against the direction of the court; and, that the Jury have the right to decide the law without regard to such direction; and finding also, that this article of impeachment, as well as the arguments in support of it, appear to be grounded on these principles, that I have been almost induced to suppose I had mis-read the eighth amended article of the constitution, but on turning to it, I find that the constitution secures to the criminal the assistance of counsel, to see that his trial is fairly and correctly conducted, but has not given to the person charged with an offence, or to his counsel, if he is guilty, any constitutional rights, for the purpose of his evading punishment by the imposition of counsel, either on the court or the Jury.

Whatever may have been the *practice*, I have ever considered it contrary to the *duty* of counsel, either in civil or criminal cases, to exert their abilities in attempting to procure a decision, which they are conscious is unjust. The duty of a lawyer is most certainly, in every case, to exert himself in procuring justice to be done to his client, but not to support him in injustice.

Having made these observations on the relative duties of the court and counsel, let me advert a moment to the conduct of Mr. Lewis, as appears from his own testimony. When my honorable client delivered at the Clerk's table, the copy of the opinion designed for the defendant's counsel, having taken it in his hand—without opening it—without reading one word—Mr. Lewis contemptuously threw it from him, publicly declaring, that "he would never contaminate *his hand* by receiving into it a *prejudicated opinion*, in any cause where he was concerned, from any Judge whatever." What insolence! Would to God no lawyer may ever *contaminate his hand* in a more *disgraceful* manner, than by receiving therein a sensible, correct, legal opinion, in a cause about to be tried, at whatever time it may be delivered to him!

He also informs us, that he declared to the court, that he never had, nor ever would so far degrade himself as a lawyer, as to argue a question of law, in a criminal case, before the court.—What arrogance! Sir, the most eminent, the most respectable lawyers both in England and America, have been in the constant habit, not only of arguing questions of law in criminal cases before the court, but in modestly submitting to their decisions, without ever considering it as lessening their consequence. I have long been at a loss, sir, for the enmity the state of Pennsylvania has shewn for its bar, and the desire of its citizens to get rid of their lawyers; but if such is the manner, in which the lawyers conduct themselves to their courts—if they, when they are employed in a cause, claim the constitutional right, uncontrolled by the court, instead of furthering justice, to pervert it; I wonder no longer why the citizens of that state wish to be freed from them; and will readily join in the sentiment, "the sooner the better." I will go further, and say, if their courts submit to such conduct, and think themselves bound to be the *passive* witnesses of such perversion of justice, it is not much matter how soon they also get rid of their courts, for they might as well be without them.

The principles which have been advocated in support of this article, are subversive of the whole order of things; instead of lawyers being the officers of the court, subject to their control, and amenable for the propriety of their conduct; the Judges must be the menial, degraded instruments of the lawyers, and must suit their conduct, not to propriety and justice, but to the pleasure of any haughty overbearing lawyer, possessing abilities and popularity, and that too under the hazard of being impeached and turned out of office, if his principles should, on any occasion, render him restive, or, in the language of the testimony, if he should "take the stud."

And here, Mr. President, I hope I shall be indulged with some enquiry as to this "prejudicated opinion;" *which* Mr. Lewis seems to think has such a contaminating, polluting tendency to the hand of a lawyer, and of which he was so apprehensive, that he would not retain it for a moment. I confess, I feel myself here at a loss to know exactly what the witness meant by a "*prejudicated opinion*" on the law. I should suppose that the expression, if it can in any instance be correctly applied, must mean the same as to prejudge the law; which, if used to signify any thing improper, must be confined to the case where a person forms an *erroneous* opinion of the law, without using *all due means* to acquire correct information.

To *prejudge* any case, I consider as meaning, that a person without competent knowledge of facts, hath formed an opinion injurious to the merits of the case. If the term prejudication is used in this sense, there is no pretence that my honorable client gave a *prejudicated* opinion in the case of Fries; for it is not alledged that the opinion given was not strictly legal and correct. Neither Mr. Lewis nor Mr. Dallas have ever attempted to hazard their characters by suggesting the contrary, nor have the honorable managers taken that ground; they do not contest its propriety. Should they in their reply, I shall cheerfully rest that question upon the well known legal abilities of Judge Iredell, Paterson, my honorable client, the associate Judges, who concurred with them, and the legal knowledge of this honorable court.

But if by a prejudicated opinion, is meant, that the Judge, from his great legal knowledge, and familiar acquaintance with the law, as relative to the doctrine of treason, particularly levying war against the United States, had formed a clear decided opinion that the facts stated in the indictment against Fries, if proved, as laid, amounted to treason, I will readily allow that I have no doubt my honorable client had thus prejudicated the law, not only before Fries was brought to trial, but before he had committed the treason for which he was tried. But if this manner of prejudicating law is thought improper, nay, criminal, in a Judge, a prejudication, which is nothing more than an eminent and correct knowledge of the law, why I pray are gentlemen of great talents, and high legal attainments, sought for in your appointments of Judges? How, sir, are they to free themselves from this obnoxious prejudication of the law, and acquire the contended fitness for the trial of a cause, but by forgetting all that legal knowledge, which had been a principal inducement to their appointment? If I understand the gentlemen, to gratify their ideas, we ought to have Judges, who, when they take their seats on the bench to preside at the trial of a criminal, should not have one single legal idea relative to the offence about to be tried, but should have their minds exactly in that state, in which, some ingenious metaphysicians tell us, the human soul is when first united to the body, like a pure unsullied sheet of white paper, ready to receive any impressions which may be made upon it.

Well, be it so, and led us consider the trial of Fries as if it had been conducted on that principle. The Judges, with their minds like this white sheet of paper, were to sit still, and suffer the counsel to scrawl thereon whatever characters they pleased,—to blot and blurr it, until they were perfectly satisfied. After this ceremony, the Judges, examining the impressions thus made upon the antecedent clean sheet, were from these, and these *only*, to form their opinion of the law. And this opinion, having been thus formed from nothing but what occurred *during* the trial, and *after* the jury were sworn, would not be called a prejudicated opinion, and therefore I presume would be perfectly satisfactory to the honorable managers. So far we should have done very well as it related to the trial of Fries. But next day another criminal is to be tried for a *similar* offence; Messrs. Lewis and Dallas are not his defenders. Getman has selected Mr. Tilghman for his counsel. How, I pray you, are the Judges to be qualified to preside with propriety in this trial? Yesterday they gave a solemn determination in Fries's case upon the same question of law which now must come forward in the case of Getman. Mr. Tilghman was not then heard. The opinion, then given, is, as *to Mr. Tilghman and his client*, as much a prejudicated opinion, an opinion as contaminating to the hand of a lawyer to receive, and as highly criminal for a court to give, as was the opinion given by my honorable client. What can be done? The minds of the Judges are *no longer a pure unsullied sheet of paper*. Yesterday, in the trial of Fries, they had been scrawled upon and sullied by Lewis and Dallas; the impressions still remain. I, sir, can think of no remedy in this difficulty, except that the judges should be supplied with a reasonable quantity of *India rubber*, or something which shall answer in its place, with which they might wipe off and erase every impression which had been made the day before by Lewis and Dallas, during the trial of Fries. And thus *once more* take their seats on the bench for the trial of Getman, with minds again like clean sheets of white paper, ready to be again scrawled over, again to be blotted and blurred, at the pleasure of, Mr. Tilghman, and from these scrawls, blots and blurrs, and from these *alone*, to take their impressions as to the law, and form their decision as to Getman's case, without regarding, or even *remembering* the decision they had given the day before. And in this manner to proceed in every case that might come before them successively in their judicial capacity!

If, sir, Judges are to be censured for possessing legal talents, for being correctly acquainted with the law in criminal cases, and for not suffering themselves to be insulted, and the public time wasted, by being obliged to hear arguments of counsel upon questions which have been repeatedly decided, and on which they have no doubt; I pray you let not our courts of justice be disgraced, nor gentlemen of legal talents and abilities be degraded by placing them on the bench under such humiliating circumstances! But let us go to the corn fields, to the tobacco plantations, and there take our Judges from the plough, and the hoe. We shall there find men enough possessed of what seems to be thought the first requisite of a Judge, a total ignorance of the law! That degradation, which *no gentleman* of merit and abilities *could endure, they will not feel*.

In reply to my observation made by my very respectable colleague who opened our defence, and which I have endeavored to enforce, "that, if the opinion given by the court was correct, Fries could receive no injury thereby, though Messrs. Lewis and Dallas had not been suffered to argue against that opinion, because the opinion ought, notwithstanding, to have been the same, one of the honorable managers hath said, that had Judge Chase sentenced, Fries to death without the verdict of a jury: had he decided the fact as well as the law; and he says he might have done the one with as much propriety as the other, it might have been urged in the same manner in defence of the Judge, "that is was of no consequence to Fries, for the fact being clearly against him, had he been tried by a jury, the jury must have found him guilty, and then the Judge must have done what he did, sentence him to death."

This argument is totally fallacious. By the constitution and laws of the United States, the criminal has a right to demand that the facts shall be decided by a jury. This the court cannot refuse if the criminal requires it. Was a Judge to refuse the criminal the trial of the fact by a jury, he would violate a well known legal and constitutional right of the criminal But as the criminal has a right that the jury should determine questions of fact, so do the principles of jurisprudence equally declare it to be the right of the court to decide questions of law; and the constitution in no part, contravenes this right; it no where says that the Judges must be ignorant of the law, and take their impressions from the counsel of the criminal, or that it is the right of counsel to be heard where the court has no doubt of the law, or to argue to the jury that the law is contrary to the direction of the court, or that the jury should have a right to decide the law contrary to such direction. Hence, therefore, there is this great distinction between the two cases; in the first the court only exercise their own rights, infringing no right of the criminal; while in the last, the court would act in direct violation of his well known legal and constitutional rights. But though the criminal has the constitutional right to have all facts decided by a jury, he may wave this right, in which case the court may pass sentence without the intervention of a jury, as where the criminal demurs to the indictment, and rests upon his demurrer, or where he pleads guilty, in which cases, the court, without the intervention of a jury, proceeds to pass sentence according to law, and the nature of the offence.

In the opening of our defence, it has also been urged, that if there was any impropriety in the conduct of the court, respecting the trial of Fries, on the first day, it was amply compensated by the conduct of the court on the second day, in having called in the written opinions, and the copies which had been taken, and given the counsel liberty to proceed in such manner as they should think proper.

In answer to this the honorable managers have replied, that it was then too late. The mischief, that had been done the first day, was irretrievable; the sin, that day committed, was inexpiable; Nay, one of the managers has told us, that the excuse is as absurd, as would be the excuse of a person, who, having thrown a firebrand into combustibles, and set the whole neighborhood in a blaze, should attempt to excuse himself by saying "he had again got into his possession, and extinguished the brand, with which he had enkindled the fire, although the conflagration was still extending, and consuming every thing before it;"—a most happy simile.

But let us examine wherein was the mischief so irretrievable—the sin so inexpiable? neither more nor less, than in this, that as the written opinions only contained the impressions on the minds of the Judges, the destruction of that written opinion would not prevent the same impressions remaining on their minds; and those impressions would be as difficult to remove, after the opinions were called in, as before. It is all very true; but how came the Judges to have on their minds those impressions? Not from having committed them to paper, but from their correct knowledge of the law. And how were those impressions to be removed? Certainly by no means, unless that correct knowledge of the law could also be removed. To accomplish which, I know of no means that could be used, unless the Judges could have been supplied with a quantity of our *India rubber*, or with a few barrels of the waters of Lethe, with the one to rub out and efface from their minds all their legal knowledge, or by copious drafts of the other, to wash it away. But, sir, I have not made, nor shall I make any use of the proceedings of the second day as an excuse for any impropriety of the court on the first; I only consider them as incontestible proofs, that the court had no other object in view, on either of those days, than conscientiously to discharge their duty, by giving Fries a fair and impartial trial, that if he was guilty he might be punished—if innocent, acquitted. I deny that the court was guilty on the first day, of any impropriety; I take higher ground, and have contended, and do contend, that the conduct of the court on the first day, was correct and proper, and during the whole trial I find nothing improper in their conduct, except their almost humiliatingly soliciting the counsel of Fries to do their duty, instead of committing them to goal for the impropriety of their conduct, which the court ought to have done; but even in this, the court has afforded the strongest proof of their solicitude that Fries should have every legal and constitutional benefit of counsel at his trial.

Reflect, also, that at the time when Mr. Lewis thus contemptuously dashed from his *pure hand* the *contaminating* opinion, he had not read a single word, nor received the least intimation of its contents, nor did he know its contents until long after; and yet he instantly formed the determination not to appear for Fries, and to advise their client not to accept the assignment of any other counsel, should the court offer it. Whence this conduct? How did he know the opinion was not favorable to his client? His conscience told him it was not. His own great legal knowledge confirming to him the truth. He well knew the law; he was acquainted with the correct decisions which had been before given. He well knew the great legal knowledge of the Judge, who on this occasion presided; he was certain my honorable client could not but concur with his brethren. He acknowledges they had no hope to change the opinion of the court, and that they had not the vanity to suppose that the jury would, under their influence, decide the law contrary to what the court should direct; therefore that they had no hopes of the acquittal of their client by the jury on the trial, whatever services they were permited to render him; and therefore, as the only chance, which they had to save his forfeit life, they assumed that line of conduct, which has been disclosed in the evidence. When Mr. Lewis, in giving his testimony, mentioned, "Judge Peters asked us on the next day whether if the court had got into a scrape the first day, the counsel would not let the court get out of it." "No," said Mr. Lewis, "we were determined not to let them get out of it, as the only means to save our client's life," and in the conclusion of his testimony, he repeated that they were actuated in their conduct, from considering it the only chance they had to save the life of their client, and not from any other motive. And Mr. Dallas also observed in his testimony, that when the court, on the second day pressed them to continue their services as counsel of Fries they refused, determined not to depart from the policy they had adopted, and to withdraw, as the most probable means of benefitting their client.

I shall conclude what relates to this article by observing, that the conduct of Fries's counsel to the court, on that trial, was such as nothing can excuse. It can only be palliated by the reflection that for his crimes he was liable to suffer death. Feelings of humanity and compassion, independent of interest, might excite in their bosoms an earnest anxiety to save his life, this may serve to mitigate censure; but even those feelings, however amiable, ought not be gratified at the expence of national justice, nor by an endeavor to stamp upon Judges of uprightness and integrity the dishonorable charge of partiality and oppression. I fear, sir, I have been tedious on this article; but it will be considered that, whatever may be my own sentiments of the futility of any part of these charges, I cannot determine how far this honorable court may correspond with me in sentiment. Nor can I do otherwise than treat, as of consequence, any charge brought forward by the honorable House of Representatives, or not consider it as being of importance.

I will now, Mr. President, proceed to those articles which arise out of the trial in Virginia; and I find it stated in the beginning of the second article, that my honorable client went there prompted by the *same* shameful spirit of persecution and injustice; the truth of which I am ready to acknowledge, after having satisfactorily proved that at Philadelphia he had not shewn in any manner whatever a spirit of persecution and injustice, but had acted with uprightness and integrity; and that his greatest fault on that occasion was, that he did not commit the counsel of Fries to the public jail for their insolent, their arrogant, their contemptuous behaviour to the court: and I flatter myself that I shall be able to shew that my hon. client acted with the same uprightness and integrity in the case of Callender as I have shewn he acted in the case of Fries.

The second article goes on to charge Judge Chase with over-ruling the objection of John Basset, who wished to be excused from serving on the Jury in the trial of Callender, and causing him to be sworn, and to serve on the said jury, by whose verdict Callender was convicted.

This article requires a discussion of the law relating to challenges of jurors, and whether Mr. Basset was legally sworn on that jury. And here again as well as in the case of Fries, I meet with the most perfect novelties, for except in those trials I never heard of jurors, when called to be sworn, examined on oath whether they had formed;—or formed or delivered, or whether they had formed and delivered an opinion on the subject about to be tried. And here also let me observe that there is no just grounds for the charge that Judge Chase from partiality administered the oath differently in Callender's case from the manner in which he administered it to the jurors in the case of Fries, for Mr. Rawle, referring to his notes taken at the time, hath told us that in the case of Fries, one or two of the first jurors were only asked whether he had formed an opinion; after which the question was put, whether he had formed *or* delivered an opinion, but ultimately the question asked was, whether they had formed *and* delivered an opinion, which question was put to the greater part of the jurors; so that the interrogatory *ultimately* fixed upon in the case of Fries is the same which was put to all the jurors, who were interrogated in the case of Callender.

I have, Mr. President, been in the practice of the law for thirty years.—Before the revolution I attended, two or three years, the two counties on the Eastern Shore of Virginia—Sussex county in Delaware—and Somerset and Worcester in Maryland; since the revolution I have constantly attended the general courts on the Western and Eastern Shores of Maryland, and the civil and criminal courts of Baltimore county—and for about six years several other counties in Maryland. In the whole course of my practice, I have never known a single case either civil or criminal, in which the jurors have been, when called to the book, demanded to answer upon oath either of the aforesaid questions, which the defendant's counsel requested to be put to them.

If either party choose to challenge a juror for favor, on account of declarations made by the juror, the only ground for it is that he has used expressions shewing his determination to decide for one party or the other without regard to truth and justice. In which case the party makes his objection to the particular juror, specifying the expressions uttered by the juror indicative of such improper determination, and produces witnesses to establish his objection; for the juror cannot be examined on oath to substantiate the charge—and, unless by mutual consent, the objection made must be decided, not by the court, but by *triers*. And the only matter to be decided is whether the juror has made any declaration of a design to give a verdict one way or the other, whether right or wrong: for if the juror made the declarations from his knowledge of the facts in the case, this would be no cause of challenge, nor any objection to his being sworn on the jury. And as the juror himself against whom such objection is made cannot be examined on oath, it follows of course he cannot be challenged for having *formed* an opinion, but only for having *delivered* it, as *third* persons cannot know of an opinion being formed but by its having been delivered. And as I have observed already, even the delivery of an opinion is no cause of challenge, if it appears to have been founded upon the jurors knowledge of facts, and not from partiality—in consequence of this principle of law, it can be no objection against a juror being sworn, even though he should have the most perfect knowledge of every fact relative to the issue, to try which he is about to be sworn;—on the contrary, the principal reason assigned why trials ought to be by jurors from the *vicinage* is the presumption that they will be best acquainted with the facts which will be put in issue for their decision.

Suppose a person, summoned as a juror to try an indictment for assault and battery, or any other offence, had seen the offence committed and perfectly knew the offender, it would be no cause of challenge against the juror, nor could he for that reason be rejected at the trial—on the contrary the law considers him the better qualified to serve in that case as a juror in consequence of that knowledge. If in the instance I have put, such juryman had declared that the criminal had committed an assault and battery, and that he was determined to find him guilty, this declaration being founded on the knowledge of the juror as to the truth of the case would be no ground for challenge—to support a challenge, the juror must shew an intention to act partially thro' favor or malice. It is therefore no objection to a person serving as a juror because he is also a witness.

And so far is it from being the case that a juryman's knowledge of the law, or his having declared his opinion of the law arising in the case to be tried, should be a cause of challenge, that, if two or more persons are indicted in the same indictment for the same offence, and one is tried and convicted, a juryman, who served on that trial may be sworn on the subsequent trial of the other person joined in the indictment, and cannot be challenged, although as to the law arising in the case he had not only declared his opinion, but even declared it on oath in the former trial. So also, is the case of a Judge, whether he is to decide the law only, as in jury trials, or the law and fact both, as here in the case of impeachments; his knowledge of the facts in the cause is no objection to his acting as a Judge, and he may be called on to give testimony, and yet give his decision in his judicial capacity. In support of these principles in addition to the authorities adduced by my very respectable colleague (Mr. Key) I will trouble this honorable court with Brookes abridgment Title, Challenge pl. 90, where he says, it is a cause of challenge to the favor if the juror has declared that should he be empannelled he would give a verdict for the plaintiff.

This authority shews that a *declaration*, as I have contended, must have been made; but I shall now also shew, that as I have before stated, the declaration must be made from motives of partiality, that is, from favor or ill will, to the one or the other party. For this purpose I will read 2d Hawkins, chap. 43 sec. 28. "It hath been allowed a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion before hand, that the party is guilty, or will be hanged, or the like. Yet it hath been adjudged, that if it shall appear the juror made such declaration from his *knowledge* of the cause, and not out of any *ill will* to the party, it is no cause of challenge." This doctrine is as old as the seventh of Henry the sixth; during whose reign it was determined, that though a juror had said twenty times, that if he was sworn, he would give his verdict for one of the parties, yet if he said this from the knowledge which he had of the matter in dispute and the truth of the case, such juror was *indifferent*; but if he said this from any affection to the party, the juror in that case was *favorable*, and thus Judge Babington directed the triers; see Brooke's abrid. Title, Challenge pl. 55.

In Viner's abrid. 21 vol. pa. 265, we find the same principle recognised. It is there stated that "if a juror says twenty times that he will pass for the one party, this is not a principal challenge, for it may be that he speaks it for the *notice* which he has of the thing in issue, and not for affection." A decision in the seventh of Henry six h. and another in the twentieth of the same king are referred to; and the authority from Brooke, Challenge, pl. 55 before mentioned, is in the note introduced with approbation.

In 2 Hawkins Cap. 43, sec. 29, we find in confirmation of the positions I have taken, the law thus declared. "It hath been adjudged to be no good cause of challenge, that the juror had found other persons guilty on the same indictment, for the indictment is in judgment of law several against each defendant,