshall's answers may be as close as we can get to filling in the detail needed.³⁶² An ancient proverb claims that in the kingdom of the blind, the one-eyed man is king.³⁶³ If the lawyers' arguments alone cannot settle the questions we need to answer, Chief Justice Marshall's decision may be as reliable a guide as we can expect to find. In this setting, Chief Justice Marshall may be the one-eyed king. The remainder of the Article will apply these two lenses to identify plausible originalist rules for compelled decryption today.

*B. Burr Permits Compelling a Defendant to Disclose
the Password in Evidence Cases*

Let's begin with compelled disclosure of a password that can be used to decrypt a file or computer suspected of containing evidence. In my view, *Burr* supports the conclusion that a suspect can be compelled to disclose his password in such cases. When the government has a warrant to search a cell phone or computer or file for evidence, and it needs the password to execute the warrant, *Burr* suggests that the Fifth Amendment privilege provides no bar to asking a person if he knows the current password, and if so, what he believes the current password to be. Under the standard of *Burr*, that question is not incriminating, and therefore it can be asked without violating the privilege.

Our starting point should be that the lawyers in *Burr* all saw the Fifth Amendment privilege as equivalent to the common law privilege against self-incrimination.³⁶⁴ The privilege was understood to be rooted

³⁶¹ The common law had various doctrines relating to the privilege, and it must be decided which of them were considered part of the Fifth Amendment privilege. That issue is addressed directly *supra* notes 134 to 177 and accompanying text.

³⁶² See Baude, *supra* note 38, at 61–62.

³⁶³ See MORRIS PALMER TILLEY, A DICTIONARY OF THE PROVERBS IN ENGLAND IN THE SIXTEENTH AND SEVENTEENTH CENTURIES 194 (1950) (describing this as an English proverb from the sixteenth century).

³⁶⁴ See *supra* section V.A.1, pp. 948–50.

in cases from *State Trials*, summarized by Hawkins, in which third-party witnesses were asked questions the answer to which would amount to a confession to a crime.³⁶⁵ The key ambiguity in the caselaw raised by compelled decryption involves the second question addressed by *Burr*: What quantum of evidence does an answer need to provide to trigger the privilege? The government argued that the privilege applied only if the answer was itself sufficient to convict the witness of the crime, without a need for other evidence.³⁶⁶ The defense argued that the privilege applied as long as it provided “a single link in the chain of testimony” that supported the conviction.³⁶⁷ Chief Justice Marshall largely agreed with the defense, ruling that an answer is incriminating if the “answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime.”³⁶⁸

The first lesson to draw is the nature of the incrimination test the *Burr* players saw. None of the parties in *Burr*, nor Chief Justice Marshall, conceived of a purely causal understanding of the incrimination test.³⁶⁹ The disagreement instead centered on the quantum of evidence an answer must itself provide to trigger the privilege, not how much evidence it might lead to in a causal sense. The debate was over how much of the crime Willie’s answer itself had to prove to trigger the incrimination test, not whether it led to the discovery of evidence.³⁷⁰

This is an essential distinction. It seems obvious that Willie’s testimony could be a causal link to evidence against him. Willie’s testimony was needed to authenticate the letter, and authenticating the letter was needed to use it in court. Without Willie’s authentication, Bollman could testify to the content of the letter but not its origins — and therefore its relevance. If the letter contained evidence of Willie’s involvement in the treason, then Willie’s act of authentication would therefore lead to the admission of evidence in the letter that would help prove his crimes. And yet neither counsel nor Chief Justice Marshall conceived of a merely causal approach to the incrimination test.

This point is made particularly clear by the absence of substantive discussion on whether Willie could be liable if the letter contained evidence of his violating the Neutrality Act. “[I]f the letter should relate to [the Neutrality Act] and not to the treason,” Marshall wrote, “the court is not apprized that a knowledge and concealment of the misdemeanor

³⁶⁵ See *supra* Part II, pp. 924–35.

³⁶⁶ *United States v. Burr (In re Willie)*, 25 F. Cas. 38, 40 (C.C.D. Va. 1807) (No. 14,692e).

³⁶⁷ 1 *BURR’S TR.* 214 (statement of Botts).

³⁶⁸ *Burr*, 25 F. Cas. at 40.

³⁶⁹ See *supra* section IV.C, pp. 944–45.

³⁷⁰ See *supra* section IV.C, pp. 944–45; see also *supra* section III.C, pp. 940–41.

would expose the witness to any prosecution whatever.”³⁷¹ This must have been so because the debate framed by the *State Trials* cases did not include a merely causal connection between admitting that he knew the cipher and evidence of a Neutrality Act violation. If the letter related to the Neutrality Act violation, the content of the letter could surely implicate Willie. It might reveal, for example, that Willie was part of the preparations for Burr’s expedition and therefore that Willie had violated the Neutrality Act.³⁷² Thus, admitting that Willie knew the cipher could lead to the letter’s use in court, which ultimately would add to Willie’s risk of criminal punishment under the Neutrality Act. But evidently it did not occur to counsel or to Chief Justice Marshall that this merely causal link could amount to legal incrimination.

If we agree that the incrimination test imagined in *Burr* rejected a purely causal inquiry, the *Burr* dispute can offer a powerful originalist insight into whether the government can order a suspect to disclose a password. In particular, *Burr* suggests that ordering a suspect to disclose a password to access evidence ordinarily will not be incriminating. In the words of *Burr*, the disclosed password is not “a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime.”³⁷³

To be sure, disclosing a password may provide a causal link. Testimony about the password may allow the government to unlock the device. And unlocking the device may yield evidence. But the password *itself* is not evidence. In most cases, the password is entirely innocuous. It is a meaningless string of characters. Questioning a suspect about a password is merely a means to access evidence, not evidence itself, much like the questions posed to Willie to determine his knowledge of Burr’s cipher to authenticate Burr’s letter.

If we take Marshall’s specific reasoning in *Burr* as our originalist guide, and not just the shared premises of the debate in the case, the conclusion that the government should be permitted to compel a password to decrypt in a search for evidence is particularly compelling. The *Burr* defense had a powerful argument based on misprision of treason that admitting to knowing the cipher was incriminating.³⁷⁴ If the letter contained evidence of treason, and Willie admitted that he understood the letter, admitting that he knew the cipher would go a long way toward showing that Willie knew of but concealed the treason, and therefore help establish misprision of treason. It wouldn’t prove the element of the crime definitively on its own. But surely it would be significant evidence tending to show the element existed.

³⁷¹ *Burr*, 25 F. Cas. at 40.

³⁷² See Ch. 50, § 5, 1 Stat. 381, 384 (1794). For a discussion of the Neutrality Act, see *supra* notes 66–70 and accompanying text.

³⁷³ *Burr*, 25 F. Cas. at 40.

³⁷⁴ See *supra* notes 271–274 and accompanying text.

Chief Justice Marshall's rejection of this argument reveals the narrowness of his incrimination test. According to Marshall, Willie could be compelled to testify if he had current knowledge of the cipher because that did not prove the element of the crime that was based on past knowledge of the cipher. "[I]n a criminal prosecution," he reasoned, showing Willie's present knowledge "would not . . . justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact."³⁷⁵ Marshall's incrimination test appears to have required the answer to actually prove the element of the crime, and not just to provide some evidence in support of the element.

But wait, you may be thinking: Willie was asked only if he *knew* the cipher and not to *disclose* it. Perhaps that matters. After all, it was Bollman's job to decipher the letter rather than Willie's. And in the oral argument leading up to Marshall's decision, the government appears to have acknowledged that asking for more might lead to incrimination. If the government had asked Willie to testify about the contents of the letter, a prosecutor noted, the government "might then propound a question to which [Willie] might object."³⁷⁶ Perhaps asking Willie if he knew the cipher was only a preliminary question that would not incriminate him, while asking Willie to disclose the cipher would be a different case?

I appreciate this argument, but I am not persuaded by it. The reason is that Chief Justice Marshall's reasoning in *Burr* does not support a distinction between admitting knowledge of the cipher and disclosing the cipher. According to the holding of *Burr*, forcing Willie to admit he knew the cipher would not be incriminating because it would not "justify the inference that his knowledge [of the letter's contents] was acquired previous to this trial, or afford the means of proving that fact."³⁷⁷ What mattered to Marshall was whether the testimony proved prior knowledge of the contents of the letter to show that Willie had concealed it. That would have been incriminating because it proved an element of misprision of treason.

Based on the reasoning of *Burr*, the extent of incrimination from Willie disclosing the cipher would have been the same as admitting he knew the cipher. Disclosing the cipher would have shed no more light on Willie's past state of knowledge of the letter's contents than admitting that he knew it. In both instances, the disclosure does not show the key fact that would lead to incrimination — that is, past knowledge of

³⁷⁵ *Burr*, 25 F. Cas. at 40.

³⁷⁶ 1 BURR'S TR. 208 (statement of Mac Rae) ("My question is not, 'Do you understand this letter, and *then* what are its contents?' If I pursued this course, I might then propound a question to which he might object; but unless I take that course, how can he be criminated?").

³⁷⁷ *Burr*, 25 F. Cas. at 40.

the letter's contents. *Burr*'s reasoning therefore supports the conclusion that disclosing a password in a search for evidence is not incriminating.

Two additional points must be made here. First, this standard appears to apply to a defendant as well as to a neutral third-party witness. As noted earlier, a "witness" at the time of *Burr* referred to a sworn witness with no stake in the case.³⁷⁸ A criminal defendant could not give sworn testimony and could not be a witness.³⁷⁹ As a result, the major cases on the privilege against self-incrimination involved non-party witnesses instead of criminal defendants.³⁸⁰ This difference raises the question of how the privilege should apply when the government wants to ask questions of a defendant.

Chief Justice Marshall's exchange with Burr over the grand jury's request for Burr's consent suggests that the standards in the two contexts are the same. Recall that the grand jury foreman recognized that they could not compel Burr's assistance that would incriminate him.³⁸¹ The Chief Justice inquired, were the grand jurors wondering if they could ask Burr questions directly so long as the questions did not incriminate him?³⁸² Marshall then stated that he "knew not that there was any objection to the grand jury . . . examining any man as a witness, who laid under an indictment."³⁸³ One of Burr's defense lawyers conceded that "there could be no objection."³⁸⁴ Although not a model of clarity, this exchange appears to reflect an understanding that the same basic incrimination standards applied to questioning a defendant as applied to a neutral witness.

Second, it is worth noting that *Burr*'s understanding of the privilege conflicts with some current Supreme Court caselaw. On one hand, the basic test for incrimination today traces directly back to *Burr*. For example, in *Blau v. United States*, the Supreme Court relied on *Burr* in support of its view that the incrimination test looked to whether an answer "would have furnished a link in the chain of evidence needed in a prosecution."³⁸⁵ The Court repeated that standard the next year in the oft-cited *Hoffman v. United States*,³⁸⁶ citing *Blau*. At that point, the law directly followed from and was consistent with *Burr*.

But later, in *Kastigar v. United States*,³⁸⁷ the Court quietly expanded the test. Citing *Blau* and *Hoffman*, *Kastigar* stated that the privilege

³⁷⁸ See *supra* notes 171-177 and accompanying text.

³⁷⁹ See *supra* notes 171-177 and accompanying text.

³⁸⁰ See *supra* notes 171-177 and accompanying text.

³⁸¹ See 1 BURR'S TR. 327-28 (statement of Randolph).

³⁸² See *id.* at 328 (statement of Marshall, C.J.).

³⁸³ *Id.* (statement of Marshall, C.J.).

³⁸⁴ *Id.* (statement of Martin).

³⁸⁵ *Blau v. United States*, 340 U.S. 159, 161 (1950).

³⁸⁶ 341 U.S. 479, 486 (1951).

³⁸⁷ 406 U.S. 441 (1972).

“protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution *or could lead to other evidence that might be so used.*”³⁸⁸ Although *Blau* and *Hoffman* are consistent with *Burr*’s test, *Kastigar* is not. *Kastigar* appears to have expanded the incrimination standard beyond *Burr* to include merely causal connections between disclosures and evidence. Under *Burr*, the incrimination standard is more limited.

C. *Burr May Not Permit Compelling a Defendant to Disclose the Password in Contraband Cases*

Many modern compelled decryption cases involve efforts to search computers for child pornography.³⁸⁹ It is therefore important to see how *Burr* may support a different outcome when the government seeks a password to decrypt contents in an effort to obtain contraband instead of evidence. The analysis should be different, I think. When the government is seeking contraband instead of evidence, a defendant normally will have a much stronger argument that disclosing the password is incriminating. To be clear, this distinction does not reflect a preexisting doctrinal line.³⁹⁰ Rather, it’s an implication of *Burr*’s reasoning. The nature of contraband offenses makes a privilege claim stronger under the test Chief Justice Marshall articulated.

Some context may be helpful. Contraband is property that is unlawful to import, export, produce, or possess.³⁹¹ Digital contraband generally means child pornography, which typically means sexualized images of minors.³⁹² Both federal and state law punish possession of child pornography,³⁹³ and child pornography offenses are the most often prosecuted federal computer crimes.³⁹⁴ When the government discovers child pornography on a suspect’s computer, proving the crime typically is

³⁸⁸ *Id.* at 445 (emphasis added).

³⁸⁹ See, e.g., *United States v. Apple MacPro Comput.*, 851 F.3d 238, 248 (3d Cir. 2017); *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1339 (11th Cir. 2012); *In re Grand Jury Subpoena to Boucher*, No. 06-MJ-91, 2009 WL 424718, at *2 (D. Vt. Feb. 19, 2009).

³⁹⁰ Such a distinction has been suggested in the Fourth Amendment setting for the scope of search warrants, with at least some indication that warrants originally could be obtained for contraband but not mere evidence. See *Warden v. Hayden*, 387 U.S. 294, 300–10 (1967) (describing this distinction, but then rejecting it).

³⁹¹ See *Contraband*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining contraband as “[g]oods that are unlawful to import, export, produce, or possess”).

³⁹² See generally 18 U.S.C. § 2252(a) (prohibiting the transfer, distribution, receipt, or possession of child pornography).

³⁹³ See, e.g., *id.*; MASS. GEN. LAWS ch. 272, § 29C (West 2020); N.Y. PENAL LAW § 263.11 (Consol. 2020).

³⁹⁴ In 2018, for example, two percent of federal criminal prosecutions were for child pornography offenses. See U.S. SENT’G COMM’N, FISCAL YEAR 2018: OVERVIEW OF FEDERAL CRIMINAL CASES 11 (2019).

straightforward. Possession requires knowledge of the image and control of it.³⁹⁵ In most cases, that is easy to show. People usually know the files saved on their own devices and can manipulate them.³⁹⁶ That alone is enough to prove a possession offense.

Being forced to disclose a password might establish the elements of a contraband possession crime in two ways that go beyond the causal link found in a case involving mere evidence. The most direct way is through control. A person who knows the password to decrypt a device can control the device's contents. Entering the password decrypts the device, and decryption permits a user to manipulate the files the device contains. A person who does not know the password cannot do those things. To someone without the password, an encrypted device is just a paperweight. And an encrypted file on an unencrypted device is just gibberish. As a result, admitting knowledge of a password can prove an element of the possession crime by establishing control of the contraband contents.

In addition to showing control, knowing the password might in some cases help show knowledge. A person who knows the password may have used the password to obtain access. And a person who obtained access may know what is to be found when access has been obtained. It's not certain, of course. If I tell you that the password to an encrypted file on my computer is "ILoveBurr," you will know the password without knowing the file contents. More broadly, knowing the password to decrypt and knowing what is there when the contents are decrypted are two different things: you can have one without the other. But there is at the very least a correlation between the two.

From an originalist standpoint, taking the *Burr* dispute as our guide, how might disclosing a password be incriminating? Recall that, in *Burr*, the parties and the Chief Justice agreed that requiring Willie to testify about his past knowledge of the letter's contents would be incriminating.³⁹⁷ Admitting past knowledge of the treason that Willie had not disclosed would make him guilty of misprision of treason. The key question in *Burr* was whether making Willie testify about his current knowledge of the cipher was incriminating.³⁹⁸ The government argued it was not, and Chief Justice Marshall agreed with the government on that point.³⁹⁹

³⁹⁵ See, e.g., *United States v. Kuchinski*, 469 F.3d 853, 863 (9th Cir. 2006).

³⁹⁶ There are rare exceptions, such as when digital contents are stored in a browser cache and the user may not know they are there or how to control them. See *id.* ("Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images.")

³⁹⁷ *United States v. Burr (In re Willie)*, 25 F. Cas. 38, 40 (C.C.D. Va. 1807) (No. 14,692e).

³⁹⁸ *Id.* at 39.

³⁹⁹ See *id.* at 39–40.

The *Burr* dispute and Chief Justice Marshall's opinion suggest that being forced to disclose a password will often be incriminating when the government plans to search for contraband. Disclosing the password reveals that you know the password. Admitting that you know the password can acknowledge control over the contents that the password can reveal. Just as Willie admitting to past knowledge of the cipher would admit that he knew the letter's contents — having copied the letter himself, the process of copying would have meant understanding the letter's contents — admitting to knowing the password can reveal an ability to control the contraband that the encryption otherwise conceals. Similarly, in some cases knowledge of the password can imply awareness of contraband found on the device.

I use caveats like “can” and “in some cases” deliberately. Chief Justice Marshall's opinion in *Burr* suggests a fact-sensitive test. Marshall agreed with the government's position that admitting to past knowledge of the cipher would be incriminating while admitting to current knowledge would not be.⁴⁰⁰ The difference was critical because the crime of misprision of felony required the past act of knowing concealment.⁴⁰¹ Analogously, the crime of possessing contraband requires a moment of past awareness and control of the contraband. In some circumstances this would make an order to disclose the password likely incriminating under *Burr*'s test, while in other circumstances it likely would not.

Consider examples on both sides of the line. First, imagine a suspect is caught holding his personal computer that is believed to contain child pornography. A search of the computer pursuant to a warrant reveals that it contains an encrypted file, *childporn.jpg*. The suspect admits that he uses the computer every day and has seen the icon for the file. When the government orders him to divulge the password to decrypt the file, however, the suspect pleads the Fifth.

In such a case, the suspect would have a strong Fifth Amendment claim based on *Burr*. Providing the password would admit knowledge of the password. In that context, knowledge of the password would admit control of the image. The password was just for that one file on the suspect's one computer, and the suspect admitted he knew of the file. Admitting he knew the password to see the file would be tantamount to admission of control over the image and knowledge of its contents, much like Willie's hypothetical admitting he knew the contents of the letter in the past would admit to knowing concealment of its contents.

Next, imagine a suspect has been arrested in a conspiracy case and the police want to search his co-conspirator's phone. Our suspect is in New York, and the co-conspirator is in Alaska. The suspect tells the police that his co-conspirator long ago told him the password to his

⁴⁰⁰ See *id.* at 40.

⁴⁰¹ See *id.*

phone. The government orders the suspect to divulge the phone password, but our suspect pleads the Fifth. In that case, the assertion of privilege should fail under the *Burr* test. Our suspect's admission that he knew the password to a device thousands of miles away does not admit to either knowledge or control of the phone's contents. On these facts, our suspect's current knowledge of the password is independent of possession of the phone's contents. Disclosing the password and admitting present knowledge of it is not incriminating, much like Willie's possibly admitting present knowledge of the cipher was not incriminating in *Burr*.

*D. Whether Burr Permits Orders to Enter Passwords
Likely Depends on the Choice of Analogies*

The third and final issue is how *Burr* sheds light on compelled entry of a password. When investigators rely on this technique, typically they present the person with a password prompt to the device or file and order the person to enter in the password and unlock the device or file without disclosing the password. The order is satisfied when the device or file unlocks. In my view, *Burr*'s lesson for the Fifth Amendment implications of compelled entry likely depends on the choice of analogy. If compelled entry is treated as akin to compelled production, then it may be barred by the Fifth Amendment. If compelled entry is treated as akin to admitting knowledge of the password, then the rules for compelled entry should match those for compelled disclosure of the password.

The core challenge with applying *Burr* to compelled entry is that facts of compelled entry did not occur at the time of *Burr*. In *Burr*, the encryption used a cipher alphabet such as that shown earlier in Figure 2.⁴⁰² The communicants would agree on a set of rules for translating plain text into cipher text, and the same rules would be used in reverse to decrypt cipher text into plain text. That technology led to a specific set of ways that investigators could try to obtain and decrypt ciphered communications. First, they could try to compel ciphered letters from someone who possessed them, as discussed by the grand jury in *Burr* and commented on by Marshall after his Fifth Amendment ruling.⁴⁰³ Second, they could seek testimony about knowing the cipher to authenticate a ciphered letter, as they did from Willie and on which Marshall ruled.⁴⁰⁴ And third, they could seek an actual translation of the letter, as they apparently did from Bollman, which would require letter-by-letter and word-by-word application of the cipher alphabet by someone who either had memorized the entire cipher alphabet or knew it well enough to use it.⁴⁰⁵

⁴⁰² See *supra* note 94 & Figure 2.

⁴⁰³ See *supra* section IV.D, pp. 945–46.

⁴⁰⁴ See *supra* sections IV.A–C, pp. 942–45.

⁴⁰⁵ See *supra* section I.C, pp. 921–22.

Modern encryption systems operate differently. Today, when a person encrypts a file or device, the encryption system is primarily operated by a phenomenally complex mathematical set of operations that a computer runs on its own. The computer locks the file or device automatically. The system gives only a very small role to the user: A user can set any arbitrary password as a key, and entering the password is all that is needed to set the complex math in motion and decrypt the device. Unlocking the device only requires entering the key to decrypt the device. The computer does the rest.

The differences between encryption systems at the time of *Burr* and today means that we can't directly apply the fact patterns in *Burr* to compelled entry of a password to decrypt digital data. Instead, we must look for possible analogies between modern compelled entry and the facts of *Burr*. In my view, two analogies are plausible. First, compelled entry might be like compelling Willie to say if he knows the cipher. Second, compelled entry might be like forcing Burr to produce a ciphered letter. I take no position on which analogy is more persuasive, as that boils down to a choice of analogies rather than a lesson of history. But the key insight is that either analogy might be in play, and which is chosen determines which Fifth Amendment framework would apply under *Burr*.

Start with the first possibility. Perhaps ordering a person to enter in a password is best analogized to forcing him to say if he understands the cipher. This analogy is rooted in the shared implied testimony of the two acts. When a person enters in a password that unlocks a device, he communicates that he knows the password. He needs to know the password to enter it, and entering it therefore reveals knowledge of it. The entering does not reveal the password, of course. But it admits that the person knows the password that worked to unlock the device or file.

If this analogy is persuasive, then an originalist approach based on *Burr* would treat an order to enter the password to decrypt a computer or file just like Chief Justice Marshall treated the question of whether Willie knew the cipher. Under this approach, the Fifth Amendment standard for compelled entry would mirror that for compelled disclosure. Compelled entry would generally not be limited by the Fifth Amendment privilege in an evidence case. But the privilege might limit compelled entry, depending on the facts, in a case seeking contraband such as child pornography.

There is a second analogy to consider. We might analogize compelled entry of the passcode to compelled production of the files revealed by decryption. This analogy is rooted in the causal link between the person's act and the result of access to the files. The government wants to access the decrypted contents. With that goal in mind, it doesn't matter whether a person provides access by entering a key that unlocks the information or by gathering the information in his possession and bringing it to the government. The result is the same.

If compelled entry is analogized to compelled production, the question becomes how the Fifth Amendment was originally understood to apply to such compulsion. Common law authorities reflected a categorical bar on production of evidence from a criminal defendant when the evidence produced is incriminating.⁴⁰⁶ MacNally's 1802 treatise, relied on extensively in *Burr*, identifies the rule as being that "[i]n a criminal prosecution, though the defendant be possessed of the best evidence the nature of the case admits of, yet he cannot be obliged, or even legally required to produce it against himself."⁴⁰⁷

The *Burr* proceedings hinted at this rule during the brief exchange when the grand jury sought Burr's consent to hand over a letter he was thought to possess. "The grand jury are perfectly aware," the foreman explained, "that they have no right to demand any evidence from the prisoner under prosecution, which may tend to criminate himself,"⁴⁰⁸ to which Marshall commented that "the grand jury were perfectly right in the opinion, that no man can be forced to furnish evidence against himself."⁴⁰⁹

A caveat to this argument is that some uncertainty exists over whether this common law evidence rule was part of the Fifth Amendment privilege. At common law, the rule against compelled production of evidence by the defense appears to have been viewed as distinct from the witness privilege against self-incrimination. For example, MacNally treats the rule against defense production of evidence as one of the common law parol evidence rules (explained in Book II of his treatise) instead of one of the common law witness rules (explained in Book I of his treatise).⁴¹⁰ But assuming that the Fifth Amendment privilege was intended to encompass both rules,⁴¹¹ analogizing entering a password to production of the device's contents may lead to the conclusion that the Fifth Amendment bars compelled password entry.

Under this assumption, how *Burr* applies to password entry depends on the analogical choice between compelled production and compelled answering about knowledge of the cipher. It is not my place here to decide which analogy is more persuasive. That choice depends on whether the relevant similarity should be the implied testimony in the act or the causal link to evidence it provides. History cannot resolve that. But *Burr* plausibly frames the choice as between these two analogies.

⁴⁰⁶ See, e.g., Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1620-22 (1999).

⁴⁰⁷ MACNALLY, *supra* note 141, at 346.

⁴⁰⁸ 1 BURR'S TR. 327-28 (statement of Randolph).

⁴⁰⁹ *Id.* at 328 (statement of Marshall, C.J.).

⁴¹⁰ Compare MACNALLY, *supra* note 141, at 257-58 (explaining the witness privilege against testimony), with 2 *id.* at 346-50 (explaining the defendant privilege against production).

⁴¹¹ See *United States v. Hubbell*, 530 U.S. 27, 55-56 (2000) (Thomas, J., concurring) (suggesting that the term "witness" in the Fifth Amendment was originally understood to apply broadly to mean one who furnishes evidence, thus bringing the rules against defendant production within the Fifth Amendment privilege).

CONCLUSION

Originalist approaches to constitutional interpretation often raise the challenge of translating eighteenth-century language to modern-day facts. The historical meaning of the text can be unclear. The context can be readily lost. And how that meaning might apply to new technologies can be largely a matter of speculation. Given those difficulties, the dispute in *Burr* offers an unusual opportunity. The exhaustive detail of the materials, the talents of the lawyers, the high profile of the case, and the personal experiences of the participants should give us unusual confidence that it captures the Framing-era understanding of the privilege. And the similarity of its facts to present-day disputes is fortuitous.

Burr does not answer everything, of course. Its lessons for modern-day disputes remain open to interpretation. Potential differences exist between admitting knowledge of a cipher and disclosing a password. There is no exact historical analogue to password entry. The dispute arose after the Fifth Amendment's ratification, not before it. And broader jurisprudential commitments may make the case no more than just a cool story. In particular, a jurist who rejects originalism or is looking for a pragmatic resolution of how to apply the Fifth Amendment to new technologies may simply ignore *Burr* on the ground that it is irrelevant or quixotic.

Nonetheless, the *Burr* dispute has been an underappreciated resource that can yield unusually specific guidance for the originalist inclined. Any originalist approach to the Fifth Amendment and compelled decryption should include a close reading of the case and its supporting materials.