Haywood County "Toeprints"
April 25, 2014
Vol. #5 Issue #6 (**Subject: Emergency Management Ordinance, Swanger, Kirkpatrick, Ensley**)
www.haywoodtp.net

What's Happening?
The purpose of this newsletter is to inform Haywood County Taxpayers of what transpires at the bi–monthly County Commission Meetings. This newsletter will be written from the perspective of a casual observer, myself. Any opinions expressed will be mine.

Emergency Management Ordinance.

http://haywoodtp.net/pubII/140325EmergencyManagementAct.pdf

This piece of work was set into motion on November 16, 2009, by none other that **Mark Swanger [D], Kevin Ensley [RINO]** and **Kirk Kirkpatrick [D].** This is an Ordinance, created by a bunch of county commissioners, presumably crafted by **Chip**, a.k.a. **Leon Killian [D]**, County Attorney. This ordinance was signed and enacted by **Kirk Kirkpatrick**.

Aspects of this ordinance were brought to the attention of Haywood County Taxpayers some time ago by Denny King, and has recently become a focus of candidates running for county commissioner.

The EMO (Emergency Management Ordinance) was recently invoked this winter during some cold weather, by **Mark Swanger**.

A recent opinion piece in the Smoky Mountain News [re: www.smokymountainnews.com/opinion/item/12730-county-oversteps-its-authority.] triggered a reaction by **Mark Swanger** himself. The fact that he felt he had to respond to this opinion piece is, in itself, remarkable. Why did he respond at all?

Swanger's opinion, entitled **"Emergency management plan helps when disaster hits"**, is a piece of work.

http://www.smokymountainnews.com/opinion/item/12760-emergency-management-plan-helps-when-disaster-hits.

Swanger (an Ex-FBI guy) said:

> "I am aware that a few people have assailed the value and constitutionality of the Emergency Management policies and activities in our community and state. It is my opinion that these individuals **are the most extreme among us**, and **are well known to promote conspiracy theories** about a number of topics. It may behoove us to consider the political motives of those making such unsubstantiated claims."

Since when is it that if someone disagrees with **Swanger** and the rest of the Haywood County Commissioners, that they are automatically labeled at "Extreme", "Conspiracy Theorists", or people with "questionable motives"?

Swanger also wrote:

> "The ordinance does not give the county blanket authority to do everything referenced in the ordinance in the event of a disaster."

What? If it is written in the ordinance, then by definition, it gives the county blanket authority to do everything referenced in the ordinance! **Swanger's** statement is not even coherent.

But wait, let's review the pecking order of an Ordinance.

- Resolutions, Rules, Ordinances, lowest on the totem pole.
- Ordinances are subordinate to NC General Statues.
- NC General Statues are subordinate to NC Constitution.
- NC Constitution is subordinate to US Constitution.

The most disturbing aspect of the EMO is **§ 31.07** (4) (b) & (j), which states:

§ 31.07 Declaration of County Disaster

> (4) In addition to any other powers conferred upon the County Manager by local law, during a state of disaster, the County Manager shall have the following powers, with authority to sub-delegate all or part of these powers to the Emergency Management Director:
>
> (b) To take such action and **give such directions to law enforcement officers** and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this chapter and with the orders, rules and regulations made pursuant thereto;
>
> (j) To procure, by purchase, **condemnation, seizure or by other means** to construct, lease, transport, store, maintain, renovate or distribute materials and facilities for emergency management **without regard to the limitation of any existing law**.

What is this saying?

- Section (b) says action will be taken by "**law enforcement officers**" giving such directions to **armed** law enforcement officers and agencies, presumably Greg Christopher, Sheriff of Haywood County, enforcing this ordinance ***by force***.

- Section (j) states this ordinance is to be effected "without regard to the limitation of any existing law", i.e., ***the government established by the United States in any of its territories*.**

Supreme Court 8 U.S. 75.
The following is from 8 U.S. 75, 1807 (How did I get this?)

Cite as: 8 U.S. 75

Supreme Court of the United States

EX PARTE BOLLMAN AND EX PARTE SWARTWOUT

February Term, 1807

This court has power to issue the writ of ***habeas corpus ad subjiciendum.***

To constitute *a levying of war*, there must be an assemblage of persons for the purpose of effecting *by force* a treasonable purpose. Enlistment of men to serve against government is not sufficient. When war is levied, all those who perform any part, however *minute*, or however *remote from the scene of action, and who are actually leagued in the general conspiracy*, are traitors.

Any assemblage of men for the purpose of revolutionizing *by force* the government established by the United States in any of its territories, although as a step to, or the means of executing, some greater projects, amounts to *levying war*. The traveling of *individuals* to the place of rendezvous is not sufficient; **but the *meeting of particular bodies of men, and their marching from places of partial, to a place of general rendezvous*, is such an assemblage as constitutes a levying of war.**

[re: The full and complete rulings of 8 U.S. 75 and 9 F.Cas. 924are appended following this newsletter].

Based on this Supreme Court Ruling, this EMO, enacted by **Kirk Kirkpatrick**, **Mark Swanger** and **Kevin Ensley**, is an act of Treason.

Oaths of Office.
All three (3) of these commissioners took an Oath of Office after they were elected, most administered by **June Ray** (Clerk of Superior Court) herself.

Their Oaths of Office are posted on www.haywoodtp.net, http://haywoodtp.net/pubII/120420Oaths.pdf

There are only two (2) people in Haywood County that have taken an Article VI, Section VII Oath of Office, and those people are **June Ray** and **Sam Hyde** (assistant clerk to superior court). All others are not holding an Article VI, Section VII Oath.

This is the verbiage that **Kirkpatrick** swore to:

> I, **JAMES WEAVER KIRKPATRICK, III** do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the Constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me, God.
>
> I, **JAMES WEAVER KIRKPATRICK, III**, do swear that I will well and truly execute the duties of the office of VICE-CHAIRMAN OF THE HAYWOOD BOARD OF COUNTY COMMISSIONERS, according to the best of my skill and ability, according to law; so help me, God.

Yet, even with this oath, he signed this EMO which states:

(j) To procure, by purchase, **condemnation, seizure or by other means** to construct, lease, transport, store, maintain, renovate or distribute materials and facilities for emergency management **without regard to the limitation of any existing law**.

The last time I heard, the County Sheriff rode into town and arrested traitors.

This EMO has to be repealed / eliminated immediately.

Where is the Authority in Haywood County?
Who is the White Knight to come in and save the day for Haywood County Taxpayers?

- Is it the County Sheriff?
- Is it the D/A's Office (District Attorney **Bonfoey**)?
- Is it the District or Superior Court Judges?
- Is it the Grand Jury?

Here is how it works in Haywood County. A recent embezzlement case is an example of the incestuous cesspool we live in.

A woman, **Scarlette Heatherly**, had for years, embezzled money from the Junaluska Sanitary District, some $204,819, [re: Case files - 14CRS215, 14CRS216, 14CRS217, 14CRS218, 14CRS219] over a five (5) year period.

[**Editors Note:** This plea amount was determined from an Internal Audit, not an External Audit, which happened to be conducted concurrently by Keel, an Asheville Audit firm].

Which lawyer in town represents her? Yes, you guessed it, none other than **Kirk Kirkpatrick [D],** County Commissioner. Does anyone see a conflict of interest here, **Kirkpatrick** being a County Commissioner and the Junaluska

Sanitary District in Haywood County jurisdiction?

[**Editors Note:** County Commissions can make vacancy appointments to the Junaluska Sanitary District, [re: **§ 130A-54].**

Another lawyer involved is **Burton Smith**, who represents the Junaluska Sanitary District, worked with our D/A's office (**Bonfoey**) and before you know it, Rachael Groffski (ADA) and **Kirkpatrick** have worked a plea deal for **Scarlette Heatherly**, and Judge William Coward pencil whips a JUDGEMENT SUSPENDING SENTENCE - FELONY, and she gets off with a light probation. Folks, if this were you or I, having embezzled $200K, even if we returned it, we would be sitting in an 8 x 10 foot room at a Federal Institution.

We have one of the few options available to deal with these people, and that is with the upcoming election.

2014 Primary Elections.
You know, there is a primary election coming up, and there is a runoff in the Democrat County Commissioner race. Contenders are three incumbents, **Kirkpatrick, Sorrells** and **Upton**, with two new candidates, Kyle Edwards and Bob McClure. As is sometimes the case with county commissioners and some other offices, I express a preference with my opinion of who would best serve Haywood County.

I have used the following toeprint symbols as an aid...

 This means a good guy, and

 This means we could to better.

Here are recommendations for County Commissioners in the May Primary Election.

 Kyle Edwards

 Bob McClure

 **Kirk Kirkpatrick**

 **Michael Sorrells**

 **Bill Upton**

Democrats can vote on these candidates. Unaffiliated voters, if they select a Democrat voting ballot, can also vote for these candidates.

If you feel you must vote for three, then vote for Kyle Edwards, Bob McClure and **Bill Upton**. **Bill Upton** has traditionally trailed in all elections behind **Kirkpatrick** and **Sorrells**, and would most likely be the easiest to beat in the November Election, where two (2) Republicans and one (1) Libertarian is running.

Outstanding County Employees.
Candace Way has been added. She is Executive Assistant / Deputy Clerk to the County Manager.

• Sherrie Rogers	Register of Deeds
• Judy Hickman	Assistant Tax Assessor
• Greg Christopher	Haywood County Sheriff
• Anne Garrett	Superintendent of HC Schools
• Candace Way	Exec. Assist. to County Manager

Legend: If any name is in **bold**, it can't be a good thing.

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Haywood County Taxpayer
19 Big Spruce Lane
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Cite as: 8 U.S. 75

Supreme Court of the United States

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A person may be committed for a crime by one magistrate upon an affidavit made before another. A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths.

Quere, whether, upon a motion to commit a person for treason, an affidavit stating the substance of a letter in possession of the affiant, be admissible evidence?

The clause of the 8th section of the act of congress, '*for the punishment of certain crimes against the United States,' vol.* 1. *p.* 103. which provides that 'the trial of crimes committed on the high seas, *or in any place out of the jurisdiction of any particular state*, shall be in the district where the offender is apprehended, or into which he may be first brought,' applies only to offences committed on the high seas, or in some *river, haven, bason*, or *bay*, not within the jurisdiction of a particular state, and not to the *territories* of the United States, where regular courts are established, competent to try those offences.

The word '*apprehended*,' in that clause of the act, does not imply a *legal arrest*, to the exclusion of a *military* arrest or seizure.

FN1 On a former day (Feb. 5) *C. Lee* had made a motion for a *habeas corpus* to a military officer to bring up the body of *James Alexander*, an attorney at law at New-Orleans, who, as it was said, had been seized by an armed force under the orders of General Wilkinson, and transported to the city of Washington.
CHASE, J. then wished the motion might lay over to the next day. He was not prepared to give an opinion. He doubted the jurisdiction of this court to issue a *habeas corpus* in any case.
JOHNSON, J. doubted whether the power given by the act of congress, *vol.* 1. *p.* 101, of issuing the writ of *habeas corpus*, was not intended as a mere auxiliary power to enable courts to exercise some other jurisdiction given by law. He intimated an opinion that either of the judges at his chambers might issue the writ, although the court collectively could not.
CHASE, J. agreed that either of the judges might issue the writ, but not out of his peculiar circuit.
MARSHALL, Ch. J. The whole subject will be taken up *de novo*, without reference to precedents. It is the wish of the court to have the motion made in a more solemn manner to-morrow, when you may come prepared to take up the whole ground. [But in the mean time Mr. Alexander was discharged by a judge of the circuit court.]

C. LEE moved for a *habeas corpus* to the marshal of the district of Columbia, to bring up the body of *Samuel Swartwout*, who had been committed by the circuit court of that district, on the charge of treason against the United States; and for a *certiorari* to bring up the record of the commitment, &c.

And on a subsequent day *Harper* made a similar motion in behalf of *Erick Bollman*, who had also been committed by the same court on a like charge. [FN1]

The order of the court below, for their commitment, was in these words:

'The prisoners, Erick Bollman and Samuel Swartwout, were brought up to court in custody of the marshal, ***76** arrested on a charge of treason against the United States, on the oaths of General James Wilkinson, General William Eaton, James L. Donaldson, Lieutenant William Wilson, and Ensign W. C. Mead, and the court went into further examination of the charge: Whereupon it is ordered, that the said Erick Bollman and Samuel Swartwout be committed to the prison of this court, to take their trial for treason against the United States, by levying war against them, to be there kept in safe custody until they shall be discharged in due course of law.' [FN2]

FN2 The warrant by which they were brought before the court was as follows:
DISTRICT OF COLUMBIA, to wit: ***The United States of America***, *to the marshal of the district of Columbia, greeting:*
Whereas there is probable cause, supported by the oath of James Wilkinson, William Eaton, James Lowrie Donaldson, William C. Mead, and William Wilson, to believe that Erick Bollman, commonly called Doctor Erick Bollman, late of the city of Philadelphia, in the state of Pennsylvania, gentleman, and Samuel Swartwout, late of the city of New-York, in the state of New-York, gentleman, are guilty of the crime of treason against the United States of America.
These are, therefore, in the name of the said United States, to command you that you take the bodies of the said Erick Bollman and Samuel Swartwout, if they shall be found in the county of Washington, in your said district, and them safely keep, so that you have their bodies before the circuit court of the district of Columbia, for the county of Washington, now sitting at the Capitol, in the city of Washington, immediately to answer unto the United States of America of and concerning the charge aforesaid. Hereof fail not at your peril, and have you then and there this writ. Witness the Honourable WILLIAM CRANCH, Esq. Chief Judge of the said Court, this 27th day of January, 1807.
(*Seal*.) WILLIAM BRENT, Clerk.
Issued 27th day of January, 1807.

The oaths referred to in the order for commitment, were affidavits in writing, and were filed in the court below. [FN3]

FN3 For these affidavits, see Appendix, Note (A)***77**

C. Lee, for *Swartwout*.

Notwithstanding the decisions of this court in *Hamilton's* case, 3 *Dall.* 17. and in *Burford's* case, *ante, vol.* 3. *p.* 448. we are now called upon to show that this court has power to issue a writ of *habeas corpus*.

By the constitution of the United States, *art.* 3. *s.* 2. the grant of jurisdiction to the courts of the United States is general, and extends to *all* cases arising under the laws of the United States. This court has either original or appellate jurisdiction of every case, with such exceptions and under such regulations as congress has made or shall make. If congress has not excepted any case, then it has cognizance of the whole.

The appellate jurisdiction given by the constitution to this court includes criminal as well as civil cases, and no act of congress has

taken it away. This court derives its power and its jurisdiction not from a statute, but from the constitution itself. No legislative act is necessary to give powers to this court. It is independent of the legislature; and in all the late discussions upon the question of putting down courts, **it was admitted on all hands that the legislature could not destroy the supreme court.**

But if this court has no criminal jurisdiction to *hear and determine*, yet they may have a criminal jurisdiction to a certain extent, viz. to inquire into the cause of commitment, and admit to bail. This court has no original jurisdiction, except in certain cases; yet it has power to issue a mandamus in cases in which it has no appellate jurisdiction by writ of error or appeal, and will issue a prohibition even in a criminal case, if a circuit court should undertake to try it in a state in which the crime was not committed. So also if a district court should be proceeding upon a matter out of its jurisdiction, this court would grant a *prohibition*.

By the judiciary act, *s.* 14. *vol.* 1. *p.* 58. 'All the beforementioned courts' (and the supreme court was the court last mentioned in the preceding section) 'shall have power to issue writs of *scire facias, habeas corpus*, ***78** and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' 'And either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment: *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are *committed for trial* before some court of the same, or are necessary to be brought *into court* to testify.'

It has been suggested that the words 'and all other writs not specially provided for by statute, which may be *necessary for the exercise of their respective jurisdictions*,' forbid the issuing of a *habeas corpus*, but in a case where it is necessary for the exercise of the court's jurisdiction. But the words '*necessary*,' &c. apply only to the '*other writs not specially provided for*.'

In order to restrict in some degree the general expression '*all other writs*,' the subsequent words are used. The writ of *habeas corpus* was particularly named, because it would not (in all cases where it ought to be granted) come under the general denomination of *writs necessary for the exercise of the jurisdiction of the court issuing it*.

But admitting, for argument, that a writ of *habeas corpus* cannot issue but where it is necessary for the exercise of the jurisdiction of the court issuing it, yet the term 'jurisdiction' means the whole jurisdiction given to the court; and as this court has, by the constitution, jurisdiction in criminal cases, which jurisdiction is not taken away by any statute, it is a writ necessary for the exercise of its jurisdiction. Again, by the 33d section of the same, act, 'upon arrests in criminal cases, where the punishment may be death, bail shall not be admitted *but by the* SUPREME or a circuit *court*, or by a justice of the supreme court, or a judge of a district court, *who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, ***79** and the usages of law*.' By this section the supreme court has jurisdiction to *admit a prisoner to bail* in criminal cases punishable with death, and for that purpose *to examine into the nature and circumstances of the offence, and of the evidence*. For the exercise of this jurisdiction the writ of *habeas corpus* is necessary. There is no other writ, 'agreeable to the usages of law,' which will answer the purpose.

It is doubtful whether a judge of this court can issue the writ while the court is sitting, and in a district in which he has no authority to act as a circuit judge.

If it be said that the writ can only issue where it is in exercise of appellate jurisdiction, we say it is appellate jurisdiction which we call upon this court to exercise. The court below has made an illegal and erroneous order, and we appeal in this way, and pray this court to correct the error.

Rodney, Attorney General, declined arguing the point on behalf of the United States.

Harper, for *Bollman*.

There are two general considerations:

1. Whether this court has the power generally of issuing the writ of *habeas corpus ad subjiciendum?*

2. If it has the power generally, whether it extends to commitments by the circuit court?

1. The general power of issuing this great remedial writ, is incident to this court as a supreme court of record. It is a power given to such a court by the common law. Every court possesses necessarily certain incidental powers as a court. This is proved by every day's practice. If this court possessed no powers but those given by statute, it could not protect itself from insult and outrage. It could not enforce obedience to its immediate orders. It could not imprison for contempts in its presence. It could not compel the attendance of a witness, nor oblige him to testify. It could not compel ***80** the attendance of jurors, in cases where it has original cognizance, nor punish them for improper conduct. These powers are not given by the constitution, nor by statute, but flow from the common law. This question is not connected with another, much agitated in this country, but little understood, viz. whether the courts of the United States have a common law jurisdiction to punish common law offences against the government of the United States. The power to punish offences against the government is not necessarily incident to a court. But the power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen.

It being clear then that incidental powers belong to this in common with every other court, where can we look for the definition, enumeration and extent of those powers, but to the common law; to that code from whence we derive all our legal definitions, terms and ideas, and which forms the substratum of all our juridical systems, of all our legislative and constitutional provisions. It is not possible to move a single step in any judicial or legislative proceeding, or to execute any part of our statutes, or of our constitution, without having recourse to the common law. The constitution uses, for instance, the terms '*trial by jury*' and '*habeas corpus*.' How do we ascertain what is meant by these terms? By a reference to the common law. This court has power, in some cases, to summon jurors, and examine witnesses. If an objection be made to the competence of a witness, or a juror be challenged, how do you proceed to ascertain the competence of the witness or the juror? You look into the common law**. The common law, in short, forms an essential part of all our ideas. It informs us, that the power of issuing the writ of *habeas corpus* belongs incidentally to every superior court of record; that it is part of their inherent rights and duties thus to watch over and protect the liberty of the individual.**

Accordingly we find that the court of common pleas in England, though possessing no criminal jurisdiction ***81** of any kind, original or appellate, has power to issue this writ of *habeas corpus*. This power it possessed by the common law, as an incident to its existence, before it was expressly given by the *habeas corpus* act. This appears from *Bushell's case*, reported in Sir *Thomas Jones*, 18. and stated, in *Wood's case*, 3 *Wilson*, 175. by the chief justice, in delivering the opinion of the court. *Bushell's case* was shortly this: A person was indicted at the *Old Bailey*, in London, for holding an unlawful conventicle. The jury acquitted him, contrary to the direction of

the court on the law. For this some of the jurors, and *Bushell* among the rest, were fined and imprisoned by the court at the *Old Bailey*. *Bushell* then moved the court of common pleas for a writ of *habeas corpus*, which, after solemn argument and consideration, was granted by three judges against one. *Bushell* was brought up, and the cause of his commitment appearing insufficient, he was discharged. This took place before the *habeas corpus* act was passed, and is a conclusive authority in favour of the doctrine for which we contend. *Wood's case*, 3 *Wilson*, 175. and 3 *Bac. Ab.* 3. are clear to the same point.

Whence does the court of common pleas derive this power? Not from its criminal jurisdiction; for it has none. Not from any statute; for when Bushell's case was decided there was no statute on the subject. Not from any idea that such a power is necessary for the exercise of its ordinary functions; for no such necessity exists, or has ever been supposed to exist. **But from the great protective principle of the common law, which in favour of liberty gives this power to every superior court of record, as incidental to its existence.**

The court of chancery in England possesses the same power by the common law, as appears from 3 *Bac. Ab.* 3. This is a still stronger illustration of the principle, for the court of chancery is still further removed, if possible, than the court of common pleas, from all criminal jurisdiction, still more exempt from the necessity of such a power for the exercise of its peculiar functions.

The court of exchequer also, as appears from the same authorities, though wholly destitute of criminal jurisdiction, ***82** possesses the power of relieving, by *habeas corpus*, from illegal restraint.

Hence it appears that all the superior courts of record in England are invested by the common law with this beneficial power, as incident to their existence. The reason assigned for it in the English law books is, that the king has always a right to know, and by means of these courts to inquire, what has become of his subjects. That is, that he is bound to protect the personal liberty of his people, and that these courts are the instruments which the law has furnished him for discharging his high duty with effect.

It may then be asked, whether the same reasons do not apply to our situation, and to this court. Have the United States, in their collective capacity, as sovereign, less right to know what has become of their citizens, than the king or government of England to inquire into the situation of his subjects? Are they under an obligation, less strong, to protect individual liberty? Have not the people as good a right as those of England to the aid of a high and responsible court for the protection of their persons? Is our situation less advantageous in this respect than that of the English people? Or have we no need of a tribunal, for such purposes, raised by its rank in the government, by its independence, by the character of those who compose it, above the dread of power, above the seductions of hope and the influence of fear, above the sphere of party passions, factious views, and popular delusion? Of a tribunal whose members, having attained almost all that the constitution of their country permits them to aspire to, are exempted, as far as the imperfection of our nature allows us to be exempted, from all those sinister influences that blind and swerve the judgments of men--have nothing to hope, and nothing to fear, except from their own consciences, the opinion of the public, and the awful judgment of posterity? It is in the hands of such a tribunal alone, that in times of faction or oppression, the liberty of the citizen can be safe. Such a tribunal has the constitution created in this court, and can it be imagined that this wise and beneficient constitution intended to deny to the citizens the valuable privilege ***83** of resorting to this court for the protection of their dearest rights?

On this ground alone the question might be safely rested; but there is another, not stronger indeed, but perhaps less liable to question.

Congress has expressly given this power to this court, by the 14th section of the act of 24th September, 1789, commonly called the judiciary act. This section, according to its true grammatical construction, and its apparent intent, contains two distinct provisions. The first relates to writs of *scire facias* and *habeas corpus;* the second to such other writs as the court might find necessary for the exercise of their jurisdiction. As to writs of *scire facias* and *habeas corpus*, which are of the most frequent and the most beneficial use, congress seems to have thought proper to make a specific and positive provision. It was clearly and obviously necessary that such writs should be issued, not merely to aid the court in the exercise of its ordinary jurisdiction, but for the general purposes of justice and protection. The authority, therefore, to issue these writs, is positive and absolute; and not dependent on the consideration whether they might be necessary for the ordinary jurisdiction of the courts. To render them dependent on that consideration, would have been to deprive the courts of many of the most beneficial and important powers which such courts usually possess.

But the legislature foresaw that many other writs might, in the course of proceedings, be found necessary for enabling the courts to exercise their ordinary jurisdiction, such as *subpoenas*, writs of *venire facias, certiorari, fieri facias*, and many others known to our law. To attempt a specific enumeration of these writs might have been productive of inconvenience: for if any had been omitted, there would have been doubts of the power to issue them. Congress, therefore, instead of a specific enumeration of them, wisely chose to employ a general description. This description is contained in the words, 'all other writs--which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.'***84**

The true grammatical construction of the sentence accords with this construction. The words of restriction or description ('*which may be necessary for the exercise of their respective jurisdictions*,' &c.) stand here as a relative, and must refer to the next antecedent. There are two antecedents; 1st. 'Writs of *scire facias* and *habeas corpus;*' and 2d. '*All other writs*.' The second is the next antecedent to which, of course, the relative terms '*which may be necessary*,' &c. must relate and be confined. Those words therefore cannot, either in grammatical construction, or according to the plain object of the legislature, be considered as restricting the grant of power in the first part of the sentence; but, merely as explaining the extent of the power given in the second part.

It is clear then that this section bestows on this court the power to grant writs of *habeas corpus* without restriction. Does this power extend to the application now before the court?

The term *habeas corpus* is a generic term, and includes all kinds of writs of *habeas corpus;* as well the writ *ad subjiciendum*, as *ad testificandum*, or *cum causa*, &c.

But the 33d section of the same act must remove all doubt upon that point; for when it gives this court power to admit to bail in cases punishable with death, and commands this court to use their '*discretion therein, regarding the nature and circumstances of the offence and of the evidence;*' it takes it for granted that the prisoner is to be brought before the court for the purpose of inquiring into those circumstances. If this section does not give the power, it shows at least that the legislature considered it as given before by the 14th section. Again, the latter part of the 14th section gives to each of the justices of this court, and of the district courts, the power for which we contend. It cannot be presumed that congress meant to give each judge singly a power which it denied to the whole court. That it confided more in the individual members of the court, than in the court itself. That it considered the weight, dignity, character, and independence of each individual ***85** member, as a more firm barrier against oppression than those of the tribunal itself, sitting for the exercise of the highest judicial functions known to our law.

This part of the statute is remedial and beneficial to the subject, and it is a sound maxim of law, that such statutes are to be construed liberally in favour of liberty.

Considering it as settled that congress intended to give this court the power to issue writs of *habeas corpus ad subjiciendum*, the next question is, whether congress had authority, by the constitution, to confer that power?

The authority of congress must be tested by the constitution, and if they should appear to this court to have exceeded the limits there prescribed, this court must consider their act void. **The power of the judiciary to collate an act of congress with the constitution, when it comes judicially before them, and of declaring it void if against the constitution, is one of the best barriers against oppression, in the fluctuations of faction, and in those times of party violence which necessarily result from the operation of the human passions in a popular government**. In the violence of those political storms which the history of the human race warns us to expect, this shelter may indeed be found insufficient; but weak as it may be, it is our best hope, and it is the part of patriotism to uphold and strengthen it to the utmost. But it is a power, of a delicacy inferior only to its importance; and ought to be exercised with the soundest discretion, and to be reserved for the clearest and the greatest occasions.

The question whether congress could confer upon this court the power of issuing the writ of *habeas corpus ad subjiciendum*, depends upon another question, viz. whether this power or jurisdiction be in its nature original or appellate. The *original* jurisdiction of this court being limited to certain specified cases, of which this is not one, it follows, that if the issuing such a writ of *habeas corpus* be an exercise of *original* jurisdiction, ***86** the power to issue it cannot be conferred on, or exercised by this court.

This principle was established by the case of *Marbury* v. *Madison*, *(ante, vol.* 1. *p.* 175.) where the court said that 'to enable this court to issue a *mandamus*, it must be shown to be an exercise of *appellate* jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms; and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that *will* must be obeyed. This is true. Yet the jurisdiction must be *appellate*, not *original*. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is in effect the same as to sustain an original action for that paper; and therefore seems not to belong to appellate, but to original jurisdiction.'

This passage needs no comment. The criterion which distinguishes appellate from original jurisdiction, is that it revises and corrects the decisions of another tribunal; and a *mandamus* may be used when it is for the accomplishment of such a purpose.

The object of the *habeas corpus* now applied for, is to revise and correct the proceedings of the Court below, (under whose orders the prisoners stand committed,) so far as respects the legality of such commitment. If that court had given judgment against the applicants in the sum of one hundred dollars, the power to revise that judgment would have been appellate, and might have been given by congress to this court. From a decision which might take a few dollars from their pockets they might be relieved. Shall the relief be rendered impossible because the decision deprives them of all that can distinguish a freeman from the most abject slave--of all that can render life desirable?

If the question, respecting the power of this court, under the constitution and the act of congress, if not ***87** under the common law, to

issue the writ of *habeas corpus ad subjiciendum*, were still open, it ought, on these principles and authorities, to be decided in our favour. But it is not open. It has been twice solemnly adjudged in this court. First in the case of *Hamilton*, 3 *Dallas*, 17. not long after the court was organized; and very recently in the case of *Burford. (Ante, vol.* 3. *p.* 448.) We contend that the case is settled by these decisions, and that it is no longer a question whether this court has the power which it is now called upon to exercise.

The exercise of this power, the benefit of these decisions, the protection of the law thus established, we claim as a matter of right, which this honorable court cannot refuse.

Shall it be said that no part of our law is fixed and settled, except what is positively and expressly enacted by statute? On the contrary, is it not certain that by far the greatest portion of that law on which our property, our lives, and our reputations depend, rests solely on the decisions of courts? Shall it be said that all this important and extensive branch of the law is uncertain and fluctuating, dependent on the ever varying opinions and passions of men, and liable to change with every change of times and circumstances? Shall it be said that each individual judge may rightfully disregard the decisions of the court to which he belongs, and set up his own notions, his prejudices, or his caprice, in opposition to their solemn judgment? This is not the principle of our law; this is not the tenure by which we hold our rights and liberties. *Stare decisis* is one of its favourite and most fundamental maxims. It is behind this wise and salutary maxim that courts and judges love to take refuge, in times and circumstances that might induce them to doubt of themselves, to dread the secret operation of their own passions and prejudices, or those external influences, against which, in the imperfection of our nature, our minds can never be sufficiently guarded. In such times and circumstances, a judge will say to himself, 'I know not how far I might be able, in this case, to form an impartial opinion. ***88** I know not how far my judgment may be blinded or misled by my own feelings or the passions of others, by the circumstances of the moment, or the views and wishes of those with whom I am connected. But here is a precedent established under circumstances which exclude all possibility of improper bias. This precedent is therefore more to be relied on than my judgment; and to this I will adhere as the best and only means of protecting myself, my own reputation, and the safety of those who are to be affected by my decision, against the danger of those powerful, though imperceptible influences, from which the most upright and enlightened minds cannot be considered as wholly exempt.'

There have, indeed, been instances where precedents destructive to liberty, and shocking to reason and humanity, established in arbitrary and factious times, have been justly disregarded. But when in times of quiet, and in cases calculated to excite no improper feelings, precedents have been established in favour of liberty and humanity, they become the most sacred as well as the most valuable parts of the law, the firmest bulwark for the rights of the citizens, and the surest guardian for the consciences and the reputation of judges.

Such are the precedents on which we rely.

The case of *Hamilton* was decided soon after the establishment of the government, when little progress had been made in the growth of party passions and interests, and when whatever of political feeling can be supposed to have existed in the court, was against the prisoner. Yet this beneficial power was exerted for his relief. He was brought before this court by *habeas corpus*, and was discharged. The precedent thus established was, by this court, fifteen years afterwards, in the case of *Burford*, declared to be decisive.

The case of *Burford* was wholly unconnected with political considerations, or party feelings. The application was made on behalf of an obscure individual, strongly suspected, though he could not be legally convicted, of a most odious and atrocious crime. The ***89** abhorrence of his

supposed offence, the strong circumstances which appeared against him, the course of his life, his general character, and the universal belief entertained of his guilt, all combined to excite against him every honest feeling of the human heart. Yet he had the benefit of one of those precedents which we now claim; and in his case the authority of another and a more solemn decision was added to the doctrine for which we contend.

Again let it be asked, is not the law to be considered as settled by these repeated decisions? Are we still, as to this most important point, afloat on the troubled ocean of opinion, of feeling, and of prejudice? If so, deplorable indeed is our condition.

Misera est servitus, ubi lex est vaga aut incerta.

This great principle, *stare decisis*, so fundamental in our law, and so congenial to liberty, is peculiarly important in popular governments, where the influence of the passions is strong, the struggles for power are violent, the fluctuations of party are frequent, and the desire of suppressing opposition, or of gratifying revenge under the forms of law, and by the agency of the courts, is constant and active.

2. The second head of inquiry is, whether the power to issue writs of *habeas corpus* be restricted by the circumstance of the commitment having been made by the *circuit court* of the district of Columbia.

Before such a principle is admitted, let us inquire into its possible and even probable effects on the liberties of the people. Is it not manifest that it would deprive the citizens of the guardianship of the most respectable and independent courts, and place their personal liberty at the mercy of inferior tribunals? Do we not know that congress may institute as many inferior tribunals, and may assign to the judges of these tribunals such salaries as they may think fit? Does it not hence result that a succession of courts may be instituted, to the lowest of which may be assigned salaries so contemptible, and duties so unimportant or so odious, as necessarily ***90** and certainly to exclude every man of character, talents and respectability of every party? Will not such courts, therefore, be necessary filled by the meanest retainers, the most obsequious flatterers, and the most servile tools of those in power for the moment? Can any thing like independence or integrity be expected from such judges? Will they not act continually under the influence, not merely of their own party passions and prejudices, but of hope and of fear, those great perverters of the human mind? The precedent is already set that they may be turned out of office by the abolition of their courts; and their hopes of promotion to a higher station, and a better salary will depend on their servility and blind obedience to those in power. Let it be once established by the authority of this court, that a commitment on record by such a tribunal, is to stop the course of the writ of *habeas corpus*, is to shut the mouth of the supreme court, and see how ready, how terrible, and how irresistible an engine of oppression is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party which it hates and fears. Does the history of the human passions warrant the conclusion, or the expectation, that such an engine will not be used? We unfortunately know, from the experience of every age, that there are few excesses into which men may not be hurried by the lust of power or the thirst of vengeance. We too are men of like passions, and it behoves us, ere we have reached these fatal extremes, to provide, as far as the imperfection of human nature will permit, against the dangers which have assailed others, and which threaten us. The best mode of making this provision, is to establish salutary maxims in quiet times, and to adhere to them steadily. Let it be now declared that there resides in this high tribunal (as respectable as our constitution can make it, and as independent as the nature of our government permits) a power to protect the liberty of the citizen, by the writ of *habeas corpus*, against the enterprizes of inferior courts,

which may be constituted for the purposes of oppression or revenge, and you place one barrier more round our safety.***91**

What stubborn maxim of law, what binding authority requires the admission of a principle so repugnant to all our feelings and to the spirit of the constitution? On what ground or reason of law can it be pretended that a commitment by the circuit court stops the course of the writ of *habeas corpus?*

Is it because the circuit court has competent jurisdiction to commit? This cannot be the reason, for every justice of the peace has competent jurisdiction to commit, and the reason, therefore, if it existed, would destroy the whole effect of the writ of *habeas corpus*.

Is it because the circuit court has competent jurisdiction to try the offence? This cannot be the reason, for in *Bushell's case*, formerly cited from 3 *Wilson*, 175. it appears that a commitment by the sessions at the *Old Bailey*, a criminal court of very high authority, and which had jurisdiction over the offence, did not prevent the court of common pleas from relieving by *habeas corpus*.

So also by the forest laws in England, in former times, the judge of the forest had jurisdiction for the punishment of offences within the forest; and yet it appears, from 2 *Inst.* 290. that a person committed by the judge of the forest for such an offence, might be relieved by *habeas corpus* from the superior courts.

It is well known, too, that, by the laws of England, the king has power to erect courts by special commission, with power to try and punish offences. From *Wood's case*, 3 *Wilson*, 173. it appears that a person committed by such commissioners, in a case which they had authority to try, may be relieved by *habeas corpus*. This, therefore, cannot be the reason.

Is it because the circuit court is a court of record? So is the court of *Piepoudre*. But can it be imagined that if that court were to commit a man in England, the power of relieving by *habeas corpus* from the superior courts would be thereby taken away? Congress may erect as many inferior courts of record as they please. Can it be imagined that by instituting such ***92** courts they can, in effect, suspend the writ of *habeas corpus* indefinitely, and in cases where the suspension is expressly forbidden by the constitution?

This power, moreover, has been shown to be appellate; and it is of the very essence of appellate power to review the decisions of inferior courts of record. Can it be imagined that such a decision may be reviewed where a small amount of property only is affected, and that there is no relief where it deprives a citizen of his liberty?

Between superior courts of record, of equal authority and co-ordinate rank, there may properly be a comity observed which would prevent them from attempting to interfere with the decisions of each other. Perhaps in England the court of common pleas would not attempt to release by *habeas corpus*, a person committed by the exchequer, or chancery, and *vice versa*. But this comity cannot exist between superior and inferior courts; and there is no doubt that the court of king's bench, which is a court superior to the common pleas and the exchequer, would grant a writ of *habeas corpus*, for any person imprisoned by either of those courts for a criminal matter.

But this point does not rest on general reasoning alone, however strong. It has been expressly adjudged by this court. The case of *Burford*, formerly cited, is a complete authority on this point, as well as on the former. *Burford's* case had been acted on judicially by the circuit court of this district. He stood committed under its decision. That court did not, indeed, commit him in the first instance, but he was brought before it on *habeas corpus*--the order of commitment made by the justices of the peace was altered and modified, and he was committed by a new order from the circuit court. This recommitment was as

complete an adjudication upon the subject as the commitment in the present case. One was as much a determination on record by the circuit court as the other; and one can, no more than the other, preclude the exercise of this court's power to relieve by *habeas corpus*.***93**

Again, therefore, we claim the benefit of this decision. We again appeal to the great maxim *stare decisis;* we again deprecate the mischiefs that must ensue, if precedents in favour of liberty, made in times and under circumstances the most favourable to correct decision, should be disregarded in other times, and in situations where the existence of passion, prejudice and improper influence may be dreaded. We deprecate the dangers and mischiefs that must ensue, should the laws on which our dearest rights depend, be thus left to fluctuate on the ever varying tide of circumstances and events, and we trust that the protecting power of this high tribunal, will now fix this great land-mark of the constitution; and will place our liberties, as far as the imperfection of human things can permit, beyond the reach of opinion, of caprice, and of sinister views.

February 13.

MARSHALL, Ch. J. [FN4] delivered the opinion of the court, as follows:

FN4 The only judges present when these opinions were given were, *Marshall*, Ch. J. *Washington*, *Johnson* and *Livingston*, Justices, *Cushing*, J. and *Chase*, J. were prevented by ill health from attending.

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, **that for the meaning *94 of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.**

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.

To enable the court to decide on such question, the power to determine it must he given by written law.

The inquiry therefore on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of *habeas corpus*, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

The 14th section of the judicial act (*Laws U. S. vol.* 1. *p.* 58.) has been considered as containing a substantive grant of this power.

It is in these words: 'That all the before mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment. *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.'***95**

The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some cause which they are capable of finally deciding.

It has been urged, that in strict grammatical construction, these words refer to the last antecedent, which is, 'all other writs not specially provided for by statute.'

This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt, is, that the true sense of the words is to be determined by the nature of the provision, and by the context.

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.'

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of *habeas corpus*.

It has been truly said, that this is a generic term, and includes every species of that writ. To this it may be added, that when used singly--when we say *the writ of habeas corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution.***96**

The section proceeds to say, that 'either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.'

It has been argued that congress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled.

There is certainly much force in this argument, and it receives additional strength from the consideration, that if the power be denied to this court, it is denied to every other court of the United States; the right to grant this important writ is given, in this sentence, to every judge of the circuit, or district court, but can neither be exercised by the circuit nor district court. It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the *supreme* court the power to award the great writ of *habeas corpus*, there could be none which would induce them to withhold it from *every* court in the United States; and as it is granted to *all* in the *same sentence* and by the *same words*, the sound construction

would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

The doubt which has been raised on this subject may be further explained by examining the character of the various writs of *habeas corpus*, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable ***97** the court to exercise its jurisdiction in causes which it is enabled to decide finally.

The various writs of *habeas corpus*, as stated and accurately defined by judge Blackstone, (3 *Bl. Com.* 129.) are, 1st. The writ of ***habeas corpus ad respondendum,*** 'when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above.'

This case may occur when a party having a right to sue in this court, (as a state at the time of the passage of this act, or a foreign minister,) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the *United States*, or of a *state* court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and consequently could not be contemplated by the legislature. It would not be required, in such case, to bring the body of the defendant actually into court, as he would already be in the charge of the person who, under an original writ from this court, would be directed to take him into custody, and would already be confined in the same jail in which he would be confined under the process of this court, if he should be unable to give bail.

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case.

The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by *habeas corpus*. They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government.

2d. The writ of ***habeas corpus ad satisfaciendum***, 'when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to ***98** some superior court to charge him with process of execution.'

This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole juridical system forbids it.

3d. ***Ad prosequendum, testificandum, deliberandum,*** &c. 'which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed.'

This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of congress; but the power to bring a person up that he may be tried in the proper jurisdiction is understood to be the very question now before the court.

4th, and last. The common writ *ad faciendum et recipiendum*, 'which issues out of any of the courts of Westminster-hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated an ***habeas corpus cum causa***,) to *do and receive* whatever the king's court shall consider in that behalf. **This writ is grantable of common right, without any**

motion in court, and it instantly supersedes all proceedings in the court below.'

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

It would not be difficult to demonstrate that the writ of *habeas corpus cum causa* cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a ***99** state court against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the United States.

The only power then, which on this limited construction would be granted by the section under consideration, would be that of issuing writs of ***habeas corpus ad testificandum.*** The section itself proves that this was not the intention of the legislature. It concludes with the following *proviso*, 'That writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.'

This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts:--where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

From this review of the extent of the power of awarding writs of *habeas corpus*, if the section be construed in its restricted sense; from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature.

But the 33d section throws much light upon this question. It contains these words: 'And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted *but by the supreme* or a circuit *court*, or by a justice of the supreme court, or a judge of a district ***100** court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law.'

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners not committed by itself, may award a writ of *habeas corpus* for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

If, by the sound construction of the act of congress, the power to award writs of *habeas corpus* in order to examine into the cause of commitment is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted.

The only objection is, that the commitment has been made by a court having power to commit and to bail.

Against this objection the argument from the bar has been so conclusive that nothing can be added to it.

If then this were *res integra*, the court would decide in favour of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. (*United States* v. *Hamilton*, 3 *Dall.* 17.)

If the act of congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the constitution.

In the *mandamus* case, (*ante*, *vol.* 1. *p.* 175. *Marbury* v. *Madison*,) it was decided that this court would not exercise original jurisdiction except so far as that jurisdiction was given by the constitution. But so far as that ***101** case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.

It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual **shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.**

The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.

But this point also is decided in Hamilton's case and in Burford's case. [FN5]

FN5 At February term, 1806, in this court.

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.

That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.

The motion, therefore, must be granted.

JOHNSON, J.

In this case I have the misfortune to dissent from the majority of my brethren. As it is a case of much interest, I feel it incumbent upon me to assign the reasons upon which I adopt the opinion, that this court has not authority to issue the writ of *habeas corpus* now moved for. The prisoners are in confinement under a commitment ordered by the superior ***102** court of the district of Columbia, upon a charge of high treason. This motion has for its object their discharge or admission to bail under an order of this court, as circumstances upon investigation shall appear to require. The attorney general having submitted the case without opposition, I will briefly notice such objections as occur to my mind against the arguments urged by the counsel for the prisoners.

Two questions were presented to the consideration of the court.

1st. Does this court possess the power generally of issuing the writ of *habeas corpus?*

2d. Does it retain that power in this case after the commitment by the district court of Columbia?

In support of the affirmative of the first of these questions, two grounds were assumed.

1st. That the power to issue this writ was necessarily incident to this court, as the supreme tribunal of the union.

2dly. That it is given by statute, and the right to it has been recognized by precedent.

On the first of these questions it is not necessary to ponder long; this court has uniformly maintained that it possesses no other jurisdiction or power than what is given it by the constitution and laws of the United States, or is necessarily incident to the exercise of those expressly given.

Our decision must then rest wholly on the due construction of the constitution and laws of the union, and the effect of precedent, a subject which certainly presents much scope for close legal inquiry, but very little for the play of a chastened imagination.

The first section of the third article of the constitution vests the judicial power of the United States in one supreme court, and in such inferior courts as the congress ***103** may from time to time establish. The second section declares the extent of that power, and distinguishes its jurisdiction into original and appellate.

The *original jurisdiction* of this court is restricted to cases affecting ambassadors or other public ministers, and consuls, and those in which a state shall be a party. In all other cases within the judicial powers of the union, it can exercise only an appellate jurisdiction. The former it possesses independently of the will of any other constituent branch of the general government. Without a violation of the constitution, that division of our jurisdiction can neither be restricted or extended. In the latter its powers are subjected to the will of the legislature of the union, and it can exercise appellate jurisdiction in no case, unless expressly authorised to do so by the laws of congress. If I understand the case of *Marbury* v. *Madison*, it maintains this doctrine in its full extent. I cannot see how it could ever have been controverted.

It is incumbent, then, I presume, on the counsel, in order to maintain their motion, to prove that the issuing of this writ is an act within the power of this court in its original jurisdiction, or that, in its appellate capacity, the power is expressly given by the laws of congress.

This it is attempted to do, by the fourteenth and thirty-third sections of the judiciary act, and the cases of *Hamilton* and *Burford*, which occurred in this court, the former in 1795, the latter in 1806.

How far their position is supported by that act and those cases, will now be the subject of my inquiry.

With a very unnecessary display of energy and pathos, this court has been imperatively called upon to extend to the prisoners the benefit of precedent. I am far, very far, from denying the general authority of adjudications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right or exempted from the necessity of examining into the correctness or consistency of its own ***104** decisions, or those of any other tribunal. If I need precedent to support me in this doctrine, I will cite the example of this court, which, in the case of the *United States* v. *Moore*, February, 1805, acknowledged that in the case of the *United States* v. *Sims*, February, 1803, it had exercised a jurisdiction it did not possess. Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not *law*, and in a thousand instances have such cases been declared so by courts of justice.

The claim of the prisoners, as founded on precedent, stands thus. The case of Hamilton was strikingly similar to the present. The prisoner had been committed by order of the district judge on a

charge of high treason. A writ of *habeas corpus* was issued by the supreme court, and the prisoner bailed by their order. The case of Burford was also strictly parallel to the present; but the writ in the latter case having been issued expressly on the authority of the former, it is presumed that it gives no additional force to the claim of the prisoners, but must rest on the strength of the case upon which the court acted.

It appears to my mind that the case of Hamilton bears upon the face of it evidence of its being entitled to little consideration, and that the authority of it was annihilated by the very able decision in *Marbury* v. *Madison*. In this case it was decided that congress could not vest in the supreme court any original powers beyond those to which this court is restricted by the constitution. That an act of congress vesting in this court the power to issue a writ of *mandamus* in a case not within their original jurisdiction, and in which they were not called upon to exercise an appellate jurisdiction, was unconstitutional and void. In the case of Hamilton the court does not assign the reasons on which it founds its decisions, but it is fair to presume that they adopted the idea which appears to have been admitted by the district attorney in his argument, to wit, that this court possessed a concurrent power with the district court in admitting to bail. Now a concurrent power in such a case must be an original ***105** power, and the principle in Marbury v. Madison applies as much to the issuing of a *habeas corpus* in a case of treason, as to the issuing of a *mandamus* in a case not more remote from the original jurisdiction of this court. Having thus disembarrassed the question from the effect of precedent, I proceed to consider the construction of the two sections of the judiciary act above referred to.

It is necessary to premise that the case of *treason* is one in which this court possesses neither original nor appellate jurisdiction. The 14th section of the judiciary act, so far as it has relation to this case, is in these words:--'All the beforementioned courts (of which this is one) of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.' I do not think it material to the opinion I entertain what construction is given to this sentence. If the power to issue the writs of *scire facias* and *habeas corpus* be not restricted to the cases within the original or appellate jurisdiction of this court, the case of Marbury and Madison rejects the clause as unavailing; and if it relate only to cases within their jurisdiction, it does not extend to the case which is now moved for. But it is impossible to give a sensible construction to that clause without taking the whole together; it consists of but one sentence, intimately connected throughout, and has for its object the creation of those powers which probably would have vested in the respective courts without statutory provision, as incident to the exercise of their jurisdiction. To give to this clause the construction contended for by counsel, would be to suppose that the legislature would commit the absurd act of granting the power of issuing the writs of *scire facias* and *habeas corpus*, without an object or end to be answered by them. This idea is not a little supported by the next succeeding clause, in which a power is vested in the individual judges to issue the writ of *habeas corpus*, expressly for the purpose of inquiring into the cause of commitment. That part of the thirty-third section of the judiciary act which relates to this subject is in the following words:--'And ***106** upon all arrests in criminal cases, bail shall be admitted, except where the punishment is death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and usage of law.'

On considering this act it cannot be denied that if it vests any power at all, it is an original power. 'It is the essential criterion of appellate jurisdiction, that it revises and corrects the

proceedings in a cause already instituted.' I quote the words of the court in the case of *Marbury* v. *Madison*.

And so far is this clause from giving a power to revise and correct, that it actually yests in the district judge the same latitude of discretion by the same words that it communicates to this court. And without derogating from a respectability which I must feel as deep an interest in maintaining as any member of this court, I must believe that the district court, or any individual district judge, possesses the same power to revise our decision, that we do to revise theirs; nay, more, for the powers with which they may be vested are not so particularly limited and divided by the constitution as ours are. Should we perform an act which according to our own principle we cannot be vested with power to perform, what obligation would any other court or judge be under to respect that act? There is one mode of construing this clause, which appears to me to remove all ambiguity, and to render every part of it sensible and operative. By the consent of his sovereign, a foreign minister may be subjected to the laws of the state near which he resides. This court may then be called upon to exercise an original criminal jurisdiction. If the power of this court to bail be confined to that one case, *reddendo singula singulis*, if the power of the several courts and individual judges be referred to their respective jurisdictions, all clashing and interference of power ceases, and sufficient means of redress are still held out to the citizen, if deprived of his liberty; and this surely must have been the intention of the legislature. It never could have been contemplated that the mandates of this court ***107** should be borne to the extremities of the states, to convene before them every prisoner who may be committed under the authority of the general government. Let it be remembered that I am not disputing the power of the individual judges who compose this court to issue the writ of *habeas corpus*. This application is not made to us as at chambers, but to us as holding the supreme court of the United States--a creature of the constitution, and possessing no greater capacity to receive jurisdiction or power than the constitution gives it. We may in our individual capacities, or in our circuit courts, be susceptible of powers merely ministerial, and not inconsistent with our judicial characters, for on that point the constitution has left much to construction; and on such an application the only doubt that could be entertained would be, whether we can exercise any power beyond the limits of our respective circuits. On this question I will not now give an opinion. One more observation, and I dismiss the subject.

In the case of Burford I was one of the members who constituted the court. I owe it to my own consistency to declare that the court were then apprized of my objections to the issuing of the writ of *habeas corpus*. I did not then comment at large on the reasons which influenced my opinion, and the cause was this: The gentleman who argued that cause confined himself strictly to those considerations which ought alone to influence the decisions of this court. No popular observations on the necessity of protecting the citizen from executive oppression, no animated address calculated to enlist the passions or prejudices of an audience in defence of his motion, imposed on me the necessity of vindicating my opinion. I submitted in silent deference to the decision of my brethren.

In this case I feel myself much relieved from the painful sensation resulting from the necessity of dissenting from the majority of the court, in being supported by the opinion of one of my brethren, who is prevented by indisposition from attending.***108**

February 16.

The marshal of the district of Columbia, having returned, upon the *hobeas corpus*, that he detained the prisoners by virtue of the before recited order of the circuit court of that district,

C. Lee, now moved that they should be discharged; or at least admitted to bail; and contended,

1. That from the record of the circuit court, and upon the face of the proceedings the imprisonment was illegal and oppressive; and

2. That if the commitment was not illegal upon its face, yet as the order of the court refers to the testimony on which it was founded, it will appear to be illegal upon the whole proceedings.

The commitment is not for trial at any particular *time*, before any particular *court*, nor in any particular *place*.

By the 3*d article of the constitution of the United States*, the trial of crimes shall be in the *state where they shall have been committed;* but when not committed in any state, the trial shall be at such place or places as congress may by law have directed. So by the 29th section of the judiciary act of 1789, *vol.* 1. *p.* 67. in all cases punishable with death, the trial shall be had in the *county* where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence; and by the 33*d section of the same act*, *p.* 73. offenders are to be arrested and imprisoned or bailed for trial before *such court of the United States, as by that act has cognizance of the offence;* and copies of the process shall be returned as speedily as may be into the clerk's office of *such* court, together with the recognizances of the witnesses for their appearance to testify in the case, and if the commitment be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of the *district* where the delinquent is imprisoned to issue a warrant for the removal of the offender to *the district in which the trial is to be had*.***109**

These are provisions for a speedy and *fair* trial, in obedience to the constitution; for it has always been considered as necessary to a fair trial that it should be where the witnesses may easily attend, and where the party is known. The 6th amendment to the constitution provides that the accused 'shall enjoy the right to a *speedy and public trial* by an impartial jury of the *state* and *district*, wherein the crime shall have been committed, which district shall have been previously ascertained by law,' &c.

By the act for the punishment of certain crimes, *section* 8. *vol.* 1. *p.* 103. it is enacted that 'the trial of 'crimes committed' 'in any place out of the jurisdiction of any particular state shall be in the district where the offender is apprehended, or into which he may first be brought.'

By the English *habeas corpus* act, whose provisions are considered as extending to cases even out of the act, the prisoner may petition the court for trial at the first term, and if not then tried he is entitled to bail of course. If the commitment is in a district in which he cannot be tried, he will not be entitled to this privilege, for he is still to be removed to the place of trial. Hence it is necessary that the commitment should state the court before whom the trial is to be had. It is also necessary in order that the district judge may know where to send him. No person *but* the district judge has authority to send him to the place of trial, and if the *commitment* be not made by the district judge, it is impossible that he should judicially know where to send him, unless the place of trial be mentioned in the warrant of commitment.

It is also necessary that the accused may know where to collect his witnesses together.

The order of commitment ought also to have stated more particularly the overt act of treason. It is too vague and uncertain.

3. The testimony before the circuit court did not show *probable cause*.***110**

By the 4th amendment to the constitution it is declared 'that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; *and no warrants shall issue, but upon* PROBABLE CAUSE *supported by oath or affirmation*.'

All the facts necessary to constitute this probable cause must appear upon oath or affirmation. It is not necessary indeed that there should be positive proof of every fact constituting the offence; but nothing can be taken into the estimate, when forming an opinion of the probability that the fact was committed by the person charged, but facts supported by oath or affirmation.

No belief of a fact tending to show probable cause, no hearsay, no opinion of any person *however high in office*, respecting the guilt of the person accused, can be received in evidence on this examination.

The question then is whether these affidavits exhibit legal proof of probable cause.

If the testimony be vague or ambiguous as to the person, or as to the offence, the court will apply the maxim of law, that every person is to be adjudged innocent unless proved to be guilty.

The facts stated in general Wilkinson's two affidavits of the 14th and 26th of December, consist of the letters of col. Burr, the declarations of Swartwout, and the belief of general Wilkinson. Neither the letters of col. Burr, nor the declarations of Swartwout, contain any ground for probable cause to believe that the prisoners, or either of them is guilty of treason; and general Wilkinson's belief, as he himself states, is founded upon those facts.

Mr. Lee, went into a minute examination of those affidavits, to satisfy the court that the facts stated in them could at most prove an intent to set on foot an expedition against Mexico, in case of a war between this country and Spain. He contended that if the object was such an expedition *at all events*, and if they had intended ***111** to force their way through the United States, for the purpose of attacking Mexico, and even if they had done so, they would not have been guilty of treason, but merely of lawless violence. Even if they had plundered the bank at New-Orleans, or any private property, or had seized arms and vessels, the property of individuals, it would have been robbery, but not treason.

But the circumstance that no place of trial can be designated, is a sufficient reason for admitting them to bail. They certainly cannot be tried here, for it is not contended that they have here committed any offence; and this is not the district in which they were first apprehended or brought. They were seized by orders of a military officer 2,000 miles from this place, without any process of law or legal authority, and sent here to be disposed of by the Executive. They have been committed for trial, not before any court, or in any particular district, and their imprisonment will be perpetual, unless government can find out when and where the offence was committed, and devise some means of transmitting them to the place of trial.

Mr. Lee attempted to discredit the affidavits of General Wilkinson by the circumstance that they were made, as he contended, to vindicate and justify the illegal seizure and transportation of the prisoners. He contended also that those affidavits ought to be totally discarded, because the oath upon which a warrant of arrest or commitment is to be grounded, must be made before the magistrate who is about to issue the warrant. *He* must be satisfied of the probable cause. The laws were open in New-Orleans. General Wilkinson might have gone before a justice of peace there and made his oath, and obtained a warrant to arrest the prisoners. There was no necessity to proceed in this illegal and unprecedented manner.

F. S. Key, on the same side.

Unless this court can look behind the order for commitment, and examine the grounds upon which it was made, the writ of *habeas corpus* will be wholly useless; for every court or magistrate who commits a person to ***112** prison, will take care to cover himself under the strict forms of law.

The constitution declares that reason against the

United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

An adherence to rebels, is not an adherence to an enemy within the meaning of the constitution. Hence if the prisoners are guilty, it must be of levying war against the United States.

In England the books speak of two kinds of levying of war;--*direct* and *constructive--(East's Cr. Law*, 67.) But there is only one kind in this country; and ought not to be in England.

By using the word '*only*' the constitution meant to take away all pretence of constructive treason. Every man is to answer for his own acts only. If 100 men conspire, and only 50 actually levy war, the latter only are guilty as principals.

And what reason can be given why there should not be the same distinction between principal and accessory in treason, as in other crimes. In a republican government, whose basis is the affection of the people, it is unnecessary to guard against offences of this kind with the same vigilance as in a monarchy or a despotism whose foundation is fear. (4 *Tucker's Bl. Appendix, p.* 39.) But if this construction of the constitution be not correct, and if the English authorities are to be considered in full force, it must be shewn,

1st. That war has been levied--and

2d. That the prisoners are confederates in that war.

The affidavits of General Wilkinson are not authenticated so as to make them evidence. It does not appear that an oath was administered to him. The act to prescribe the mode of authenticating public acts, records and judicial proceedings, &c. is extended to the territory ***113** of Orleans, by the act erecting that territory. (*Vol.* 7. *p.* 117.) And even if this be not strictly a judicial proceeding, yet it is within the meaning of that act.

The certificate of the secretary of state [FN6] only shows that it appears by the official returns to his office, that J. Carrick and George Pollock had been appointed justices of the peace for the county of Orleans; but not that they had taken the oaths necessary to qualify them to act.

FN6 The secretary of state of the United States had certified under the seal of his office, that George Pollock and James Carrick, were appointed justices of the peace for the county of Orleans, in the territory of Orleans, in the year 1805, as appears by the official returns of the secretary of the said territory, 'remaining in the office of this department.'

But if these affidavits are examinable, they do not show any act of treason. They prove no assemblage of men, no military array. There is not a tittle of evidence that any two men have been seen together with treasonable intent, whether armed or not. The supposed letter from Col. Burr, speaks indeed of *choice spirits*, but he does not tell us they are *invisible spirits*.

The affidavits of Meade and Wilson relate only to rumours derived from General Wilkinson, whose business it was, if he could get such rumours there by no other means, to create them himself.

The territory of Orleans, if it was to be revolutionized, might be revolutionized without levying war against the United States.

There is no evidence that the prisoners knew that Col. Burr had any treasonable projects in view. Even if he had such views, he might have held out to them, as he did to others, only the Spanish expedition.

Again, the bench-warrant issued in this case for the arrest of the prisoners was illegal. The court has no authority to issue a bench-warrant, but upon a presentment by a grand jury, or for an

offence committed in ***114** the presence of the court. It is not a power inherent in the court, nor given by any law. The act of congress only gives to a judge out of court, or to a justice of peace, the power of arresting offenders. And it is a power inconsistent with a fair trial, because the court would thereby have prejudged the case, and decided upon the guilt of the prisoner. No such practice is known in Maryland, under whose laws the court below was acting.

February 17.

Jones, attorney for the district of Columbia, mentioned to the court, that *Hiort*, being better prepared upon points of practice, would make some observations in support of the form of the commitment.

MARSHALL, Ch. J. I understand the clear opinion of the court to be, (if I mistake it my brethren will correct me,) that it is unimportant whether the commitment be regular in point of form or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done.

Rodney, Attorney General.

The affidavit of General Wilkinson is sufficiently authenticated. The justices of peace in the territory of Orleans are officers of the United States--they are appointed by the governor of the territory, who is appointed by the President of the United States; and the secretary of the territory is bound by law to transmit copies of all the executive proceedings of the governor of the territory every six months to the President of the United States. (*Laws U. S. vol.* 7. *p.* 112, 113.) All the officers of the United States are bound to take notice of each other.

The act of congress respecting authentication of records, &c. is cumulative only. It does not repeal any former law.

There is some weight in the objection that the oath ought to be made before the magistrate who issues the ***115** warrant. But one magistrate is as competent as another to administer the oath. The constitution is silent on the subject; and if it be taken before a person competent to administer it, it satisfies the provision of the constitution. How else could a criminal be arrested in one part of the United States, when the witness lived in another?

It is true that none of the evidence now offered would be competent on the trial; nor even if it appeared in a proper shape, would it be sufficient to convict the prisoners. But the question is whether, in this incipient stage of the prosecution, it is not sufficient to show probable cause.

The expedition against Mexico would not be treason, unless it was to be accomplished by means which in themselves would amount to treason. But if the constituted authorities of the United States should be suppressed but for one hour, and the territory of Orleans revolutionized but for a moment, it would be treason.

What would be treason by adhering to an enemy, if done towards a rebel will be a levying of war. (3 *Wilson's Lectures*, 105. 4 *Bl. Com.* 92.)

In treason all are principals. There are no accessories. It has been argued, (and the respectable authority of Judge *Tucker* is cited,) that none are principals but those present at the treasonable act. The argument may have some weight, but it is a point at least doubtful, and therefore ought to be left to be decided on the trial.

It is true that we cannot at present say exactly when and where the overt act of levying war was committed, but from the affidavits we think it fair to infer that an army has been actually levied and arrayed. The declaration of one of the prisoners was, that Col. Burr '*was levying* an armed body of 7,000 men.' How the fact has turned out to be since we do not know; and it is also true that we do not know that any men have been seen collected in military array. But Dr. Bollman

informed General Wilkinson that he had seen a letter from Col. Burr, in which he says that he should be at Natchez ***116** with 2,000 men on the 20th of December, and that he would be followed by 4,000 more, and that he *could have* raised 12,000, as easily as 6,000, but he did not think that number necessary. If Col. Burr was actually *levying* an armed body of men, if he expected to be at Natchez on the 20th of December with 2,000, and calculated upon being followed by 4,000 more, and if he found it so easy to raise troops, is there not a moral certainty that some troops at least have been raised and embodied.

It may be admitted that General Wilkinson was interested to make the worst of the story, but the declarations of the prisoners themselves are sufficient.

Jones, attorney for the district of Columbia, on behalf of the prosecution.

As to the objection that the commitment must be for trial in some court having jurisdiction over the offence.

It was uncertain whether any, and if any, what place was prescribed for the trial of this offence. But any court of the United States had jurisdiction to commit for trial. By the act of congress for the punishment of certain crimes, &c. *vol.* 1. *p.* 103. *s.* 8. 'the trial of crimes committed on the high seas, *or in any place* out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought.' Although the first part of the section speals of certain crimes committed 'upon the high seas, or in any river, haven, bason or bay, out of the jurisdiction of any particular state,' yet the last clause of the section is general, and in its terms applies to the trial of all crimes committed out of the jurisdiction of any particular state. This act of congress is the only exercise of the provision of the 3d article of the constitution respecting crimes committed not within any state. Unless this act of congress fixes the place of trial, there is no place prescribed, either by the law or the constitution, and the trial may as well be in the district of Columbia as elsewhere. But if this act of congress does fix the place, then, it is objected, ***117** that this district is neither that in which the prisoners were apprehended, nor that into which they were first brought.

The answer is, that the act of congress means the district in which they shall be *legally* apprehended, that is, arrested by process of law. It could not mean a mere military seizure. But whether the court below had or had not jurisdiction to try the prisoners, it clearly had jurisdiction to commit them; and if their commitment be irregular, this court will say how they ought to be committed. *Laws U. S. vol.* 1. *p.* 73. *s.* 33.

It is objected that, although the judges and justices have power to arrest, yet the courts have not, and therefore cannot issue a bench-warrant but upon the presentment of a grand jury, or for an offence committed in the presence of the court. And the practice of Maryland is cited. But it is stated that at Montgomery Court, in Maryland, very lately a venerable and ancient judge of that court did issue a bench-warrant for an offence not presented by the grand jury, nor committed in presence of the court. [FN7]

> FN7 F. S. Key stated that he was present at the transaction alluded to. The facts were, that after the court adjourned, and as the judge was going out of the court-house, a man who had been waiting in the yard assaulted a lawyer, in the presence of the judge, for disrespectful language used by the lawyer in arguing a cause. The judge considered it as a contempt of court, and therefore directed a bench-warrant to issne.

It is not necessary that the commitment should state the place of trial, nor that they are committed for trial. If at the time of commitment it be uncertain where they ought to be tried, they

may be committed generally, *until discharged by due course of law*. In England it is only necessary that the commitment should be to some jail in England. 2 *Hawk. P. C.* 120. *b.* 2. *c.* 16. *s.* 18.

As to the authentication of the affidavits of General Wilkinson, it being shewn that Pollock and Carrick were duly appointed justices of the peace, and having ***118** undertaken to act as such, it is to be presumed that they have taken the necessary oaths.

It is admitted that the constitution has prevented many questions as to the doctrine of treason. The intention of having a constitutional definition of the crime, was to put it out of the power of congress to invent treasons. But it was impossible to define what should in every case be deemed a levying of war. It is a question of fact to be decided by the jury from all the circumstances.

Warlike array is not necessary. It is only a circumstance. 1 *East's Cr. Law*, 66. According to the English books, a *direct* levying of war, is a war directly against the person of the king. A constructive levying of war, is war against the government.

If men have been levied, and arms provided, with a treasonable intent, this is a sufficient levying of war, without warlike array.

The affidavit of General Eaton establishes the treasonable intent in Colonel Burr. The question, then, is, whether that intent, or a knowledge of that intent, can be brought home to the prisoners? Mr. Jones here went into an argument to show the connexion of the prisoners with Colonel Burr, and their knowledge of his projects. He observed that his argument, on a former occasion, respecting the president's message to congress, had been misunderstood. A state of war is a matter of public notoriety, and he had considered the president's message as evidence of that notoriety, it being a communication from the supreme executive, in the course of his duty, to that department of government which alone could decide on the state of war.

He contended that no specific number, no sufficiency of force to accomplish the object, was necessary to constitute treason.

If soldiers are levied and officered, with a treasonable intent, and equipments prepared, so that they can readily lay hold of their arms; although no men are ***119** actually armed, although only five men in a detachment should march to assemble at a place of rendezvous, and although there should be no warlike array, yet it would be treason. Any thing which amounts to setting on foot a military expedition, with intent to levy war against the United States, is treason.

The distinction between those who are present at the overt act of levying war, and those who are confederated, adhering, acting and assisting, giving aid and comfort, is contrary to all analogy. In treason, all are principals.

In murder, if two conspire, and one is acting and assisting at such a distance as to give aid, he is equally guilty with him who gave the wound.

It has been insinuated that General Wilkinson is to be considered as *particeps criminis*. If that were the case, it would be no disqualification of his testimony.

Treason is a greater crime in republics than in monarchies, and ought to be more severely punished.

Harper, in reply, congratulated his country on the triumph of correct principles, in the abandonment, on the part of the prosecution, of the dangerous doctrine, that executive messages were to be received as evidence in a criminal prosecution.

[*Jones*. The sole purpose for which we introduced the president's message, was to show that the assemblage of a military force by Colonel Burr was a matter of notoriety. We did

not attempt or wish to introduce it as direct evidence.]

Harper. To use an executive message in a court of justice, for any purpose of proof whatever, so as to aid in the commitment of a citizen under a criminal accusation; to introduce it as evidence of any fact; (of notoriety, for instance, which is a fact;) is to give it the effect of *testimony*, and is a direct violation of the constitution.***120**

We object to the translation of the ciphered letter contained in General Wilkinson's affidavits, being admitted as evidence, because General Wilkinson has not sworn that it is a true translation, nor sent the original, with the key, so that the court can have a correct translation made. Nor is it proved that the original was written by Colonel Burr, or by his direction, nor that the prisoners were acquainted with its contents.

Another objection to the affidavits is, that they were not made for the purpose of procuring an arrest. They were not made before the judicial officer on whose warrant the proceedings of the court were to be founded; and who would have been bound to cross-examine the witness, to sift the facts, and to judge how far they were proved, and how far they were sufficient to justify the proceedings. But, *after a military arrest*, the affidavits are drawn up by the author of the arrest, without cross-examination or inquiry, and were sworn to by him, as the justification of his conduct. The persons whom he has thus arrested are sent to a distant part of the country, and these affidavits are sent after them, to operate as the ground of their commitment and detention. No person can lawfully be committed on testimony so taken. In cases of arrests and commitments, the general rules of evidence are no further to be departed from than the necessity of the case requires. On application to a magistrate for a warrant of arrest, the evidence must necessarily be *ex parte*, but no other departure from the common rules of evidence is justifiable, because not necessary. It is a general rule of law respecting testimony, that it shall be taken before the tribunal which is to act upon it, or under the direction of that tribunal; that the person who is to decide, shall also inquire; that the inquiry shall not be before one tribunal, and the judgment pronounced by another. This rule, so important to the safety of persons accused, is equally applicable to arrests and commitments, as to trials, and should therefore be equally observed. The party arrested and brought before the magistrate for commitment, has a right to be confronted with his accuser, and to cross-examine the witnesses produced against him, and by that means to explain circumstances which, at first view, might criminate him. But if the practice ***121** which is attempted in this case be sanctioned by this court; if a military officer, or any other person, is to be permitted to seize a man, and send him 2,000 miles from the place of arrest, and from the place of the alleged transaction, and to send after him an *ex parte* affidavit as the ground of his subsequent commitment, the great security provided by law for the protection of innocence and liberty is broken down.

Mr. *Harper* then went into a minute examination of the contents of the affidavits, and contended that, if they could be considered by this court as evidence, they did not prove that treason had been committed, nor that the prisoners had participated in any crime or offence whatever.

February 18.

Martin, on the same side.

The order for the commitment was erroneous in directing the prisoners to be committed to the prison of the court. It ought to have been to the marshal. 1 *Salk.* 348. *Bethel's case*. 5 *Mod.* 19. S. C.

This court cannot remand them, or commit them, upon this *habeas corpus*, for any crime but that for which they were committed in the court below; and can only commit them for trial before some court. The only power given by the 33d section of the judiciary act, is to cause offenders to 'be arrested; and imprisoned or bailed, as the

case may be, *for trial before such* court of the United States, as by this act has cognizance of the offence.' The place of trial is to be decided by the place where the offence was committed.

The act of congress *for the punishment of certain crimes, s.* 8. *vol.* 1. *p.* 103. does not apply to crimes committed in any *territory* of the United States in which there are courts of the United States having cognizance of the offence. It applies only to offences committed upon the '*high seas, or in any river, haven, bason, or bay, out of the jurisdiction of any particular state*.'***122**

The courts of the United States erected in the territory of Orleans are competent to try the offence of treason against the United States committed within that territory. By the 8th section of the act of congress of 26th March, 1804, *vol.* 7. *p.* 117. erecting the territory of Orleans, a district court of the United States is established therein, having all the original powers and jurisdiction of a circuit court of the United States. And by the same act, the '*act for the punishment of certain crimes against the United States*,' is extended to that territory.

It was therefore a wanton and unnecessary exertion of arbitrary power to send the prisoners here, where they cannot be tried. If there is any probability that a crime was committed by the prisoners, it is equally probable that it was committed in the territory of Orleans. It is at all events certain that it was not committed here. The word *apprehended*, in the act of congress, cannot mean a *legal arrest* only. If it did, it would be in the power of a military commander to seize a man, and appoint the tribunal by which he shall be tried.

If it is the duty of this court to commit the prisoners for trial, it is equally its duty to bind over the witnesses to appear at the time and place of trial to testify in the case, and to return copies of the process, together with the recognizances of the witnesses, to the office of the clerk of the court having cognizance of the offence. This shows that, upon every commitment, the witnesses must be in the presence of the tribunal committing.

This court cannot commit, unless they first ascertain in what court the trial is to be had.

There is no legal evidence that General Wilkinson ever made oath to his statement. The certificate of the secretary is only that it appears by the return of the secretary of the territory of Orleans, that Pollock and Carrick were justices. A copy of that return ought to be certified.***123**

February 19.

The court, not having made up an opinion, admitted the prisoners to bail until the next day. The Chief Justice stated that the court had difficulty upon two points, viz.

1. Whether the affidavit of General Wilkinson was evidence admissible in this stage of the prosecution; and,

2. Whether, if admissible, his statement of the contents of the substance of a letter, when the original was in his possession, was such evidence as the court ought to notice.

If the counsel had any authorities on these points, the court said they would hear them.

February 20.

The Chief Justice asked if the counsel had found any authorities on the points mentioned yesterday.

Rodney, Attorney General, said he had not; but he relied on general principles.

F. S. Key cited 3 *T. R.* 707. *The King* v. *The Inhabitants of Eriswell*, where the principal question was, whether the *ex parte* examination of the pauper taken before two justices, to whom *no* application was made for a removal of the pauper, was good evidence before two *other* justices, five years afterwards, upon an

application for his removal, the pauper having in the mean time become insane. The judges of the court of king's bench were equally divided. But *Grose*, J. said, 'nothing can be more unjust, than that a person should be bound by evidence which he is not permitted to hear.' 'The common law did not permit a person accused to be affected by an examination baken in his absence, because he could not cross-examine.' *Buller*, J. who was opposed to *Grose*, upon the principal question, admitted, 'that if the taking the examination were not a judicial act, but was merely *coram non judice*, it is ***124** not evidence,' and that 'it must be a judicial act at the time it was taken, or cannot become so at all.'

Lord *Kenyon*, Ch. J. said the two justices who took the examination 'were not applied to for the purpose of making an order of removal; the overseers called upon them for no other purpose than to examine the pauper; all the proceedings, therefore, were *extrajudicial;* and the examination on oath might just as well have been taken before the parish clerk, and would have been as much entitled to credit as this.'

So in this case we say that, as General Wilkinson did not apply to justices Carrick and Pollock for a warrant to arrest Dr. Bollman and Mr. Swartwout, and as he did not make the affidavit for the purpose of obtaining from them such warrants, the whole proceedings before those justices were extrajudicial. The affidavits are not such as would support an indictment, if false. In the language of Lord Kenyon, they deserve no more credit than if they had been made before the parish clerk. If the affidavit be a judicial proceeding, it ought to be authenticated according to the act of congress. If it be *not* a judicial proceeding, it is not evidence.

MARSHALL, Ch. J. If a person makes an affidavit before a magistrate to obtain a warrant of arrest, such affidavit must necessarily be *ex parte*. But how is it on a motion to commit, after the person is taken? Must not the commitment be upon testimony given in presence of the prisoner?

Rodney, Attorney General. The first affidavit would be sufficient, unless disproved or explained by the prisoner on his examination.

Harper. The *necessity of the case* is the only ground of an exception to the general rule of evidence; and that necessity ceases when the party is taken.***125**

February 21.

MARSHALL, Ch. J. [FN8] delivered the opinion of the court.

FN8 The other judges present were *Chase, Washington* and *Johnson*.
The opinion of Chief Justice *Morshall* upon the trial of Col. Burr, in the circuit court at *Richmond*, in the summer of 1807, elucidates and explains some passages in this opinion which were supposed to be in some degree doubtful. For this opinion see Appendix (B).

The prisoners having been brought before this court on a writ of *habeas corpus*, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case.

This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail. 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.'

The specific charge brought against the

prisoners is treason in levying war against the United States.

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

To prevent the possibility of those calamities which result from the extension of treason to offences of minor ***126** importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend.

'Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.'

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. **However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason**. To **conspire to levy war**, and **actually to levy war**, the distinct offences. **The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed.** So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his county. On the contrary, if war be actually levied, that is**, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors**. **But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.**

Crimes so atrocious as those which have for their object the subversion by violence of those laws and those *127 institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New-Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

In conformity with the principles now laid down, have been the decisions heretofore made by the judges of the United States. ***128**

The opinions given by Judge Paterson and Judge Iredell, in cases before them, imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. Their opinions, however, contemplate the actual employment of force.

Judge Chase, in the trial of Fries, was more explicit.

He stated the opinion of the court to be, **'that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the *quantum* of the force employed, neither lessens nor increases the crime: whether by one hundred, or one thousand persons, is wholly immaterial.'** 'The court are of opinion,' continued Judge Chase, on that occasion, **'that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war.'**

The application of these general principles to the particular case before the court will depend on the testimony which has been exhibited against the accused.

The first deposition to be considered is that of General Eaton. This gentleman connects in one statement the purport of numerous conversations held with Colonel Burr throughout the last winter. In the course of these conversations were communicated various criminal projects which seem to have been revolving in the mind of the projector. An expedition against Mexico seems to have been the first and most matured part of his plan, if indeed it did not constitute a distinct and separate plan, ***129** upon the success of which other schemes still more culpable, but not yet well digested, might depend. Maps and other information preparatory to its execution, and which would rather indicate that it was the immediate object, had been procured, and for a considerable time, in repeated conversations, the whole efforts of Colonel Burr were directed to prove to the witness, who was to have held a high command under him, the practicability of the enterprize, and in explaining to him the means by which it was to be effected.

This deposition exhibits the various schemes of Col. Burr, and its materiality depends on connecting the prisoners at the bar in such of those schemes as were treasonable. For this purpose the affidavit of General Wilkinson, comprehending in its body the substance of a letter from Colonel Burr, has been offered, and was received by the circuit court. To the admission of this testimony great and serious objections have been made. It has been urged that it is a voluntary or rather an extrajudicial affidavit, made before a person not appearing to be a magistrate, and contains the substance only

of a letter, of which the original is retained by the person who made the affidavit.

The objection that the affidavit is extrajudicial resolves itself into the question whether one magistrate may commit on an affidavit taken before another magistrate. For if he may, an affidavit made as the foundation of a commitment ceases to be extrajudicial, and the person who makes it would be as liable to a prosecution for perjury as if the warrant of commitment had been issued by the magistrate before whom the affidavit was made.

To decide that an affidavit made before one magistrate would not justify a commitment by another, might in many cases be productive of great inconvenience, and does not appear susceptible of abuse if the verity of the certificate be established. Such an affidavit seems admissible on the principle that before the accused is put upon his trial all the proceedings are *ex parte*. The court therefore overrule this objection.***130**

That which questions the character of the person who has on this occasion administered the oath is next to be considered.

The certificate from the office of the department of state has been deemed insufficient by the counsel for the prisoners, because the law does not require the appointment of magistrates for the territory of New-Orleans to be certified to that office, because the certificate is in itself informal, and because it does not appear that the magistrate had taken the oath required by the act of congress.

The first of these objections is not supported by the law of the case, and the second may be so readily corrected, that the court has proceeded to consider the subject as if it were corrected, retaining however any final decision, if against the prisoners, until the correction shall be made. With regard to the third, the magistrate must be presumed to have taken the requisite oaths, since he is found acting as a magistrate.

On the admissibility of that part of the affidavit which purports to be as near the substance of the letter from Colonel Burr to General Wilkinson as the latter could interpret it, a division of opinion has taken place in the court. Two judges are of opinion that as such testimony delivered in the presence of the prisoner on his trial would be totally inadmissible, neither can it be considered as a foundation for a commitment. Although in making a commitment the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though from the nature of the case it must be *ex parte*, ought in many other respects to be such as a court and jury might hear.

Two judges are of opinion that in this incipient stage of the prosecution an affidavit stating the general purport of a letter may be read, particularly where the person in possession of it is at too great a distance to admit of ***131** its being obtained, and that a commitment may be founded on it.

Under this embarrassment it was deemed necessary to look into the affidavit for the purpose of discovering whether, if admitted, it contains matter which would justify the commitment of the prisoners at the bar on the charge of treason.

That the letter from Colonel Burr to General Wilkinson relates to a military enterprize mediated by the former, has not been questioned. If this enterprize was against Mexico, it would amount to a high misdemeanor; if against any of the territories of the United States, or if in its progress the subversion of the government of the United States in any of their territories was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the assemblage of a body of men to effect it would be levying war against the United States.

The letter is in language which furnishes no distinct view of the design of the writer. The co-operation, however, which is stated to have been secured, points strongly to some expedition against the territories of Spain. After making these general statements, the writer becomes rather more explicit, and says, 'Burr's plan of operations is to move down rapidly from the falls on the 15th of November with the first 500 or 1,000 men in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient in the first instance to seize on or to pass by Baton Rouge. The people of the country to which we are going are prepared to receive us. Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled.'

There is no expression in these sentences which would justify a suspicion that any territory of the United States was the object of the expedition.***132**

For what purpose seize on Baton Rouge; why engage Spain against this enterprize, if it was designed against the United States?

'The people of the country to which we are going are prepared to receive us.' This language is peculiarly appropriate to a foreign country. It will not be contended that the terms would be inapplicable to a territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it is recollected that he was the governor of a territory adjoining that which must have been threatened, if a territory of the United States was threatened, and that he commanded the army, a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

'Their agents now with Burr say, that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled.'

This is apparently the language of a people who, from the contemplated change in their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power. That the Mexicans should entertain these apprehensions was natural, and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a different faith from theirs, and who, by making them dependent on England or the United States, would subject them to a foreign power.

That the people of New-Orleans, as a people, if really engaged in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

There certainly is not in the letter delivered to Gen. Wilkinson, so far as that letter is laid before the court, one syllable which has a necessary or a natural reference ***133** to an enterprize against any territory of the United States.

That the bearer of this letter must be considered as acquainted with its contents is not to be controverted. The letter and his own declarations evince the fact.

After stating himself to have passed through New-York, and the western states and territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprize, he states their object to be, 'to carry an expedition into the Mexican provinces.'

This statement may be considered as explanatory of the letter of Col. Burr, if the expressions of that letter could be thought ambiguous.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an inquiry from General Wilkinson, he

said, 'this territory would be revolutionized where the people were ready to join them, and that there would be some seizing, he supposed, at New-Orleans.'

If these words import that the government established by the United States in any of its territories, was to be revolutionized by force, although merely as a step to, or a mean of executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war. But on the import of the words a difference of opinion exists. Some of the judges suppose they refer to the territory against which the expedition was intended; others to that in which the conversation was held. Some consider the words, if even applicable to a territory of the United States, as alluding to a revolution to be effected by the people, rather than by the party conducted by Col. Burr.

But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage of ***134** men for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling.

The prisoner stated that 'Col. Burr, with the support of a powerful association extending from New-York to New-Orleans, was levying an armed body of 7,000 men from the state of New-York and the western states and territories, with a view to carry an expedition to the Mexican territories.'

That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question then is, whether this evidence proves Col. Burr to have advanced so far in levying an army as actually to have assembled them.

It is argued that since it cannot be necessary that the whole 7,000 men should have assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime.

This position is correct, with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary that there should be an actual assemblage, and therefore the evidence should make the fact unequivocal.

The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.

The particular words used by Mr. Swartwout are, that Col. Burr 'was levying an armed body of 7,000 men.' ***135** If the term *levying* in this place imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

It is thought sufficiently apparent that the latter is the sense in which the term was used. The fact alluded to, if taken in the former sense, is of a nature so to force itself upon the public view, that if the army had then actually assembled, either together or in detachments, some evidence of such assembling would have been laid before the court.

The words used by the prisoner in reference to seizing at New-Orleans, and borrowing perhaps by force from the bank, though indicating a

design to rob, and consequently importing a high offence, do not designate the specific crime of levying war against the United States.

It is therefore the opinion of a majority of the court, that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Against Erick Bollman there is still less testimony. Nothing has been said by him to support the charge that the enterprize in which he was engaged had any other object than was stated in the letter of Colonel Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both of the prisoners were engaged in a most culpable enterprize against the dominions of a power at peace with the United States, those who admit the affidavit of General Wilkinson cannot doubt. But that no part of this crime was committed in the district of Columbia is apparent. It is therefore the unanimous opinion of the court that they cannot be tried in this district.***136**

The law read on the part of the prosecution is understood to apply only to offences committed on the high seas, or in any river, haven, bason or bay, not within the jurisdiction of any particular state. In those cases there is no court which has particular cognizance of the crime, and therefore the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offence was committed.

But in this case, a tribunal for the trial of the offence, wherever it may have been committed, had been provided by congress; and at the place where the prisoners were seized by the authority of the commander in chief, there existed such a tribunal. It would, too, be extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried.

The act of congress which the prisoners are supposed to have violated, describes as offenders those who begin or set on foot, or provide, or prepare, the means for any military expedition or enterprize to be carried on from thence against the dominions of a foreign prince or state, with whom the United States are at peace.

There is a want of precision in the description of the offence which might produce some difficulty in deciding what cases would come within it. But several other questions arise which a court consisting of four judges finds itself unable to decide, and therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed, and if those whose duty it is to protect the nation, by prosecuting offenders against the laws, shall suppose ***137** those who have been charged with treason to be proper objects for punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offence has been committed, institute fresh proceedings against them.

4 Cranch 75, 8 U.S. 75, 2 L.Ed. 554

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Cite as: 9 F.Cas. 924

Circuit Court, D. Pennsylvania.

Case of FRIES.

April 29, 1800.

This was an indictment against John Fries for treason, in levying war against the United States. For a trial on a former indictment, see Case No. 5,126.

The prisoner was arraigned, and pleaded not guilty to the following indictment (the first having been withdrawn by the district attorney): 'The grand inquest of the United States of America, in and for the Pennsylvania district, upon their respective oaths and affirmations, do present, that John Fries, late of the county of Bucks, in the state and district of Pennsylvania, yeoman, owing allegiance to the United States of America, wickedly devising, and intending the peace and tranquillity of the said United States to disturb and to prevent the execution of the laws thereof within the same, to wit, a law of the said United States, entitled, 'An act to provide for the valuation of lands and dwelling houses, and the enumeration of slaves within the United States,' and also a law of the said United States, entitled 'An act to lay and collect a direct tax within the United States,' on the 7th day of March, in the year of our Lord one thousand seven hundred and ninety-nine, in the county of Northampton, in the state and district aforesaid, said, and within the jurisdiction of this court, wickedly and traitorously intend to levy war against the said United States, within the same, and to fulfil and bring to effect the said traitorous intention of him, the said John Fries, he, the said John Fries, afterwards, that is to say, on the said seventh day of March, in the said year of our Lord one thousand seven hundred and ninety-nine, in the said state, district and county aforesaid, and within the jurisdiction of this court, with a great multitude of persons, whose names are to the said grand inquest unknown, to a great number, to wit, to the number of one hundred persons, and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons as well offensive and defensive, being then and there unlawfully and traitorously assembled, did traitorously assemble and combine against the said United States, and then and there with force and arms, wickedly and traitorously, and with the wicked and traitorous intention to oppose and prevent, by means of intimidation and violence, the execution of the said laws of the said United States, within the same, did array and dispose themselves in a warlike and hostile manner against the said United States, and then and there, with force and arms, in pursuance of such their traitorous intention, he, the said John Fries, with the said persons so as aforesaid, traitorously assembled, armed and arrayed in manner aforesaid, wickedly and traitorously did levy war against the said United States. And further to fulfil and bring to effect the said traitorous intention of him, the said John Fries, and in pursuance and in execution of the said wicked and traitorous combination to oppose, resist and prevent the said laws of the United States from being carried into execution, in the state and district aforesaid, he, the said John Fries, afterwards, to wit: on the said seventh day of March, in the said year of our Lord one thousand seven hundred and ninety-nine, in the state, district and county aforesaid, and within the jurisdiction of this court, with the said persons, whose names to the grand inquest aforesaid are unknown, did wickedly and traitorously assemble against the said United States, with the avowed intention by force of arms and intimidation, to prevent the execution of the said laws of the said United States, within the same; and in pursuance and execution of such their wicked and traitorous combination and intention, he, the said John Fries, then and there, with force and arms, with the said persons to a great number, to wit, the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords and other warlike weapons, as well offensive as defensive, being then and there unlawfully and traitorously assembled, did wickedly and traitorously resist and oppose the marshal of the said United States, in and for the said Pennsylvania district, in the execution of the duty of his office of marshal aforesaid, and then and there, with force and arms, with the said great multitude of persons, so as aforesaid unlawfully and traitorously assembled, and armed and arrayed in manner aforesaid, he, the said John Fries, wickedly and traitorously did oppose and resist, and prevent, the said marshal of the said United States from executing the lawful process to him directed and delivered against sundry persons, inhabitants of the county aforesaid and district aforesaid, and charged upon oath before the judge of the district court of the said United States, for the said district, with having entered

into a conspiracy to prevent the execution of the said law of the United States, entitled 'An act to lay and collect a direct tax within the United States,' which process duly issued by the said judge of the said district court of the district aforesaid, the said marshal of the said United States, then and there had in his possession, and was then and there proceeding to execute as by law he was bound to do; and so the said grand inquest, upon their respective oaths and affirmations aforesaid, do say, that the said John Fries, in manner aforesaid as much as in him lay, wickedly and traitorously did prevent, by means of force and intimidation, the execution of the said laws of the said United States, in the said state and district of Pennsylvania. And further to fulfil and bring to effect the said traitorous intention of him the said John Fries, and in pursuance and in execution of the said wicked and traitorous combination to oppose, resist and prevent the execution of the said laws of the said United States, in the state and district aforesaid, he, the said John Fries, afterwards, to wit, on the said seventh day of March, in the said year of our Lord one thousand seven hundred and ninety-nine, in the state, district and county aforesaid, and within the jurisdiction of this court, with the said persons whose names to the grand inquest aforesaid are unknown, did wickedly and traitorously assemble against the said United States with the avowed intention, by means of force and intimidation, to prevent the execution of the said laws of the said United States, in the state and district aforesaid, and in pursuance and in execution of such their wicked and traitorous combination and intention, then and there in the state, district and county aforesaid, and within the jurisdiction of this court, with force and arms, with a great multitude of persons, to wit, the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons, as well offensive as defensive, being then and there unlawfully and traitorously assembled, he, the said John Fries, did traitorously, with force and arms and against the will of the said marshal of the said United States, in and for the district aforesaid, liberate and take out of his custody sundry persons by him before that time arrested, and in his lawful custody then and there being, by virtue of lawful process against them issued by the said judge of the district court of the said United States, for the said Pennsylvania district, on a charge upon oath of a conspiracy to prevent the execution of the said law of the said United States, entitled 'An act to lay and collect a direct tax within the United States;' and so the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, do say, that the said John Fries, as much as in him lay, did then and there, in pursuance and in execution of the said wicked and traitorous combination and intention, wickedly and traitorously, by means of force and intimidation, prevent the execution of the said law of the said United States, entitled 'An act to provide for the valuation of lands and dwelling houses, and the enumeration of slaves, within the United States,' and the said law of the said United States, entitled 'An act to lay and collect a direct tax within the United States,' in the state and district aforesaid, contrary to the duty of his said allegiance, against the constitution, peace and dignity of the said United States, and also against the form of the act of the congress of the said United States, in such case made and provided. William Rawle, Attorney of the United States for the Pennsylvania District.'

***925** Mr. Lewis and Mr. Dallas, before engaged to act for the prisoner, on account of the conduct directed by the court to be observed by the counsel, withdrew their assistance; so that the prisoner was left without counsel; and on being asked by the court if he would wish to have some assigned, he did not accept the offer. [FN1]

FN1 See note 1 at end of case.

Thursday, April 24. Before the jurors were sworn in, they were individually asked (upon oath) these questions: 'Are you any way related to the prisoner?' They all answered, 'No.' 'Have you ever formed or delivered an opinion as to the guilt or innocence of the prisoner, or that he ought to be punished?' The answer generally was, 'Not to my knowledge.' Some of the jurors said they had given their sentiments generally, disapprobatory of the transaction, but not as to the prisoner particularly. These were admitted. One of the jurors (Mr. Taggert), after he was sworn, expressed himself to the court to be very

uneasy under ***926** his oath; he then meant that he never had made up his mind that the prisoner should be hung, but very often had spoken his opinion that he was very culpable; he did not, when he took the oath, conceive it so strict, and therefore wished, if possible, to be excused. The court informed the juror it was impossible to excuse him, now he was sworn. The court informed the prisoner that he had a right to challenge thirty-five without showing cause, and as many more as he could show cause for. Thirty-four were challenged, and the following admitted and sworn on the jury: Samuel Wheeler, foreman; Henry Pepper, John Taggert, Cornelius Comegys, Ephraim Clark, Thomas Baily, Lawrence Cauffman, John Edge, Charles Deshler, Henry Dubois, Isaac Dehaven, John Balliot.

Mr. Rawle and Mr. Ingersol, for the prosecution.

Mr. Rawle then opened the charge exhibited in the indictment. He observed that the jury must be aware of the very unpleasant duty he had to perform; he felt an extreme difficulty of situation,--called forth by his duty to exhibit a charge against the prisoner at the bar of the highest magnitude, who now stood to answer, unattended by any legal advice, he felt impressed with the necessity of sticking more than usually close to the line of his duty, which he should endeavor to discharge as faithfully as possible. And he trusted that, while the jury felt their relation to their unfortunate fellow-citizen at the bar, they would, at the same time, make all suitable allowance for any errors which might appear on his (Mr. Rawle's) part, though it was sincerely his desire to avoid any, either in laying down the facts or the law, which he should do under the direction of the court; and he hoped that the jury would carefully sift and examine the law and testimony which his duty called upon him to advance, in order to substantiate the charge. Mr. Rawle then proceeded to open the charge. He said, he should be able to prove, that John Fries, the prisoner at the bar, did oppose the execution of two laws of the United States, to effectuate which he was provided with men, who, as well as himself, were armed with guns, swords, and other warlike weapons, which, by their numbers and military appearance, were sufficient to accomplish their purpose, which was, not only to intimidate the officers of the government appointed to execute the above laws themselves, but to release from the custody of the marshal of Pennsylvania a number of persons who were held in prison by the said marshal, and to prevent him executing process upon others. All this was done, as stated in the indictment, by a combination and conspiracy to oppose those laws, by a large body of armed men, of whom the prisoner at the bar was the chief, and commander.

Mr. Rawle then proceeded, under the direction of the court, to state the law. The treason whereof the prisoner was charged was, '**levying war against the United States**.' Const. U. S. art. 3, ß 3. What, he asked, was levying war against the United States? He conceived himself authorized, upon good authority, to say, levying war did not only consist in open, manifest, and avowed rebellion against the government, with a design of overthrowing the constitution; but it may consist in assembling together in numbers, and by actual force, or by terror, opposing any particular law or laws. Again, there can be no distinction as to the kind or nature of the law, or the particular object for which the law was passed, since all are alike the acts of the legislature, who are sent by the people at large to express their will. Force need not be used to manifest this spirit of rebellion, nor is it necessary that the attempts should have been successful to constitute the crime. The endeavour, by intimidation, to do the act, whether it be accomplished or not, amounts to treason, provided the object of those concerned in the transaction, is of a general nature, and not applied to a special or private purpose. In order to effect the object of those embarked in crimes of this high nature, it is well known that various means are necessarily employed; various acts may be perpetrated to accomplish the main end: they may proceed by the execution of some enormous crimes, as burglary, arson, robbery, or murder, either, or all of them; but even if one or all of these crimes were committed, except the purpose should be of a general nature, they may form distinct and heinous offences; but the perpetrators may not be guilty of treason. If a

particular friend of the party had been in the custody of the marshal; if even a number sufficient for the purpose should step forward and rescue such a person, if it was not with a view to rescue prisoners generally, it would amount to no more than a rescue; but, if general, it is treason. The views of the party fix the crime, and therefore only the design is necessary to be known.

To prove that this doctrine was well established in the United States, Mr. Rawle turned to 2 Dall. [2 U. S.] 346, 355, stating the opinions of the court in the cases of Vigol and Mitchell, [FN2] charged with, and convicted for, treason. The attack on Gen. Neville's house was of this general nature, because he was an officer appointed to execute the obnoxious law; and being to the officer and not to the man that they objected, it was thought to be treason, and that decision was well grounded. He observed, that the clause in our constitution was founded on a statute which was passed in England, to prevent the ever-increasing and ever-varying number of treasons, upon the general and undefined opposition to royal prerogative: the situation of things was such, previous to that period, as to call forth from the statesman, ***927** from the philosopher, and from the divine, even in those dark ages, the most vehement complaints: in attendance to these reasonable and just murmurs, the statute was passed.

FN2 Cases Nos. 16,621 and 15,788.

Mr. Rawle was then producing an authority, when Judge CHASE said, the court would admit, as a general rule, of quotations which referred to what constituted actual or constructive levying war against the king of Great Britain, in his regal capacity; or, in other words, of levying war against his government, but not against his person, because it was of the same nature as levying war against the United States would be applied here: so was that part called adhering to the king's enemies:--they may, any of them, be read to the jury, and the decisions thereupon--not as authorities whereby we are bound, but as the opinions and decisions of men of great legal learning and ability. But even then, the court would attend carefully to the time of the decisions, and in no case must it be binding upon our juries.

Mr. Rawle quoted Hawkins (book 1, c. 17, ß 23) as an authority of authenticity to prove, that not only those who rebelled against the king, by taking up arms with the avowed design of dethroning him, but those who withstood his lawful authority, and who endeavoured to oppose his government; who withstood the king's forces, or attacked any of his fortresses--those, in fine, whose avowed object was of a public and general, and not of a private and personal nature, were guilty of high treason. He also read Sir John Friend's Case from Holt, 681, and Dammaree and Purchases' Case, 15 State Tr. 589.

CHASE, Circuit Justice, begged the counsel to read only those parts of the cases which referred to what could be treason in the United States, and nothing which related to compassing the king's death. It would be found, he observed, by an attention to the last case, that because the intention was a rising to demolish all meeting-houses, generally, it was considered to be an insurrection against the toleration act, by numbers and open force, setting the law at defiance. This would be found to be the opinion in Foster, 213.

Mr. Rawle said, that he conceived that, even if the matter made a grievance of, was illegal, the demolition of it in this way was, nevertheless, high treason, because of the people so assembled taking the law into their own hands; thus, in Foster, it would be seen that demolishing all bawdy-houses, as such, was high treason, as much as demolishing all meeting-houses, being equally an usurped authority. He also read Doug. 590, Lord George Gordon's Case, when it was Lord Mansfield's opinion that any attempt, by violence, to force the repeal of a law, or to prevent its execution, is levying war, and treason. He considered, from those few authorities, that he was justifiable in saying that a rising, with intent by force to prevent the execution of a law, as well as laws in general, preventing the marshal executing his warrants, and preventing the other officers charged with the execution of the laws in question, amounted to levying war, agreeably to

the constitution of the United States. Mr. Rawle then proceeded to state the most prominent facts which could be produced in the course of the evidence, in which it would fully appear, he presumed, that John Fries, the prisoner, was the most active in his opposition to those laws and to every attempt to carry them into effect; that he in every instance showed his aversion of, and opposition to, the assessors, and determination by threats and menaces to prevent them doing their duty, and that whenever any force was used, or terrific appearances held up, he was the commander, and gave the orders to his men, who, at times in great numbers, joined him: and that finally, by threats and intimidation, equally the same in the eyes of the law as force, he, the prisoner, did attain his object, to wit, the release of a number of prisoners who were confined for opposing the execution of the law, and were actually in custody of the marshal in a house at Bethlehem, which, by reason of his having prisoners there, and his having an armed posse to protect his lawful authority, was to all intents a fortress of the United States; and further, that he did, completely for a time, prevent the execution of the laws intended, in those parts, and thus did bid defiance to all lawful authority.

Judge CHASE then said to the prisoner: 'John Fries, you will attend to all the evidence that will be brought against you; will attend to their examination, and ask any questions you please of the several witnesses, or of the court; but be careful to ask no questions wherein you may possibly criminate yourself, for remember, whatever you say to your own crimination, is evidence with the jury; but if you say anything to your justification, it is not evidence. The court will be watchful of you; they will check anything that may injure yourself: they will be your counsel, and give you every assistance and indulgence in their power.'

(The evidence adduced on this trial is of so similar a character to that reported on the former occasion, as to render a report of it unnecessary. The defendant produced no testimony.)

Mr. Rawle said he felt himself so very peculiarly situated in this case, that he would wish the opinion of the court. The unfortunate prisoner at the bar appeared to answer to a charge, the greatest that could be brought against him, without the assistance of counsel, or any friend to advise with. To me, said Mr. R., the evidence against the prisoner is extremely strong. It will be recollected, that, in opening the evidence, I informed the jury what points I shall prove: I opened my ideas of constructive law, and ***928** produced a few authorities in support of my opinions. I believe it will be found, that in no material point have I failed to substantiate what I first gave notice that I could prove. I therefore conceive the charges are fully confirmed. But although, if this trial was conducted in the usual way, and counsel were ready to advocate the cause of the prisoner, it would now be proper, on my part, to sum up the evidence as produced to the jury, and apply it to the law, in order to see whether the crime was fixed or not. Under the present circumstances, I feel very great reluctance to fulfil what would, in other circumstances, be my bounden duty, lest it should appear to be going further than the rigid requisition of my office compels me to. I therefore shall rest the evidence and the law here, unless the court think that my office as public prosecutor, demands of me to do it, or thatI should not fulfil my duty without doing it.

Judge CHASE: It is not unfrequent for a prisoner to appear in a court of justice without counsel, but it is uncommon for a prisoner not to accept of legal assistance. It is the peculiar lenity of our laws that makes it the duty of a court to assign counsel to the person accused. With respect to your situation, sir, it is a matter entirely discretionary with you whether you will state the evidence and apply it to the law or not. There is great justice due to a prisoner arraigned on a charge so important as the present: there is great justice also due to the government. On the one hand, an innocent person shall not be made to suffer for want of legal assistance; on the other, a guilty person shall not escape through an undue indulgence, or the failure of the accuser in a duty his office may require of him. If you do not please to proceed, I shall consider it my duty to apply the law to the facts. The prisoner may therefore offer what he pleases to the jury.

Prisoner: I submit to the court to do me that

justice which is right.

Judge CHASE: That I will, by the blessing of God, do you every justice.

PETERS, District Judge: Mr. Attorney, while you are justifiable in considering the situation of the prisoner, that he might not suffer by any partial impressions you may make on the jury, there is another consideration deserving attention--there is justice due to the United States. Though I see no difficulty in resting it here, yet, possibly, persons who may have come into court since the trial commenced, may expect something of a narrative of the transactions, and such a narrative may be of great help to the jury. I wish it to be done for the due execution of public justice, and, God knows, I do it not with a desire to injure the prisoner, for I wish not the conviction of any man. It is a painful task, but we must do our duty. Still I think you are at liberty to fulfil your own pleasure.

Mr. Rawle would, then, under a solemn impression that it was his duty, take up some part of the time of the court and jury in relation to the prisoner at the bar, a task rendered far more painful on his part, from the circumstance of the prisoner's appearing there (unexpectedly) without counsel to plead his cuase. In as few words as possible, he would endeavour to collect the most prominent features of the testimony which had been produced, and to apply it to the law. As he stated before, Mr. Rawle said, levying war in the United States against the United States, was a crime defined by the constitution; in relation to the republican form of government existing among us, it could only consist in an opposition to the will of the society, of which we all are members, declared and established by a majority; in short, an opposition to the acts of congress, in whole or in part, so as to prevent their execution, either by collecting numbers, by a display of force, or by exhibiting that degree of intimidation which should operate, in either way, upon those charged with the execution of the law, either throughout the United States or in any part thereof, to procure a repeal or a suspension of the law, by rendering it impracticable to carry such law or laws into effect in the place so opposing, or in any other part. This offence he considered to be strictly treason against the United States.

The question, then, is, how far the case of the prisoner and his conduct merit this definition. In order to be informed of that, it was necessary to call to recollection the evidence, so collected, as to display the train and progress which marked its footsteps from its first dawning till its arrival at the fatal deed denominated treason. It will first be observed by the testimony of several respectable witnesses (Messrs. Heckavelter, Ramich, Schymer, Ormond, and Williamson), that attempts were made and executed, by a combination, in which, unfortunately for him, the prisoner at the bar was very active, to prevent the assessors from doing the duty required of them when they accepted their office, and that this combination existed both in Northampton and Bucks counties, and to such a degree that it was impossible to carry the law into effect. In Lower Milford, more particularly, we have the evidence of four respectable gentlemen (Mr. Chapman, a principal assessor, and Mr. Rodrick, Mr. Foulke, and Mr. Childs, three assessors), who were employed in the execution of those laws. These gentlemen say that they met with such opposition at an early period of the insurrection, as deterred Samuel Clarke from undertaking the business at all, although he had taken upon him the office. From this difficulty, Messrs. Foulke, Rodrick and Childs determined that they would proceed to assess Lower Milford township together, which they attempted, and did not desist until compelled by the extreme opposition which ***929** their respective testimony relates to have happened on the 5th and 6th of March, in their progress to, and at Quakertown, which ill usage is all corroborated by other witnesses. This spirit of opposition to the laws, as exhibited generally, is also related by Mr. Henry and Col. Nichols, the marshal, wherein it appears that process could not be served, and that witnesses could not be subpoenaed, being deterred from the threats made to them by this extensive combination; and that, in the serving of process, personal abuse was given, as well as to the assessors who attempted to execute the law. In short the law was prostrate at the feet of a powerful combination.

Mr. Rawle here called to view the occurrences in Bucks county, as deposed by Messrs. Foulke,

Rodrick, Chapman, Thomas, Mitchel, and Wiedner, exhibiting a disposition to insurrection by a great number of persons, and who engaged in its acts; he referred to the meeting at Jacob Fries', where John Fries, the prisoner at the bar, expressed himself as determining to oppose and continue hostile to the laws; also to the circumstance afterwards near Singmaster's, where Mr. Rodrick made his escape, and where, as well as at other times, the prisoner forbade those officers to proceed, under threats of personal danger. It appeared Mr. Rodrick had given offence, not by his conduct, but because he came from a distance of ten or twelve miles into that township to prosecute his duty. However, the assessors met the next day, but were stopped at Quakertown, where they were extremely abused. To be sure, while the prisoner at the bar was in the room, and whenever he was present, their abuse was suspended; when he absented himself, it was renewed. The papers were taken from Mr. Childs, and also from Mr. Foulke, but returned, because they were not the identical papers. Here it must be observed, in justice to the prisoner, that one more of his few good actions appeared, which Mr. Rawle wished in his heart had been more numerous. Fries assisted Mr. Foulke to get out of the house the back way, and advised him to keep out of the way of the men. On the evening of that day they went up to Millerstown: here Mr. Rawle called to mind the message delivered by John Dillinger for convening the meeting the next day; this message was the fruits of a consultation held at the house of Jacob Fries, after they left Quakertown, when they determined to proceed to Millerstown the next morning. The next morning they met and went on as far as Ritters, where it appeared they were stopped for a short period by young Marks, who had been sent forward, with information that the prisoners were gone on to Bethlehem: a doubt being started whether they would not be too late, it was debated, and at last determined to go forward: of this latter opinion was the prisoner at the bar. It was in evidence that none of those people knew the prisoners whom they were going to release: this, Mitchel and others swore.

Here, Mr. Rawle thought, commenced the overt act in the indictment. Hitherto only the general opposition to the law, and the intention with which the after conduct was perpetrated, appeared. They proceeded to Bethlehem, and here the officer of militia, the man who derived his power from the people, the prisoner, Captain John Fries, whose duty it was to support the law and constitution of the United States, made a most distinguished figure. At Bethlehem it appeared that the prisoner was to step forward to effect the surrender of the prisoners, and of course to lay prostrate the legal arm of the United States. These prisoners were in the lawful custody of the marshal; he had lawful process against them from the district judge; they were in the house appointed for their safe keeping until they should be removed; he kept guard over them, and in order to execute his office, he had provided, by virtue of the powers given to the sheriff in the several counties agreeable to law, an armed force called a posse comitatus, or the power of the county. This force (about sixteen or seventeen) he supposed sufficiently great to prevent the prisoners in his charge being liberated; it appeared, however, in the sequel that they were not sufficient for that purpose. The prisoner with an armed force arrived at Bethlehem, and proceeded on his mission to the marshal: he had a sword when he marched his men into the town; but it appeared that he left it when he entered on his other business, to wit, demanding the surrender of the prisoners; the marshal answered, that he could not deliver them up. John Fries then returned to his men; and from the testimony of Mitchel, Barnet, and Schlaugh, (this was an important part of his conduct,) he said, 'They must be taken by force; the marshal says he cannot deliver them up; if you are willing, we will take them by force: I will go foremost; if I drop, then take your own command.' Words were followed by actions; they went into the house, and the prisoners were given up. This, Mr. Rawle thought, was an unquestionable, full and complete proof of the commission of the over act; and that overt act is high treason, as laid in the third and fourth counts of the indictment, to wit, that they did by force prevent the marshal from executing lawful process to him directed; and, secondly, that they did deliver, and take from him certain persons, whom he had in lawful custody; and, further, this was done by force and arms, by men arrayed in a

warlike manner, and by a number exceeding one hundred persons. This the indictment justly calls levying war, and treason. To him, Mr. Rawle said, there was no doubt but the act of levying war was completed in the county of Bucks, independently of all those actions ***930** at Bethlehem; for there the prisoner and others were armed, and arrayed with all the appearances of war--with drums and fifes, and at times firing their pieces; and this to oppose the laws and prevent their execution; and there, by this force, they executed one, and the main part of their plan; they there did set the law at definace. That was part of their grand object, and was done with a general, and not with a particular view, an essential ingredient in treason. Whether these actions were to be considered as a separate act of treason, or whether they were to evince the intentions of the party, it certainly must be considered as testimony, and such as must have an important weight towards the verdict.

Gentlemen, said Mr. Attorney, you will consider how far the individual witnesses are deserving your credit. If you consider them worthy of being believed, and if the facts related apply to the law which I submitted to your consideration, and which, from the silence of the court, I think you must consider as accurate--if not, I shall stand corrected by the court--there can be but little doubt upon your minds, that the prisoner is guilty: if it be not so, in your opinion, you must find him otherwise. I have endeavoured to do my duty with integrity. I have advanced nothing but what appears to me to be clearly substantiated; but with you, gentlemen, and with the court, I leave the truth of the opinion.

Court: John Fries, you are at liberty to say anything you please to the jury.

Prisoner: It was mentioned, that I collected a parcel of people to follow up the assessors; but I did not collect them. They came and fetched me out from my house to go with them. I have nothing to say, but leave it to the court.

CHASE, Circuit Justice (charging jury):

Gentlemen of the Jury: John Fries, the prisoner at the bar, stands indicted for the crime of treason, of levying war against the United States, contrary to the constitution. By the constitution of the United States (article 3, ß 3) it is declared, 'that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.' By the same section it is further declared, 'that no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court;' and that 'the congress shall have power to declare the punishment of treason.' Too much praise cannot be given to this constitutional definition of treason, and the requiring such full proof for conviction; and declaring, that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. This constitutional definition of treason is a question of law. Every proposition in any statute (whether more or less distinct, whether easy or difficult to comprehend) is always a question of law. What is the true meaning and true import of any statute, and whether the case stated comes within it, is a question of law, and not of fact. The question in an indictment for levying war against (or adhering to the enemies of) the United States, is, whether the facts stated do, or do not amount to levying war, within the contemplation and construction of the constitution. **It is the duty of the court in this case, and in all criminal cases, to state to the jury their opinion of the law arising on the facts**; but the jury are to decide on the present, and in all criminal cases, **both the law and the facts**, on their consideration of the whole case. **It is the opinion of the court, that any insurrection or rising of any body of the people, within the United States, to attain or effect by force or violence any object of a great public nature, or of public and general (or national) concern, is a levying of war against the United States, within the contemplation and construction of the constitution. On this general position the court are of opinion, that any such insurrection or rising to resist, or to prevent by force or violence, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts, or excises; or for calling forth the militia to execute the laws of the Union, or for any other object of a general nature or national concern, under any**

pretence, as that the statute was unjust, burthensome, oppressive, or unconstitutional, is a levying was against the United States, within the contemplation and construction of the constitution. The reason for this opinion is, that an insurrection to resist or prevent, by force, the execution of any statute of the United States, has a direct tendency to dissolve all the bands of society, to destroy all order and all laws, and also all security for the lives, liberties and property of the citizens of the United States. **The court are of opinion, that military weapons (as guns and swords, mentioned in the indictment) are not necessary to make such insurrection or rising amount to a levying war, because numbers may supply the want of military weapons**, and other instruments may effect the intended mischief. **The legal guilt of levying war may be incurred without the use of military weapons or military array. The court are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges, or other peace officers, should be insulted or resisted, or even great outrages committed to the persons or property of our citizens.**

The true criterion to determine whether acts committed are treason, or a less offence (as a riot), is the quo animo, or the intention, with which the people did assemble. When the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered, construed, or reduced to a riot. The commission of any number of felonies, riots, or other ***931** misdemeanours, cannot alter their nature, so as to make them amount to treason; and, on the other hand, if the intention and acts combined amount to treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of property, or the like) are done, will show to what class of crimes the case belongs. **The court are of opinion, that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, that they are only guilty of a high misdemeanour; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime--whether by one hundred or one thousand persons, is wholly immaterial. The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used, in pursuance of such design to levy war; but that it is altogether immaterial whether the force used is sufficient to effectuate the object--any force connected with the intention will constitute the crime of levying war. This opinion of the court is founded on the same principles, and is, in substance, the same as the opinion of the circuit court for this district, on the trials (in April, 1795) of Vigol and Mitchell, who were both found guilty by the jury, and afterwards pardoned by the late president.**

At the circuit court for the district (April term, 1799), on the trial of the prisoner at the bar, Judge Iredell delivered the same opinion, and Fries was convicted by the jury. [Case No. 5,126.]

To support the present indictment against the prisoner at the bar, two facts must be proved to your satisfaction: First. That some time before the finding of the indictment, there was an insurrection (or rising) of a body of people in the county of Northampton, in this state, with intent to oppose and prevent, by means of intimidation and violence, the execution of a law of the United States, entitled, 'An act to provide for the valuation of lands and dwelling houses, the enumeration of slaves within the United States;' or, of another law of the United States, entitled, 'An act to lay and collect a direct tax within the United States;' and that some acts of violence were committed by some of the people so assembled, with intent to oppose and prevent, by means of intimidation and violence, the execution of both, or of one of the said laws of congress. In the consideration of this fact, you are to consider and determine with what intent the people assembled at Bethlehem, **whether to effect, by force, a public or a private measure.**

The intent with which the people assembled at Bethlehem, in Northampton, is a necessary ingredient to the fact of assembling, and to be proved like any other fact, by the declarations of those who assembled, or by acts done by them. When the question is, **'What is a man's intent**?' it may be proved by a number of connected circumstances, or by a single fact. If, from a careful examination of the evidence, you shall be convinced that the real object and intent of the people assembled at Bethlehem was of a public nature (which it certainly was, if they assembled with intent to prevent the execution of both of the above-mentioned laws of congress, or either of them), it must them be proved to your satisfaction, that the prisoner at the bar incited, encouraged, promoted, or assisted in the insurrection, or rising of the people, at Bethlehem, and the terror they carried with them, with intent to oppose and prevent, by means of intimidation and violence, the execution of both the above-mentioned laws of congress, or either of them; and that some force was used by some of the people assembled at Bethlehem. In the consideration of this fact, the court think proper to assist your inquiry by giving you their opinion.

In treason, all the participes criminis are principals; there are no accessaries to this crime. Every act, which, in the case of felony, would render a man an accessary, will, in the case of treason, make him a principal. To render any person an accomplice and principal in felony, he must be aiding and abetting at the fact; or ready to afford assistance, if necessary. If a person be present at a felony, aiding and assisting, he is a principal. It is always material to consider whether the persons charged are of the same party, upon the same pursuit, and under the expectation of mutual defence and support. **All persons present, aiding, assisting, or abetting any treasonable act, are principals. All persons, who are present and countenancing, and are ready to afford assistance, if necessary, to those who actually commit any treasonable act, are also principals. If a number of persons assemble and set out upon a common design, as to resist and prevent, by force, the execution of any law, and some of them commit acts of force and violence, with intent to oppose the execution of any law, and others are present to aid and assist, if necessary, they are all principals.** If any man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law, in this case, judgeth of the intent by the fact. If a number of persons combine or conspire to effect a certain purpose, as to oppose, by force, the execution of a law, any act of violence done by any one of them, in pursuance of such combination, and with intent to effect such object, is, in consideration of law, the act of all who are present when such act of violence is committed. If persons collect together to act for one and the same common end, any act done by any one of them, with intent to effectuate such common end, is a fact that may be given in evidence ***932** against all of them; the act of each is evidence against all concerned. I shall not detain you at this late hour to recapitulate the facts:--you have taken notes, and they have been stated with accuracy and great candor by Mr. Attorney. I will only remark, that all the evidence relative to transactions before the assembling of the armed force at Bethlehem, are only to satisfy you of the intent with which the body of the people assembled there. If either of the three overt acts (or open deeds) stated in the indictment, is proved to your satisfaction, THE COURT are of opinion, that it is sufficient to maintain the indictment; for THE COURT are of opinion that every overt act is treasonable. As to accomplices--they are legal witnesses, and entitled to credit, unless destroyed by testimony in court. If, upon consideration of the whole matter (law as well as fact), you are not fully satisfied, without any doubt, that the prisoner is guilty of the treason charged in the indictment, you will find him not guilty; but if, upon consideration of the whole matter (law as well as fact), you are convinced that the prisoner is guilty of the treason charged in the indictment, you will find him guilty.

The jury retired for the space of two hours, and brought in their verdict, 'Guilty.'

After the verdict was given, Judge CHASE, with great feeling and sensibility, addressed the prisoner, observing that, as he had no counsel on the trial, if he, or any person for him, could point

out any flaw in the indictment, or legal ground for arrest of judgment, ample time would be allowed for that purpose.

Friday, May 2. THE COURT this morning called before them Charles Deshler, a juror on the above trial of John Fries, who, on the first evening of the said trial, on the adjournment of the court, separated from the jury and retired to his lodgings. Mr. Hopkinson, on behalf of Mr. Deshler, produced his own affidavit, and that of two others, which proved that, on the said evening, Charles Deshler was inadvertently separated from his brethren by the crowd, in going out of the jury box; that he did not know to what place the jury had adjourned: that he then proceeded to his lodgings, where he cautiously avoided all conversation respecting the trial depending. THE COURT, satisfied by this representation of the innocence of Mr. Deshler, ordered that he be discharged, and that the before-mentioned affidavit be entered on the record of the court.

The prisoner being set at the bar, Judge CHASE, after observing to the other defendants that what he had to say to Fries would apply generally to them, proceeded:----

John Fries, you have been already informed, that you stood convicted of the treason, charged upon you by the indictment on which you have been arraigned, of levying war against the United States. You have had a legal, fair, and impartial trial, with every indulgence that the law would permit. Of the whole panel, you peremptorily challenged thirty-four, and with truth I may say, that the jury who tried you were of your own selection and choice. Not one of them before had ever formed and delivered any opinion respecting your guilt or innocence. The verdict of the jury against you was founded on the testimony of many creditable and unexceptionable witnesses. It was apparent from the conduct of the jury, when they delivered their verdict, that if innocent, they would have acquitted you with pleasure; and that they pronounced their verdict against you with great concern and reluctance, from a sense of duty to their country, and a full conviction of your guilt. ***The crime of which you have been found guilty is treason; a crime considered, in the most civilized and the most free countries in the world, as the greatest that any man can commit.*** It is a crime of so deep a dye, and attended with such a train of fatal consequences, that it can receive no aggravation; yet **the duty of my station requires that I should explain to you the nature of the crime of which you are convicted; to show the necessity of that justice which is this day to be administered, and to awaken your mind to proper reflections and a due sense of your own condition, which, I imagine, you must have reflected upon during your long confinement. You are a native of this country--you live under a constitution (or form of government) framed by the people themselves; and under laws made by your representatives, *faithfully executed by independent and impartial judges.*** Your government secures to every member of the community equal liberty and equal rights; by which equality of liberty and rights, I mean, that every person, without any regard to wealth, rank, or station, may enjoy an equal share of civil liberty, and equal protection of law, and an equal security for his person and property. You enjoyed, in common with your fellow-citizens, all those rights. If experience should prove that the constitution is defective, it provides a mode to change or amend it, without any danger to public order, or any injury to social rights. **If congress, from inattention, error in judgment, or want of information, should pass any law in violation of the constitution, or burdensome or oppressive to the people, a peaceable, safe and ample remedy is provided by the constitution. The people themselves have established the mode by which such grievances are to be redressed; and no other mode can be adopted without a violation of the constitution and of the laws. *If congress should pass a law contrary to the constitution, such law would be void, and the courts of the United States possess complete authority, and are the only tribunal to decide, whether any law *933 is contrary to the constitution.* If congress should pass burdensome or oppressive laws, the remedy is with their constituents, from whom they derive their existence and authority. *If any law is made repugnant to the voice of a majority of their constituents, it is in their power to make choice of persons to repeal it;***

but until it is repealed, it is the duty of every citizen to submit to it, and to give up his private sentiments to the public will. If a law which is burdensome, or even oppressive in its nature or execution is to be opposed by force; and obedience cannot be compelled, there must soon be an end to all government in this country. It cannot be credited by dispassionate men, of any information, that congress will intentionally make laws in violation of the constitution, contrary to their sacred trust, and solemn obligation to support it. None can believe that congress will wilfully or intentionally impose unreasonable and unjust burdens on their constituents, in which they must participate. The most ignorant man must know, that congress can make no law that will not affect them equally, in every respect, with their constituents. Every law that is detrimental to their constituents must prove hurtful to themselves. From these considerations, every one may see, that congress can have no interest in oppressing their fellow-citizens. It is almost incredible, that a people living under the best and mildest government in the whole world, should not only be dissatisfied and discontented, but should break out into open resistance and opposition to its laws.

The insurrection in 1794, in the four western counties of this state (particularly in Washington), to oppose the execution of the laws of the United States, which laid duties on stills, and spirits distilled, within the United States, is still fresh in memory: it originated from prejudices and misrepresentations industriously disseminated and diffused against those laws. Either persons disaffected to our government, or wishing to aggrandize themselves, deceived and misled the ignorant and uninformed class of the people. The opposition commenced in meetings of the people, with threats against the officers, which ripened into acts of outrage against them, and were extended to private citizens. Committees were formed to systematize and inflame the spirit of opposition. Violence succeeded to violence, and the collector of Fayette county was compelled to surrender his commission and official books; the dwelling house of the inspector (in the vicinity of Pittsburgh) was attacked and burnt; and the marshal was seized, and obtained his liberty on a promise to serve no other process on the west side of the Alleghany mountains. To compel submission to the laws, the government were obliged to march an army against the insurgents, and the expense was above one million one hundred thousand dollars. Of the whole number of insurgents (many hundreds) only a few were brought to trial; and of them only two were sentenced to die (Vigol and Mitchell), and they were pardoned by the late president. Although the insurgents made no resistence to the army sent against them, yet not a few of our troops lost their lives, in consequence of their great fatigue, and exposure to the severity of the season. This great and remarkable clemency of the government had no effect upon you, and the deluded people in your neighbourhood. The rise, progress, and termination of the late insurrection bear a strong and striking analogy to the former; and it may be remembered that it has cost the United States 80,000 dollars. It cannot escape observation, that the ignorant and uninformed are taught to complain of taxes, which are necessary for the support of government, and yet they permit themselves to be seduced into insurrections which have so enormously increased the public burthens, of which their contributions can scarcely be calculated. When citizens combine and assemble with intent to prevent by threats, intimidation and violence, the execution of the laws, and they actually carry such traitorous designs into execution, they reduce the government to the alternative of prostrating the laws before the insurgents, or of taking necessary measures to compel submission. No government can hesitate. The expense, and all the consequences, therefore, are not imputable to the government, but to the insurgents. The mildness and lenity of our government are as striking on the late as on the former insurrection. Of nearly one hundred and thirty persons who might have been put on their trial for treason, only five have been prosecuted and tried for that crime.

In the late insurrection, you, John Fries, bore a conspicuous and leading part. If you had reflected, you would have seen that your attempt was as weak as it was wicked. It was the height of folly in you to suppose that the great body of our citizens, blessed in the enjoyment of a free

republican government of their own choice, and of all rights civil and religious; secure in their persons and property; and conscious that the laws are the only security for their preservation from violence, would not rise up as one man to oppose and crush so ill-founded, so unprovoked an attempt to disturb the public peace and tranquillity. If you could see in a proper light your own folly and wickedness, you ought now to bless God that your insurrection was so happily and speedily quelled by the vigilance and energy of our government, aided by the partriotism and activity of your fellow-citizens, who left their homes and business and embodied themselves in the support of its laws. The annual, necessary expenditures for the support of any extensive government like ours must be great; and the sum required can only be obtained by taxes, or loans. In all countries the levying ***934** taxes is unpopular, and a subject of complaint. It appears to me that there was not the least pretence of complaint against, much less of opposition and violence to, the law for levying taxes on dwelling-houses; and it becomes you to reflect that the time you chose to rise up in arms to oppose the laws of your country, was when it stood in a very critical situation with regard to France, and on the eve of a rupture with that country. I cannot omit to remind you of another matter, worthy of your consideration. If the marshal, or any of the posse, or any of the four friends of government who were with him, had been killed by you, or any of your deluded followers, the crime of murder would have been added to the crime of treason. In your serious hours of reflection, you ought to consider the consequences that would have flowed from the insurrection, which you incited, encouraged, and promoted, in the character of a captain of militia, whose incumbent duty it is to stand ready (whenever required), to assist and defend the government and its laws, if it had not been immediately quelled. Violence, oppression and rapine, destruction, waste, and murder, always attend the progress of insurrection and rebellion; the arm of the father would have been raised against the son; that of the son against the father; a brother's hand would have been stained with brother's blood; the sacred bands of friendship would have been broken, and all the ties of natural affection would have been dissolved.

The end of all punishment is example; and the enormity of your crime requires that a severe example should be made to deter others from the commission of like crimes in future. You have forfeited you life to justice. Let me, therefore, earnestly recommend to you most seriously to consider your situation--to take a review of your past life, and to employ the very little time you are to continue in this world in endeavors to make your peace with that God whose mercy is equal to his justice. I suppose that you are a Christian; and as such I address you. Be assured, my guilty and unhappy fellow-citizen, that without serious repentance of all your sins, you cannot expect happiness in the world to come; and to your repentance you must add faith and hope in the merits and mediation of Jesus Christ. These are the only terms on which pardon and forgiveness are promised to those who profess the Christian religion. Let me, therefore, again entreat you to apply every moment you have left in contrition, sorrow and repentance. Your day of life is almost spent; and the night of death fast approaches. Look up to the Father of Mercies, and God of Comfort. You have a great and immense work to perform, and but little time in which you must finish it. There is no repentance in the grave, for after death comes judgment; and as you die, so you must be judged. By repentance and faith, you are the object of God's mercy; but if you will not repent, and have faith and dependence upon the merits of the death of Christ, but die a hardened and impenitent sinner, you will be the object of God's justice and vengeance. If you will sincerely repent and believe, God has pronounced has forgiveness; and there is no crime too great for his mercy and pardon. Although you must be strictly confined for the very short remainder of your life, yet the mild government and laws which you have endeavoured to destroy permit you (if you please) to converse and commune with ministers of the gospel; to whose pious care and consolation, in fervent prayers and devotion, I most cordially recommend you. What remains for me is a which the law has appointed for crimes of my duty. It is to pronounce that judgment which the lsw has appointed for crimes of this magnitude. The judgment of the law is, and this court doth award, 'that you be hanged by

the neck until dead;' and I pray God Almighty to be merciful to your soul!

NOTE 1.

The 'conduct directed by the court,' which led to the withdrawal of Mr. Dallas and Mr. Lewis, afterwards became the subject of the first of the articles of impeachment on which Judge Chase was tried before the senate of the United States, in February, 1805. A fair view of the transaction may be gathered from the answer of Judge Chase, and the testimony of Mr. Dallas and Mr. Rawle.

Judge Chase's Answer.--The first articles relate to his supposed misconduct in the trial of John Fries, for treason, before the circuit court of the United States, at Philadelphia, in April and May, 1800: and alleges that he presided at that trial, and that, 'unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, faithfully and impartially, and without respect to persons,' he did then, 'in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust.' This general accusation, too vague in itself for reply, is supported by three specific charges of misconduct: 1st. In delivering an opinion, in writing, on the question of law, on the construction of which the defence of the accused materially depended; which opinion, it is alleged, tended 'to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his favor. 2d. 'In restricting the counsel for the said John Fries, from recurring to such English authorities as they believed apposite; or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defence of their client.' 3d. 'In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavouring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.' This first article then concludes, that in consequence of this irregular conduct of this respondent, '**the said John Fries was deprived of the right secured to him by the eighth article amendatory of the constitution; and was condemned to death, without having been heard by counsel, in his defence**.' By the eighth article amendatory to the constitution, this respondent supposes is meant the sixth amendment ***935** to the constitution of the United States; which secures to the accused, in all criminal prosecutions, the right to have the assistance of counsel for his defence.

In answer to these three charges, the respondent admits that the circuit court of the United States, for the district of Pennsylvania, was held at Philadelphia, in that district, in the months of April and May, in the year of our Lord one thousand eight hundred; at which court John Fries, the person named in the said first article, was brought to trial, on an indictment for treason against the United States; and that this respondent then held a commission as one of the associate justices of the supreme court of the United States; by virtue of which office he did, pursuant to the laws of the United States, preside at the above mentioned trial, and was assisted therein by Richard Peters, Esq., then and still district judge or the United States, for the district of Pennsylvania; who, as directed by the laws of the United States, sat as assistant judge at the said trial. With respect to the opinion which is alleged to have been delivered by this respondent at the above mentioned trial, he begs leave to lay before this honourable court the true state of that transaction, and to call its attention to some facts and considerations, by which his conduct on that subject will, he presumes, be fully justified. The constitution of the United States, in the third section of the third article, declares that 'treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.' By two acts of congress, the first passed on the 3d day of March, 1791 [1 Stat. 199], and the second on the 8th day of May, 1792 [1 Stat. 267], a duty was imposed on spirits distilled within the United States, and on stills, and various provisions were made for its collection. In the year 1794, an insurrection took place in four of the western counties of Pennsylvania, with a view of resisting

and preventing by force the execution of these two statutes; and at a circuit court of the United States, held at Philadelphia, for the district of Pennsylvania, in the month of April, in the year 1795, by William Patterson, Esq., then one of the associate justices of the supreme court of the United States, and the above mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania, two persons, who had been concerned in the above named insurrections, namely, Philip Vigol and John Mitchell were indicted for treason of levying war against the United States, by resisting and preventing by force the execution of the two last-mentioned acts of congress; and were, after a full and very solemn trial, convicted on the indictments, and sentenced to death. They were afterwards pardoned by George Washington, then president of the United States. In the first of these trials, that of Vigol [Case No. 16,621], the defence of the prisoner was conducted by very able counsel, one of whom, William Lewis, Esq., is the same person who appeared as counsel for John Fries, in the trial now under consideration. Neither that learned gentlemen nor his able colleague then thought proper to raise the question of law, whether resisting and preventing by armed force the execution of a particular law of the United States be a 'levying of war against the United States,' according to the true meaning of the constitution; although a decision of this question in the negative must have acquitted the prisoner. But in the next trial, that of Mitchell [Cases Nos. 15,788 and 15,789], this question was raised on the part of the prisoner, and was very fully and ably discussed by his counsel; and it was solemnly determined by the court, both the judges concurring, '**that to resist or prevent by armed force, the execution of a particular law of the United States, is a levying of war against the United States, and consequently is treason, within the true meaning of the constitution.**' The decision, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, although not absolutely obligatory, ought to be viewed with very great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness.

On the 9th of July, 1798 [1 Stat. 580], an act of congress was passed, providing for a valuation of lands and dwelling houses, and an enumeration of slaves throughout the United States; and directing the appointment of commissioners and assessors for carrying it into execution: and on the 14th day of July [1 Stat. 597] in the same year**, a direct tax was laid by another act of congress of that date, on the lands, dwelling houses, and slaves, so to be valued and enumerated.** In the months of February and March, A. D. 1799, an insurrection took place in the counties of Bucks and Northampton, in the state of Pennsylvania, for the purpose of resisting and preventing by force, the execution of the two last-mentioned acts of congress, and particularly that for the valuation of lands and dwelling houses. John Fries, the person mentioned in the article of impeachment now under consideration, was apprehended and committed to prison, as one of the ringleaders of this insurrection; and at a circuit court of the United States, held at Philadelphia, in and for the district of Pennsylvania, in the month of April A. D. 1799, he was brought to trial for this offence, on an indictment for treason, by levying war against the United States, before James Iredell, Esq., then one of the associate justices of the supreme court of the United States, who presided in the said court, according to law, and the above mentioned Richard Peters, then district judge of the United States, for the district of Pennsylvania, who sat in the said circuit court as assistant judge. In this trial, which was conducted with great solemnity, and occupied nine days, the prisoner was assisted by William Lewis and Alexander James Dallas, Esqrs., two very able and eminent counsellors; the former of whom, William Lewis, is the person who assisted as above mentioned, in conducting the defence of Vigol, on a similar indictment. These gentlemen, finding a that the facts alleged were fully and undeniably proved, by a very minute and elaborate examination of witnesses, thought proper to rest the case of the prisoner on the question of law, which had been determined in the cases of Vigal and Mitchell above mentioned, and had then been acquiesced in**, but which they thought proper again to raise. They contended 'that to resist by force of arms a particular law of the United States**

does not amount to levying war against the United States, within the true meaning of the constitution, and therefore it is not treason, but a riot only.' This question they argued at great length, and with all the force of their learning and genius; and after a very full discussion at the bar, and the most mature deliberation by the court, the learned and excellent judge who then presided, and who was no less distinguished by his humanity and tenderness towards persons tried before him, than by his extensive knowledge and great talents as a lawyer, pronounced the opinion of himself and his colleague, 'that to resist or prevent by force the execution of a particular law of the United States, does not amount to levying war against them, within the true meaning of the constitution, and does not therefore constitute the crime of treason,' thereby adding the weight of another and more solemn decision to the precedent which had been established in the above-mentioned Cases of Vigol and Mitchell. Under this opinion of the court on the question of law, the jury, having no doubt as to the facts, found the said John Fries guilty of treason, on the above-mentioned indictment. But a new trial was granted by the court, not by ***936** reason of any doubt as to the correctness of the decision on the question of law, but solely on the ground, as this respondent hath understood and believes, that one of the jurors of the petit jury, after he was summoned, but before he was sworn on the trial, had made some declaration unfavourable to the prisoner. The yellow fever having appeared in Philadelphia in the summer of the year 1799, the above mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania, did, according to law, appoint the next circuit court of that district, to be held at Norristown therein: pursuant to which appointment, a circuit court was held at Norristown aforesaid, in and for the said district, on the 11th day of October, in the last-mentioned year, before Bushrod Washington, Esq., then one of the associate justices of the supreme court of the United States, and the above-mentioned Richard Peters; at which court no proceedings were had on the aforesaid indictment against John Fries, because, as this respondent hath been informed and believes, the commission of the marshal of the said district had expired, before he summoned the jurors to attend at the said court, and had not been renewed; by reason of which no legal panel of jurors could be formed.

On the 11th day of April, A. D. 1800, and from that day until the 2d day of May in the same year, a circuit court of the United States was held at Philadelphia, in and for the district of Pennsylvania, before this respondent, then one of the associate justices of the supreme court of the United States, and the above-mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania. At this court, the indictment on which the said John Fries had been convicted as above mentioned, was quashed ex-officio by William Rawle, Esq., then attorney of the United States for the district of Pennsylvania, and a new indictment was by him preferred against the said John Fries, for treason of levying war against the United States, by resisting and preventing by force, in the manner above set forth, the execution of the above-mentioned acts of congress, for the valuation of lands and dwelling houses and the enumeration of slaves, and for levying and collecting a direct tax. This indictment, of which a true copy, marked 'Exhibit No. 1,' is herewith exhibited by this respondent, who prays that it may be taken as a part of this his answer, being found by the grand jury on the 16th day of April, 1800, the said John Fries was on the same day arraigned thereon, and plead not guilty. William Lewis and Alexander James Dallas, Esqrs., the same persons who had conducted his defence at his former trial, were again at his request assigned by the court as his counsel: and his trial was appointed to be had on Tuesday, the 22d day of the last-mentioned month of April. After this indictment was found by the grand jury, this respondent considered it with great care and deliberation, and finding, from the three overt acts of treason which it charged, that the question of law arising upon it, was the same question which had already been decided twice in the same court, on solemn argument and deliberation, and one in that very case, he considered the law as settled by those decisions, with the correctness of which on full consideration he was entirely satisfied; and by the authority of which he should have deemed himself bound, even had he regarded the question as doubtful in itself. The are moreover, in

perfect conformity with the uniform tenor of decisions in the courts of England and Great Britain, from the revolution in 1688, to the present time, which, in his opinion, added greatly to their weight and authority. And surely we need not urge to this honourable court the correctness, the importance, and the absolute necessity of adhering to principles of law once established, and of considering the law as finally settled, after repeated and solemn decisions by courts of competent jurisdiction. A contrary principle would unsettle the basis of our whole system of jurisprudence, hitherto our safeguard and our boast; ***would reduce the law of the land, and subject the rights of the citizen, to the arbitrary will, the passions, or the caprice of the judge in each particular case; and would substitute the varying opinions of various men, instead of that fixed, permanent rule in which the very essence of the law consists***. If this respondent erred in regarding this point as settled, by the repeated and solemn adjudications of his predecessors, in the same court and in the same case; if he erred in supposing that a principle, established by two solemn decisions, was obligatory upon him, sitting in the same court where those decisions had been made; if he erred in believing that it would be the highest presumption in him to see up his opinion and judgment over that of his colleague, who had twice decided the same question, and of two of his predecessors, who justly rank among the ablest judges that have ever adorned a court; if in all this he erred, it is an error of which he cannot be ashamed, and which he trusts will not be deemed criminal in the eyes of this honourable court, of his country, or of that posterity by which he, his accusers, and his judges, must one day be judged. Under the influence of these considerations, this respondent drew up an opinion on the law arising from the overt acts stated in the said indictment, which was conformable to the decisions before given as above mentioned, and which he sent to his colleague, the said Richard Peters, for his consideration. That gentleman returned it to this respondent, with some amendments affecting the form only, but not in any manner touching the substance. The opinion thus agreed to, this respondent thought it proper to communicate to the prisoner's counsel; several reasons concurred in favour of this communication.

In the first place, this respondent considered himself and the court as bound by the authority of the former decisions; especially the last of them, which was on the same case. He considered the law as settled, and had every reason to believe that his colleague viewed it in the same light. It was not suggested or understood that any new evidence was to be offered; and he knew that if any should be offered, which could vary the case, it would render wholly inapplicable both the opinion and the former decisions on which it was founded. And he could not and did not suppose, that the prisoner's counsel would be desirous of wasting very precious time in addressing to the court a useless argument on a point which that court held itself precluded from deciding in their favour. He therefore conceived that it would be rendering the counsel a service and a favour, to apprise them beforehand of the view which the court had taken of the subject; so as to let them see in time the necessity of endeavouring to produce new testimony, which might vary the case, and take it out of the authority of former decisions. Secondly. There were more than one hundred civil causes then depending in the said court, as appears by the exhibit marked 'No. 1,' which this respondent prays may be taken as part of this, his answer. Many of those causes had already been subjected to great delay, and it was the peculiar duty of this respondent, as presiding judge, to take care that as little time as possible should be unnecessarily consumed, and that every convenient and proper dispatch should be given to the business of the citizens. He did believe that an early communication of the court's opinion might tend to the saving of time, and, consequently, to the dispatch of business. Thirdly. As the court held itself bound by the former decisions, and could not therefore alter its opinion in consequence of any argument; and as it was the duty of the court to charge the jury on the law, in all cases submitted to their consideration; he knew that this opinion must not only be made known at some period ***937** or other of the trial, but must, at the end of the trial, be expressly delivered to the jury by him, in a charge from the bench. And, he could not suppose and cannot yet imagine, that an opinion,

which was to be thus solemnly given in charge to the jury, at the close of the trial, could make any additional impression on their minds, from the circumstances of its being intimated to the counsel before the trial began, in the hearing of those who might be afterwards sworn on the jury. And, lastly, it was then his opinion, and still is, that ***it is the duty of every court of this country, and was his duty on the trial now under consideration, to guard the jury against erroneous impressions respecting the laws of the land.*** He well knows that it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and ***that hence results the power of juries to decide on the laws as well as on the facts, in all criminal cases.*** This power he holds to be a sacred part of our legal privileges, which he never has attempted, and never will attempt, to abridge or to obstruct. But he also knows that, in the exercise of this power, ***it is the duty of the jury to govern themselves by the laws of the land***, over which they have no dispensing power; and ***their right to expect and receive from our court all the assistance which it can give, for rightly understanding the law***. To withhold this assistance, in any manner whatever; to forbear to give it in that way which may be most effectually for preserving the jury from error and mistake, would be an abandonment or forgetfulness of duty, which no judge could justify to his conscience or to the laws. In this case, therefore, where the question of law arising on the indictment had been finally settled by authoritative decisions, it was the duty of the court, and especially of this respondent as presiding judge, early to apprise the counsel and the jury of these decisions, and their effect, so as to save the former from the danger of making an improper attempt to mislead the jury in a matter of law, and the jury from having their minds pre-occupied by erroneous impressions.

It was for these reasons that, on the 22d day of April, 1800, when the said John Fries was brought into court, and placed in the prisoner's box for trial, but before the petit jury was impaneled to try him, this respondent informed the above-mentioned William Lewis, one of his counsel, the aforesaid Alexander James Dallas not being then in court, 'that the court had deliberately considered the indictment against John Fries for treason, and the three several overt acts of treason stated therein. That the crime of treason was defined by the constitution of the United States; that, ***as the federal legislature had the power to make alter, or repeal laws, so the judiciary only had the power, and it was their duty, to declare, expound, and interpre***t, the constitution and laws of the United States. ***That is was the duty of the court, in all criminal cases, to state to the petit jury their opinion of the law arising on the facts; but the jury, in all criminal cases, were to decide both the law and the facts, on a consideration of the whole case.*** That there must be some constructive exposition of the terms used in the constitution, 'levying war against the United States.' That the question, what acts amounted to levying war against the United States, or the government thereof, was a question of law, and had been decided by Judges Patterson and Peters, in the Cases of Vigol and Mitchell [supra], and by Judges Iredell and Peters, in the case of John Fries, prisoner at the bar, in April, 1799 [Case No. 5,126]. That Judge Peters remained of the same opinion, which he had twice before delivered, and he, this respondent, on long and great consideration, concurred in the opinion of Judges Patterson, Iredell, and Peters. That to prevent unnecessary delay, and to save time on the trial of John Fries, and to prevent a delay of justice in the great number of civil causes depending for trial at that term, the court had drawn up in writing their opinion of the law, arising on the overt acts, stated in the indictment against John Fries; and had directed David Caldwell, their clerk, to make out three copies of their opinion, one to be delivered to the attorney of the district, one to the counsel for the prisoner, and one to the petit jury, after they should have been impaneled and heard the indictment read to them by the clerk, and after the district attorney should have stated to them the law on the overt acts alleged in the indictment, as it appeared to him.' After these observations, this respondent delivered one of the above-mentioned copies to the aforesaid William Lewis, then attending as one of the prisoner's counsel, who read part of it, and then laid it down on the table before him. Some observations were then made on the subject

by him and the above-mentioned Alexander James Dallas, who had then come into court; but this respondent doth not now recollect those observations, and cannot undertake to state them accurately. And this respondent further saith, that the paper marked 'Exhibit No. 2,' and herewith exhibited, which he prays leave to make part of this his answer, is a true copy of the original opinion, drawn up by him and concurred in by the said Richard Peters, as above set forth, which original opinion is now in the possession of this respondent, ready to be produced to this honourable court. He may have erred in forming this opinion, and in the time and manner of making it known to the counsel for the prisoner. If he erred in forming it, he erred in common with his colleague and with two of his predecessors; and he presumes to hope that an error which has never been deemed criminal in them, will not be imputed as a crime to him, who was led into it by their example and their authority. If he erred in the time and manner of making known this opinion, he feels a just confidence that when the reasons which he has alleged for his conduct, and by which it seemed to him to be fully justified, shall come to be carefully weighed, they will be sufficient to prove, if not that this conduct was perfectly regular and correct, yet that he might sincerely have considered it as right; and that in a case where so much doubt may exist, to have committed a mistake is not to have committed a crime. And this respondent further answering, insists, that the opinion thus delivered to the prisoner's counsel, viz: that '**any insurrection or rising of any body of people within the United States, for the purpose of resisting or preventing by force or violence, under any pretence whatever, the execution of any statute of the United States, for levying or collecting taxes, or for any other object of a general or national concern, is levying war against the United States, within the contemplation and true meaning of the constitution of the United States,**' is a legal and correct opinion, supported not only by the two previous decisions above mentioned, but also by the plainest principles of law and reason, and by the uniform tenor of legal adjudications in England and Great Britain, from the revolution in 1688 to this time. It ever was, and now is his opinion, that the peace and safety of the national federal government must be endangered by any other construction of the terms ***'levying war against the United States,'*** used by the federal constitution; and he is confident that no judge of the federal government, no judge of a superior state court, nor any gentleman of established reputation for legal knowledge, would or could deliberately give a contrary opinion. If, however, this opinion were erroneous, this respondent would be far less censurable than his predecessors, by whose example he was led astray, and by whose authority he considered himself bound. Was it an error to consider himself bound by the authority of their previous decisions? If it were, he was led into the error by the uniform course ***938** of judicial proceedings in this country and England, and is supported in it by one of the fundamental principles of our jurisprudence. Can such an error be a crime or misdemeanour? If, on the other hand, the opinion be in itself correct, as he believes and insists that it is, could the expression of a correct opinion on the law, whenever and however made, mislead the jury, infringe their rights, or give an improper bias to their judgment? Could truth excite improper prejudice? Could the jury be less prepared to hear the law discussed, and to decide on it correctly, because it was correctly stated to them by the court? And is not that a new kind of offence, in this country at least, which consists in telling the truth, and giving a correct exposition of the laws?

As to the second specific charge adduced in support of the first article of impeachment, which accuses this respondent 'of restricting the counsel for the said Fries, from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defence of their client,' this respondent admits that he did, on the above-mentioned trial, express it as his opinion to the aforesaid counsel for the prisoner, 'that the decisions in England, in cases of indictments for treason at common law, against the person of the king, ought not to be read to the jury, on trials for treason under the constitution and statutes of the United States; because such decisions could not inform, but might mislead and deceive the jury; that any decisions on cases of treason, in the

courts of England, before the revolution of 1688, ought to have very little influence in the courts of the United States; that he would permit decisions in the ***courts of England or of Great Britain,*** since the said revolution, to be read to the court or jury for the purpose of showing what acts have been considered by those courts as a constructive levying of war against the king of that country, in his legal capacity, but not against his person; because levying war against his government was of the same nature as levying war against the government of the United States; ***but that such decisions, nevertheless, were not to be considered as authorities binding on the courts and juries of this country,*** but merely in the light of opinions entitled to great respect as having been delivered, after full consideration, by men of great legal learning and ability.' These are the opinions which he did on that occasion deliver to the counsel for the prisoner, and which he then thought, and still thinks, it was his duty to deliver. The counsellors admitted to practice in any court of justice, are, in his opinion, and according to universal practice, to be considered as officers of such courts and ministers of justice therein, and as such, subject to the direction and control of the court, as to their conduct in its presence, and in conducting the defence and criminals on trial before it. As counsel, they owe to the person accused, diligence, fidelity and secrecy, and to the court and jury, due and correct information, according to the best of their knowledge and ability, on every matter of law which they attempt to adduce in argument. ***The court, on the other hand, hath power, and is bound in duty, to decide and direct what evidence, whether by records or by precedents of decisions in courts of justice, is proper to be admitted for the establishment of any matter of law or fact.*** Consequently, should counsel attempt to read to the jury, as al law still in force, a statute which had been repealed, or a decision which had been reversed, or the judgments of courts in countries whose laws have no connection with ours, it would be the duty of the court to interpose, and prevent such an imposition from being practiced on the jury. For these reasons this respondent thinks that his conduct was correct in expressing to the counsel for Fries the opinions stated above. He is not bound to answer here for the correctness of those principles, though he thinks them incontestable; but merely for the correctness of his motives in delivering them. A contrary opinion would convert this honourable court from a court of impeachment into a court of appeals; and would lead directly to the strange absurdity, that, whenever the judgment of an inferior court should be reversed on appeal or writ of error, the judges of that court must be convicted of high crimes and misdemeanours, and turned out of office; that error in judgment is a punishable offence, and that crimes may be committed without any criminal intention. Against a doctrine so absurd and mischievous, so contrary to every notion of justice hitherto entertained, so utterly subversive of all that part of our system of jurisprudence which has been wisely and humanely established for the protection of innocence, this respondent deems it his duty now, and on every fit occasion, to enter his protest and lift up his voice; and he trusts that, in the discharge of this duty, infinitely more important to his country than to himself, he shall find approbation and support in the heart of every American, of every man throughout the world, who knows the blessings of civil liberty, or respects the principles of universal justice. It is only, then, for the correctness of his motives in delivering these opinions, that he can now be called to answer; and this correctness ought to be presumed, unless the contrary appear by some direct proof, or by some violent presumption arising from his general conduct on the trial, or from the glaring impropriety of the opinion itself. For he admits that cases may be supposed of an opinion delivered by a judge so palpably erroneous, unjust and oppressive, as to preclude the possibility of its having proceeded from ignorance or mistake.

Do the opinions now under consideration bear any of these marks? This honourable court need not be informed that there has existed in England no such thing as treason at common law, since the year 1350, when the statute of the 25 Edw. III. c. 2, declaring what alone should in future be judged treason, was passed. Is it perfectly clear that decisions made before that statute, 450 years ago, when England, together with the rest of Europe, was still wrapped in the deepest gloom of ignorance and barbarism; when the system of

English jurisprudence was still in its infancy; when law, justice and reason, were perpetually trampled under foot by feudal oppression and feudal anarchy; when, under an able and vigorous monarch, everything was adjudged to be treason which he thought fit to call so, and under a weak one nothing was considered as treason which turbulent, powerful, and rebellious nobles thought fit to perpetrate--is it perfectly clear that decisions made at such a time, and under such circumstances, ought to be received by the courts of this country as authorities to govern their decisions, or lights to guide the understanding of juries? It is perfectly clear that decisions made in England, on the subject of treason, before the revolution of 1688, by which alone the balance of the English constitution was adjusted, and the English liberties were fixed on a firm basis; decisions made either during the furious civil wars, in which two rival families contended for the crown; when, in the vicissitudes of war, death and confiscation in the forms of law, continually walked in the train of the victors, and actions were treasonable or praise-worthy, according to the preponderance of the party by whose adherents they were perpetrated; during the reigns of three able and arbitrary monarchs who succeeded this dreadful conflict, and relaxed or invigorated the law of treason, according to their anger, their policy, or their caprice; or during those terrible struggles between the principles of liberty, not yet well defined or understood on one hand, and arbitrary power insinuating itself under the forms of the constitution on the other; struggles which presented at some ***939** times the wildest anarchy, at others the extremes of servile submission, and after having brought one king to the scaffold, ended in the expulsion of another from his throne? Is it clear that decisions on the law of treason, made in times like these, ought not only to be received as authorities in the courts of this country, but also to have great influence on their decisions? Is it clear that decisions made in England, as to what acts will amount to levying war against the king, personally, and not against his government, are applicable to the constitution and laws of this country? Is it clear that such English decisions on the subject of treason, as are applicable to our constitution and laws, are to be received in our courts, not merely as the opinions of learned and able men, which may enlighten their judgment, but as authorities which ought to govern absolutely their decisions? Is all this so clear, that a judge could not honestly and sincerely have thought the contrary? That he could not have expressed an opinion to the contrary, without corrupt or improper motives? If it be not thus clear, then must it be admitted that this respondent, sincerely and honestly, and in the best of his judgment, considered these decisions as wholly inadmissible, or admissible only for the purposes and to the extent which he pointed out. And if he did so consider them, was it not his duty to prevent them from being read to the jury, except under those restrictions, and for those purposes? Would his duty permit him to sit silently, and see the jury imposed on and misled? To sit silently and hear a book read to them as containing the law, which he knew did not contain the law? ***Such silence would have rendered him a party to the deception, and would have justly subjected him to all the contumely which a conscientious and courageous discharge of his duty has so unmeritedly brought on his name.***

With respect to the statutes of the United States, which he is charged with having prevented the prisoner's counsel from citing on the aforesaid trial, he denies that he prevented any act of congress from being cited, either to the court or jury, on the said trial; or declared at any time, that he would not permit the prisoner's counsel to read to the jury, or to the court, any act of congress whatever. Nor does he remember or believe, that he expressed on the said trial any disapprobation of the conduct of the circuit court before whom the said case was first tried, in permitting the act of congress relating to crimes less than treason, commonly called the 'Sedition Act,' to be read to the jury. He admits, indeed, that he was then and still is of opinion, that the said act of congress wholly was irrelevant to the issue, in the trial of John Fries, and, therefore, ought not to have been read to the jury, or regarded by them. This opinion may be erroneous, but he trusts that the following reasons on which it was founded, will be considered by this honourable court, as sufficiently strong to render it possible, and even probable, that such an opinion might be sincerely held and honestly expressed: 1st. That congress

did not intend by the sedition law to define the crime of treason by 'levying war.' Treason and sedition are crimes very distinct in their natures, and subject to very different punishments; the former by death, and the latter by find and imprisonment. 2dly. The sedition law makes a combination or conspiracy, with intent to impede the operation of any law of the United States, or the advising or attempting to procure any insurrection or riot, a high misdemeanour, punishable by fine and imprisonment; but a combination or conspiracy with intent to prevent the execution of a law, or with intent to raise an insurrection for that purpose, or even with intent to commit treason, is not treason by 'levying war' against the United States, unless it be followed by an attempt to carry such combination or conspiracy into effect, by actual force or violence. 3dly. **The constitution of the United States is the fundamental and supreme law, and having defined the crime of treason, congress could not give any legislative interpretation or exposition of that crime, or of the part of the constitution by which it is defined. 4thly. The judicial authority of the United States is alone vested with power to expound their constitution and laws.**

And this respondent, further answering, saith, that after the above mentioned proceedings had taken place in the said trial, it was postponed until the next day, Wednesday, April 23d, 1800; when, at the meeting of the court, this respondent told both the above-mentioned counsel for the prisoner, 'that to prevent any misunderstanding of anything that had passed the day before, he would inform them that, although the court retained the same opinion of the law, arising on the overt acts charged in the indictment against Fries, yet the counsel would be permitted to offer arguments to the court, for the purpose of showing them that they were mistaken in the law; and that the court, if satisfied that they had erred in opinion, would correct it; and, also, that the counsel would be permitted to argue before the petit jury, that the court were mistaken in the law.' And this respondent added, that he court had given no opinion as to the facts in the case, about which both the counsel had declared that there would be no controversy. After some observations by the said William Lewis and Alexander James Dallas, they both declared to the court, 'that they did not any longer consider themselves as the counsel for John Fries, the prisoner.' This respondent then asked the said John Fries, whether he wished the court to appoint other counsel for his defence? ***He refused to have other counsel assigned***; in which he acted, as this respondent believes and avers, by the advice of the said William Lewis and Alexander James Dallas: whereupon the court ordered the said trial to be had on the next day, Thursday, the 24th of April, 1800. On that day the trial was proceeded in; and before the jurors were sworn, they were, by the direction of the court, severally asked on oath, whether, and were in any way related to the prisoner, and whether they had ever formed or delivered any opinion as to his guilt or innocence, or that he ought to be punished? Three of them answering in the affirmative, were withdrawn from the panel. The said John Fries was then informed by the court, that he had a ***right to challenge thirty-five of the jury***, ***without showing any cause***, or challenge against them, and as many more as he could show cause of challenge against. He did accordingly challenge peremptorily thirty four of the jury, and the trial proceeded. In the evening, the court adjourned till the next day, Friday, the 25th of April; when, after the district attorney had stated the principal facts proved by the witnesses, and had applied the law to those facts, this respondent, with the concurrence of his colleague, the said Richard Peters, delivered to the jury the charge contained and expressed in exhibit marked 'No. 3,' and herewith filed, which he prays may be taken as part of this his answer. Immediately after the petit jury had delivered their verdict, this respondent informed the said Fries, from the bench, ***that if he, or any person for him, could show any legal ground, or sufficient cause to arrest the judgment, ample time would be allowed him for that purpose.*** But no cause being shown, sentence of death was passed on the said Fries on the 2d day of May, 1800, the last day of the term; and he was afterwards pardoned by John Adams, then president of the United States.

And this respondent, further answering, saith, that if the two instances of misconduct, first stated in support of the general charge contained

in the first article of impeachment, were true as alleged, yet the inference drawn from them, viz. 'that the said Fries was hereby deprived of the benefit of counsel for his defence,' is not true. He insists that the said Fries was ***940** deprived of the benefit of counsel, not by any misconduct of this respondent, but by the conduct and advice of the above-mentioned William Lewis and Alexander James Dallas, who, having been, with their own consent, assigned by the court as counsel for the prisoner, **withdrew from his defence, and advised him to refuse other counsel when offered to him by the court, under pretence that the law had been prejudged, and their liberty of conducting the defence,** ***according to their own judgment, improperly restricted by this respondent;*** but in reality because they knew the law and the facts to be against them, and the case to be desperate, and supposed that their withdrawing themselves under this pretence, might excite odium against the court; might give rise to an opinion that the prisoner had not been fairly tried; and in the event of a conviction, which, from their knowledge of the law and the facts, they knew to be almost certain, might aid the prisoner in an application to the president for a pardon. That such was the real motive of the said prisoner's counsel, for depriving their client of legal assistance on this trial, this respondent is fully persuaded, and expects to make appear, not only from the circumstances of the case, but from their own frequent and public declarations. As little can this respondent be justly charged with having, by any conduct of his, endeavoured to ***'wrest from the jury their indisputable right to hear argument, and determine upon the question of law as well as the question of fact involved in the verdict which they were required to give***.' He denies that he did at any time declare that the aforesaid counsel should not at any time address the jury, or did in any manner hinder them from **addressing the jury on the law as well as on the facts arising in the case.** It was expressly stated, in the copy of his opinion delivered as above set forth to William Lewis, ***that the jury had a right to determine the law as well as the fact:*** and the said William Lewis and Alexander James Dallas were expressly informed, before they declared their resolution to abandon the defence, ***that they were at liberty to argue the law to the jury.*** This respondent believes that the said William Lewis did not read the opinion delivered to him as aforesaid, except a very small part at the beginning of it, and of course, acted upon it without knowing its contents: and that the said Alexander James Dallas read no part of the said opinion until about a year ago, when he saw a very imperfect copy, made in court by a certain W. S. Biddle.

And this respondent, further answering, saith, that, according to the constitution of the United States, civil officers thereof, and no other persons, are subject to impeachment; and they only for treason, bribery, corruption or other high crime or misdemeanour, consisting in some act done or committed, in violation of some law forbidding or commanding it; on conviction of which act, they must be removed from office; and may, after conviction, be indicted and punished therefor, according to law. Hence, it clearly results, that no civil officer of the United States can be impeached, except for some offence for which he may be indicted at law; and that no evidence can be received on an impeachment except such as, on an indictment at law, for the same offence, would be admissible. **That a judge cannot be indicted or punished according to law,** ***for any act whatever done by him in his judicial capacity,*** **and in a matter of which he has jurisdiction, through error of judgment merely, without corrupt motives, however manifest his error may be, is a principle resting on the plainest maxims of reason and justice, supported by the highest legal authority, and sanctioned by the universal sense of mankind.** He hath already endeavoured to show, and he hopes with success, that all the opinions delivered by him in the course of the trials now under consideration, were correct in themselves, and in the time and manner of expressing them; and that even admitting them to have been incorrect, there was such strong reason in their incorrect, there was move from his conduct every suspicion of improper motives. If these opinions were incorrect, his mistake in adopting them, or in the time or manner or expressing them, cannot be imputed to him as an offence of any kind, much less as a high crime and misdemeanour, for which he ought to be removed from office;

unless it can be shown by clear and legal evidence, that he acted from corrupt motives. Should it be considered that some impropriety is attached to his conduct, in the time and mode of expressing any of these opinions, still be apprehends, that a very wide difference exists between such impropriety, the casual effects of human infirmity, and a high crime and misdemeanour for which he may be impeached, and must on conviction be removed from office.

Finally, this respondent, having thus laid before this honourable court a true state of his case, so far as respects the first article of impeachment, declares, upon the strictest review of his conduct during the whole trial of John Fries for treason, that he was not on that occasion unmindful of the solemn duties of his office as a judge;--that he faithfully, and impartially, and according to the best of his ability and understanding, discharged those duties towards the said John Fries; and that he did not in any manner, during the said trial, conduct himself arbitrarily, unjustly, or oppressively, as he is accused by the honourable the house of representatives. And the said Samuel Chase, for plea to the said first article of impeachment, saith, that he is not guilty of any high crime or misdemeanour, as in and by the said first article is alleged; and this he prays may be inquired of by this honourable court, in such manner as law and justice shall seem to them to require.

Evidence on the part of the United States.

Alexander James Dallas sworn.

Mr. Nicholson: Please to state your knowledge relative to the trial of Fries.

Mr. Dallas: I will endeavour to be as correct as I can in stating the facts relative to the trial, and also the order in which they took place, as well as the language used; but from the length of time which has elapsed since the trial, it is probable I may be mistaken in some part of my relation, as to the language and the order in which the facts took place.--When the prisoners who were charged with having committed an insurrection in the counties of Bucks and Northampton, were brought to Philadelphia, Mr. Ingersoll and myself were applied to by some gentlemen in Philadelphia, to undertake their defence. Mr. Ingersoll being at the time attorney-general of the state of Pennsylvania, determined not to defend them. About this time Mr. Lewis was also spoken to, and engaged in their defence. This produced a meeting at the jail where the prisoners were, and we gave the necessary information relative to a preparation for trial. A Mr. Ewing, a gentleman of the bar, had been employed to defend some of the prisoners, and undertook the defence of Fries with us. This was the first trial, the circumstances of which have been related. On the morning of the second trial, I did not enter the court until some time after it was called. Fries was then in the box assigned for the prisoners. I pressed towards the bar, when my attention was attracted by an animated conversation which was taking place between Mr. Lewis and Mr. Edward Tilghman.--When Mr. Lewis observed me, he met me, and related what he has stated here; he said that **Judge Chase had declared that the court had made up their minds with respect to the law relative to treason**, and had ordered three copies of the opinion to be made out; one for the attorney of the district; one for the prisoner's counsel; and a third for the jury to take ***941** out with them. After having exchanged our sentiments, we entered the bar together; something fell from the court, which caused a reply from Mr. Lewis. I believe the question was, whether we were ready to proceed with the defence? Mr. Lewis observed that there were no doubts as to the facts, and as the court had made up their minds as to the law, he did not expect that he should be able to change them; and that he should decline action as counsel for Fries. I at this time addressed the court, and recapitulated what had been told me by Mr. Lewis, thinking that there might be some mistake, for although I was certain that Mr. Lewis would not have related anything that was not true, yet I deemed it probable that I might have misunderstood him. After a moment's pause, in order that I might be corrected if in an error, I proceeded, and delivered some general remarks as to the powers of the court and jury in criminal cases; and concluded by stating to the court my determination not to consider myself as counsel for the prisoner any longer, under the opinion which the court had given. I remember

to have heard Judge Peters say to Judge Chase, 'I told you so; I knew they would take the stud.' Judge Peters also on the same day expressed a wish that we would proceed with the defence, and to take any range we pleased. The bar and the audience appeared extremely surprised at the transactions of the day. ***On the second day, it became the subject of altercation whether we had a right to address the jury upon the law***. Judge Chase then said, that, although he had before stated that we must not, ***yet that we might address the jury on the law, but it would be at the hazard of our reputation.*** This had the contrary effect rather than to induce me to proceed. In the evening of that day, Mr. Lewis and myself visited Fries at the prison. We stated to him that we had two objects in view; ***the first was that of saving his life, and the second to maintain our privileges as members of the bar.*** We told him that under the then existing circumstances, we had no hopes of an acquittal, as there were no doubts as to the facts, and the court having made up their opinion as to the law, and the jury having heard the declaration of the court, which would influence their verdict. **And we told him that if he would consent to our withdrawing from his defence, and refuse to accept other counsel, it would be a strong recommendation to the president for a pardon.** He appeared at first extremely alarmed, but after some time he agreed to our proposition. We told him, at the same time, that if he insisted on it, we would proceed to defend him at every hazard. On the next day, we both stated to the court that we were no longer his counsel, upon which both Judge Peters and Judge Chase spoke in the manner in which Mr. Lewis has stated it. We determined to adhere to our determination of withdrawing. Judge Chase then said that we might think to embarrass the court, but we should find ourselves mistaken. He then asked Fries if he wished other counsel assigned him. The prisoner replied that he did not know what was best for him to do, but would leave it entirely to the court. Judge Chase then observed, that, by the blessing of God, they would do him as much justice as the counsel who had been assigned him. I then left the court, and I believe Mr. Lewis did also. On the first trial of Fries, ***we were allowed to address the jury both on the law and on the fact--***to read what authorities we pleased, both before and after the revolution in England, and also the statutes of congress, in order to show that Fries had only been guilty of a riot. Our law points were, that the **constitution had defined the law concerning treason, and that the legislature nor the judges had the power of defining it.** We argued that the judges before the revolution in England, held their office at the pleasure of the crown, and, therefore, would make anything treason. We took up the common law decisions to show, not what was the law, but what had been their decisions. We cited the case of the man whose stag the king killed, and who wished the horns of the stag in the king's belly, and also that of the innkeeper who kept the sign of the crown, and who said he would make his son heir to the crown, in order to show the great lengths to which the doctrine of constructive treason was carried. We then contended that, although the judges since the revolution in England, had become independent of the crown, yet they considered themselves as bound by these decisions of their predecessors, and, therefore, ought not to be considered as authorities to govern our courts on the subject of treason. We also read the statutes of congress, particularly the first section of the act called the 'Sedition Law,' in order to show that the legislature of the United States had declared the offence of which Fries was charged to have committed to have been only a riot, and punishable with fine and imprisonment. We attempted to show a difference between the case of Fries and the Western insurrection, and I was surprised that the cases should have been decided to be similar. After a new trial was granted, my attention was almost entirely directed to the object of showing a difference between the two cases at the second trial. This is all that I recollect of the circumstances; but whatever might have been my conduct in order to save the life of the prisoner, yet I never had the least intention of bringing the court into odium.

Mr. Nicholson: Was the jury present at the time that Judge Chase declared that the counsel on the question of law must address themselves to the court?

Mr. Dallas: I know not whether he made this declaration on the first day, as I before stated that

I was not in court at the time, and it was related to me by Mr. Lewis.

Mr. Nicholson: When the judge observed that you might proceed at the hazard of your reputation, were the papers withdrawn?

Mr. Dallas: I know not; but I think the judge observed that they were.

William Rawle, affirmed.--Ques. Were you present at the trial of Fries? Ans. I was. Ques. What took place on that occasion? Ans. The circuit court of the United States for the district of Pennsylvania, met on the 11th of April, 1800. As the proceedings against John Fries were considered as not to be revived, without the interposition of an act of congress, it appeared best to me to move the court, on the first day of their session, to quash the indictment against him. This I accordingly did, and the court granted my motion. Upon the same day the court charged the grand jury, and I sent up to them, among others, an indictment against John Fries, which was returned a true bill. On the 16th of April, John Fries was brought to the bar, arraigned, and plead not guilty. I can't say whether Messrs. Lewis and Dallas were on that day assigned him by the court as counsel, or whether they continued to act, having been his counsel on the first trial. Copies of the indictment were furnished to Fries and his counsel. The trial was then postponed, on account of the absence of a material witness, and it was not assigned for the day which Messrs. Lewis and Dallas have given testimony of, and which has been called the first day of the trial. Fries might have been in the box, through mistake, because, that I had on a certain day directed the marshal to bring up a number of persons, charged with seditious, practices, and Fries might have been brought with them. Shortly after, the court met. Judge Chase observed, that the court had made up their minds as to the law of treason, and to avoid being misunderstood, they had reduced their opinion to writing, and that they had directed t***hree copies of the opinion to be made out; one for the district attorney, another for the counsel for the prisoner, and a third for the *942 jury***, to be delivered to them after the case had gone through, on the part of the prosecution. As these words were pronounced, several papers were thrown, I know not whether by the court or the clerk. I took up one of them and began to read; but casting my eyes up, I saw Mr. Lewis on the opposite side of the table, with one of the papers in his land, which he looked at with apparent indignation, and then threw it on the table. I cannot call to my recollection anything further that passed between the counsel and the court on that day. I perceived much agitation among the gentlemen of the bar; but having a great burthen of criminal prosecutions on my hands, I could hear nothing until the court rose. In the course of that morning, twenty-one persons were brought to the bar for seditious combinations, and submitted to the court. The court rose early in the day, and requested me not to examine the witnesses on those cases of sedition. After the court rose, I understood that the counsel for Fries meant to decline acting in his defence. I have an indistinct recollection of hearing this from Mr. Dallas. Soon after I got home on that day, Judge Chase and Judge Peters came to my house. We went into another room from that in which I was sitting, when Judge Peters began by expressing an apprehension that the counsel for Fries would decline acting for him. Judge Chase observed that he could not suppose that that would be the case. I supported the opinion of Judge Peters, and stated that the gentlemen of the bar of Philadelphia were very independent, and that in my opinion the counsel for Fries would not proceed, unless the papers were withdrawn, and they were permitted to go on in their usual way. Judge Chase observed that he was sorry that the opinion had been considered in the light it was, and that it was not intended to preclude the counsel from going on in the usual manner, provided they thought proper. Both the judges then requested me to obtain all the copies of the opinion which had been taken, which I readily promised to comply with. I recollected to have seen Messrs. Tilghman and Ross taking copies of the opinion. I went to their houses and requested them, which they gave to me immediately, and I took them to Mr. Caldwell, the clerk of the court. I asked him whether he knew of any other persons taking a copy, and he answered that he believed that Mr. William Meredith had; upon which I requested him to go to Mr. Meredith, and try to obtain it. I did not at that time know that

Mr. Biddle, who was then a student of mine, had taken a copy; nor did I then recollect that I had one of them myself. I, therefore, did not hand it to the clerk, but have it now in my possession. The papers which were thrown down did not appear to me to be read by any persons but those who copied them; and I entertained an anxious hope, on the next day, that the gentlemen who were concerned as counsel for Fries would proceed in his defence, and be satisfied.

I will now, with the permission of the court, refer to some original notes which I took upon the remaining part of the transaction. On the 23d day of April, John Fries was brought to the bar. The court then, addressing themselves first to me, and then to the counsel for Fries, asked if we were ready to proceed with the trial? to which I answered affirmatively. Mr. Lewis then observed, that if he had been employed by the prisoner, he would think himself bound to proceed; but having been assigned as his counsel--(He was here interrupted by Judge Chase, who said 'You are not bound by the opinion delivered yesterday, but are at liberty to contest it on both sides.') Mr. Lewis answered, that he had understood that the ***court had made up their minds as to the law, and as the prisoner's counsel had a right to address the jury both on the law and the fact,*** it would place him in too degrading a situation to argue the case after what had passed, and, therefore, he would not proceed with the defence. Judge Chase answered with impatience, 'You are at liberty to proceed as you think proper. ***Address the jury and lay down the law as you think proper.***' Mr. Lewis answered, with considerable warmth, ***'I will never address myself to the court upon the question of law in a criminal case***.' He then went into a lengthy argument upon the law of high treason in England, previous to their resolution, and contended that the courts, since that period, had considered themselves as bound by those decisions which were made prior to it. Judge Chase observed, that the counsel must do as they please. Mr. Dallas then rose, and went into a general view of the ground, which had been taken by Mr. Lewis, and concluded with his determination not to proceed as counsel for Fries. Judge Chase observed, 'No opinion has been given as to the facts of the case. I would not suffer the witnesses against those persons charged with seditious combinations, to be examined before the trial of Fries came on, lest their evidence might have been heard by some of the jury. As to the law, I know that the trial before took a considerable time, and that cases at common law, and decisions in England before the revolution on the law of treason, such as the case of the man whose stag the king killed, and wished the horns of the stag in the king's belly, and the case of the innkeeper, who kept the sign of the crown, and who said he would make his son heir to the crown. These cases ought not, and shall not go to the jury. **There is no case which can come before me on which I have not a decided opinion as to the law; otherwise I should not be fit to preside here.** I have always conducted myself with candour, gentlemen, and meant to have saved you trouble by what I did. Is it not respectable for counsel to say that they have a right to offer what they please to the jury? What! would you cite decisions in Rome, in Turkey, or in France? You will now proceed, and stand acquitted or condemned in your own consciences as you conduct the defence, and go on in your own way. The case will be opened by the attorney--the manner must be regulated by the court.' Judge Peters added, that the papers were all withdrawn. Mr. Lewis said, the paper was withdrawn, but the impressions remained with the jury; he, therefore, should not act. A pause then ensued for a few moments, when Judge Chase said: 'You can't bring the court into difficulties, gentlemen; you do not know me if you think so.' He then caused the avenue to the prisoner's bar to be cleared, and asked Fries whether he was ready for his trial, or whether he wished other counsel assigned him. Fries appeared very much alarmed, and replied, that he did not know what to do. I then informed the court that, as this was a remarkable case, I hoped the trial would be postponed until the next day, which was readily acquiesced in by the court, and Fries was remanded to prison. On the next day he was again brought to the bar, and asked whether he would have counsel assigned him; he replied with much firmness that he would look to the court to be his counsel. Judge Chase then answered: 'Then by the blessing of God, the court will be your counsel, and will do you as much justice as those who were your counsel.'

The jury were then called, and Judge Chase took particular pains to inform Fries of his right to challenge, and ***that he might challenge thirty-five without showing any cause, and as many more as he could show cause against.*** After the jurors had been passed by Fries, Judge Chase, after asking them whether they were related to the prisoner, asked, 'whether they had delivered an opinion as to the guilt of Fries, or that he ought to be punished.' The first juror answered in the negative, and was sworn on the jury. The second observed, that in a conversation which he lately had, he had declared that Fries ought to be punished--he was directed by the court to be set aside. The question was ***943** then directed to be put by the clerk to each juror in this manner: 'Have you formed or delivered an opinion relative to the guilt of the prisoner?' This was put to three jurors; when, by the direction of the court, it was changed, and put as follows: 'Have you formed and delivered an opinion relative to the guilt of the prisoner?' There persons answered affirmatively, and were set aside. The prisoner challenged thirty-four. ***Twelve jurors having been passed, were sworn.*** John Fries called no witnesses, but at the end of the examination of every one on the part of the prosecution, Judge Chase reminded him of his right to put questions to them; but charged him not to put any one which might criminate himself. After the evidence closed, I addressed the jury in as brief a manner as I could, consistent with my duty. The court then charged the jury, and they retired to their room, and in about half an hour returned with a verdict of 'Guilty.' These are the general facts which took place. If I am asked any question, I will endeavour to answer it.

Questions by Mr. Randolph: Ques. Did you hear Mr. Lewis, when he threw down the paper which was handed him, declare that his hand should not be polluted by a prejudicated opinion? Ans. I have no recollection of hearing Mr. Lewis say anything at the time. Ques. Mr. Lewis declared that he would not address the court on a question of law in a criminal case. Did you hear any opinion given by the court, which warranted Mr. Lewis in the opinion that he was to be precluded from addressing the jury on the law? Ans. The court said that they would not suffer such cases as I have mentioned to be read to the jury, to mislead them, but I did not hear the court say that the counsel should not address the jury on the law. Ques. You have stated that both the judges came to your house, soon after you returned from court the first day. Was that their place of abode? Ans. It was not. Ques. You have stated that Judge Peters declared his apprehensions that the counsel for Fries would not proceed in his defence, and that you concurred in opinion with him. Had you any reason for apprehending it but your knowledge of the independence of the bar of Philadelphia? Ans. I think I understood, from some of the gentlemen of the bar, that the counsel for Fries meant to decline acting, and I have an impression on my mind that I heard something of that kind fall from Mr. Dallas. Ques. Did you express to the judges this knowledge? Ans. I believe I did not. Ques. **Did you ever know an opinion to be given in a criminal case before counsel were heard?** Ans. I never have, except so **far as charges to grand juries may be termed opinions on the law.** Ques. Did much conversation take place on the subject of this opinion? Ans. Situated as I was, I can't undertake to say that I had any conversation on the subject, until the court rose. Ques. Do you suppose that the conduct of the court and counsel attracted the notice of the jury? Ans. From the number of persons summoned, I conceive that a number of them knew not what was going on. Ques. From what did you infer the indignation of Mr. Lewis, if you did not hear any expressions that he used? Ans. From his countenance. Ques. Did that attract the attention of the court at the time? Ans. If they were looking at him, it must have attracted their attention. Ques. Did you hear Judge Chase say that the counsel must address themselves to the court on the questions of law? Ans. I have no recollection of hearing anything of that kind fall from Judge Chase. In criminal cases, however, there are a number of motions which must be made, exclusively to the court; such as a motion to quash an indictment.

Questions by Mr. Nicholson: Were your notes of the conversations which took place, made in the order of time in which they took place? Ans. Precisely so. Ques. What was there in Judge Chase's conversation that induced Mr. Lewis **to think that he should be precluded from**

reading the statutes of the United States to the jury? Ans. I know not why Mr. Lewis thought so, unless from the strenuous opposition which was made to them, on the first trial of Fries, on the part of the United States. Judge Chase said, that no case could come before him on which he had not an opinion on the law. Ques. Was there anything in the conduct of the court which induced Mr. Lewis to **believe that he was to be precluded from arguing the law to the jury, and caused him so often to declare, that he would not address himself to the court in a criminal case**? Ans. It appeared to me to be a misapprehension of Mr. Lewis. He supposed that it was intended to withdraw the question of law from the jury, and I thought the court did not set him right as explicitly as they might have done.

Questions by Mr. Randolph: You say, Mr. Rawle, that, after the papers were called in, you entertained an anxious hope, that the counsel would be induced to proceed with the defence of the prisoner. I wish to know your reasons for having such a hope, and why you became the agent of the court? Ans. My reasons were, that I did not wish to be put in the situation in which I was afterwards placed, and in which I never wish my greatest enemy to experience the pain which I felt, that of being obliged to prosecute a man arraigned for a capital offence, and who was without the assistance of professional gentlemen. I therefore was anxious that the counsel for Fries should proceed in his defence, and save me from so painful a situation. Ques. Did you take any notes of the transactions which took place on the first day of the trial? Ans. I did not.

William Rawle cross-examined by Mr. Harper: Ques. Did Judge Chase say anything to restrict the counsel from citing any statutes of the United States? Ans. He did not, in my hearing. Ques. Did he say that he disapproved of the conduct of the court in the first trial of Fries? Ans. He did not. Ques. Have you the paper now which Judge Chase they down? Ans. I have. (He here produced the opinion, and Mr. Harper read it to the court.) Ques. Did not the court, after the jury had returned a verdict of guilty against Fries, inform him that, if he had anything to say in arrest of judgment, he would be heard? Ans. They did, and the answer of Fries was, that he had nothing to say.

The paper containing the opinion of the court, as handed to the counsel for the defence, and referred to in the above testimony, is as follows:

The prisoner, John Fries, stands indicted for levying was against the United States. **The constitutional definition of treason is a question of law**. ***Every proposition in any statute (whether more or less distinct--whether easy or difficult to comprehend), is always a question of law***. ***What is the true meaning and true import of the statute, and whether the case stated comes within the statute, is a question of law, and not of fact***. The question on an indictment for levying war against (or adhering to the enemies of), the United States, is 'whether the facts stated do not amount to levying war.' ***It is the duty of the court in this, and in all criminal cases, to state to the jury their opinion of the law arising on the facts***; but the jury are to decide on the present, and in all cases, ***both the law and the facts***, on their consideration of the whole case. The court heard the indictment read on the arraignment of the prisoner, some days past, and just now on his trial, and they attended to the overt acts stated in the indictment. It is the opinion of the court that any insurrection or rising of any body of people, within the United States, to attain or effect, by force or violence, any object of a great public nature, or of public and general (or national) concern, is a levying war against the ***944** United States, within the contemplation and constitution of the United States. On this general position, the court are of opinion that any such insurrection or rising to resist or to prevent by force or violence, the execution of any statute of the United States for levying or collecting taxes, duties, imposts or excises; or for any other purpose (under any pretence, as that the statute was unequal, burthensome, oppressive, or unconstitutional), is a levying war against the United States within the constitution. ***The reason for this opinion is,*** that an insurrection to resist or prevent by force the execution of any statute, has a direct tendency to dissolve all the bonds of society, to destroy all order and all laws, and also all security for the lives, liberties, and property of the citizens of the

United States. The court are of opinion that military weapons (as guns and swords, mentioned in the indictment), are not necessary to make such insurrection or rising amount to levying war, because numbers may supply the want of military weapons; and other instruments may effect the intended mischief. The legal guilt of levying war may be incurred without the use of military weapons, or military array. The court are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges and peace officers should be insulted or resisted, or even great outrage committed to the persons and property of our citizens. The true criterion to determine whether acts committed are a treason or a less offence (as a riot) is quo animo the people did assemble. When the intention is universal or general, as to effect some object of a general public nature, it will be treason, and cannot be considered or construed or reduced to a riot. The commission of any number of felonies, riots or other misdemeanors, cannot alter their nature, so as to make them amount to treason; and, on the other hand, if the intention and acts combined amount to treason, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of houses or the like) are done, will show to what class of crimes the case belongs. The court are of opinion that, ***if a body of people conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanour***; ***but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime--whether by one hundred or one thousand persons, is wholly immaterial.*** The court are of opinion, that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; **some actual force or violence must be used in pursuance of such design to levy war,** but that it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war.

NOTE 2.

Proclamation.

By John Adams, President of the United States of America.

Philadelphia, May 23.

Whereas, the late wicked and treasonable insurrection against the just authority of the United States, of sundry persons in the counties of Northampton, Montgomery, and Bucks, in the state of Pennsylvania, in the year one thousand seven hundred and ninety-nine, having been speedily suppressed, without any of the calamities usually attending rebellion; whereupon peace, order, and submission to the laws of the United States were restored in the aforesaid counties, and the ignorant, misguided, and misinformed in the counties, have returned to a proper sense of their duty; whereby it is become unnecessary for the public good that any future prosecutions should be commenced or carried on against any person or persons, by reason of their being concerned in the said insurrection:--wherefore be it known, that I, John Adams, president of the United States of America, have granted, and by these presents do grant, a full, free, and absolute pardon, to all and every person or persons concerned in the said insurrection, excepting as hereinafter excepted, of all treasons, misprisions of treason, felonies, misdemeanours, and other crimes by them respectively done or committed against the United States; in either of the said counties, before the twelfth day of March, in the year 1799; excepting and excluding therefrom every person who now standeth indicted or convicted of any treason, misprision of treason, or other offence against the United States; whereby remedying and releasing unto all persons, except as before excepted, all pains and penalties incurred or supposed to be incurred for or on account of the promises. Given under my hand, and the seal of the United States of America, at the city of Philadelphia, this twenty-first day of May, in the year of our Lord eighteen hundred, and of the independence of the said States the twenty-fourty.

John Adams.

This paper, which was followed by the pardon of Fries himself, was the cause of much dissension in Mr. Adams' cabinet, and among his immediate supporters. The petitions on which it rested are as follows:

Petition of John Fries.

To the President of the United States:

The petition of John Fries respectfully showeth:--That your prisoner is one of those deluded and unfortunate men, who at the circuit court of this district, have been convicted of treason against the United States, for which offence he is now under sentence of death. In this awful situation, impressed with a just sense of the crime which he has committed, and with the sincerity of a penitent offender, he entreats mercy and pardon from him on whose determination rests the fate of an unfortunate man. He solicits the interference of the president to save him from an ignominious death, and to rescue a large and hitherto happy family, from future misery and ruin. If the prayer of his petition should be granted, he will show by a future course of good conduct, his gratitude to his offended country, by a steady and active support of that excellent constitution and laws which it has been his misfortune to violate and oppose.

Philadelphia Prison, May, 1800.

The subscribers most respectfully recommend the petitioner to the president of the United States. They are warmly attached to the constitution and laws of their country, which they will, on every occasion, and at every hazard, manifest their zeal to defend and support. But when they reflect on the ignorance, the delusion, and the penitence of the persons involved in the late insurrection, their pity supersedes every vindictive sentiment, and they sincerely think that an exercise of mercy will have a more salutary effect than the punishment of the convicts. It is on this ground that the subscribers, knowing the humanity as well as the fortitude of the president, venture to claim his attention on the present awful occasion, in favour of the wretched father of a numerous family.

The views of Mr. Adams at the outset may be gathered from the following letters:

Mr. Adams to Mr. Wolcott.

(Gibbs' Adm. of Wash. and Ad., 233.)

Quincy, April 26, 1799.

If a real reformation should take place in Northampton county, in consequence of a conscientious ***945** conviction of their error and crime, it would be happy; but a cessation of opposition from fear only, may last no longer than the terror.

I am, sir, your most obedient, John Adams.

Mr. Wolcott to Mr. Adams.

(2 Gibbs' Adm. of Wash. and Ad., 240.)

Phila., May 11th, 1799.

After a very laboured trial, Fries, who led the armed party at Bethlehem, has been convicted of treason. He continued tranquil until the verdict of the jury was returned, when and since he has been much affected. His composure during trial was not owing to stupidity, for though an illiterate man, he is not deficient in sagacity. He confidently expected to be acquirred, and his hopes are supposed to have been founded on the opinion of Mr. Lewis, who, on all occasions, since the commencement of the trial, has declared that the offence did not amount to treason. Both of the judges were decided in their definitions of the crime, and the evidence was complete, both as to the acts done, and of the intention to prevent the execution of the law. It is admitted on all hands, that the trial has been fair and impartial; the jury was respectable, and two of them were persons, upon the bias of whose political sentiments, calculations favourable to the prisoners were made. The jury received the charge at about six o'clock in the evening, when the court adjourned till ten. At the time appointed the verdict was returned--guilty. I am told this morning of a circumstance which proves

that the jury were governed by humane, delicate, and honorable sentiments. When they retired, it was agreed that without previous argument among themselves, the opinion of each person should be given by ballot. By this trial it was found that the jury were unanimous.

Mr. Adams to Mr. Wolcott.

(2 Gibbs' Adm. of Wash. and Ad., 266.)

Quincy, May 17, 1799.

I thank you, sir, for the favour of the 11th, which I received last night. The termination of the trial of Fries, is an important, an interesting, and an affecting event. I am unable to conjecture the grounds of Mr. Lewis' opinion, and wish I had a sketch of them. Is Fries a native or a foreigner? Is he a man of property and independent, or is he in debt? What has been his previous life? industrious or idle, sober or intemperate? It is of importance to discover, if possible, the great men alluded to by Fries in his observation to Mr. Wood, as at the bottom of the business, and the evidence of any agitator among the insurgents ought to be collected. It is of moment, also, to ascertain whether the insurgents had any general views, or extensive communications with others of similar dispositions in other counties, or correspondences with other states. We ought also to inquire whether Fries is the most culpable among the guilty, if that can be known. It highly concerns the people of the United States and especially the Federal government, that in the whole progress and ultimate conclusion of this affair, neither humanity be unnecessarily afflicted, nor public justice essentially violated, nor the public safety endangered.

I have the honour to be, sir, your most obedient and humble servant,

John Adams.

Mr. Hamilton, in his letter on the public conduct of Mr. Adams, p. 41, in treating of the pardon, says:----

'The last material occurrence in the administration of Mr. Adams of which I shall take notice, is the pardon of Fries, and other principals in the late insurrection in Pennsylvania. It is a fact, that a very refractory spirit has long existed in the western counties of that state. Repeatedly, have its own laws been opposed with violence, and as often, according to my information, with impunity. It is also a fact which everybody knows, that the laws of the Union, in the vital article of revenue, have been twice resisted in the same state, by combinations so extensive and under circumstances so violent, as to have called for the employment of military force, once under the former president, and once under the actual president; which, together, cost the United States nearly a million and a half of dollars. In the first instance it happened, that by the early submission of most of the leaders upon an invitation of the government, few offenders of any consequence remained subject to prosecution. Of these, either from the humanity of the jurors or some deficiency in the evidence, not one was capitally convicted. Two poor wretches only were sentenced to die, one of them little short of an idiot, the other, a miserable fellow in the hindmost train of rebellion; both, being so insignificant in all respects, that after the lenity shown to the chiefs, justice would have worn the mien of ferocity, if she had raised her arm against them. The sentiment that their punishment ought to be remitted was universal; and the president, yielding to the special considerations, granted them pardons. In the last instance, some of the most important of the offenders were capitally convicted, one of them, by the verdict of two successive juries. The general opinion of the friends of the government demanded an example, as indispensable to its security. The opinion was well founded. Two insurrections in the same state, the one upon the heels of the other, demonstrated a spirit of insubordination or disaffection which required a strong corrective. It is a disagreeable fact, forming a weighty argument in the question, that a large part of the population of Pennsylvania, is of a composition which peculiarly fits it for the intrigues of factious men, who may desire to disturb or overthrow the government. And it is an equally disagreeable fact, that disaffection to the national government is in no other state more general, more deeply rooted, or more envenomed.

The late Governor Mifflin himself informed me that, in the first case, insurrection had been organized, down to the very liberties of Philadelphia, and that, had not the governor anticipated it, a general explosion would speedily have ensued. It ought to be added, that the impunity so often experienced, had made it an article in the creed of those, who were actuated by the insurgent spirit, that neither the general not the state government dared to inflict capital punishment. To destroy this persuasion, to repress this dangerous spirit, it was essential that a salutary rigour should have been exerted, and that those who were under the influence of the one and the other, should be taught that they were the dupes of a fatal illusion. Of this Mr. Adams appeared so sensible, that while the trials were pending, he more than once imprudently threw out, that the accused must found their hopes of escape, either in their innocence, or in the lenity of the juries; since from him, in case of conviction, they would have nothing to expect. And, a very short time before he pardoned them, he declared (of these two facts, my evidence is inferior to that which supports the other allegation of this letter, yet it is so strong that I feel myself warranted to state them), with no small ostentation, that the mistaken clemency of Washington on the former occasion, had been the cause of the second insurrection, and that he would take care there should not be a third, by giving the laws their full course against the convicted offenders. Yet he thought proper, as if distrusting the courts and officers of the United States, to resort, through the attorney general, to the counsel of the culprits, for a statement of their cases; in which was found, besides some objections of form, the novel doctrine, disavowed by every page of our law books, that treason does no consist of resistance by force to a public law, unless it be an act relative to the militia, or other military force. And ***946** upon this, or some other ground not easy to be comprehended, he of a sudden departed from all his former declarations, and against the unanimous advice of his ministers, with the attorney general, came to the resolution, which he executed, of pardoning all those which had received sentence of death. No wonder that the public was thunder-struck at such a result, that the friends of government regarded it as a virtual dereliction; it was impossible to commit a greater error. The particular situation of Pennsylvania, the singular posture of human affairs, in which there is so strong a tendency to the disorganization of the government, the turbulent and malignant humours which exist, and are so industriously nourished throughout the United States; everything loudly demanded that the executive should have acted with exemplary vigour, and should have given a striking demonstration, that condign punishment would be the lot of the violent opposers of the laws. The contrary course, which was pursued, is the most inexplicable part of Mr. Adams' conduct. It shows him so much at variance with himself, as well as with sound policy, that we are driven to seek a solution for it in some system of concession to his political enemies; a system the most fatal for himself and for the cause of public order, of any that he could possibly devise. It is by temporizings like these, that men at the head of affairs, lose the respect both of friends and foes; it is by temporizings like these, that in times of fermentation and commotion, governments are prostrated, which might easily have been upheld by an erect and imposing attitude.'

'The conduct of the president,' (in reply to this it is urged in an answer to Mr. Hamilton's letter by 'A Citizen of New York,' p. 25,) 'in the pardoning of Fries and others, is truly meritorious. Notwithstanding the censure that his enemies have issued against him, he exercised a prerogative of mercy, and restored a number of unfortunate victims to their families, their friends, and the world. Public indignation would have been aroused by their execution, and consequences of an alarming nature would have ensued, in which even government itself would have received a wound. The genius of a republic is mildness; the wheel, the gibbet, the guillotine, may answer an advantage under the reign of terror; but with freemen they are objects of horror and detestation. They suit the calamitous reign of a Caligula, and not the enlightened period in which you demand their exercise. Recollect, sir, that this manly resistance to these laws, originated in a persuasion that they operated unequally, and plundered the public indirectly; that excisemen and public officers consumed the greatest portion of a tax that was

collected by threats, by insults, and oppression; a tax that exposed the circumstances of men by daily visitations and nocturnal searches; a tax that has emanated from the criminal sentiment, that there is a swinish multitude who must be governed by deception; and who would raise up their heads against direct application. The public mind, at the time of resistance to the tax, was extremely agitated: it was penetrated with a sense of its injustice and the extent of its oppression. The military that was raised on that occasion, was in tenfold adequate to suppress the insurrection. On their approach to East Town disaffection was gone, and only a few scattered individuals could be seized as the violaters of the laws. The return of the military was attended with circumstances of disgrace, that will only be recorded in the pages of infamy and crimes. Every place they halted at some act of madness, licentiousness, or folly was perpetrated, to the lasting dishonour of the citizen soldier. Did the pardon of Mr. Adams, under the considerations that have been mentioned, seem like a concession to his political enemies? Can that be deemed a temporizing spirit which is regulated by justice and tempered by an amiable clemency? Could he lose any respect as executive magistrate, with discerning friends or the warmest enemies, by one of the most agreeable features of the administration? That he was at variance with himself as well as with sound policy, is, perhaps, no more than the vagrant sentiment of a sanguinary bosom and a disappointed enemy. Cruel measures are often ruinous, and a government is never better established, than when supported by the enlightened will of a country. Barbarity awakens enemies, mercy inspires friendship and ameliorates the heart. That insurrection has been organized down to the very liberties of Philadelphia, is the suggestion of guilty apprehension, or the extravagant sentiment of a disordered imagination. That Mifflin could have advanced such an opinion, will not, cannot be credited; but the dead can be quoted to justify a falsehood, whilst the living, to answer certain purposes, may injure their memory.'

Mr. Pickering, in his review of the Cunningham Correspondence, p. 95, adds:----

'I have one more case to mention, on which I shall be sparing of comments, and content myself with a brief statement of facts: it is the case of Fries of Pennsylvania, while convicted of treason, the second time, on a new trial, ordered on a supposed incorrectness discovered after the first conviction, and allowed by the court, though not affecting the facts on which the prosecution had taken place, nor the construction of the law applied to the facts; in other words, not affecting the merits of the case. Judge Iredell, of the supreme court of the United States, presided on the first trial, and was assisted by Judge Peters, the district judge of Pennsylvania. On the second trial Judge Chase presided, and Judge Peters sat with him. The first trial had occupied nine days. Judge Chase considered, that much irrelevant matter had been suffered to be introduced in the first trial, in respect to cases in English books, occurring in times and under circumstances which rendered them inadmissible on trials for treason under the constitution of the United States; and made known this opinion in writing, that such cases would not be permitted to be introduced in the trial of Fries. Upon this, William Lewis and A. J. Dallas, of counsel for Fries, refused to act; and advised Fries not to accept of any other counsel, should the court offer to assign any; which advice Fries accepted. On the 24th of April, 1800, the trial commenced. On the evening of the second day, the evidence was closed; and the court charged the jury; who, retiring for two hours, brought in a verdict of guilty. On the second day of May, (the last day of the session,) Fries was brought into court and received sentence of death. Mr. Lewis, in his deposition (to be used on the impeachment of Judge Chase), states, that, soon after sentence of death had been pronounced on Fries, Thomas Adams, son of the president, told him, that 'his father wished to know the points and authorities which Mr. Dallas and he had intended to rely on, in favour of Fries, if they had defended him on the trial. The attorney-general of the United States, Charles Lee, made the like request to Mr. Lewis and Mr. Dallas. These gentlemen made their statement accordingly, and sent it to Mr. Lee; who, on the 19th of May, acknowledged the receipt of it, and informed them that he had immediately laid the same before the president, who directed him to return to them his thanks for the trouble they had so obligingly taken.' It

would not have been difficult to anticipate the consequence of consulting, in this case, only the counsel of the convict: Fries was pardoned. It was a popular act in Pennsylvania. My removal from office was on the 12th of the same month of May, as I have already stated, with its motives. I content myself with just remarking, that Mr. Adams sought not any information in this case from ***947** the persons best qualified to give it impartially--the judges of the court; especially when the presiding judge was Samuel Chase, his old congressional friend, of whom he gives this honourable character: 'I have long wished for a fair opportunity of transmitting to posterity my humble testimony to the virtues and talents of that able and upright magistrate and stateman.' Nor would it have been amiss to have applied to William Rawle, district attorney of Pennsylvania, who had conducted both the trials, and from whose fair mind might have been expected information quite as correct as that which could be derived from the counsel of the convict. But if to pardon was the object, it was expedient to consult the counsel only. Mr. Dallas in his deposition (also taken in the case of the impeachment of Judge Chase) avowed the leading motive with him and Mr. Lewis, in eventually refusing to act as counsel for Fries. He says, 'I may be permitted, likewise, to discharge a duty to the counsel, as well as to all the parties interested, in observing, that Mr. Lewis and myself were greatly influenced, in the conduct which we pursued, by our opinion of the means most likely to save the life of Fries, under all the circumstances of the case.' Judge Chase says, they refused to appear for Fries, 'because they knew the law and the fact to be against them, and the case to be desperate: and supposed that their withdrawing themselves, (under the circumstances above intimated,) in the event of a conviction, which from their knowledge of the law and the facts they knew to be almost certain, might aid the prisoner in an application to the president for a pardon.' General Hamilton (in the letter of 1800, on the conduct and character of Mr. Adams), noticing this case of Fries, and the extraordinary step of consulting only the culprit's counsel, makes this reflection on the pardon: 'We are driven to seek a solution for it in some system of concession to his political enemies; a system the most fatal for himself, and for the cause of public order, of any that he could possibly devise. It is by temporizings like these, that in times of fermentation and commotion, governments are prostrated, which might easily have been upheld by an erect and imposing attitude.' The reflections of Mr. Adams are of quite a different complexion. In his tenth letter in the Boston Patriot (May 17, 1809), remarking on his responsibility for all his executive acts, and, therefore, that it was his right and duty to be governed by his own mature and unbiased judgment, though unfortunately it may be in direct contradiction to the advice of all his ministers, he says, 'This was my situation in more than one instance. It had been so in the nomination of Mr. Gerry; it was afterwards so in the pardon of Fries; two measures that I recollect with infinite satisfaction, and which will console me in my last hour.' How much cause for satisfaction and consolation in the case of Mr. Gerry, the reader will be able to judge, from the proceedings exhibited in this review of that gentlemen as Mr. Adams's minister to the French republic. As to Fries, he having been at the head of a second insurrection in Pennsylvania, to prevent, by force, the execution of the laws enacted by congress for levying taxes laid in pursuance of the express provisions of the constitution, and, in 1798, of the most pressing necessity, for the common defence of the country, and the protection of its great and essential commercial interests, against the hostilities of the French republic; under these circumstances, the public welfare appeared to demand a signal example of inflexible justice. We see, however, that in various acts of President Adams, combined with their apparent motives, he can glory, and draw consolation, where other men would find cause only for profound regret.'

The letter from Mr. Lewis and Mr. Dallas, on the grounds on which a new trial was asked for, I have obtained in manuscript from the papers of the late Mr. Rawle:

Sir: In compliance with your request, we shall now proceed, briefly, to communicate the points and authorities, which we intended to urge in the case of the United States against Fries, if the conduct of the court had not, unexpectedly, deprived us of every hope of success from these

means of defence. It may be proper to premise that on the morning appointed for the trial, the presiding judge, in the presence of the prisoner, the jury, and a numerous audience, delivered to the clerk a paper which, he said, contained the opinions of the court, formed, after mature deliberation, upon the law of treason: directed copies of the paper to be given to the attorney of the district and the prisoner's counsel; and declared his intention to present a copy of it to the jury, as soon as the case was opened on the part of the United States. He referred, likewise, in terms of disapprobation, to the arguments which (as he was informed) had been used in favour of the prisoner on the former trial, and announced a determination to prevent his counsel from citing any authorities at common law, or, indeed, any authorities prior to the English revolution. The cause thus prejudged; the province of the advocate thus circumscribed; and the minds of the jury thus prejudiced; we deemed it a duty we owed to the prisoner, to the public, and to ourselves, to surrender the task, which the court had previously assigned to us; for, as there existed no controversy in relation to the facts, and as the jury would naturally rely on the judgment of the court in relation to the law, we had not the vanity to suppose, that any effort, on our part, could do more than give to the trial the form and ceremony of defence; while our acquiescence might afford some sanction to the establishment of a precedent, hostile to the rights of the citizens, ruinous to the trial by jury, and degrading to the character of the profession. The candour and humanity which have induced you to interpose in the present mode, have also, however, influenced our decision; and if you will allow for the different effect of arguments publicly delivered before a jury entitled, in a capital case, to decide both on the law and the fact (with whom even a doubt would lead to an acquittal), we confidently offer for your consideration the following general positions: I. That there has been a mis-trial. II. That offence charged is not treason. III. That a new trial ought to have been awarded.

I. That there has been a mis-trial:--1. By the judiciary act it is declared 'that in all cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence.' 1 Stat. (Swift's Ed.) p. 67, ß 29. 2. The offence was committed by Fries in the county of Northampton, but his trial was in the county of Philadelphia. 3. The language of the act is mandatory 'the trial shall be had in the county where the offence was committed;' and some 'great inconvenience' must appear judicially to the court, before they can exercise a discretion of ordering a trial in any other county. No such inconvenience was suggested on the record or even stated at the bar; if it existed in the present instance, it must forever exist in all future cases and the law be rendered altogether void. 4. It is true that an ineffectual motion was made on the first trial to change the place of trial; but it was overruled on grounds which have no application to the second trial: For--1st. There was no inconvenience owing to the riotous state of the county of Northampton, at the time of the second trial. U. S. v. Insurgents [Case No. 15,442]. 2d. And the court (being bound to notice everything that was essential to an exercise of jurisdiction) might have ordered the trial in the proper county before it was commenced in Philadelphia, by the finding of a new indictment, a nol. pros. having been entered on the old one. 5. For any mis-trial, on account of ***948** jury process, or on any other account, the verdict must be set aside. 6 Coke, 146; Hawk, P. C., bk. 2, c. 47, ß 11; Id. bk. 2, c. 27, ß 108.

II. That the offence charged is not treason. 1. The constitution defines treason to be 'levying war against the United States,' &c., and the act of congress inflicts the punishment of death of the person convicted of the crime. 1 Stat. p. 16; Const. art. 3, ß 3; Id. 100, ß 1. 2. As the spirit of the constitution is opposed to implied powers, and constructive expositions, we are bound to take the plain manifest meaning of the words of the definition, independent of any glossary which the English courts, or writers, may have affixed to the words of the English statute. 3. The plain, manifest meaning then, is 'A forcible opposition to the powers of the government, with the intent to subdue and overthrow it.' 4. This meaning may embrace a forcible attack upon the legislature (or perhaps any other principal

department) to compel the repeal of a law. 5. But it does not embrace the case of an opposition to the execution of a particular law. 6. It seems, indeed, upon principle, to be a confusion of crimes to include in the same class, a forcible attempt to subvert and overthrow the power of government, and a mere resistance of subordinate agents, in carrying a particular law or regulation into effect. 1 Hale, P. C. 146; Fost. 219. 7. If Fries and his companions had opposed in arms, the troops that were sent against them, it would clearly have been an act of treason: but in the conduct which they pursued, we can only perceive sedition, riot and rescue. 8. Such, likewise, has been the legislative construction and discrimination between the cases; for, unquestionable, the penal law and sedition act, define and punish the offences committed by Fries and his companions, as distinct from the offence of treason; and when an offence is classed under a particular head in the penal code, it is unconsistent to search for it, and furnish it under another head. 1 Hale, P. C. 146; Fost. 200, 201; Keilw. 75. 9. But even if the English decisions, and writers, are considered as giving a construction for our use, to the same words employed in the statute of Edward III. they do not extend so far as to pronounce an opposition to the execution of a particular law to be treason, by levying war. 10. At common law there is not a single case, or dictum to support such a doctrine; though, indeed, in the reign of Henry VIII. rescue was made treason by a statute, which was afterwards repealed. 11. Under the statute of Edward III. there have been many wild constructive treasons by levying war; of which Coke, Hale and Blackstone solemnly complain; but none, even in the bad times of judicial history of England, have gone so far as the present case. 4 Bl. Comm. 69, 75, 88. 12. We cannot trace a single instance of a riot in opposition to the execution of a particular law, being prosecuted as treason in England, though the history of that nation abounds with such insurrections. 1 Hale, P. C. 132; Id. 133, 134; Fost. 254-258; 3 Inst. 22, 23. 13. The constructive cases in England, turn upon universality of object, in opposition to the power of the government. The case of _____ v. _____, 4 State Tr. 844, 900, was decided on that ground; for, if the rising had been to suppress all bawdy houses, it would have been equally with the principle, as the rising to suppress all meeting houses. So, a rising to alter or reform religion, which can only be done by force or the legislature, is treason. But Lord George Gordon's trial and acquittal, established the doctrine for which we contend. It is true, Lord Mansfield there declares an opposition to militia law to be treason. But we apprehend the reason of this is, because, in effect it is the same to oppose the militia, or the execution of the militia law, as to oppose the regular forces, which has always been held to be treason, and the expression used by Lord Mansfield is confined to an opposition to the execution of this particular kind of law, and does not extend to any other, as would, we think, have been the case, had the rule been the same in other cases. 4 Bl. Comm. 81; 1 Hawk. P. C. c. 17, ß 28.

III. That a new trial ought to have been awarded. 1. After the jury were sworn, and the evidence partly given, one of the jury separated from his brethren, and slept at his own lodgings. Affidavit of Mr. Barnet. 2. During this separation, he conversed with one person on the subject of the trial, 'declaring that the evidence of a certain witness went hard against the prisoner;' and being told by another person, that 'he supposed the evidence would go hard against Fries.' Affidavit of Isaac Roush. 3. Hence, in the contemplation of the law, he was committed by an expression of his own opinion, and influenced by the expression of the opinion of another. 4. The law and practice of Pennsylvania, (in the federal as well as the state courts,) have uniformly opposed the separation of the jury in a capital case, though necessity has compelled an adjournment of the court. 5. The law of England is peremptory, that a jury in a capital case cannot be discharged without giving a verdict, and that they cannot give a privy verdict. From Fost. 25, ß 28, it appears that the meaning of the expression 'can't be discharged' is, that the jury can't be permitted to separate, and the reason why a privy verdict cannot be received in a capital case, is for fear of tampering, and corruption, which is much stronger than the case of separating before they have agreed. Co. Litt. 227; Hawk. bk. 2, c. 47, ß ß 1, 2; 4 Bl. Comm. 360; 2 Strange, 984. 6. It is true, that in civil cases, a separating works only a punishment of

the delinquent juror; and in misdemeanors, the rule is not strictly enforced, though an able counsel has given a formal opinion, that the separation would be a mis-trial even in a misdemeanour. Barnes Notes Cas. 441; Canning's Case, 10 State Tr. (Harg. Ed.) 407 (n). 7. The cases put by Hale, will be found to admit of a clear explanation, consistent with present position. 1st. The first case is not stated to have been a capital one, and if it was a capital one, the jury was discharged in consequence of the separation and a new jury sworn. 2 Hale, 295. 2d. The second is either a case of misdemeanour or a trespass; and the whole proceeding was matter of consent. Id. 296. 8. But the law has been adjudged. On the question, 'whether after a prisoner is upon his trial, and the evidence of the prosecution is given, the jury may separate for a time, which is the consequence of an adjournment to another day,' the judges of England were decidedly in the negative. Lord Delamere's Case, 4 State Tr. (Harg. Ed.) 232; 3 Inst. 30. 9. And on the principle of this decision, the lord high steward declared that a verdict and judgment given after such separation would be erroneous, and liable to be reversed. 10. This remained the law of the land, so that there could be neither an adjournment of the court, nor a separation of the jury, in a capital case, till the late trials of Hardy, Tooke, &c. But the alteration then introduced was limited by the necessity that called for it--to an adjournment of the court, not extended to a separation of the jury. Accordingly, in none of the instances did the jury separate.

We are, sir, your most obedient humble servants.

[Signed,] Wm. Lewis.

A. J. Dallas.

The reception by the president of this memorial, is thus treated by Mr. Pickering in a letter to Mr. Wolcott, dated,

Philadelphia, June 24, 1800.

In conversation, lately, with Mr. Liston, the pardoning of the three persons, Fries, Gettman and Hainey, Northampton insurgents, convicted of treason, and sentenced to be hanged, was mentioned, and the extraordinary measure of the president, in consulting Mr. Lewis and Mr. ***949** Dallas, the prisoner's counsel, instead of the judges, to get information, either as to the law or the facts in the case; and, that Lewis and Dallas gave their statement and opinion in writing, expressing it to be done at the request of the president. 'Yes,' said Mr. Liston, 'Mr. Dallas showed me their letter to the president;' and then spoke of its contents, mentioning the opinion of those gentlemen to the best of my recollection, that the acts of those insurgents amounted to sedition, but not to treason. But the fact of Mr. Dallas' showing the letter to Mr. Liston, was the principal and only thing you desired me to state, and of that I am certain.

With sincere respect and esteem, &c.,

T. Pickering.

In connection with Fries, a series of parties, supposed to be his confederates, were indicted, several for treason, and the remainder for misdemeanours in obstructing the course of justice. All were ultimately pardoned.

Fries, it is said, opened a tin-ware store in Phidadelphia, where, profiting by the custom his notoriety drew to him, he acquired a respectable fortune, and a respectable character. See Sawyer's Life of Randolph, 19.

Whart.St.Tr. 610, 9 F.Cas. 924, No. 5127

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