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SENATE OF THE UNITED STATES,
December 31st, 1807.

MR. ADAMS— from the —— Committee appointed to enquire whether it be compatible with the honor and priviledges of this House that John Smith, a senator from the state of Ohio, against whom bills of indictment were found at the circuit court of Virginia, held at Richmond, in August last, for treason and misdemeanor, shall be permitted any longer to have a seat therein, and to enquire into all the facts regarding the conduct of Mr. Smith as an alleged associate of Aaron Burr, and report the same to the Senate—submitted the following

REPORT:

Your committee are of opinion that the conspiracy of Aaron Burr and his associates against the peace, union, and liberties of these states, is of such a character, and that its existence is established by such a mass of concurring and mutually corroborative testimony, that it is incompatible not only with the honor and privileges of this House, but with the deepest interests of this nation, that any person engaged in it should be permitted to hold a seat in the Senate of the United States.

Whether the facts, of which the committee submit herewith such evidence, as under the order of the Senate they have been able to collect, are sufficient to substantiate the participation of Mr. Smith in that conspiracy, or not, will remain for ths Senate to decide.

The committee submit also to the consideration of the Senate the correspondence between Mr. Smith and them through their chairman in the course of their meetings. The committee have never, conceived themselves invested with authority to try Mr. Smith. Their charge was to report an opinion relating to the honor and privileges of the Senate, and the facts relating to the conduct of Mr. Smith. Their opinion indeed cannot be expressed in relation to the privileges of the Senate, without relating at the same time to Mr. Smith's right of holding a seat in this body; but in that respect the authority of the committee extends only to proposal, and not to decision—But as he manifested a great solicitude to be heard before them, they obtained permission from the Senate to admit his attendance, communicated to him the evidence in their possession, by which he was inculpated—furnished him in writing with the questions arising from it, which appeared to them material, and received from him the information and explanations herewith submitted as part of the facts reported. But Mr. Smith has requestd as a right to be heard in his defence by counsel, to have compulsory process, for witnesses, and to be confronted with his accusers, as if the committee had been a circuit court of the United States; but it is before the Senate itself that your committee conceived it just and proper that Mr. Smith's defence of himself should be heard; nor have they conceived themselves bound in this enquiry by any other rules, than those of natural justice and equity due to a Brother Senator on the one part, and to their country on the other.

Mr. Smith represents himself on this enquiry as solitary, friendless and unskilled, contending for rights which he intimates are denied him, and the defender of senatorial privileges, which he seems apprehensive will be refused him by Senators, liable so long as they hold their offices to have his case made their own. The committee are not unaware, that in the vicissitudes of human events, no member of this body can be sure that his conduct will never be made a subject of enquiry and decision before the assembly to which he belongs. They are aware that in the course of proceeding, which the Senate may now sanction, its members are marking out a precedent which may hereafter, apply to themselves—They are sensible that the principles upon which they have acted, ought to have the same operation upon their own claims to privileges as upon those of Mr. Smith, the same relation to the rights of their constituents, which they have to those of the legislature which he represents. They have deemed it their duty to advance in the progress of their enquiry with peculiar care and deliberation. They have dealt to Mr. Smith that measure which under the supposition of similar circumstances they would be content to find imparted to themselves, and they have no hesitation in declaring, that under such imputatitions, colored by such evidence, they should hold it a sacred obligation to themselves, to their fellow-senators, and to their country, to meet them by direct, unconditional acknowledgment or denial, without seeking a refuge from the broad face of day, in the labyrinth of technical forms.

In examining the question whether these forms of judicial proceedings, or the rules of judicial evidence, can or ought to be applied to the exercise of that censorial authority which the Senate of the United States possesses over the conduct of its members, let us assume, as the test of their application either the dictates of unfettered reason, the letter and spirit of the constitution, or precedents, domestic or foreign, and your committee believe that the result will be the same—That the power of expelling a member must in its nature be discretionary, and in its exercise always more summary than the tardy process of judicial tribunals.

The power of expelling a member for misconduct results on the principles of common sense, from the interest of the nation, that the high trust of legislation should be invested in pure hands. Where the trust is elective it is not to be presumed that the constituent body will commit the deposit to the keeping of worthless characters. But when a man, whom his fellow-citizens have honored with their confidence, on the pledge of a spotless reputation, has degraded himself by the commission of infamous crimes, which become suddenly and unexpectedly revealed to the world, defective indeed would be that institution which should be impotent to discard from its bosom the contagion of such a member, which should have no remedy of amputation to apply until the poison had reached the heart.

The question upon the trial of a criminal cause, before the courts of common law, is not between guilt and innocence, but between guilt and the possibility of innocence. If a doubt can possibly be raised either by the ingenuity of the party or of his counsel or by the operation of general rules in their unforeseen application to particular cases, that doubt must be decisive for acquittal, and the verdict of not guilty, perhaps in nine cases out of ten, means no more than that the guilt of the party has not been demonstrated in the precise specific and narrow forms prescribed by law. The humane spirit of the laws multiplies the barriers for the protection of innocence, and freely admits that these barriers may be abused for the shelter of guilt. It avows a strong partiality favorable to the person upon trial, and acknowledges the preference that ten guilty should escape rather than that one innocent should suffer. The interest of the public that a particular crime should be punished is but as one to ten, compared with the interest of the party that innocence should be spared. Acquittal only restores the party to the common rights of every other citizen—it restores him to no public trust—it invests him with no public confidence—it substitutes the sentence of *mercy* for the doom of justice, and to the eyes of impartial reason, in the great majority of cases, must be considered rather as a pardon than a justification.

But when a member of a legislative body lies under the imputation of aggravated offences, and the determination upon his cause can operate only to remove him from a station of extensive powers, and important trust, this disproportion, between the interest of the public and the interest of the individual, disappears; if any disproportion exists it is of an opposite kind. It is *not* better that ten traitors should be members of this Senate, than that one innocent man should suffer expulsion. In either case, no doubt, the evil would be great. But in the former it would strike at the vitals of the nation—in the latter it might, tho' deeply to be lamented, only be the calamity of an individual.

By the letter of the constitution, the power of expelling a member is given to each of the two Houses of Congress, without any limitation other than that which requires a concurrence of two thirds of the votes to give it effect. The spirit of the constitution is perhaps in no respect more remarkable, than in the solicitude which it has manifested, to secure the purity of the legislature, by that of the elements of its composition. A qualification of age is made necessary for the members to ensure the maturity of their judgement. A qualification of long citizenship to ensure a community of interests and affections between them and their country. A qualification of residence to provide a sympathy between every member and the portion of the union from which he is delegated. And to guard, as far as regulation can guard against every bias of personal interest, and every hazard of interfering duties, it has made every member of Congress ineligible to office which he contributed to create, and every officer of the union, incapable of holding a seat in Congress. Yet in the midst of all this anxious providence of legislative virtue, it has not authorised the constituent body to recall in any case its representative. It has not subjected him to removal by impeachment—and when the darling of the people's choice has become their deadliest foe, can it enter the imagination of a reasonable man, that the sanctuary of their legislation must remain polluted with his presence, until a court of common law, with its pace of snail can ascertain, whether his crime was committed on the right or on the left bank of a river—whether a puncture of difference can be found between the words of the charge and the words of the proof—whether the witnesses of his guilt should or should not be heard by his jury—and whether he was punishable, because present at an overt act, or intangible to public justice, because he only contrived and prepared it. Is it conceivable that a traitor to that country, which has loaded him with favors, guilty to the common understanding of all mankind, should be suffered to return unquestioned to that post of honor and confidence, where in the zenith of his good fame, he had been placed by the esteem of his countrymen, and in defiance of their wishes, in mockery of their fears, surrounded by the public indignation, but inaccessible to its bolt, pursue the purposes of treason in the heart of the national councils? Must the assembled rulers of the land listen with calmness and indifference, session after session, to the voice of notorious infamy, until the sluggard step of municipal justice can overtake his enormities? Must they tamely see the lives and fortunes of millions, the safety of present and future ages, depending upon his vote, recorded with theirs, merely because the abused benignity of general maxims, may have remitted to him the forfeiture of his life?

Such in very supposable cases would be the unavoidable consequence of a principle which should offer the crutches of judicial tribunals, as an apology for crippling the Congressional power of expulsion. Far different in the opinion of your committee, is the spirit of our constitution. They believe that the very purpose for which this power was given, was to preserve the legislature from the first approaches of infection. That it was made discretionary because it could not exist under the procrastination of general rules—That its process must be summary because it would be rendered nugatory by delay.

Passing from the constitutional view of the subject, to that which is afforded by the authority of precedent, your committee find that since the establishment of our present national legislature there has been but one example of expulsion from the Senate—In that case, the member implicated was called upon in the first instance, to answer whether he was the author of a letter, the *copy* of which only was produced, and the writing of which was the cause of his expulsion. He was afterwards requested to declare whether he was the author of the letter itself, and declining in both cases to answer, the fact of his having written it was established by a comparison of his hand writing, and by the belief of persons who had seen him write, upon inspection of the letter. In all these points the committee perceive the admission of a species of evidence, which in courts of criminal jurisdiction would be excluded—and in the resolution of expulsion the Senate declared the person inculpated *guilty of a high misdemeanor*, although no presentment or indictment had been found against him, and no prosecution at law was ever commenced upon the case.

This event occurred in July 1797.—About fifteen months before that time, upon an application from the legislature of Kentucky, requesting an investigation by the Senate, of a charge against one of the members from that state, of perjury, which had been made in certain newspaper publications, but for which no prosecution had been commenced, the Senate did adopt by a majority of 16 votes to 8, the report of a committee, purporting that the Senate had no *jurisdiction* to try the charge, and that the memorial of the Kentucky legislature should be dismissed. There were indeed very sufficient reasons of a different kind assigned in the same report, for not pursuing the investigation in that particular case any further, and your committee believe, that in the reasoning of that report, some principles were assumed and some inferences drawn, which were altogether unnecessary for the determination of that case, which were adopted without a full consideration of all their consequences, and the inaccuracy of which was clearly proved by the departure from them in the instance which was so soon afterwards to take place. It was the first time that a question of expulsion had ever been agitated in Congress since the adoption of the constitution. And the subject being thus entirely new, was considered perhaps too much with reference to the particular circumstances of the moment, and not enough upon the numerous contingencies to which the general question might apply. Your committee state this opinion with some confidence, because, of the sixteen Senators who in March, 1796, voted for the report, dismissing the memorial of the Kentucky legislature, eleven, on the subsequent occasion in July 1797, voted also for that report, which concluded with a resolution for the expulsion of Mr. Blount. The other five were no longer, present in the Senate—yet if the principles advanced in the first report, had been assumed as the ground of proceeding at the latter period, the Senate would have been as impotent of jurisdiction upon the offence of Mr. Blount, as they had supposed themselves upon the allegation against Mr. Marshall.

Those parts of the fifth and sixth articles amendatory to the constitution, upon which the report in the case of Mr. Marshall appears to rely for taking away the jurisdiction of the Senate, your committee suppose can only be understood as referring to prosecutions at law. To suppose that they were intended as restrictions upon powers expressly granted by the constitution to the legislature or either of its branches, would in a manner annihilate the power of impeachment, as well as that of expulsion. It would lead to the absurd conclusion that the authority given for the purpose of removing iniquity from the seats of power, should be denied its exercise, in precisely in those cases, which most loudly call for its energies. It would present the singular spectacle of a legislature vested with powers of expelling its members, of impeaching, removing and disqualifying public officers, for trivial transgressions beneath the cognizance of the law, yet forbidden to exert them against capital or infamous crimes.

Those two articles were in substance borrowed from similar regulations contained in that justly celebrated statute, which for so many ages has been distinguished by the name of the great Charter of England. Yet in that country, where they are recognized as the most solid foundations of the liberties of the nation, they have never been considered as interfering with the power of expelling a member, exercised at all times by the house of commons; a power which there however rests only upon parliamentary usage, and has never been bestowed as in the constitution of the United States, by any act of supreme legislation. From a number of precedents which have been consulted, it is found that the exercise of this authority there has always been discretionary, and its process always far otherwise compendious, than in the prosecutions before the judicial courts. So far indeed have they been from supposing a conviction at law necessary to precede a vote of expulsion, that in one instance a resolution to demand a prosecution appears immediately after the adoption of the resolution to expel. In numerous cases the member submits to examination, adduces evidence in his favor, and has evidence produced against him, with or without formal authentication; and the discretion of the house is not even restricted by the necessary concurrence of more than a bare majority of the votes.

The provision in our constitution which forbids the expulsion of a member, by an ordinary majority, and requires for this act of rigorous and painful duty, the assent of two thirds, your committee consider, as a wise and sufficient guard against the possible abuse of this legislative discretion. In times of heat and violent party spirit, the rights of the minority might not always be duly respected if a bare majority could expel their members, under no other control than that of their own discretion. The operation of this rule is of great efficacy, both over the proceedings of the whole body, and over the conduct of every individual member. The times when the most violent struggles, of contending parties occur, when the conflict of opposite passions is most prone to excess, are precisely the times when the numbers are most equally divided. When the majority amounts to two thirds, the security in its own strength is of itself a guard against extraordinary stretches of power. When the minority dwindles to the proportion of one third, its consciousnes of weakness dissuades from any attempts, to encroach upon the rights of the majority which might provoke retaliation. But if expulsion were admisible only as a sequel to the issue of a legal prosecution, or upon the same principles and forms of testimony, which are established in the criminal courts, your committee can see no possible reason why it should be rendered still more imbecile by the requisition of two thirds to give it effect.

It is now the duty of your committee to apply the principles which they have here endeavored to settle and elucidate, to the particular case upon which the Senate have directed them to report. The bills of indictment found against Mr. Smith, at the late session of the circuit court of the United States, at Richmond (copies of which are herewith submitted) are precisely similar to those found against Aaron Burr. From the volume of printed evidence communicated by the President of the United States to Congress, relating to the trial of Aaron Burr, it appears that a great part of the testimony which was essential to his conviction upon the indictment for treason was withheld from the jury, upon an opinion of the court that Aaron Burr, not having been *present* at the overt act of treason alleged in the indictment, no testimony relative to his conduct or declarations elsewhere, and subsequent to the transactions of Blannerhassett's island, could be admitted—and in consequence of this suppression of evidence, the traverse jury found a verdict "that Aaron Burr was not proved to be guilty under, that indictment by any evidence submitted to them." It was also an opinion of the court that none of the transactions of which evidence was given on the triais of Aaron Burr did amount to an overt act of *levying war*, and of course that they did not amount to treason.—These decisions forming the basis of the issue upon the trials of Burr, anticipated the event which must have awaited the trials of the bills against Mr. Smith, who, from the circumstances of his case, must have been entitled to the benefit of their application:—they were the sole inducements upon which the counsel for the United States abandoned the prosecution against him.

Your committee are not disposed now to question the correctness of these decisions, on a case of *treason*, before a court of criminal jurisdiction. But whether the transactions proved against Aaron Burr did or did not amount in technical language to an overt act of levying war, your committee have not a scruple of doubt upon their minds, that but for the vigilence and energy of the government, and of faithful citizens under its directions, in arresting their progress, and in crushing his designs, they would in a very short lapse of time have terminated not only in war, but in war of the most horrible description—in war at once foreign and domestic. As little hesitation have your committee in saying, that if the day light of evidence, combining one vast complicated intention, with overt acts innumerable, be not excluded from the mind by the curtain of artificial rules, the simplest understanding cannot but see, what the subtlest understanding cannot disguise—crimes before which ordinary treason whitens into virtue—crimes, of which war is the mildest feature. The debauchment of our army—the plunder and devastation of our own and of foreign territories—the dissolution of our national Union, and the root of interminable civil war, were but the means of individual aggrandizement—the steps to projected usurpation. If the ingenuity of a demon were tasked to