

# **MEDIATION: THE PROCESS THAT MIGHT HAVE SAVED FACE FOR TWO PROMINENT FIGURES IN AMERICAN HISTORY AND THE LIFE OF THE FIRST SECRETARY OF THE TREASURY**

Nicola A. Gelormino

## **I. INTRODUCTION**

In the late 1700s, a small yet prominent group of political leaders united to create the American republic and proceeded to hold it together during its formative years.<sup>1</sup> Although their efforts created the now oldest, enduring republic in the world,<sup>2</sup> the political environment of the early republic posed significant challenges. Characterized by historians as “the Age of Passion,” this era was known for its “flamboyant displays of ideological intransigence, intense personal rivalries, and hyperbolic claims of imminent catastrophe.”<sup>3</sup> With one fatal exception in 1804,<sup>4</sup> the leaders at this time used political parties to successfully manage the emotionally charged environment and political differences existing between individuals. So why did Alexander Hamilton and Aaron Burr, two of the most prominent political leaders of the early republic, choose to resolve their differences with a method that involved deadly weapons and was technically illegal?

This paper will explore how the dispute might have been handled differently if the parties had engaged in a mediation-like process in the hours before the famous duel, the duel which took the life of the first United States Secretary of the Treasury, Alexander Hamilton. This paper opens by providing insight into Alexander Hamilton’s and Aaron Burr’s character and the deterioration of their relationship. Part III resolves the dispute

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<sup>1</sup> JOSEPH J. ELLIS, *FOUNDING BROTHERS* 13 (Vintage Books 2002) (2000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 16.

<sup>4</sup> *See id.* at 15-18.

using a mediation led by Joseph Story in place of the duel that occurred on July 11, 1804. Part IV explains the mediator's approach and the parties' strategies and Part V briefly concludes.

## II. HISTORICAL BACKGROUND

Aaron Burr was born into an aristocratic family in Newark, New Jersey.<sup>5</sup> He has been described as a man of courage and strict discipline with a "high spirit and readiness to fight" as well as an intelligent man who readily used the resources available to him.<sup>6</sup> On the other hand, he exhibited insincerity at times during his political career.<sup>7</sup> In striking contrast to Burr's upbringing, Hamilton was born an impoverished, illegitimate child in the British West Indies.<sup>8</sup> He has been described as someone constantly trying to prove himself,<sup>9</sup> perhaps in part because of his indigent beginnings and status as an illegitimate child.<sup>10</sup> Hamilton has also been referred to as blunt yet practical and as having a "pessimistic view of human nature."<sup>11</sup>

Despite the differences in their early lives, Burr and Hamilton shared some similarities in their backgrounds. Both served in the military; Hamilton served as Inspector General of the New Army and Burr served as a Colonel in the American

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<sup>5</sup> *People & Events, The Duel*, PBS, <http://www.pbs.org/wgbh/amex/duel/peopleevents/pande01.html> (last visited October 12, 2010).

<sup>6</sup> Lyndon Orr, *Famous Affinities of History: The Story of Aaron Burr*, <http://www.authorama.com/famous-affinities-of-history-ii-3.html> (last visited Oct. 12, 2010).

<sup>7</sup> *Id.*

<sup>8</sup> PBS, *People & Events*, *supra* note 5.

<sup>9</sup> ELLIS, *supra* note 1, at 22.

<sup>10</sup> Illegitimate children were given harsh and unsympathetic treatment by the English Common Law. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS AND ESTATES* 115-16 (Aspen Publishers 8<sup>th</sup> ed. 2009).

<sup>11</sup> Robert K. Wright, Jr. and Morris J. MacGregor, Jr., *Soldier-Statesmen of the Constitution*, <http://www.history.army.mil/books/RevWar/ss/hamilton.htm> (last visited Oct. 12, 2010).

Revolution.<sup>12</sup> In the 1780s, both men became successful attorneys, practicing law in New York, and entered politics shortly thereafter.<sup>13</sup> The late 1700s marked a high point in both Burr and Hamilton's political careers; President Washington appointed Hamilton as his Secretary of the Treasury and Burr won a United States Senate seat.<sup>14</sup> However, this period also marked the start of a tumultuous relationship between these two men.

**a. Significant events leading up to the dispute**

In 1791, Burr won his U.S. Senate seat from Hamilton's father-in-law, Federalist Philip Schuyler.<sup>15</sup> In 1800, Burr published a private document Hamilton wrote on the character of President John Adams, thereby causing a rift in the Federalist Party.<sup>16</sup> Also that year, Burr ran alongside Thomas Jefferson in the presidential election and used his power to steer the electoral votes in New York towards himself and Jefferson, resulting in a tie.<sup>17</sup> Hamilton lobbied the Federalists to support Jefferson while Burr chose not campaign for himself.<sup>18</sup> Ultimately, Jefferson was elected President and Burr was named Vice President.<sup>19</sup> In 1804, Hamilton campaigned against Burr in the New York governor's race to prevent him from gaining the support of the Federalists.<sup>20</sup> Burr lost to Republican Morgan Lewis, mainly because the latter's supporters publicly slandered Burr.<sup>21</sup> Later that year at a gathering for the Federalist Party, Hamilton attacked Burr's qualifications

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<sup>12</sup> *Timeline, The Duel*, PBS, <http://www.pbs.org/wgbh/amex/duel/timeline/index.html> (last visited October 12, 2010).

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

and reputation.<sup>22</sup> In April of 1804, Dr. Charles Cooper published a letter in the *Albany Register* about the matter.<sup>23</sup> In it, Cooper stated that Hamilton expressed a despicable opinion of Burr to others, although the author did not explain what he was referring to.<sup>24</sup> This resulted in an exchange of angry letters and insults between Hamilton and Burr whereby Burr demanded that Hamilton acknowledge or disown the statement, but Hamilton refused to address it.<sup>25</sup> Shortly thereafter, Burr challenged Hamilton to a duel on July 11, 1804.<sup>26</sup>

*When July 11<sup>th</sup> came, Hamilton was strongly opposed to the duel and the practice of dueling in general.<sup>27</sup> In fact, two years before this date, Hamilton's eldest son was fatally wounded in a duel at the very same location.<sup>28</sup> That morning, Hamilton said he felt no ill-will towards Burr aside from political opposition and intended to throw away at least his first shot to give Burr time to reflect.<sup>29</sup> Burr's thoughts at the moments before the duel were lesser known.<sup>30</sup> After firing the fatal shot, however, Burr appeared "surprised and regretful" and unsuccessfully tried to go back and speak with Hamilton.<sup>31</sup>*

### III. MEDIATING THE DISPUTE

In addition to trading letters days before the duel, the parties also engaged in verbal exchanges described as

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<sup>22</sup> Aaron Burr Kills Alexander Hamilton in a Duel, nps.gov, <http://www.nps.gov/archive/jeff/lewisclark2/circa1804/in1804/headlinesaaronburrduel.htm> (last visited Oct. 12, 2010).

<sup>23</sup> ELLIS, *supra* note 1, at 32.

<sup>24</sup> NPS, *supra* note 22.

<sup>25</sup> ELLIS, *supra* note 1, at 32-33.

<sup>26</sup> Marcia Claesson, *The Hamilton Burr Duel – Reasons & Preparations*, SUITE101.com, <http://www.suite101.com/content/the-hamilton-burr-duel---reasons--preparations-a204599> (last visited October 3, 2010).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> ELLIS, *supra* note 1, at 23.

<sup>30</sup> See Claesson, *supra* note 26.

<sup>31</sup> ELLIS, *supra* note 1, at 25.

“negotiations” by historian Joseph Ellis.<sup>32</sup> Formalities of this nature flowed from the *Code Duello*, or the rules of dueling, which addressed the practice of dueling and points of honor.<sup>33</sup> The exchanges consisted of representatives for each party issuing a series of statements on that party’s behalf to the other side’s representative.<sup>34</sup> The negotiations failed and, coupled with the letters, led to Burr’s challenge on the grounds that the parties could not reach an agreement.<sup>35</sup> This Part will use mediation following the failed negotiations to resolve the parties’ differences.

#### **a. Mediator Selection**

The parties involved in the dispute desired to select a mediator possessing a keen understanding of the political environment of the time. However, the person selected also could not have strong ties to any political party because this could compromise the mediator’s obligation to remain impartial.<sup>36</sup> Moreover, there was a significant emotional element in this dispute, as both parties were fighting to maintain their political power.<sup>37</sup> Thus, the parties preferred a mediator capable of empowering the parties and enabling them to drive the mediation.

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<sup>32</sup> ELLIS, *supra* note 1, at 34.

<sup>33</sup> *Special Features, The Duel*, PBS, <http://www.pbs.org/wgbh/amex/duel/sfeature/rulesofdueling.html> (last visited Oct. 12, 2010).

<sup>34</sup> ELLIS, *supra* note 1, at 33-35.

<sup>35</sup> *Id.* at 33-36.

<sup>36</sup> A mediator’s obligation to remain impartial throughout the process is codified in the modern Rules for Certified and Court-Appointed Mediators as Rule 10.330. Rule 10.330 defines impartiality as “freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties.” *Rules for Certified and Court Appointed Mediators*, flcourts.org, [http://www.flcourts.org/gen\\_public/adr/bin/RulesForMediators.pdf](http://www.flcourts.org/gen_public/adr/bin/RulesForMediators.pdf) (last visited Nov. 11, 2010). Mediator impartiality is a significant concern for purposes of this paper for two reasons. First, the intense political environment of the early 1800s suggests many individuals familiar with politics at that time may have strong ties to a political party. Second, political differences played a significant role in this dispute; therefore, the mediator selected must be able minimize these differences to the extent possible.

<sup>37</sup> See NPS, *supra* note 22 (explaining that by 1804 both men had lost their political credibility due to their own behavior).

The mediator selected by the parties was Joseph Story. Several considerations led to this decision. By July 11, 1804, Story had already been practicing law in New England for several years.<sup>38</sup> This predated his political positions on the Massachusetts Legislature, the U.S. House of Representatives, the Massachusetts State Legislature,<sup>39</sup> and his appointment in 1811 as the youngest Associate Justice of the Supreme Court.<sup>40</sup> Thus, the mediation occurred at the height of his successful legal career and prior to acquiring any strong, perceived political ties. Irrespective of this timing, Story was recognized early on in his life for his abilities to be true to himself and boldly disagree with the prevailing beliefs of any party with which he identified.<sup>41</sup> In addition, Story later authored the first comprehensive treatise on the U.S. Constitution and development of the American republic.<sup>42</sup> This suggests he had a deep understanding of the political environment of the time. Finally, after serving on the Court, Story became a well-liked professor of law at Harvard.<sup>43</sup> This indicates he possessed the ability to influence law students. A reasonable inference from this finding is that Story possessed the ability to empower other individuals outside of academia. In sum, Joseph Story had the necessary keen political understanding, impartiality, and ability to empower the parties to serve as the mediator in this dispute.

### **b. Mediator's Opening Statement**

**Mediator:** Good afternoon gentlemen. I am Joseph Story, your mediator for this matter. Before we begin, it is important that I touch upon a few important items beginning with the private nature of this process. Unlike the open courtroom you have encountered in

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<sup>38</sup> *Joseph Story*, History Central, <http://www.historycentral.com/bio/ant/Story.html> (last visited Oct. 12, 2010).

<sup>39</sup> *Id.*

<sup>40</sup> Paul Finkelman, *Joseph Story Biography*, <http://law.jrank.org/pages/19087/Joseph-Story.html> (last visited Oct. 12, 2010).

<sup>41</sup> History Central, *supra* note 38.

<sup>42</sup> Arthur Sutherland, *Introduction*, [http://www.constitution.org/js/js\\_001.htm](http://www.constitution.org/js/js_001.htm) (last visited Oct. 12, 2010).

<sup>43</sup> History Central, *supra* note 38.

your practice as attorneys, mediation offers a private setting where the information disclosed will be kept strictly confiden...

**Burr:** [*interrupting*] Good! At least *you* will not publicly disclose any more of this man's lies about my character.

**Mediator:** Mr. Burr, I will provide you with the opportunity to speak fully and candidly about this matter in a few minutes. It is my experience that this process works best if each of you speaks to the other in a respectful manner and listens when the other person is talking. Do you think you can wait until it is your turn to bring up this point?

**Burr:** Sure, carry on then.

**Mediator:** As I was saying, anything that is said during this mediation will be kept in strict confidence unless both of you agree otherwise. I assure you that I will not make any public disclosures, as that would compromise my neutrality. In fact, my role as your mediator requires that I am and will remain a completely neutral party at all times. During this process, I may ask to speak with you individually if I think it would be beneficial. If such a situation occurs, I will explain the procedure for the separate session in greater detail at that time.

I have significant experience as an attorney and at handling disputes and believe that I can use these strengths to help the two of you change the quality of your interaction. All decision-making power shall remain in your hands, and I will neither suggest ways to settle this matter, nor dictate the terms of an agreement. Do either of you have any questions about the points I just mentioned?

**Hamilton/Burr:** No.

**Mediator:** While the events giving rise to this dispute are well known by all of us, I would like each of you to describe the situation from your point of view and express any issues or concerns that you want to address today. Typically, the party bringing the case speaks first. So, if you do not object, Mr. Hamilton, I will ask Mr. Burr to start.

**Hamilton:** I do not have any objections at this time.

**c. Opening Joint Session**

**Burr:** Now can I speak?

**Mediator:** Yes, of course.

**Burr:** I would like to start this discussion where the two of us left off. Mr. Hamilton still owes me an apology for Dr. Cooper's *Albany Register* letter. [*turning toward the mediator*] Cooper indicated in his letter that Mr. Hamilton's opinion of me was even more *despicable* than the criticisms he made of my character at a political gathering for the Federalist Party several months ago. By way of my letter, I gave him the opportunity to explain his slanderous remark or apologize for it, but he refused. Once he apologizes for that, he can apologize for all of his personal and political remarks attacking my character. [*turning towards Hamilton*] You have spent the past 13 years vilifying me, ever since I won the Senate seat from your father-in-law.

**Hamilton:** As I said in my letter to you Mr. Burr, "[h]ow am I to judge of the degree intended [by this word despicable]?"<sup>44</sup> I cannot be bothered with this exercise

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<sup>44</sup> ELLIS, *SUPRA* NOTE 1, AT 33.

of considering what the author intended by such a remark. This was an inference Cooper drew himself from some comments I made concerning Mr. Burr's political principles at a Federalist gathering. And, I certainly will not apologize for any other remarks made so long ago that I'm not even certain I made them.

**Burr:** Slanderer! I should have sued you for libel a long time ago.

**Hamilton:** Libel? Ha! All I spoke was the truth about your character.

*[As Hamilton recalled the conversation, it dealt entirely with Burr's political views and did not include an attack on his personal character.<sup>45</sup> At this time, it was well known that "[a]ffairs of honor were supposed to involve only personal charges" and "[p]olitical or ideological disagreements, no matter how deep, lay outside the field of honor on which a gentleman could demand satisfaction."<sup>46</sup>]*

**Mediator:** Gentleman, this process can be successful if you abide by the ground rules I asked you to follow in my opening statement. However, it is your choice to continue with the mediation and decide your level of involvement in it. *[both appear to be listening and willing to continue]* Now, I would like you to focus on just a few of the issues but first, Mr. Hamilton, would you like the opportunity to make an opening statement?

**Hamilton:** No, I said all I needed to in response to Mr. Burr's remark.

**Mediator:** Very well. Specifically, I would like to focus on Mr. Hamilton's conversation about *political topics* at the Federalist gathering. Mr. Hamilton, can you describe

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<sup>45</sup> *Id.* at 34.

<sup>46</sup> *Id.*

the nature of that conversation without reference to any specific comments that were made?

**Hamilton:** I was conversing with several gentlemen at the party about politics. At one point, Mr. Burr's name was mentioned. At the time, he was running for governor, so it was unsurprising that the attendees mentioned his name or were discussing his political views and principles. I merely expressed my opinion on his views and his qualifications. Quite frankly, I did not think Mr. Burr was qualified for the position.

**Burr:** [*turning towards Hamilton*] It seems to me that Dr. Cooper would not have indicated you had a more despicable opinion of me than your political comments suggested *unless* you attacked my personal character.

**Hamilton:** That's insulting. I am a man of honor, Mr. Burr. Both you and I know that if I dealt personal attacks on your character, you would be justified in demanding satisfaction for them. On the contrary, my comments contained no reference to your past conduct or personal character, for which you are not justified in demanding satisfaction.

**Mediator:** Mr. Hamilton, are you saying that you had nothing to do with Dr. Cooper's remark?

**Hamilton:** Of course I didn't. I'm not sure why Mr. Burr has convinced himself of that.

**Mediator:** Can you understand how upset Mr. Burr would be over a personal attack on his character?

**Hamilton:** I suppose, but, again, I had nothing to do with the remark.

**Burr:** Fine, even if the remarks that you made were strictly political criticisms, you are not upholding the promise you made to stop vilifying my character.

**Mediator:** Gentlemen, I would like to recap what has been said and ask that you, Mr. Burr, hold onto the new issue that you raised so we can address it in a few minutes. It

seems you both have indicated Mr. Hamilton's remarks made at the Federalist Party were only political criticisms and did not include attacks on Mr. Burr's personal character. Further, this matter falls outside of what is considered an affair of honor under the *Code*. As a result, it offers no guidance on resolving the matter or at least does not support a demand for satisfaction by the party in Mr. Burr's situation.

**Hamilton:** That is correct, Mr. Story.

**Burr:** Yes, that is what is written in the *Code*.

**Mediator:** It appears honor is important to both of you and may be one reason that you are here today. It also seems that both of you respect the *Code*. So, is there a way that you can think beyond the rules for dueling set forth in the *Code*, yet keep its guiding principle of honor in mind, to resolve the hard feelings that resulted from this situation?<sup>47</sup>

**Burr:** The *Code* mandates that a party who commits an offense must issue a verbal apology at the time designated in the rules. Thus, I think a public apology by Mr. Hamilton on this matter would show he's a man of great honor.

**Hamilton:** Although Mr. Burr speaks the truth about the *Code*, it also allows for one or several shots before the next required apology. I want to be clear that should not apply here under any circumstance, as this is not a matter of honor. Furthermore, I do not believe I have anything to apologize for as my remarks were made in the spirit of politics.

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<sup>47</sup> In addition to the ethical concern of mediator impartiality discussed in note 36, saving face is a significant concern because Hamilton and Burr harmed each other's image by publicly insulting one another. Particularly here where Story is guiding the parties in resolving their dispute, he must be very careful with his remarks. Story must make certain that the parties' proposal(s) will help them maintain a good self-image without forcing either party to admit they were wrong or backed down; otherwise, he risks losing their cooperation. Additionally, Story cannot come up with the proposal himself, as it will fail to empower the parties.

**Mediator:** Gentlemen, if your supporters misunderstood your position on an issue while you were running for office, how would you handle the situation?

**Burr:** I would simply clarify my position. [*pauses*] I suppose it doesn't have to be an apology - as long as Mr. Hamilton publicly acknowledges that he did not attack my character at the Federalist gathering and denounces the "despicable" remark, I will be satisfied.

**Hamilton:** I will consider issuing a public statement of the truth. Isn't that the honor which we seek here today? My statement will not address the "despicable" remark which I did not utter.

**Burr:** That remark is what started this whole thing! Is it truly honorable if you allow others to believe the remark was something that you uttered at the party?

**Hamilton:** Fine, I will say that I did not authorize any published accounts of my remarks that day and they may not reflect what was actually stated or intended.

**Mediator:** Mr. Burr, is this something you can agree to?

**Burr:** Well...ok.

**Mediator:** The two of you have known each other since the time you were officers in the Continental Army. Was this the first time your disagreements centered on personal complaints rather than political ones?

**Burr:** It was certainly not the first time either of us made a personal remark about the other.

**Mediator:** Was this the first time that either of you tried to speak to the other about his conduct?

**Burr:** I suppose it was the first time I confronted Mr. Hamilton about it.

**Mediator:** Mr. Hamilton, does what Mr. Burr said sound correct to you?

**Hamilton:** It seems correct as far as I can recall.

**Mediator:** And prior to this point, were you both able to hold your respective offices and carry out your responsibilities despite the differences in your political views?

**Hamilton:** I guess we were. It really did not affect my prior appointments, although it certainly caused constant annoyance and distraction.

**Burr:** Well, for me, it did not affect my appointments until most recently with the New York governor's race, which Hamilton sabotaged.

**Hamilton:** While you lost that race on your own, Aaron Burr, it pleases me to see any man assume the position that will not use it to secure lasting power and wealth for himself at the expense of the Republic.<sup>48</sup>

*[The Mediator realizes that probing the participants about their past causes Hamilton to admit his true concerns. Rather than interrupting, the Mediator intentionally lets Burr respond to the comment in hopes to create an opportunity for recognition.]*

**Burr:** With all due respect Mr. Hamilton, you understand not what drives me. I am a highly ambitious man who is skilled at politics and desires to be a leader of this Republic. For I defended it against British attacks and served in the military until the War ended. This defeat will not stop me!

**Mediator:** Gentlemen, it is clear that points of difference exist between the two of you, but I would like to remind you of what was said about your relationship - you both agreed that you could get along without negatively affecting your respective offices until these recent events. Is this a fair assessment of what you both said?

**Hamilton:** It seems fine to me. *[Burr nods in agreement]*

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<sup>48</sup> It is believed that Hamilton feared the survival of the nation was at stake, and if men like Aaron Burr took office, it would destroy the republican government forever. See ELLIS, *supra* note 1, at 40-47. Hamilton's fears were well-founded; the Federalist cause was coming to an end. *Id.* What Hamilton meant by men like Burr referred to Burr's willingness to accept support from any political party offering it to him.

**Mediator:** If you could get things back on the same footing as before – when your relationship did not prevent you from holding or obtaining political offices – would you want to do this? If so, is there a way the two of you can work it out?

**Burr:** I like the idea of us working without the other's interference, as we did in the past, but I am not certain at this point that Mr. Hamilton will uphold such an agreement.<sup>49</sup>

**Hamilton:** If you do not think I can keep my word, then you are free to end this mediation.

**Mediator:** Gentleman, if neither of you object, I would like to speak with each of you privately beginning with Mr. Burr. If you agree, each of you will have an equal opportunity to meet with me. Anything that is said during the separate sessions will be kept confidential, unless you agree that it can be shared when the joint session continues.

**Burr:** I have no objections.

**Hamilton:** Neither do I.

#### **d. Private Caucus**

##### **i. Caucus with Aaron Burr**

**Mediator:** I would like to better understand what you want to do in this situation and why you doubt that Mr. Hamilton can uphold an agreement.

**Burr:** I want us to stop attacking one another. I am not overly concerned with how it happens, but if it doesn't stop, this matter will most likely end in a duel. The last time Mr. Hamilton agreed to stop attacking me, not only did he continue, but it got worse.

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<sup>49</sup> A couple years before the angry exchange of letters and statements in 1804, Burr had confronted Hamilton regarding Hamilton's repetitious verbal attacks on Burr's character. Ellis, *supra* note 1, at 34. Hamilton apologized and promised to stop. *Id.* It seems Burr sees these actions as a continuation of Hamilton's prior behavior.

**Mediator:** Are you saying that you are willing to reach an agreement today to stop verbally attacking one another if you can feel more comfortable that Hamilton will uphold such an agreement?

**Burr:** That's correct.

**Mediator:** Ok. Let's talk about why your relations with Hamilton may have gotten worse after he apologized. I would like to know what you think the reasons are for this.

**Burr:** It seems clear to me that Hamilton personally dislikes me and will do anything to make sure that I do not hold another office.

**Mediator:** So you feel that losing the governor's race was caused solely by Hamilton's actions?

**Burr:** Yes.

**Mediator:** Given what Mr. Hamilton said in response to that remark earlier, do you think there may have been something driving his actions that did not have to do with you personally?

**Burr:** Well, his remark did strike me as a bit odd. It seems he is afraid of me gaining great political power. [*Mediator nods & does not interrupt*]

**Burr:** Actually, he has not held a federal office in several years. And come to think of it, the governor's race this year was the first time he campaigned directly against me. Perhaps as I am fighting for power right now, he is too, particularly because the Federalist Party is not as strong as it once was.

**Mediator:** So do you think that perhaps some of Hamilton's actions were a result of his struggle to maintain power for this Party?

**Burr:** Even if they were, it doesn't justify his behavior. I had to go to great lengths to get supporters in that race. In fact, I have repeatedly fought hard to prove that I possess the ambition and strategic thinking to shape this

nation. The Republicans were going to drop me from the ticket in Jefferson's reelection campaign you know. So I took a great political risk to hold onto a position. And that is something to be kept in strict confidence, Mr. Story.

**Mediator:** I will repeat nothing without your permission. I urge you to consider, however, disclosing to Mr. Hamilton that when you learned about the Republicans' plan, you only sought support from the Federalists to hold onto a position because you care about this nation. For he might react differently about ongoing cooperation.

**Burr:** [*pauses, then responds*] I'm not certain I want to do that right now.

**Mediator:** That's perfectly fine. I will leave that decision to you. At this point, if you could work something out with Hamilton despite your hesitation with respect to his long-term cooperation, would it be better for you than resolving this dispute through another process like going to court?

**Burr:** Yes, I believe it would.

**Mediator:** Any thoughts on the terms you would be willing to agree to?

**Burr:** I want Hamilton's word that he will not campaign against me in any future election I participate in and I will agree to do the same. We must also agree to not utter another personal remark about the other in public. I won't stand for it.

**Mediator:** Ok. I would now like to speak separately with Mr. Hamilton and then we will resume our joint discussions.

## ii. Caucus with Alexander Hamilton

**Mediator:** Mr. Hamilton, I would like to explore your last two comments before we broke from the joint session.

**Hamilton:** I am not comfortable discussing in great detail the sensitive issues that were raised.

**Mediator:** Let's talk about only what you feel comfortable discussing. Again, everything you say to me in this session will be kept confidential unless I ask for and you agree to give me permission to share it.

**Hamilton:** Ok. This matter is much more complicated than it seems, Mr. Story. As you know, this nation is still very fragile. If corrupt politicians like Mr. Burr take control, they could destroy the republican government we created. Our laws and institutions are still developing. This nation may not survive without virtuous leaders.

**Mediator:** Your concerns about the future of our nation are respectable, but we must try to focus on Mr. Burr here. When he was appointed to positions in the past, did you sense that he was able to influence others to steer away from a republican form of government?

**Hamilton:** Well...not directly, no.

**Mediator:** And when he lost the race for governor, did you feel that he lost mainly as a result of your campaign against him?

**Hamilton:** Actually, no. In fact, Burr lost by a landslide mainly as a result of slanderous attacks by several Republicans backing his opponent.

**Mediator:** If that's the case, do you think Mr. Burr's remark before the separate sessions was not a personal attack directed at you?

**Hamilton:** It's obvious to some extent that he fears losing his own power. In fact, while I don't respect the fact that he sought the support of an opposing party to try and win the race, it's clear that he does not have the strong support of the Federalists.

**Mediator:** If that's the case, and your greater concern is the overall well-being of the nation, do you think you could better serve it by focusing your efforts on either holding an

office yourself or supporting someone else that you think fits the description of a virtuous leader?

**Hamilton:** Yes, I do.

**Mediator:** In the event you can reach an agreement with Mr. Burr concerning ongoing relations, do you have any specific concerns about the terms?

**Hamilton:** In light of what you and I discussed, I would be willing to stop campaigning directly against him as an individual in exchange for his promise to do the same. Also, I want to continue supporting my political party at various events without his interference.

**Mediator:** Alright. I would like to go ahead now and reconvene in the joint session unless there is anything else you would like to address.

**Hamilton:** I have nothing else.

#### **e. Closing Joint Session**

**Mediator:** Gentlemen, after speaking with you individually, I think that there are some points of common ground. Both of you expressed a desire to reach an agreement. You also mentioned that you would agree to not directly campaign against the other individual in a future election. Mr. Burr further proposed that the two of you should agree to not *outwardly* support a political party if the party opposes the other man's position. Mr. Hamilton, what do you think of this suggestion?

**Hamilton:** Well, as you both know, I'm devoted to the Federalist cause and quite frankly, I will not agree to stop outwardly supporting my party. What would the party think of me?

**Mediator:** Mr. Hamilton raises a concern that should be kept in mind while fashioning an agreement. As I mentioned before, I will not make suggestions for you but I want to point out that any proposal made should be sensitive to the concerns of your supporters and respective parties.

**Burr:** I want to clarify my statement – I only asked that Mr. Hamilton not outwardly support a party *when* they are opposing me in an election. I did not ask him to stop supporting his party in general.

**Mediator:** Mr. Hamilton, can you think of another way to handle this concern?

**Hamilton:** The only way I would agree to that is if Mr. Burr commits to a single party's political views to show he isn't acting in his own self-interest.

**Burr:** I will not agree to that! Perhaps I do not entirely support a single party's views.

**Hamilton:** Or perhaps you maintain an equivocal point of view on important issues to gain the support of several parties.

**Mediator:** Gentlemen, both of you have raised valid concerns. This is just one way of looking at the problem. Can you think of another way?

**Burr:** What if we agree to not support a political party opposing the other man in limited geographical areas – for example, when I run for another position in the state of New York, Hamilton will not outwardly support the party opposing me.

**Hamilton:** I will absolutely not agree to New York!

*[A long silence occurs; both men appear frustrated and exhausted at this point]*

**Mediator:** Gentleman, do you want to discuss another option?

*[Both men indicate they are not interested in discussing any other options at this point.]*

**Mediator:** As I said when the mediation began, it is entirely your choice. Nevertheless, I would like to make a few closing remarks. This session was productive. I want you to realize that you accomplished several things today despite not reaching an agreement. First, you did reach an agreement on the Cooper letter matter. To

recap, you agreed that Mr. Hamilton will make a public statement that any published accounts of his remarks that day were not authorized by him and may not reflect what he said or intended. In addition, I think you both will leave here with a better understanding of what you really want– to run for and hold political offices without the other’s interference. I also believe the two of you will find ways to accomplish your goal. Also, you started to speak respectfully and listen to one another without interrupting. While you may not want to continue the discussion today, this will be useful for your interactions in the future. With all of these things in mind, I would like to thank you both for coming today and for your efforts.

#### **IV. POST-MEDIATION CONSIDERATIONS**

##### **a. Mediator’s Approach**

The mediator orientation selected to resolve this dispute was a transformative approach. Hamilton and Burr tolerated one another for a period of almost thirty years, despite their extreme dislike for each other. Once the period of intense conflict began, the relationship rapidly degenerated, causing both parties to interact in a hostile and destructive manner. The height of the conflict occurred in the weeks preceding the duel when both suffered significant political defeats. Thus, the parties were highly emotional and fighting to regain political power. For both of them to continue working in politics, the strategy selected had to help improve the parties’ underlying relationship, rather than just solve the problem.<sup>50</sup>

Employing a transformative orientation creates an opportunity to empower the parties and help them recognize each

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<sup>50</sup> For a discussion of the difference between the transformative and problem-solving orientations to mediation, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 81- 84 (2000).

other's concerns.<sup>51</sup> The mediator's primary focus under this approach is to help the parties restore strength in character and gain an understanding of the other party.<sup>52</sup> Here, the mediator helped the parties achieve the objectives of empowerment and recognition at two separate points in the mediation. A clear point of empowerment occurred when the mediator challenged the parties to resolve the Cooper letter dispute in a way that superseded the *Code Duello*. As a result, the parties calmly worked together to create a resolution. Similarly, there was also a clear point of recognition for Hamilton and Burr in the private caucuses. They both realized that the other was also struggling for political power and that they were both better off focusing on their own careers, as opposed to crippling the other's political efforts. The mediator helped the parties build this recognition by probing them about their past in the joint session and exploring the concerns further in the separate sessions. In addition to the specific techniques used to create empowerment and recognition, Story executed the approach by assuming a more attenuated role overall, limiting his involvement to asking the parties questions that would focus their attention on the other party's concerns and repairing their relationship. As a result, the parties were able to change the way they interacted.

#### **b. Parties' Strategies**

The parties to the mediation shared common goals: to stop the other from interfering with their political endeavors and to defend their honor. More specifically, Burr wanted Hamilton to acknowledge and apologize for the *despicable* remark made in Cooper's letter. In addition, Burr wanted to put an end to what he thought were incessant attacks on his character by Hamilton. To accomplish these goals, Burr made a high initial demand of an apology for all of Hamilton's remarks in hopes it would help him obtain the few significant ones that mattered most to him.

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<sup>51</sup> *Id.* at 84.

<sup>52</sup> *Id.*

However, in order to reach an agreement, he was willing to make a few concessions.

Hamilton ultimately hoped to use mediation to reach an agreement with Burr to cooperate so Hamilton could stop worrying about Burr's political advancements. To accomplish this, Hamilton used a competitive approach to reach a long-term agreement, taking a firm stance on some issues. Because Hamilton knew he was not responsible for the remarks Cooper attributed to him in the letter, he tried to leverage this as a bargaining chip. Underlying his strategy was also a hidden agenda – he would hold off on reaching an agreement until he felt comfortable that he was not giving Burr the power he needed to take over the New Republic. He also used the mediation to gather information about Burr's intentions.

## **V. CONCLUSION**

This paper explores mediation as an alternative dispute resolution method to dueling, a prevailing practice in the early 1800s. Settling the dispute in court was another option at this time – it would have likely involved a claim of libel – but the parties did not pursue it. Perhaps this is because litigation would have had various short-comings. In fact, honor was a significant factor, but the courts only decided legal matters. In addition, the parties needed to come up with a way to work together in the future; litigation does not provide for this type of resolution.

In contrast to litigation, mediation provided the parties with an open forum where they could explore these issues. As noted above, the parties engaged in ultimately failed negotiations weeks before the duel. A reason for this might have been that the negotiations lacked a neutral party. In this paper, Joseph Story, the neutral party selected from this era to serve as the mediator, helped the parties reach an agreement on one issue. Further, and more importantly in this case, he helped the parties achieve strength of self (i.e. empowerment) and recognition of the other's position by employing transformative mediation. These methods of human

conduct embody the qualities of noble and good,<sup>53</sup> which coincide with the parties' concern with honor. Thus, Story helps Hamilton and Burr move from a state of weakness to one of strength and understanding. As a result, the parties achieved moral development and were able to change the way they acted towards one another. If Alexander Hamilton and Aaron Burr actually brought in a neutral party like Joseph Story to mediate their dispute prior to July 11, 1804, the parties might have been able to reach a similar agreement and avoid the famous duel.

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<sup>53</sup> *Id.* at 230.