

were such only as affected the public at large. But if a man thought proper to make a denunciation of individual characters, he had been guilty of a great offence and deserved no protection.

Mr. Hay declared, that he was willing to expose so much of the letter as related to Col. Burr himself. But he enquired whether it would be right to exhibit to public view those parts which would tend to produce controversy between others. Cases may occur in which the disaffection to the government may be such, and so extensive even among the officers of the government, that it may become the duty of private citizens to inform. The accused may have all that belongs to his defence; but he never would put it in his power, to make use of the letter for the purposes to which he was satisfied it would be applied. He could not see why Col. Burr should step forward as the friend of those who had been denounced, even if there were such. But, in truth, the passages of the letter which he was unwilling to expose, were merely opinions of the writer with respect to certain persons, which opinions may have changed; as it related to some of them, he knew they had changed. There were two passages in the letter which he could not consent should be seen unless they were extorted by the court. He did not know that he would yield under any circumstances. He would, indeed, rather go to jail than expose them.

Mr. Wickham observed, that after the sentiments of defiance which had been uttered by the gentlemen on the other side, it only remained to apply to the court for an exertion of its authority. Motives of delicacy, it was settled, were not sufficient to suppress evidence which was deemed essential for the purposes of justice. He instanced the case of the Dutchess of Kingston, in which certain gentlemen were compelled to give testimony of a most delicate nature, and relative to subjects which they had solemnly promised forever to conceal. But these parts of the letter proposed to be suppressed, may be of the utmost importance to the accused. If Gen. Wilkinson shall have denounced persons deservedly high in the confidence of the government and people, it would materially lessen his credulity in relation to Col. Burr.

C. Justice. The writ of *subpoena duces tecum* is sometimes awarded upon motion, but it is more frequently a matter of course upon the mere suggestion of the party. An argument as to the propriety of calling for the paper for the production of which it was awarded, is reserved for the return.

The writ of *subpoena duces tecum* was accordingly issued, to which Mr. Hay made the return inserted in our last: and on the next day, annexed the supplemental return, which we have given in this day's paper.

On this return, an animated debate ensued. Mr. Botts and Mr. Wickham on the side of Col. Burr; Mr. McRae and Mr. Wirt on the side of the prosecution. Col. Burr also addressed a few observations to the court.

The counsel for Colonel Burr contended that it belonged to the accused and his counsel exclusively, to judge whether the whole letter would be necessary for the defence or not; that neither the counsel for the United States, nor the judge himself, could in secret, without argument, or a knowledge of the points on which they meant to place the defence of their client, say whether those parts which were deemed confidential, would or would not have an important bearing on the cause; that if certain characters had been calumniated, the authors of that calumny ought to be exposed; that if the denunciations of Gen. Wilkinson were just and merited, it was an act of justice to give to him the laurels which he deserved; that however necessary state secrecy might be in diplomatic affairs, yet in domestic matters it was detestable, because it might furnish pretexts to men in power to work the destruction of any person obnoxious to them, without giving them an opportunity of justifying themselves. They believed these parts of the letter which related to the characters of individuals of the utmost importance to their client; and that the other parts were really unimportant.

The counsel for the United States referred to the form of the affidavit filed by Col. Burr, in which he states, that the letter may be of importance to him as a matter of evidence; that no particular ground was stated why the letter would be material, and it was impossible in such a case to detect the person making the affidavit, because there was no point to which it was directed; that if a person might capriciously by a vague affidavit of

this kind, extort evidence, no man's private papers would be sacred; that the most confidential papers in his possession might be extracted from his desk, under a pretext that they might be essential for the purposes of justice; that even admitting the passages proposed to be withheld from public view, were really important as it respected the persons alluded to, yet they were of no importance to Col. Burr, nor could they form any part of his defence; that the president having confided to the attorney of the United States an exercise of his discretion as to those parts of the letter which were of a confidential nature, and which ought not to be disclosed; the attorney ought, as to this subject, to be regarded as the president; that whether the public good requires the withholding of any communication made to the president, it was for him alone to decide; that this was not a mere question of delicacy, but of sound policy which may affect the whole country; and that a decision of this question which goes to the length contended for, that the president may be compelled to disclose all communications made to him of treasonable machinations carrying on against the government, would tend to suppress information which the government had a right to expect, and on which its very existence might depend. The case of *Marbury vs. Madison* was referred to, in which the supreme court had decided that the president was not bound to disclose communications made to him in his official character.

In the course of the argument Col. Burr rose, he said, to correct an error which seemed to have pervaded the counsel on both sides. It had not been adverted to, as it surely ought, that the president of the United States by being president, was not divested of his character of an individual. As president, there were certain official channels through which all communications were to be made to him; these were his ministers. Any letter addressed to the president, not through those channels, was not official. He would test the position by another rule. The President is not the keeper of any official paper. He could not have the custody of papers of that description. They belong to the offices of the respective heads of departments. It would be a criminal act in him to withdraw them from offices. Again, when the president retires from office, the succeeding president succeeds to all the official rights of his predecessor, and has a right to inspect all the public letters. Gen. Wilkinson could have made no communications to the president as such, but through the secretary at war. Individuals may indeed communicate with the president in his individual character; and in this instance, he believed many individuals had. The case of *Marbury vs. Madison* had no weight, because that was an application for an official document. One great secret however, had been developed to day, that a system of espionage had been adopted by the government, and that individuals had been invited to send forward their denunciations.

Mr. Wirt, in his reply, particularly animadverted on the latter part of Col. Burr's observations. He contrasted his former conduct with his declarations this day made, and enquired how long it had been that secrecy had ceased to be a predominant trait in his character.

The Chief Justice, though he decided in favour of the production of the letter (as stated in our last); yet did not admit the positions of Col. Burr to the extent contended for by him. He could readily perceive cases, he said, in which letters might be addressed to the president immediately, which contain state secrets, and which might in every respect be regarded as public letters.

SATURDAY, Sept. 5.

Mr. Hay wished to extend the terms of the return which he made yesterday. There was one passage in Gen. Wilkinson's letter, which he was certain the president himself would keep back.

Mr. McRae. As the president is now at Monticello, is it not practicable to send an express to him with a subpoena duces tecum? It is advantageous on every consideration to have the trial completed at this term. Almost all the witnesses are present; and perhaps it would be impossible to collect them here again. An express might, perhaps, return in four days from Monticello; and is it not far better to postpone the trial for that period, than to the next term of the court?

Mr. Hay here read the following additional return:

I hereby certify, that upon a more minute examination of the letter above mentioned, I have observed a few other passages, which are entirely of a

public nature, and which, according to my best judgment, ought not to be disclosed, and which, I conceive, would not be disclosed by the President himself, if the return were to be made by him.

GEORGE HAY.

Mr. Hay then observed, that he did not conceive himself at liberty to put this letter into the hands of the defendant; but that he would immediately send an express to Monticello for instruction; and that the return might probably be made by Tuesday evening.

C. Jus. Is there any objection then to the courts adjourning till Tuesday?

Mr. Martin said that he proposed to bring the case of Israel Smith before the court on Monday.

On the application of Mr. Wirt, Dr. Tazewell (Williamsburg) was excused from serving on the jury on account of the indisposition of his friends.

The Ch. Jus. then observed, that the court would meet on Monday; at some arrangement might be in the mean time made, respecting the letter—Mr. Hay. I can consent to no arrangement but for me to furnish such parts of the letter only as I may deem material to the defence. C. Jus. If there are any state secrets in that letter, the court would be extremely unwilling to call for its production.

Mr. Martin. Gentlemen need not be so scrupulous, Sir, upon this subject; for we can compel the appearance of the president before this court with that letter. Mr. Hay. Shall I furnish such parts in the mean time, as I am disposed to surrender? Mr. Burr. Yes; under the reservation, that such a step does not impair my right to demand the remainder.

The Ch. Jus. then observed, that the court would meet again at half after two, when he understood that Col. Burr was to give bail on the trial for misdemeanor.

At 3, the court assembled, when Jonathan Dayton and Thomas Langburne were accepted as his securities.

MONDAY, Sept. 7.

Mr. Botts. The court will recollect, that when the order was moved for the continuance of the trial for misdemeanor, we deprecated the serious inconveniences of delay. It is much to be regretted, that we should now be driven into the trial without the letter, which we have required; but as that letter may probably be received in the course of the trial, we are willing to enter into it.

Mr. Hay observed, that he should not wish the trial to be gone into with such a declaration on the part of the accused; that he had sent an express to Monticello, agreeably to his promise; and that he expected him to return by to-morrow 12 o'clock. He therefore did not wish the jury to be fully sworn to-day.

The Chief Justice did not see any necessity for delay on that account. The paper would probably be here by the time when it is wanted, as it will not be required until the defence is opened.

Mr. Hay wished every preparation for the trial to be made to-day, but hoped that the trial will not be gone into until to-morrow. He expected some communication from the president, which would have considerable influence on him, with respect to his conduct on the trial.

At this moment, Herman Blannerhasset appeared in court, when Mr. Botts observed, that Mr. Bl. had attended for the purpose of understanding his true situation. He could obtain bail for the misdemeanor, and it was obvious under the opinion of the court, the indictment for treason could not be supported. Will you, Mr. Hay, enter a *nolle prosequi* to the prosecution for treason?

Mr. Hay acquiesced.

Mr. Martin. Will you not adopt the same course, as to the case of Mr. Israel Smith?

Mr. Hay acquiesced again.

Mr. Martin. I will mention the case of John Smith of Ohio; would it not be better to save the expense of bringing him here as a prisoner, by entering a *nolle prosequi* in his case?

Mr. Hay. His case is not before the court.

Mr. Botts then requested the court to fix Blannerhasset's bail for misdemeanor. It was already ascertained that he is not rich. The C. Jus. determined that he should give the same as Aaron Burr; 5000 dols. The same sum was also fixed for Israel Smith.

Mr. Botts observed, that as Mr. Blannerhasset would find some difficulty in getting two securities, he hoped it was not an inflexible rule with the court to insist upon two; when one alone was deemed sufficient to cover the amount of Bail. Mr. D. Woodbridge had offered himself to be

Mr. Bl's bail. Mr. Hay. I can have no objection, if the court deems one security sufficient.

Mr. Woodbridge was accepted.

Some conversation then ensued about the jury;—when it was determined to examine but one to swear them to-day.

When Orris Payne was called, Mr. Hay mentioned that motives of peculiar delicacy induced him to wish that Mr. P. might be excused from serving; as he was extremely intimate with him; and was in the constant habit of conversing with him on this subject.—Mr. Burr. I may perhaps get a worse man. Mr. Hay. You cannot get a better.—Mr. Payne was suspended for further examination.

2. Thomas Underwood, sen.—Mr. Burr. I challenge you, sir: I do it because I understand you have expressed opinions unfavourable to me. Mr. U. It is true, that I have, sir.—Mr. U. was accordingly set aside.

3. Nicholas Hallam was excused on account of his indisposition.

4. James Bootwright was accepted.

5. Obadiah Garthright wished to be excused on account of the indisposition of his family.—Mr. Burr. Perhaps your family may be better by to-morrow.

6. John Murphy.—Mr. Burr. Have you not expressed unfavourable opinions about me?—Mr. M. I do not recollect any time or place, where I have done it; but is more than probable that I have. Mr. M. was accepted.

7. Byrd George wished to be excused on account of indisposition. He was directed to attend to-morrow if he was better. If not, his non-attendance would be noted.

8. William Niece had expressed very unfavourable opinions of Aaron Burr.—Set aside.

9. When J. McRae was called, Mr. McRae, (counsel for the prosecution) observed, that if motives of delicacy had suggested a late application to the court, he thought that still stronger motives of delicacy would apply to him on the present occasion. After a short conversation between Mr. McRae and the accused, which we did not distinctly hear, Mr. McRae was excused.

10. Francis Walker.—Mr. Burr. I challenge Mr. Walker.—Mr. W. I intended to have stated my objections to serving. I believe the plans attributed to Col. Burr were such as he had really formed; that he contemplated the separation of the Western from the Atlantic States, and that after seizing on New-Orleans, he intended to attack Mexico.

11. Benjamin J. Harris had received and still retained an opinion that A. B. had been guilty of something.—Set aside.

12. Jacob Ege had formed and expressed strong prepossessions against the accused.—Set aside.

13. Tarlton Williams was not a freeholder.

14. Robert Adams had made declarations against the accused.

15. Nathaniel Wilkinson. Mr. Burr. Mr. Wilkinson will be good enough to declare whether he has not formed and expressed opinions against me? and very strong ones? Mr. W. Yes: very strong ones indeed.—Set aside.

16. Abraham Cawley had formed and expressed opinions unfavourable to the accused.—Set aside.

17. Col. Wm. Bentley was accepted.

18. William Austin had expressed very unfavourable opinions of the accused. Set aside.

19. Joseph P. Owings was detained on the jury in the District Court (now sitting in the other wing of the Capitol.) Mr. Burr observed, that Mr. O. might perhaps be at liberty to attend to-morrow.

20. Thomas Pulling was indisposed; but suspended till to-morrow.

21. Daniel Wiseger was suspended for a similar reason.

22. James Whitehaw had formed and expressed very unfavourable opinions of the accused. Set aside.

23. Yeaman Smith was accepted.

24. Richard Young was excused on account of his indisposition.

25. Carter Page was extremely indisposed; suspended till to-morrow.

26. Robert Randolph was indisposed and wished to be excused. Mr. Burr requested him to be suspended until to-morrow. Mr. Randolph urged his extreme anxiety to be excused from serving. Mr. Hay. I do not wish to object to you, sir; but there is one ground which you may get off. Have you not formed and expressed some opinion on this subject? A. I have. Mr. Wickham. If Mr. Randolph will deliberately declare that he cannot give an impartial verdict on this case, we wish him to be discharged. A. I must repeat that I have

formed an opinion on this subject, without intending to say, on which side that opinion leans. Mr. Randolph was discharged.

The Chief Justice then instructed the deputy marshal to summon twelve additional Jurymen by to-morrow. Mr. Burr. The Marshal can hand me the list of them this evening.

The court then adjourned till to-morrow 10 o'clock.

TUESDAY, Sep. 8.

No measure of importance was adopted this day.

Mr. Hay informed the court, that his messenger had not returned from Monticello.

Mr. Israel Smith appeared in court and was bailed on the indictment of a charge of a misdemeanor; himself in the sum of 5000 dollars and his securities John B. Walton and John Alcock in 2500 dols. each.

The names of the jurors who had been summoned were called over: Messrs. John Richards, Daniel Price, William McKim, Robert Mayo, Robert \*\*\*\*\*, Benjamin Stetson were set aside on account of their previous impressions. George W. Dixon was excused on account of his indisposition.

Carter Berkeley and Robert McKim were accepted.

WEDNESDAY, September 9.

The names of the jurors who had been previously selected, were called over; some of them were absent. The court then proceeded to fill up the vacancy.

1. Charles Spencer had formed and expressed an unfavorable opinion of the accused. Set aside.

2. Robert Gordon, upon being asked by the chief justice whether he had formed or expressed an opinion on the subject, replied, that like most other people he had conversed about it; but that he was not conscious of any fixed prejudice for or against the accused. Accepted.

3. James Taylor had formed and expressed an opinion that Col. B. had been guilty of something. Set aside.

4. John Glinn had also formed and delivered an unfavorable opinion. Set aside.

5. John New was in the same situation. Set aside.

6. William Rowlett observed, that he lived in Richmond, and was in the same situation. Set aside.

7. James Penn had been occasionally engaged in conversation on this subject; but he had not made up any positive opinion.—Accepted.

8. Heath Jones Miller was decidedly of opinion that the accused was guilty. Set aside.

9. Jourdan Harris had made up a positive opinion to the same effect. Set aside.

10. James Harris was in the same situation. Set aside.

11. Samuel Woodson had formed a very unfavorable opinion of the accused. Set aside.

12. Benjamin Wolfe had formed and expressed his opinion a thousand times. His mind was fixed as to the guilt of the accused. Set aside.

13. Jesse Bowles had said, that if common report was to be believed, Col. Burr had been guilty of something; but he had not made up a positive opinion on this charge. Accepted.

14. Daniel Holloway was excused from indisposition.

15. John Price was excused for the same reason.

16. Thomas Lewis had in general conversation expressed an opinion unfavorable to Colonel Burr; being asked by the chief justice, he said, that his opinion on this charge was not fixed. Accepted.

17. Richard Young was excused from indisposition.

Carter B. Berkeley, one of the selected Jurymen, wished to be excused from serving on account of his business. Mr. Hay. Have you, Mr. Berkeley, formed and expressed no opinion on this subject? Mr. B. I have seen, sir, different publications about it; I have thought that Colonel Burr might have been guilty of something; but I have formed no positive opinion. Mr. B's excuse was overruled by the court.

Mr. Hay was solicitous to have Orris Payne excused, and asked him whether upon his conscience he had formed no opinion on this subject? Mr. Payne observed, that he had formed an opinion. Mr. Baker. Is it a fixed opinion on this particular charge, or has it fluctuated according to circumstances? Mr. Payne observed that he had no fixed opinion as to this particular charge. Mr. Payne was retained.

The jury were then sworn, and consisted of the following individuals:

Orris Payne, Carter B. Berkeley, James Bootright, Robert McKim, Obadiah Garthright, Robert Gordon, John Murphy, James Penn, William Bentley, Jesse Bowles, Yeamans Smith, Thomas Lewis.

See the Gazette, for continuation.