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TRIAL OF
COL. AARON BURR.

MONDAY, MAY 25.

(Mr. Hay in continuation.)

But *they* say, he ought not to be committed, because the presence of the grand jury suspends the authority of this court. But where are the precedents which justify this position? I have not made many researches into this case; because I did not suppose that there was a single sceptic at this bar who would deny the universality of the proposition that we have laid down; that it was the right of the court to commit in every case, where they deemed it proper— *They* say that in this case, the powers of the grand jury and the court are concurrent. Strange that they should forget the immense difference between their powers! There is a difference in the evidence necessary to convince them. We are not bound to submit the same testimony before the grand jury which we may produce before this court —much less before a petit jury. Affidavits may convince the court that it is proper to commit; but it is not yet perfectly certain whether it be proper to exhibit them before a grand jury. I am, however, unacquainted with the opinion, which the court entertain on this point: but I will boldly enquire, whether I should discharge my honest duty, were I to submit my indictments before the grand jury at this moment, when I have not all the material evidence which we may possess? Sir, these gentlemen may cast their groundless censures upon me: but in vain: all their clamors will never move me from my purpose. The course which I am pursuing is sufficient to satisfy my own conscience; and it is indifferent to me whether ten or ten thousand men should join in my condemnation.

Mr. Botts asserts, that we have produced no authorities to prove our position: and that we have none to produce. But is it right to be continually recurring to precedents? Is there no allowance to be made for the operations of common sense, in any case? Where cases of doubt and difficulty occur, a reference of this kind is certainly proper to enlighten and fortify our own judgments. But even admitting the propriety of introducing precedents in the whole extent for which gentlemen contend, it is their business and not our own to comply with the requisition for precedents. We stand upon the broad, general principle, that courts have the power to commit. If gentlemen contest this principle in the present case, why do they not introduce their countervailing authorities?

Mr. Hay expressed his regret that his friend Mr. Wickham had not more seriously meditated upon this subject, before he had urged his objections; that if he had understood it with his usual correctness, he never would have troubled the court with the law of Virginia: for that this law had not the slightest bearing upon the specific proposition before them.

Mr. Wickham enquires why we do not at once send up our indictments before the grand jury; and suppose, sir, we should pursue the course which he recommends; suppose we should send up our indictments on the evidence which is now in our possession. Several days might elapse before they would be able to investigate this body of evidence. In the mean time some of those numerous persons who are prying into every hole and corner of this city, might probably catch some distant hint of the probable decision of the jury. They have certainly too much discretion not to keep their own council: but it is absolutely impossible to exclude completely the busy eye of curiosity. Some vague insinuations may probably escape; something which might justify a suspicion of their determination. Suppose then that Aaron Burr was to be actuated by these considerations; suppose that his fears (if fears he can feel!) should prompt him to escape; what, sir, would become of our indictment? Mr. B. may quit the U. S.—he may flee for ever beyond the jurisdiction of this country; and in that case the whole world would ridicule us for the course we had pursued. Or let us even suppose that we were to withdraw this motion, where would be our security? Must we trust to the indulgence of Mr. Burr himself for remaining in this city and standing his trial?

We expect General Wilkinson here in a few days. We have an affidavit which positively states, that an express to New Orleans to command his presence on this trial, was met on the frontiers of the Mississippi territory. We have also letters from the attorney general of the U. S. explicitly stating, that General Wilkinson has been officially authorised to leave the army of the U. S. and to select whatever mode of transportation he might think proper, (here Mr. H. read the affidavit, shewing that the express to General Wilkinson had been seen in Athens, in the state of Georgia). In the mean time what is Colonel Burr's situation? It is completely optional with him, whether to stay here and face his accusers, or to avail himself of his liberty and leave the U. S. We call upon this court to exercise the authority with which they are invested; and by binding over Col. Burr as well on the charge of High treason as of a misdemeanor, to detain him here for a satisfactory trial.

Mr. Hay said he scarcely expected to have been asked why General Wilkinson was not here? The gentleman himself has said that he is a general. Can he then leave his army at any time, and without the permission of the government? Make, however, a computation of time. The attorney general left this city on the 4th or 5th of April. He reached Washington on the 7th or 8th. Allow then a reasonable time for an express from Washington to New Orleans—and for a man of General Wilkinson's age and bulk to travel to this city, and is it probable that he could have arrived here before this period? If he availed himself of the liberty and means to come by water; the gales have been lately very severe. And even two of the grand jury had assured him that if General Wilkinson was exposed to the late tempestuous weather, he would probably never see the United States.

Mr. Wickham has expatiated upon the attempts made to prejudicate the public opinion through the medium of the press. Sir, a great deal has been said, and a great deal will yet be said on this transaction. But are the presses shut against Col. Burr? When even in this very city certain presses have been found to vindicate his motives and designs? But what of all this? The public mind is hostile to any encroachment upon the liberty of the press; and it ought to be so. Where then a crime of such gigantic evil arises in this country, like the one attributed to Aaron Burr, the printers will speak and they ought to speak; the purest motives will command them to speak. And if there have been publications against Col. Burr, innumerable communications have also appeared in his favor; and if these publications have contained the severest strictures upon him, they have resulted from his own character and conduct; and he has no right to complain.

Mr. Hay demanded why Col. Burr should then wish to close the only door to his vindication by excluding the evidence. His counsel exclaim, "send the evidence to the grand jury." Surely if Col. Burr wishes to have the evidence before the jury, he should be much more anxious to have it before the court. The jury will have one side of the evidence only before them; and that will be completely against himself. Both however will go before the court. Why then does he shrink from the evidence! If an unjust prejudice assails him, the light of truth and evidence will dissipate it. Why does he shrink?

The gentleman on the other fide, continued Mr. Hay, do not do us juftice. They charge us with perfecution and oppreffion. Sir, I never contemplated or wifhed to hurt A. Burr. I fcorn it. I look not to him. I look only to the duties which I am folemnly bound to perform.—One remark more, fir, & I have done: gentlemen on the other fide infift upon the infufficiency of our evidence. Becaufe we have withheld our indictments, from the grand jury, they have haftily inferred, that we feel our evidence to be too feeble to fatisfy the jury. They are miftaken, fir. I affure them, that they are miftaken. I confcientioufly believe that we have evidence enough, even throwing out the depofitions themfelves, to fatisfy the grand jury of the guilt of A. Burr. But, fir, puerile indeed would it be for us under the prefent ftate of things to fubmit our cafe before the grand jury on the evidence before us, when we are every moment expecting better.

Mr. Edmund Randolph addreffed the court to the following effect:

Sir, it would have been impoffible for us, even had we received due notice of this motion, to have availed ourfelves of the time that was allowed to us. That would have been impoffible, becaufe the enormity of the propofition itfelf would have baffled all our confideration and all our refearches. Mark the courfe, which has been purfued towards my unfortunate client. Firft he was brought here under a military efcort. Then that little folio of depofitions and affidavits was laid before your honors: Then the charge of treafon: and then that little cock-boat which was deftined to attend this great fhip on a foreign expedition? You heard it all, fir, and what did you fay? You bound col. Burr to bail, fimply on the charge of a mifdemeanor, to appear here at the opening of the court; but not contented with this fecurity, you fuperadded, that he was not to leave the court until it had difcharged him. You opened the door too for an ulterior profecution; you declared, that if the attorney for the U. S. fhould obtain any additional evidence, the judgement which you then rendered, would not prevent his indictment of col. B. on the charge of treafon.

Sir, thus ftands the cafe, as it was underftood by the whole univerfe. On Friday we came here to meet the world; Friday however paffes away and nothing is done—On Saturday, we came here again: Saturday alfo paffes away and nothing is done. But on Sunday, fir——is broached this new-fangled doctrine, which now excites our aftonifhment. They demanded precedents, fir, for our conduct; and who are they that require it? Why, fir; they that take things out of the ordinary courfe of the law. For thirty years, I never faw fuch a proceeding: I have never read of fuch a one in the English books; & yet thefe gentlemen call upon *us* for precedents.

If we were afked for our *reasons*, fir: we fhould have enough to offer. And firft, a judge in the Federal Court, fitting in the capacity which your honor now fulfils, would be in the fame relation to the accufed as an examining Judge is in the ftates courts. But, fir, whoever invited a fingle magiftrate or a ftate court to augment the bail of any individual in the fituation of col. Burr? If a man be bound in a diftant county to anfwer to a mifdemeanor, and another crime *was* to be brought againft him to be predicated on the very fame evidence, have you, fir, ever known the trying court to encreafe his bail? There never was fuch an example, fir.

Mr. Botts's remark, Sir, is not to be anfwered. You are changing the conftitutional organ of juftice. You are completely blotting out the functions of a grand jury. The witneffes will be all produced before you: but no, improper as this proceeding will be, it is ftill lefs fo than that which they will actually purfue: None of the U. States witneffes will be brought before you, but thofe whom they may think it politic to introduce; and depend upon it, that fuch teftimony will be garbled for the ears of this court, as may be expected to bias their judgement,—Well, fir, and what will be the confequence? When the grand jury are about to retire to their own chamber they, will be told that you have demanded additional bail.— Are *you* then, fir, to be a pioneer of blood for the grand jury?—Is not this precedent outrageous, fir? The boafted principle, that no man is to be condemned but upon the verdict of 24 of his peers, is gone. Throughout this town, it will be univerfally reported that you have folemnly declared A. Burr to be guilty of high treafon againft the U. S and fome of thofe to whom the rumour may extend may hereafter be impannelled of the petit jury. And will they feel themfelves altogether unbiaffed by your judgment? Why, fir, let it be declared at once, that the grand jury is to be ftruck out as an intermediate organ of juftice.

Do not, I pray you, fir, let *us* fuffer for the delays and negligence of other people. I cannot blame the U. S. attorney; it is his bufinefs to obey the inftructions of the government; and if the witneffes are not here, it is certainly no fault of his. But furely there is time enough to travel from New-Orleans to this city in 17 days; even with the gigantic "bulk" of gen. Wilkinfon himfelf.

Mr. Hay says, our tone is changed.— And how, sir? We demand a trial now. We demand a fair trial. But must we not therefore protest against a measure which is calculated to defeat this object? Certainly, sir. You are called upon to prejudice the minds of the grand jury. But, sir, in this interesting case, where liberty and life themselves are endangered, I trust that some hard-mouthed precedents will be found in opposition to this procedure. We have come here to answer to every charge, which may be urged against us: We came here to answer in a precedented and constitutional manner. But little did we expect, that the court would decide in the first instance, instead of the grand jury; that the sentiments of the grand jury were to be prejudicated by an unconstitutional decision: and that the court itself was to commit its opinion on certain points, which would be regularly brought before them for argument and for decision at some of the ulterior stages of the prosecution.

"Why, said Mr. Wirt; do you shrink." Sir, trace the course of the prosecution, and see who it is that retires from the contest. On Friday the U. S. attorney was not ready: on Saturday he was not ready; and now indeed he will not probably be ready before Monday next. Sir, who is it that shrinks? And yet does the attorney positively aver that he has evidence enough.

We are charged, sir, with addressing the multitude. Mr. Wirt says that he could, but would not imitate the example. But neither he nor Mr. Hay have spared the theme. Sir, I will not deny the justness of his eulogiums upon the administration; but permit me only to remark, that there has been a certain conduct observed towards Col. Burr, which excites my deepest astonishment.

When I look at the first man in the government, I behold an individual whom I have long known, and whose public services have commanded my admiration. When I look at the second, sir, he has my whole heart. But, sir, the enquiry which is now before us relates not so much to the intention as to the effect. An order *has* been given to treat col. B. as an outlaw; and to burn him and his property. And, sir, again, when the H. of R. demanded certain information, as it was their right & their duty to do; the President granted it— and would to God, sir! that he had stopped here, as an executive officer ought to have done. He proceeded, however to say that col. Burr was guilty of a crime; and consequently to express an opinion, which was calculated to operate judicially upon the judges & the juries. Such was the substratum of all the censures, which have been heaped upon col. Burr.

Mr. R. proceeded to touch upon a subject, to which Mr. Hay had referred. Col. Burr was arrested in the Mississippi Territory. Was there no court? Was there no judge of integrity to try him? Arrested too after he had been acquitted by a grand jury!!— Well! he was transported thence (with humanity it has been said) dragged on by 8 musqueteers, who were ready to shoot him at a moment's warning; refused any appeal to the judicial authority; denied even the melancholy satisfaction of writing to his only child. Was all this humanity? Dragged before this court, which derives its only jurisdiction from a little speck of land on the Ohio. Yes, sir! but for that little spot of an island, Virginia would never have enjoyed this honor! What is all this, sir, but oppressive & bitter inhumanity? I trust, sir, from what I have said, that no one will think with Mr. Wirt, that I am shifting the question from col. Burr to Mr. Jefferson. I should not have made the observations, which have escaped me, but to show that my client is justified by his situation in stating every objection that he can to the present measure.

Mr. R. observed that at least one disadvantage would result from this enquiry; that it was not clear, as Mr. Hay had asserted, that the affidavits would be laid before the court only and not before the grand and petit juries, for the grand jury would soon be possessed of the substance of them; and that it was next to impossible for them to separate the impressions thus illegally to be produced upon their minds, from the weight of the legal *viva voce* testimony.

Mr. R. said, he did not understand Mr. H's expressions about certain persons in holes and corners; that if however he meant spies, there are none such; and that although the government certainly had employed no spies, yet that it has excited so much prejudice against col. Burr as was sufficient to make every man in the country desirous of contributing his full quota of information against him.

Mr. R. concluded with remarking, that the present argument had perhaps been permitted to embrace too wide a field of discussion; and that there were two great questions which he should submit to the consideration of the court: 1st. Whether there were any precedents in favor of the present motion; and 2d. Whether if a proposition like this and of such great importance was adopted, it would not yield a precedent, that would expose every man in the country to oppression.

Mr. R. contended, that this was a charge which the judge had already decided on a former examination; that it was not a supplemental crime, but the old one; that perhaps there *might be* some little affidavit to splice out some defect in the former evidence; but what would be the consequence of this proceeding? Day after day, another and another affidavit would be brought forth; facts like polypi, are easily cut into 2 or 3 pieces; and each of those atoms is to require a new recognizance. For one affidavit there must be a bail of 1000 dollars—Another affidavit, another 1000 dollars; until the burthen of bail is so oppressive as to leave no other resource, but in the four walls of a prison.

Mr. Hay observed, that he should simply notice one remark of Mr. R's.— That gentleman had used the expression of "Pioneer of blood." But surely it would not have escaped him, had he but for one moment seriously reflected upon the court whom he addressed, upon the counsel he opposed or the government. Satisfied of this, Mr. Hay said he should pass the observation by, without further notice.

Mr. Randolph stated that no similar case had occurred in his 30 years practice. It was not wonderful that such a case had not occurred. (Mr. R. here expatiated at some length upon the difference between the state courts of Virginia and the federal court.) He proceeded then to observe, that the U. S. was a most extensive country, compared to the state of Virginia; that a most material witness might be 1500 miles from the court, before whom he was to appear; and that he might be at the same time at the head of an army; in all which circumstances, the federal and the state sovereignties were different. So that this difference altogether defeated the application of Mr. R's experience, to this subject, even if that experience had been admitted as a good authority in the state courts. But even that gentleman would admit, that had a similar case occurred before the state courts, the accused would have been committed.

Mr. Randolph asserts, that this motion is made to draw forth the opinion of the court, and thus to prejudicate the minds of the grand jury. But Mr. R. has certainly forgotten, that this intelligent and impartial jury is on their oaths and their conscience; and surely this court will not pay so little compliment to their independence, as to admit that its own opinion will be sufficient to bias their judgment; more particularly too, when the point before the court is so different from that before the jury.— It is the business of the court to commit; and of the jury to indict; and it is certainly the privilege of the court to decide upon *written* testimony, altho' that point is not so perfectly established and settled, as it relates to the grand jury. How the court would decide upon this point, Mr. Hay said he could not pretend to know.

There is another consideration, which should be weighed by the opposite counsel. The grand jury is now already embodied. They are ready to proceed with any business which may be bro't before them. But, my great object, said Mr. H. is to prosecute col. Burr on the charge of Treason. I make this declaration, because I believe him to have been guilty of it. Let us suppose, however, that the grand jury was to discharge col. B. from the misdemeanor; and then that I was to bring the present motion before the court; what resource then would Mr. Randolph have? From the present proceeding, however, Mr. B. would derive the advantage of an immediate trial; whereas, according to the other mode of proceeding, weeks and months might elapse before he would be brought to trial. And certainly it is in every point of view more desirable both for the government and himself to terminate this business at once, than to impose upon us the necessity of moving for an adjourned trial.

Mr. Randolph says "we were ready on Friday; we were ready on Saturday, &c." Sir, there are two sorts of readiness; one in point of fact, and one under certain circumstances. Now these gentlemen will scarcely persuade me that they could be ready to resist the whole weight of evidence, if it were ready to be laid before them. But there is certainly no difficulty in believing, that they are now ready to proceed to trial, when the whole evidence and particularly General Wilkinson's, is not present.

One more remark! Mr. Randolph has expressed a reverence for Mr. Jefferson, which is not certainly derived from trifling considerations. I will make but one remark, and that gentleman will agree with me in the opinion; survey the many-peopled globe through all ages and nations, and you will not find a man more anxiously bent upon promoting the liberty of the people.— This was certainly the idea which Mr. Randolph intended to convey.

Mr. R. next proceeded to Mr. Madison, upon whom he has not hesitated to lavish the most unreserved encomiums. Surely then, after this solemn declaration of the oldest counsel for the prisoner, we shall hear no more about persecution. Sir, it is a state of things which is impossible to reconcile with the amiable character ascribed to the two first officers in the government.

Mr. Wickham observed that he should offer a few remarks on the supplementary arguments of Mr. Hay; that in this case col. Burr's counsel had called —they had a right to call for the precedents—that Mr. Randolph, who had so ably represented this commonwealth, as a criminal prosecutor for 30 years, had never known a single one to justify this motion; that however true it might be, that the state of Virginia was now of smaller extent than the whole of the U. S. yet that it was then cut up into small judicial districts as the U. S. at present are, and that the witnesses in a criminal prosecution might have been scattered over those districts, as they are said to be in the present circumstances; that Mr. Randolph had represented not one of those districts, but the whole, not only on this side of the mountains, but beyond them; and even the uncultivated region of Kentucky, where travelling was at that time liable to so many difficulties, and from which it was so extremely laborious to transport the witnesses to this side of the mountain; that it was not until Kentucky had been more thickly populated, that a particular court had been established there. And what is