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TRIAL

Col. Aaron Burr.

RICHMOND, May 25.

Circuit Court of the U. States for the fifth  
circuit and District of Virginia.  
Present John Marshall, Chief Justice of  
the U. States.

And CECIL GREEN, Judge of the  
District of Virginia.

Continuation of the Debate, on Mr. Hay's  
motion to commit Aaron Burr.

At this moment the grand jury returned  
into court, and their names being called  
over, requested an adjournment. After  
some desultory conversation between their  
Foreman and the Chief Justice, respecting  
certain points of form, they were accordingly  
adjourned till tomorrow 10 o'clock.—  
They immediately retired from the court,  
when Mr. Hay arose to proceed with the  
argument.—He spoke, in substance as follows:

I stand here, sir, engaged in the performance  
of a most serious duty. I appear here  
in a cause, which involves the character of  
our government. I come here to charge  
Aaron Burr with High Treason against the  
United States; with "levying war" upon  
his country. Sir, it was natural to suppose,  
that such a serious charge would have  
made a most serious impression upon A. B.'s  
mind; that he would have roused all the  
energies of his understanding in his service;  
in vindicating himself against such heinous  
charges, and not in casting imputations upon  
the government. Why then, sir, does he  
turn from himself against the administration.  
Why these complaints of persecution,  
which have fatigued our ears? I most  
solemnly deny the charge. I most confidently  
swear, that there is not a tittle of evidence  
to support it. None can be produced,  
unless it be a persecution, that the  
government brings him before a legal tribunal,  
where his guilt and innocence will be  
impartially established. A. Burr stands accused  
of the highest crimes and misdemeanors;  
he stands charged with a deliberate design  
of involving his country in all the horrors  
of a civil insurrection, or of entangling  
her in a war with a foreign nation. This  
is the true question before the court, and  
instead of meeting this charge with the energy  
and firmness which became him; instead  
of confronting it with his evidence;  
he complains forsooth of persecution. And  
where, sir, is this tremendous persecution?  
"Because he was sent here by a military  
authority?" But could A. Burr have been  
tried in the country where he was arrested?  
Was Blennerhassett's Island in the  
Mississippi Territory? Or ought he not to  
have been conveyed to that judicial district,  
which possessed a competent jurisdiction?  
But if A. Burr ought to have been sent  
here, by what number of men should he  
have been escorted? Was it by one man  
only; from whom he could have been so  
easily rescued, and whose vigilance he could  
most probably have eluded? Or ought he  
to have been conveyed, as he really was, by  
the energy of men, like Perkins, whose un-  
shrinking firmness and whose humanity (in  
the presence of A. Burr himself, I avow it,  
let him deny it if he can!) had completely  
qualified him for the safe transportation of  
his prisoner?

But, sir, when this cry and spell of per-  
secution are once excited, it is not easy to  
set bounds to its fury? Not contented with  
investing against the pretended persecution  
of the government—a government, which  
never did persecute—a government, which  
cannot persecute; and which will forever  
stand firm in the affections of the people,  
from the integrity and intelligence which  
mark its measures—not contented with la-  
vishing their complaints against it, the coun-  
sel for the prisoner have even turned against  
the humble instruments who conduct the  
prosecution. They seriously complain,  
that we have given them no previous notice  
of this motion—and there are the very men  
who have so often offered motions to this  
court, without the slightest intimation to  
ourselves.—Sir, I most positively assert, that  
no notice in the present case ought to have  
been given. I shall not pretend to assert,  
that A. Burr was disposed under the present  
state of things to effect his escape;—  
But I say, that supposing such to have been  
the fact, and supposing that, availing him-  
self of the information which we had im-  
parted, he should have taken to flight; I  
appeal to the candor of every impartial  
man; I appeal to the candor of the opposite  
counsel themselves, whether I should not  
have been guilty of a most gross violation of  
my duty.

But they say, he ought not to be  
committed, because the presence of the  
Grand Jury suspends the authority of this  
court. But where are the precedents  
which justify this position? I have  
not made many researches into this  
subject, because I did not suppose  
that there was a single sceptic at this  
bar who would deny the universality of  
the proposition that we have laid down,  
that it was the right of the court to  
commit in every case, where they deemed  
it proper. They say that in this

case, the powers of the Grand Jury and  
the Court are concurrent. Strange  
that they should forget the immense  
difference between their powers!—  
There is a difference in the evidence  
necessary to convince them. We are  
not bound to submit the same testimony  
before the Grand Jury which we  
may produce before this court; much  
less before a petit jury. Affidavits may  
convince the court that it is proper to  
commit; but it is not yet perfectly cer-  
tain whether it be proper to exhibit  
them before a Grand Jury. I am, how-  
ever, unacquainted with the opinion,  
which the court entertain on this point;  
but I will boldly enquire, whether I  
should discharge my honest duty, were  
I to submit my indictments before the  
Grand Jury at that moment, when I  
have not all the material evidence  
which we may possess? Sir, these gen-  
tlemen may call their groundless cen-  
sures upon me; but in vain; all their  
clamours will never move me from my  
purpose. The course which I am pur-  
suing is sufficient to satisfy my own  
conscience; and it is indifferent to me  
whether ten or ten thousand men  
should join in my condemnation.

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

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

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

We expect Gen. Wilkinson here in a  
few days. We have an affidavit which  
positively states, that an express to N.  
Orleans to command his presence on  
this trial, was met on the frontiers of  
the Mississippi Territory. We have  
also letters from the attorney-general of  
the U. States explicitly stating, that gen.  
Wilkinson has been officially authorized  
to leave the army of the United States  
and to select whatever mode of trans-  
portation he may think proper. [Here  
Mr. H. read the affidavit, shewing that  
the express to general W. had been seen  
in Athens, in the state of Georgia.]  
In the mean time, what is Col. Burr's  
situation? It is completely optional with  
him, whether to stay here and face his  
accusers; or to avail himself of his li-  
berty and leave the United States. We  
call upon this court to exercise the au-  
thority with which they are invested;  
and by binding over Col. B. as well on  
the charge of High Treason, as of a mis-  
demeanor, to detain him here for a sat-  
isfactory trial.

Mr. Hay said he scarcely expected to have  
been asked, why general Wilkinson was not  
here? The gentleman himself has said,  
that he is a general. Can he then leave his  
army at any time, and without the permis-  
sion of the government? Make, however,  
a computation of time. The attorney gen-  
eral left this city on the 4th or 5th of April.

he reached Washington on the 7th or 8th.  
Allow then reasonable time for an express  
from Washington to N. Orleans; and for a  
man of gen. W.'s age and bulk to travel to  
this city, and is it probable that he could  
have arrived here before this period? If he  
availed himself of the liberty and means to  
come by water; the gales have lately been  
very severe. And even two of the Grand  
Jury had assured him that if gen. W. was  
exposed to the late tempestuous weather,  
he would probably never see the United  
States.

Mr. Wickham has expatiated upon the  
attempts made to prejudice the public op-  
inion through the medium of the press.  
Sir, a great deal has been said; and a great  
deal will yet be said on this transaction. But  
are the presses shut against col. Burr when  
even in this very city certain presses have  
been found to vindicate his motives and de-  
signs? But what of all this? The public  
mind is hostile to any encroachments upon  
the liberty of the press; and it ought to be  
so. Where then a crime of such gigantic  
evil arises in this country, like the one at-  
tributed to A. Burr, the printers will speak  
and they ought to speak; the purest motives  
will command them to speak. And if there  
have been publications against col. Burr;  
innumerable communications have also ap-  
peared in his favor; and if these publica-  
tions have contained the severest strictures  
upon him, they have resulted from his own  
character and conduct; he has no right to  
complain.

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

The gentlemen on the other side, contin-  
ued Mr. Hay, do not do us justice. They  
charge us with persecution and oppression.  
Sir, I never contemplated or wished to hurt  
A. Burr. I scorn it. I look not to him.  
I look only to the duties which I am solemnly  
bound to perform. One remark more,  
and I have done: gentlemen on the other  
side insist upon the insufficiency of our evi-  
dence. Because we have withheld our in-  
dictments, from the Grand Jury, they have  
hastily inferred, that we feel our evidence  
to be too feeble to satisfy the jury. They  
are mistaken sir. I assure them that they  
are mistaken. I conscientiously believe that  
we have evidence enough, even throwing  
out the depositions themselves, to satisfy the  
Grand Jury of the guilt of A. Burr. But,  
sir, peruse indeed would it be for us under  
the present state of things to submit our  
case before the Grand Jury on the evidence  
before us, when we are every moment ex-  
pecting better.

MONDAY, JUNE 1.

Present, Chief Justice Marshall.  
The Grand Jury met at 10 o'clock: and were  
adjourned till tomorrow 10 o'clock.

Mr. Hay observed, that it was extremely  
disagreeable for him to detain the Grand Jury;  
but he knew of no better expedient under exist-  
ing circumstances; that he had received no new  
information respecting General Wilkinson; and  
that the only new communications which he had  
received by the last western mail, was a mass  
of affidavits from Chillicothe, drawn up by persons  
who had defended the river with Colonel Burr, &  
that though their affidavits were extremely im-  
portant, they could not be brought into court as  
evidence, there being no evidence that the person  
before whom they were taken was really a  
magistrate.

TUESDAY, JUNE 2.

Present, Judges Marshall and Griffin.  
The Grand Jury met and were adjourned till  
tomorrow 10 o'clock.—There were no other  
proceedings connected with the trial.

Mr. Edmund Randolph addressed the court  
to the following effect:  
Sir, it would have been impossible for us, even  
had we received due notice of this motion, to  
have availed ourselves of the time that was al-  
lowed to us. That would have been impossible,  
because the enormity of the proposition itself  
would have baffled all our consideration and all  
our researches. Mark the course, sir, which has  
been pursued towards my unfortunate client.  
First he was brought here under a military  
escort. Then that little folio of depositions  
and affidavits was laid before your honour:  
Then the charge of treason: and then that lit-  
tle cock-book which was destined to attend this  
trip on a foreign expedition! You heard it all,  
sir, and what did you say? You bound Col.  
Burr to bail, simply on the charge of a misde-  
meanor, to appear here at the opening of the  
court; not contented with this security, you  
superadded, that he was not to leave the court  
until it had discharged him. You opened the  
door too for an ulterior prosecution; you de-  
clared, that if the attorney for the U. S. should  
obtain any additional evidence, the judgment  
which you then rendered, would not prevent his  
indicting Col. B. on the charge of treason.  
Sir, thus stands the case, as it was understood  
by the whole universe. On Friday we came  
to meet the world; Friday however passes away  
and nothing is done.—On Saturday, we came  
here again; Saturday also passes away and no-  
thing is done. But on Sunday, sir, is broach-  
ed this new-fangled doctrine, which now excites  
our astonishment. They demand precedents,  
sir, for our conduct; and who are they that re-  
quire it? Why, sir, they that take things out  
of the ordinary course of the law. For thirty  
years, I never saw such a proceeding: I have  
never read of such a one in the English books;  
and yet these gentlemen call upon us for pre-  
cedents.

If we are asked for our reasons, sir, we  
should have enough to offer. And first, a judge  
in the Federal Court, sitting in the capacity  
which your honor now fulfils, would be in the  
same relation to the accused as an examining  
judge in the courts. Burr, sir, whoever invited  
a single magistrate or a state court to segment  
the bail of any individual in the situation of  
Col. Burr? If a man be bound in a distant  
county to answer to a misdemeanor, another

crime was to be brought against him to be pre-  
sented on the very same evidence, have you, sir,  
ever known the trying court to invade his bail?  
There never was such an example, sir.

Mr. Bott's remark, Sir, is not to be answer-  
ed. You are changing the constitutional organ  
of justice. You are completely blotting out the  
functions of a Grand Jury. The witnesses will  
be all produced before you; but no, improper  
as this proceeding will be, it is still less so than  
that which will actually pursue: None of the  
U. S. witnesses will be bro't before you, but  
those whom they may think it politic to in-  
troduce; and depend upon it, that such testimony  
will be garbled for the ears of this court, as may  
be expected to bias their judgment.—Well,  
Sir, and what will be the consequence? When  
the Grand Jury are about to retire to their own  
chamber, they will be told that you have de-  
manded additional bail.—Are you then, Sir, to  
be a pioneer of blood for the Grand Jury?—Is  
not the precedent outrageous, Sir? The boasted  
principle, that no man is to be condemned  
but upon the verdict of 24 of his peers, is gone.  
Throughout this town, it will be universally re-  
ported that you have solemnly declared A. Burr  
to be guilty of High Treason against the U. S.  
and some of those to whom the rumour may ex-  
tend may hereafter be impannelled on the Petit  
Jury. And will they feel themselves altogether  
unbiased by your judgment? Why, Sir, let it  
be declared at once, that the Grand Jury is to  
be struck out as an intermediate organ of jus-  
tice.

Do not, I pray you, Sir, let us suffer for the  
delays and negligence of other people. I can-  
not blame the U. S. attorney: it is his business  
to obey the intrusions of the government; &  
if the witnesses are not here, it is certainly no  
fault of his. But surely there is time enough  
to travel from N. Orleans to this city in 17 days;  
even with the gigantic "bulk" of gen. Wilkin-  
son himself.

Mr. Hay says, our tone is changed. And how,  
Sir? We demand a trial now. We demand  
a fair trial. But, Sir, in this interesting case,  
where liberty and life themselves are endan-  
gered, I trust that some hard mouthed precedents  
will be found in opposition to this procedure.  
We have come here to answer to every charge,  
which may be urged against us: We come  
here to answer in a precedent and constitu-  
tional manner. But little did we expect, that  
the court would decide in the first instance, in-  
stead of the Grand Jury; that at the sittings of  
the Grand Jury were to be prejudicated by an  
unconstitutional decision; and that the Court  
itself was to commit its opinion on certain points  
which would be regularly brought before them  
for argument and for decision at some of the ul-  
terior stages of the prosecution.

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

We are charged, sir, with addressing the  
multitude. Mr. Wirt says that he could,  
but would not imitate the example. But  
neither he nor Mr. Hay, have spared the  
theme. Sir, I will not deny the justness of his  
eulogiums upon the administration; but  
permit me only to remark, that there has  
been a certain conduct observed towards  
Col. B. which excites my deepest astonish-  
ment. When I look at the first man in the  
government, I behold an individual whom  
I have long known, and whose public ser-  
vices have commanded my admiration.—  
When I look at the second, sir, he has my  
whole heart. But, sir, the enquiry which is  
now before us relates not so much to the  
intention as to the effect. An order has been  
given to treat Col. Burr as an outlaw; and  
to burn him and his property. And, sir, a-  
gain, when the H. of R. demanded certain  
information, as it was their right and their  
duty to do; the President granted it; and  
would to God! sir, that he had stopped here,  
as an executive officer ought to have done.  
He proceeded, however, to say that Col. B.  
was guilty of a crime; and consequently to  
express an opinion, which was calculated to  
operate judicially upon the Judges and the  
Juries. Such was the substratum of all  
the censures, which have been heaped upon  
Col. Burr.

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

Mr. R. observed that at least one disad-  
vantage would result from this enquiry; that  
it was not clear, as Mr. Hay had asserted,  
that the affidavits would be laid before the court  
only & not before the Grand & Petit Juries,  
for the Grand Jury would soon be possess-  
ed of the substance of them; and that it  
was next to impossible to separate the im-  
pressions thus illegally to be produced upon  
their minds, from the weight of the legal  
viva voce testimony.

Mr. R. said, he did not understand  
Mr. H.'s expressions about certain per-  
sons in holes and corners; that if how-  
ever he meant spies, there are none  
such; & that although the government  
certainly had employed no spies, yet that  
it has excited to much prejudice against  
Col. Burr as was sufficient to make ev-  
ery man in the country desirous of con-  
tributing his full quota of information

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

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

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

Mr. Randolph stated that no similar  
case had occurred in his thirty years  
practice. It was not wonderful that  
such a case had not occurred. (Mr. H.  
here expatiated at some length upon the  
difference between the State courts of  
Virginia & the federal court.) He pro-  
ceeded then to observe, that the U. S.  
was a most extensive country, compared  
to the state of Virginia; that a most ma-  
terial witness might be 1500 miles from  
the court, before whom he was to ap-  
pear; and that he might be at the same  
time at the head of an army; in all which  
circumstances, the federal and state sov-  
ereignities were different. So that this  
difference altogether deflected the ap-  
plication of Mr. R.'s experience, to this  
subject, even if that experience had  
been admitted as a good authority in  
the State Courts. But even that gen-  
tleman would admit, that had a similar  
case occurred before the State Courts,  
the accused would have been committed.

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

There is another consideration which  
should be weighed by the opposite counsel.  
The grand jury is now already embodied.  
They are ready to proceed with any busi-  
ness which may be brought before them.  
But, my great object, said Mr. H. is to pro-  
secute col. Burr on the charge of Treason.  
I make this declaration, because I believe  
him to have been guilty of it. Let us sup-  
pose, however, that the grand jury were to  
discharge col. B. from the misdemeanor;  
and then that I was to bring the present  
motion before the court; what resources  
then would Mr. Randolph have? From the  
present proceeding, however, Mr. B. would  
derive the advantage of an immediate trial;  
whereas, according to the other mode of  
proceeding, weeks and months might elapse  
before he could be brought to trial. And  
certainly it is in every point of view more  
desirable both for the government and him-  
self to terminate this business at once, than  
to impose upon us the necessity of moving  
for an adjourned trial.

Mr. Randolph says "we are ready, we  
were ready on Friday; we were ready on  
Saturday, &c." Sir, there are two sorts of  
readiness; one in point of fact, and the other  
certain circumstances. Now these gen-  
tlemen will sincerely persuade me that they  
could be ready to resist the whole weight of  
evidence, if it were ready to be laid before  
them; but there is certainly no difficulty in  
believing, that they are now ready to pro-  
ceed to trial, when the whole evidence and  
particularly gen. Wilkinson's, is not pre-  
sent.

One more remark.—Mr. Randolph has ex-  
pressed a reverence for Mr. Jefferson, which is  
not certainly derived from lauding considera-  
tions. I will make but one remark, and that gen-  
tleman will agree with me in the opinion; let  
every the many people, globe through all ages  
and nations) and you will find a man more  
anxiously bent upon promoting the liberty of  
the people. This was certainly the idea which  
Mr. Randolph intended to convey.

Mr. R. next proceeded to Mr. Madison, upon  
whom he has not bestowed an illustrious merit  
unreservedly, surely then, after this