

The following is the opinion delivered by Judge Fitzgibbon, on the commitment of Messrs. BOLLMAN and SWARTWOUT, on a charge of treason.

My extreme indisposition has prevented me from preparing any remarks in support of the opinion which I am called on to give; but since it has been thought proper by the members of the court to assign our reasons for the course which has been pursued, I shall express those sentiments which at present occur to me.

This question has been urged, as if it were now before a jury who were called on to convict, or acquit the prisoners, without recollecting that we are at that stage where, in the language of the constitution, probable cause, supported by oath or affidavit, is sufficient. This remark is necessary to shew, that many of the conclusions of counsel are incorrect. In this incipient state, the evidence is always *ex parte*, and such as would be inadmissible at the final trial.—A warrant goes forth to apprehend and afterwards to commit, on the suggestion of an individual, supported by oath, that a crime has been committed. The affidavit is made in the absence of the supposed offender, and no more certainty is required than probable cause. By a law U. S. vol. 1, p. 109, there must be the confession in open court, on the testimony of two witnesses to the same overt act, to convict one of treason. Whereas probable cause, supported by oath or affirmation, will authorize issuing a warrant. In no case, whether criminal or civil, is an affidavit evidence at the trial; because taken in the absence of the party against whom it is intended to operate; and yet it has always been considered as sufficient to justify issuing a warrant to arrest.

These inquiries obviously occur: 1st. Is there probable cause to believe that any treason has been committed against the United States, and this supported by oath, &c.? 2d. Are the prisoners implicated in the treason? And 3d. How, whether as principals, or only guilty of misprison of treason?

That there is probable cause to believe that treason has been committed by colonel Burr, the public rumor and universal alarm which seems to have convulsed our country from the extremity to the centre—the president's communication to congress and to the court, afford at least ground of suspicion, and this is supported by the positive oaths of Gen. Eaton, Gen. Wilkinson, Mr. Donaldson, Mr. Meade, and Mr. Wilson, all going to shew the origin, existence and progress of Burr's treasonable projects and acts. But here the counsel for the prisoners have insisted that none of this mass of evidence criminate B. and have contended that the president's communications are inadmissible. It is not generally by detached parts of evidence, but by a well connected chain of circumstances that we arrive to proof—nor can a crime be made out by the proof of any solitary fact. In a charge of murder it would not be sufficient to shew that a blow was given from which death ensued; but it is necessary to prove and disclose a particular state of mind. There must be deliberate resentment, or ill will; there must be malice prepense. So in treason (the case now under consideration) no degree of violence, however atrocious, no enlisting or marching men; no injury, if limited in its object to personal rivalry, or even extensive enough in point of locality, to contemplate and threaten the opposition and destruction of the laws and government of any one of the U. S. will amount to treason against the United States. 'Tis the intention alone which fixes the grade of the offence. This intention is only to be collected from circumstances; and though the communications of the president do not of themselves furnish full evidence of B's treason against the United States, yet they must be considered entitled to some weight in leading to the conclusion that there is probable cause; but when, in addition to this, it is considered that the most solemn obligation is imposed by the constitution on the president to make communications of this nature to congress, and that he has also in further discharge of his constitutional duties ordered out the militia, which on ordinary and trivial occasions he is not justifiable in doing, a person must be strangely incredulous who will not admit that there is probable cause of suspicion that a dangerous insurrection or treason exists in our country. A report thus sanctioned by duty and oath, if made to this court by one of its officers, would be respected, and why shall not a communication from the first executive officer of the union be credited when he announces to the nation information in the line of his duty. But this general ground of alarm is rendered more specific by the affidavits which have been exhibited to us. If the persons who have been sworn on this occasion are to be believed (and no one has yet questioned their credibility) they prove a scheme laid by Burr to usurp the government of the United States, to sever the western states from the union; to establish an empire west of the Alleghany mountains, of which he, Burr, was to be the sovereign, and New-Orleans the emporium, and to invade and revolutionize Mexico. That in prosecution of these projects he wrote a letter to general Wilkinson, the commander in chief of the American army, with the avowed object and design of alienating him from his duty, and inviting him to embark in the undertaking, and holding out to him the most flattering and sanguine assurances and prospects of success. Florid as this attempt was, yet if the information had reached no further, I should have no hesitation in saying that it would have been nothing more than a conspiracy to

commit treason or some other offence. But when Burr assures Wilkinson that he had obtained funds and actually commenced the enterprise; that detachments from various points, and under various pretences, would rendezvous on the Ohio the 1st November, that his plan was to move down rapidly from the falls the 15th November with the first 500 or 1000 men in light boats, now constructing for that purpose;—When in addition to this, Wilson and Meade swear that when they left New-Orleans, the one the 15th, the other the 19th December, the strongest apprehension and belief universally prevailed among the inhabitants that Burr and his confederates had prepared an armed force, and were marching to attack and plunder the city; and that they knew that Wilkinson was decidedly of opinion, from the most satisfactory information, that Burr was advancing, and under that belief, he was putting the place in a posture of defence.—When this coincidence of circumstances and this strength of testimony appear, there can be little doubt of the existence and the extent of Burr's views, and of his having embodied and enlisted men with views hostile to the government of his country, and that he has done acts which amount to levying war on the United States.

Burr's treason then being established, we are to inquire whether the prisoners were his confederates. They are represented under oath, to have been the bearers of the duplicates of Burr's letters in cypher to Wilkinson, and to possess Burr's confidence—they use arguments in addition to those in the letter, to invite Wilkinson to accede to their views; admit that they have corresponded with Burr on the subject since the delivery of the letter: That Swartwout informed Wilkinson that Burr, with a powerful association, extending from New-York to New-Orleans, was levying an armed body of 7000 men, from New-York and the western states and territories, with a view to carry an expedition against the Mexican provinces, and that 600 men under colonel Swartwout and major Tyler, were to descend the Alleghany, for whose accommodation light boats had been built and were ready—said that New-Orleans would be revolutionized when the people were ready to join them, and that there would be some seizing.

Here then is evidence of a connection with colonel Burr of a treasonable nature. What is it? The act of congress defines misprison of treason to be a neglect to disclose the knowledge of a treason. But the prisoners have not only known of the treason; but carried a treasonable letter, knowing its contents; endeavored to further Burr's views and wishes, and to seduce Wilkinson from his duty. The offence exceeds misprison of treason, and as there is no intermediate class of offences of a treasonable nature between misprison and treason, it must be treason.

It has been observed by the counsel for the prisoners, that no judge could commit on an affidavit made before any other judge. This distinction is certainly new, and I believe unprecedented. In all general warrants for arresting a supposed offender, the direction to the officer is to bring the party before the person issuing the warrant, or some other justice of peace, &c. which would be at least nugatory, if no person could inspect or regard the affidavit except the person before whom it was made. Therefore I conclude that Wilkinson's affidavits made before justices of the peace of New-Orleans, whose commissions appear to be properly authenticated by the secretary of state, are evidence at this stage of our inquiry.

I am therefore of opinion, that the prisoners should be committed for treason against the United States, in levying war against them.

#### CONGRESS.

##### HOUSE OF REPRESENTATIVES.

Monday, January 26.

Debate on the bill to suspend the Habeas Corpus.

A message from the senate by Mr. Smith of Maryland, was received. Mr. S. observed that the message was confidential. Whereupon

On motion of Mr. Gregg (Penn.) the galleries were cleared.

Mr. Smith then delivered a bill suspending the writ of habeas corpus, for the term of three months, which the senate had passed on Friday, and in which they desired the concurrence of this house as speedily as in their judgment the emergency required.

The bill was read as follows:

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, That in all cases where any person or persons, charged on oath with treason, misprison of treason, or other high crime or misdemeanor, endangering the peace, safety, or neutrality of the United States, have been or shall be arrested, or imprisoned, by virtue of any warrant or authority of the president of the United States, or from the chief executive magistrate of any state or territorial government, or from any persons acting under the direction or authority of the president of the United States, the privilege of the writ of habeas corpus, shall be, and the same hereby is suspended, for and during the term of three months from and after the passage of this act, and no longer.

Mr. P. B. Thompson (Vir.) moved that the message and the bill received from the senate ought not to be kept secret and that the doors be opened.

Mr. Burwell (Vir.) and Mr. Smilie (Penn.) spoke in support of the motion.

Mr. Early (Geo.) thought that a previous order should be taken, to remove the injunction of secrecy. To open the doors and admit strangers to hear the debate, and yet continue the injunction of secrecy on members, would present a singular spectacle.

Mr. J. Randolph said they could not be bound to secrecy except by their own vote. If there was any charm by which they could be bound, except their own act, he wished it might be dissolved.

The yeas and nays being demanded by one-fifth of the members present, they were ordered to be taken.

The question then was put on the motion. That the message and bill received from the senate ought not to be kept secret, and that the doors be now opened; and resolved in the affirmative, yeas 123; nays 3. The

nays were Messrs. Masters, Thomas and N. Williams.

Mr. Burwell (Vir.) could see no reason for passing the bill received from the senate.—Can any one, said Mr. B. conceive that the United States are in danger after the declaration of the president in the late message? Here Mr. E. read an extract from the message. A suspension of the writ of habeas corpus would create an alarm which I cannot believe ought to exist. There have been in this country two insurrections, infinitely more formidable and dangerous than this, & yet no suspension was found necessary.

Mr. Elliot (Ver.) said that when he considered the respectable sources whence the bill originated, he found it difficult to express the decided hostility which he felt against it; he would therefore consider the bill as if it had been originally submitted to this house.

This bill said Mr. E. proposes to suspend the writ of habeas corpus for three months, and to create not a single dictator merely, but a host of subaltern dictators, and to extinguish the sacred flame of liberty for the space of three months.

It is said, the constitution warrants the passing of such a bill. I am ready to meet gentlemen on that ground. The framers of the constitution never contemplated such a measure at such a time as this. The words of the constitution are, that writ shall not be suspended unless in cases of rebellion or invasion the public safety may require it. The *salus populi* alone can authorize the *lex suprema*. Has such an awful crisis now arisen? Is the country in such imminent danger, as to warrant a resort to such extreme measures?

Objectionable as I consider the bill in point of principle, it is still more so in detail. It comprehends all cases affecting the peace, the safety and the neutrality of the United States. A vast range is here allowed to subordinate executive agents. I do not hesitate to pronounce the bill one of the most extraordinary ever proposed in America, and I trust in God that it will never be repeated. It proposes to give the little great men, who are so numerous in every government, an opportunity to scorch their private enemies by the lightning of public suspicion. I consider it not a proposition to suspend the habeas corpus with regard to persons guilty of treason, but to suspend it as to all persons suspected by government or by inferior agents.

The president, who has much more information on the subject than we have, has assured us, that in his opinion no serious danger threatens New-Orleans. Can any member of this house lay his hand on his heart, and declare that there is such a rebellion in this country, that the public safety requires the passing of this bill? I presume not, and if not, we have no constitutional right to pass it. Does the superstructure of our republic tremble to its base, under the modern Cataline? His resources are indeed contemptible. He possesses many of the qualities of the Roman Cataline, and is fast hastening to the same fate. He is already damned to everlasting fame.

Mr. Eppes was opposed to the bill in every shape. It goes to place, said he, individuals at the mercy, not only of the executive, but of all subordinate officers. This power, which is the most tremendous that can be exercised in a free country, ought to be resorted to only in cases of invasion and rebellion. The question now before us is, whether such a rebellion exists that the public safety requires a suspension of the writ of habeas corpus. The militia of Ohio, of Kentucky, of Tennessee, and of the Mississippi Territory, have been ordered out, and general Wilkinson has at least 1000 effective troops. What are the forces of the conspirators? The message of the president states that some boats had passed the falls of the Ohio, accounts varying from five to double or treble that number, with persons on board from one hundred to three hundred. Besides these boats, we learn that two boats have descended the Cumberland river with Aaron Burr on board.

The government has now existed for thirty years, and never has the writ of habeas corpus been suspended. There has never been a time, when every citizen could not demand the cause of his confinement. With 15,000,000 of annual revenue & 600,000 freemen, shall we be afraid of a few desperadoes? The militia of any single county in the country is adequate to suppress them. However dangerous the conspiracy may have been, it is now at an end. The bill is so objectionable in principle that I conceive it important to give it a prompt rejection.

Mr. J. Clay (Penn.) called for the yeas and nays, which were ordered to be taken.

Mr. Varnum (Mass.) was against the motion to reject the bill. The constitution does not, said he, restrain the power of suspending the habeas corpus act to cases when the government was shaken to its centre.—The language of the constitution is, that the writ shall not be suspended, unless in cases of rebellion or invasion, the public safety may require it. Will gentlemen deny that a rebellion has existed, an extensive one, and in which the head of it assures us he has powerful foreign aid? The country is not safe till the rebellion is brought to a close.

Without the aid of this suspension, a thorough investigation cannot be made into the conspiracy, and its authors and abettors brought to proper punishment. I am sensible that, as has been said, the general government has never suspended this privilege, but it was done by the state of Massachusetts in the case of Shay's insurrection, and no evils resulted from the suspension. It had a very beneficial effect. I believe the insurrection could not have been quelled without it.

Have we ever had a rebellion like this? A rebellion took place in Massachusetts a little before the organization of this government under the constitution. The object, however, was not to change or destroy the government. The people were driven to it by imperious necessity. They were oppressed by an intolerable weight of taxes, which were never before paralleled in the history of mankind. So in the insurrection in Pennsylvania, the insurgents had no idea of subverting the government. Their only object was relief from certain oppressions. But this conspiracy is directed against the free government and the happiest state of society in the world, for the sake of ambition and emolument. It is a most aggravated case.

Will any gentleman say that there is the least reason to suppose that innocent men will be taken up, if the habeas corpus is sus-

pended? There is no probability of it: there is scarcely a possibility. There is no danger to the liberties of the citizens in general.

Mr. R. Nelson (Md.) said the motion to reject, met his hearty approbation. He went at length into the nature and effect of the writ of habeas corpus, and the consequences of its suspension. He thought the movements of the conspirators did not deserve the name of a rebellion; they ought not to be dignified with that appellation. It was a little, trifling, petty insurrection. Mr. N. thought the consequences of a suspension would be dreadful, and the measure was the most — thing in nature.

Mr. Sloan said he should vote with the gentleman from Maryland, but he had a different opinion as to the nature of the conspiracy. Former insurrections compared to this, were only as a drop in the bucket. They consisted only of a handful of citizens who were aggrieved by certain laws, and their conduct has been partly justified by subsequent events, for the laws which they have complained of have been since repealed.

Mr. Bidwell (Mass.) though not satisfied with the bill in its present form, was not ready to reject it. It comes from the other branch of the legislature, and ought to take the usual course. The constitution requires two circumstances to warrant a suspension of the habeas corpus; 1st, a rebellion; 2d, the public safety may require it. There is very clearly a rebellion. It is not necessary that a battle should be fought, or a gun fired to constitute a rebellion. If troops are levied for the purpose, it is sufficient. The president has communicated the facts in his message. It appears to be a rebellion of the most wanton and profligate kind, the result of mere desperation and ambition.

I fully agree in the importance of the habeas corpus. But a suspension may be, however, beneficial. It was once suspended in Massachusetts, as has been stated by my colleague (Mr. Varnum) and no evil resulted from the suspension. On the contrary, the measure was very beneficial. I would not suspend the habeas corpus for the purpose of suppressing the rebellion that has already been accomplished by the vigilance and energy of the executive; but the measure is necessary to secure and punish the conspirators.

Mr. J. Randolph (Vir.) My vote will be very different from that of the gentleman who has just sat down. I was happy to witness the prompt and decided opposition that was made to this bill, especially from the quarter whence it proceeded (Mr. Eppes).

An attempt has been made to enlist the feelings of the house in favor of the bill by suggestions that it would be indecorous to reject it at this stage. The house are so competent to decide on the question now as ever they will be. I recollect that eight years ago a bill was smuggled through the house by a fastidious delicacy in not rejecting it at the first stages, and by finesse and management, it was finally carried.

This course is often pursued by the other branch; they reject a bill at any stage; and I believe it will be found that on every occasion, this house pursues the more liberal conduct. I recollect no case wherein this house a single veto can stop a bill, which is the fact in the other branch. I feel no scruple on the subject.

Where is the danger of deciding at once, if our minds are all clear as to the principle of the bill? We all have the liberty of speaking twice, which is once too much. The session will be short, and from some experience, I am afraid we shall not get through all the public business, which claims our attention.

Some gentlemen have expressed their regret that the motion has been made. I feel no regret, and shall therefore express none. When a bill, affecting the liberties of the people, comes from the other house, it has always a suspicious appearance. A house, so small in point of numbers, with so long a tenure of office, and so often in conclave, is not calculated to be the special guardian of the liberties of the people. How long was it after the organization of the government, before any stranger was admitted even into a two penny gallery?

I am not surprised that the senate shut their doors while deliberating on this bill; for if I had introduced such a bill into this house, I should have been very glad to have the doors shut, that my name might not be entered on the public journal as the author of such a measure. I should have been ashamed to own myself to the nation as the author or advocate of such a bill.

I have another objection to the bill. It looks like an oblique attempt to cover certain departures from the laws of the land, certain violations of the constitution which have taken place in the country.

Recollect that we met the beginning of December; that the president had information of the conspiracy in September; that the proclamation was issued in the latter part of November; and that not the least information of the conspiracy reached us officially till the 22d of this month. I will never agree in this oblique, side way manner to cover up the arbitrary and dangerous proceedings of any officers under the government. I am willing to maintain the principles which I have always maintained, and which I will maintain, God willing, so long as I have a seat in this house; nay, so long as I have life. Whatever may be the private character of a persecuted man, I and those with whom I have always been associated, have made it the rule of our conduct to regard the principle only.

What said we in cases under the sedition law? We determined to maintain the rights of the meanest reptile that breathed, who might be suffering under the operation of an illegal, unconstitutional principle. Disregarding popular clamour, disregarding

odium, we said, and said justly that we should be safe at last. In case of Callender no inquiry was ever made as to the character of the man. We regarded only the principle. He was suffering under an obnoxious law, therefore we gave him our support. I might quote other examples of a like nature, but out of deference to the feelings of the house, I will forbear.

I have another objection to this bill. I conceive the question is, whether the U. States shall be under military government the ensuing three months. The question is whether the civil power shall be subordinate to the military or the military to the civil. A case has already occurred in which the military power has set at defiance the civil authority, and usurped a kind of omnipotence.

I consider this bill as intended for softening over and soothing these usurpations.

What has been the practice, not indeed in pursuance of, but under the constitution, you have seen men taken up by a military tribunal, sent on board a vessel, and transported to a distant part of the country. If this may be done—if men may be transported from Orleans to the Atlantic coast, they may be deported to Cayenne or to Botany Bay. If you sanction this bill, instead of reaching your lodgings when the house shall have adjourned, you may be arrested on the Pennsylvania avenue, hurried on board a vessel, confined in the hold, and transported to a foreign country.

I put it to any gentleman in this house, if Cataline, Cethegus, and Lentulus, with not as many followers, can be compared to the insurrection of 1794, in point of physical force, however strong they may be in mental force. But from the result it appears that there was as great a deficit in mental as of physical power. I agree with the gentleman from Maryland (Mr. R. Nelson) that this affair does not deserve the name of a rebellion. It is nothing but an intrigue. I am happy to declare, not on the honor of a soldier, but of a man, that it is an intrigue, formed by foreign agents.

A gentleman from Massachusetts (Mr. Varnum) has said that the organization and administration of the government forbids the apprehension that any improper use will be made of this power. Surely the gentleman from Massachusetts must suppose that this is nothing new. Surely the gentleman from Massachusetts must know, if he has read history, and I presume he has, that in case of a *king de facto*, a majority of his parliament are always ready to say, there is no danger in increasing executive power; we are all honorable men, and he to whom we propose to entrust power, is above all suspicion. This is not a fair argument. I take man as he is; and in his best state, & at the best times, he is prone to abuse, prone to corruption. Every single law you pass, but proclaims the fact.

If you pass this law, it will form a new era in the history of the country. I remember that when I was a boy, and used to read such small chronological tables as I could procure, I was always much delighted in Greek and Roman story whenever I read that on such a year monarchy was abolished. But I soon found that tyranny was generally restored in a short time, under the same or a different form. After the abolition of monarchy in Rome, in a few years succeeded dictators, possessed of still greater power, and the liberties of the people did not survive the third political convulsion.

So it will be here. If you pass this bill you lay every man, as has been well expressed (by Mr. Elliot) not at the mercy of the chief executive merely, but of every subaltern officer in the army and navy. What compensation can be made to a man in return for being seized by violence, tied neck and heels, hurried on board a dirty vessel, and sent off to Orleans or Pissamiquady. Then forthwith, he must bring his action for damages, for dollars, and cents and dimes, to obtain reparation to his feelings. Let us put it in the hands of no man to do this. If we pass this bill, we ought to pass an appropriation act at the same time; we ought to mortgage the treasury to compensate the innocent for their sufferings under the act. It is not in men, with their epaulets on their shoulders and their gold buttons on their coats to make compensation.

It is said that this bill is temporary. So it was said in the case of the sedition law & other obnoxious acts. But when a law is once passed it seems an easy thing to procure its re-enactment. From the experience we have had, this clause of limitation appears to be a dangerous appendage; it is a mere bait to the trap; it is merely an entering wedge.

It is said no man becomes base at once, and it may be said with like truth, that no nation ever became enslaved at once. There are in both cases the intuitive and progressive stages, which must be passed through, before the man arrives at complete depravity, or the nation is enchained in hopeless slavery.

Let us take a case. Suppose the duration of the executive power were prolonged from four to five years. The next step would be to eight, then for life, next with the liberty of nominating a successor, and finally it would become hereditary. These are the stages, and in this way mankind are brought to agree to despotic government. It is an old remark that old birds are not to be caught with chaff; but the mass of mankind has never been composed of old birds.

One other law from the same mint, and with the same stamp, the twin brother of this, and I would quit the country. I refer to a law passed by the British parliament in 1794 to prevent seditious assemblies, and which forbid in certain cases, the assembling of more than five persons, under the severest penalties. Oppression under the sanction of law is of the most odious and intolerable kind. Was the tyranny of Robespierre less oppressive, less cruel, less ferocious, less abominable to God and man, because it was practised under the names of liberty and equality?

Mr. R. said he would offer a few remarks on the details of the bill, but he had not uttered more than one or two sentences, when he observed that he had exhausted himself