

# RALEIGH REGISTER,



## AND North-Carolina State Gazette.

Ours are the plans of fair delightful peace,  
Unwar'd by party rage, to live like Brothers.

VOL. VIII.

MONDAY, APRIL 13, 1807.

No 394.

FROM THE ENQUIRER.

### Col. Burr's Examination.

THE examination of Col. Aaron Burr, which commenced in private at the Eagle Tavern, in this city, on Monday last, was continued on Tuesday at the Capitol, before the Chief Justice of the U. States, and in the presence of an immense assemblage of the citizens. Col. Burr had been recognized to appear at 10 o'clock. At half past ten he presented himself before the judge, and with some degree of emotion, apologized for the apparent delay, declaring he had misapprehended the hour at which he was bound to appear. The judge then adjourned from the court room to the hall of the house of delegates, for the greater accommodation of the spectators.

Great complaint has been made about the private examination held at the Eagle. Some have branded it with the epithets of 'a secret and unprecedented proceeding, not unlike the process of a Spanish Inquisition.' The facts are said to be, that when the Attorney for the District applied to the Chief Justice for a warrant, some conversation ensued on the manner of examination: Mr. Marshall observed that it was indifferent to him whether it was held at the Capitol or the Eagle. Mr. Hay objected to the latter, that no room was sufficiently large to receive the crowd that would attend, which would be a source of considerable inconvenience. Mr. M. observed that this difficulty would be obviated by having the examination in private. To which Mr. H. assented, on the condition, that if there were a discussion by council, they should adjourn to the Capitol. The evidence to be adduced was already before the public. On the examination, it was agreed that a discussion was necessary. Mr. Hay then moved for an adjournment to the Capitol. In which arrangement Colonel Burr's council immediately acquiesced.

Mr. Hay, Attorney for the U. States, in the district of Virginia, opened the examination, and in a speech of great length and perspicuity, enforced the reasons which induced him to believe Col. Burr guilty of the charges alleged against him. These were the same as stated in the last Enquirer, viz. 1st. The setting on foot and providing the means for a military expedition against the territories of a nation at peace with the United States; and 2dly. For High Treason against the United States.

He cited Blackstone's Commentaries to shew, that on a mere question to commit a person accused of a crime, nothing more was necessary than to shew a probability that he had been guilty of it. To require more in this incipient stage of the proceedings, particularly in a country of such thin population & extensive territories as the United States, would be to hold out an invitation to perpetrate crimes with a certainty of avoiding punishment. In support of these charges, the testimony of Gen. Eaton; the deposition of Gen. Wilkinson, and the disclosures made to him by Bollman and Swartwout were relied on. The treasonable intentions of Col. Burr being clearly established, enough appeared to render it highly probable that he had committed the overt act required by the constitution to consummate the offence. In addition to this testimony, his flight from the Mississippi territory, and the evidence of Major Perkins, by whom he was conducted from the Tombigbee, where he was apprehended, to this place, stating his attempt to appeal to a Magistrate in the state of South-Carolina, were adduced as strong circumstances to prove his guilt.

[Mr. Hay adduced other reasons for a commitment; among others, that the Executives and Legislatures of Ohio and Kentucky had sanctioned by their own acts, the probability of some treasonable conspiracy.

Mr. Burr's attempt to escape from the hands of his escort is thus represented: In passing thro' the town of Chester in S. C. the first town of any size that they visited, Mr. B. suddenly alighted from his horse, and threw himself among the small crowd which had collected to see the cavalcade. He told them that he was A. Burr, dragged by a military escort, without any warrant, and contrary to the laws of his country. Major Perkins, however, immediately followed; seized, and replaced him upon his horse. The crowd manifested no disposition to interfere in the business.]

Mr. Wickham, in behalf of Col. Burr, combated with great ingenuity the arguments of Mr. Hay. He contended that facts establishing the guilt of the accused ought to be proved before any inference of a treasonable design can be drawn, so as even to warrant a judge in committing for trial; that the evidence in this case was altogether uncertain and illegal, that the deposition of Gen. Eaton contained its own self-condemnation; and that the flight of Col. Burr, as it was termed by the counsel for the prosecution, was nothing more than a wish to avoid military persecution. No reason, he contended, existed why the U. States were unprepared with testimony. They had chosen this place as the scene of action, and dragged Col. Burr to it. Sufficient time had elapsed since the first apprehension of Col. Burr to take affidavits, tending to prove the facts charged, if he had really been guilty.

Mr. Randolph on the same side, made an eloquent address to the feelings of the audience and pursued nearly the same train of reasoning adopted by Mr. Wickham.

[Col. Burr's counsel asserted that his objects were of a nature to be useful to the U. States. As far as they ventured to develop them, it was said to be his intention to assist the United States in case of a war with Spain, which seemed at that time a probable event; and to settle the Ouachita Grant, from which point it would be at least in the power of Col. Burr, to be an useful auxiliary to his country against its enemies.]

Colonel Burr then arose and addressed the judge. He principally relied on his two former acquittals, and enquired whether there was probable cause to suppose him guilty, when in Kentucky and the Mississippi Territory, where the greatest alarm had been excited, the civil tribunals had pronounced him innocent.

[Col. Burr spoke about ten minutes.—He dwelt upon the unfounded alarms (as he called them) which had existed in the W. country, and the way in which he had met them. The alarm prevalent in the State of Ohio, had produced a judicial enquiry into his conduct before the court of Kentucky. The moment he heard of this step, he had hurried before the court. He demanded an enquiry; and he said was honorably acquitted.—The same alarm followed him to the Mississippi Territory: he there met it gain; and not only had the grand jury found nothing against him, but they had even presented the government for meddling with him. He denied he had ever fled from the laws of his country: It was military oppression he had avoided. Although Cowles Mead had promised him his protection, while he remained in the territory, it was a promise which could not be kept. The arms of force was too strong. He had been told even

by the officers of an armed boat lying at Natchez, that he was to be seized, hurried on board, & borne off. What could he do? In pursuance of his own judgment and the advice of his best and wisest friends, he was determined to fly from the oppression. He declared it to be false, utterly false, that he had broken his recognizance. He asserted that his designs were honorable and would have been useful to the U. States. But even admitting that they had been otherwise, they must have been long since abandoned: they had not once ripened into overt acts. There was no Treason.—He complained of the treatment he had experienced: his loss of property from seizures on the Western rivers; the hardships he received from his guard; debarred the use of pen, ink and paper; even to write to his daughter. He dwelt upon his effort to escape in South-Carolina. He said it was a mere attempt to throw himself out of the tyranny of a military escort into the hands of a civil magistrate. A little before or after dismounting from his horse, he asked whether he had not called for the interference of a magistrate. He spoke as to the alarms of New-Orleans being considered as a probable evidence of a treasonable conspiracy. Those alarms were not produced by him but by others; by the President who had alarmed Gen. Wilkinson, and Gen. Wilkinson who had alarmed the City. Respecting Wilkinson and Eaton he made but few observations. He called the depositions produced before the court, a parcel of crudities which he should not pretend to be able to understand.]

Mr. Rodney, the Attorney-general for the United States, closed the arguments. His exordium expressed in a most sensible and impressive manner, the regret he felt in being compelled to arraign a man as a traitor, whom the people of the United States had once elevated to the second office in the government. In discussing this particular question, he took nearly the same ground which had been occupied by Mr. Hay, but went more particularly into an examination of the testimony.

When the arguments were gone through, the Chief Justice observed that whatever opinion he might give upon this subject he wished it to be in writing. He would accordingly adjourn till the next day at 11 o'clock, for the purpose of having time to consider the question.

On Wednesday the 1st of April, the Judge attended, and in the presence of a very numerous assembly, gave the following opinion:

### Judge Marshall's Opinion.

THE U. STATES, } On a Motion for a  
versus } COMMITMENT.  
AARON BURR.

I am required on the part of the Attorney for the U. States to commit the accused on two charges.

1st. For setting on foot and providing the means for an expedition against the territories of a nation at peace with the United States.

2d. For committing High Treason against the United States. On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require, that which should absolutely convince my own mind of the guilt of the accused; but I ought to require and should require, that probable cause be shown, and I understand probable cause to be a case made out by proof furnishing good reason, to believe that the crime alleged has been committed by the person charged with having committed it.

I think this opinion entirely reconcilable with that quoted from Judge Blackstone. When that learned and accurate commentator says, that "if

upon an enquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless; in such cases only, it is lawful totally to discharge him:—otherwise he must be committed to prison or give bail;" I do not understand him as meaning to say that the hand of malignity may grasp any individual against whom its hate may be directed, or whom it may capriciously seize, charge with some secret crime, and put him on the proof of his innocence. But I understand that the foundation of the proceeding must be a probable cause to believe, there is guilt; which probable cause is only to be done away in the manner stated by Blackstone. The total failure of proof on the part of the accuser would be considered by that writer, as being in itself a legal manifestation of the innocence of the accused.

In enquiring, therefore, into the charges exhibited against A. Burr, I hold myself bound to consider how far these charges are supported by probable cause.

The first charge stands upon the testimony of Gen. Eaton and Gen. Wilkinson.

The witness first named proves that among other projects which were more criminal, Col. Burr meditated an expedition against the Mexican dominions of Spain. This deposition may be considered as introductory to the affidavit of Gen. Wilkinson, and as explanatory of the objects of any military preparations which may have been made.

I proceed then to that affidavit.

To make the testimony of Gen. Wilkinson bear on Col. Burr, it is necessary to consider as genuine, the letter stated by the former to be, as nearly as he can make it, an interpretation of one received in cypher from the latter. Exclude this letter, and nothing remains in the testimony, which can in the most remote degree affect Col. Burr. That there are to the admissibility of this part of the affidavit great and obvious objections, need not be stated to those, who know with how much caution proceedings in criminal cases ought to be instituted, and who know that the highest tribunal of the U. States has been divided on them. When this question came before the Supreme Court, I felt the full force of these objections, although I did not yield to them. On weighing in my own mind the reason for and against acting, in this stage of the business, on that part of the affidavit, those in favor of doing so appeared to me to preponderate, and, as this opinion was not overruled, I hold myself still at liberty to conform to it.

That the original letter, or a true copy of it accompanied by the cypher, would have been much more satisfactory, is not to be denied:—but I thought, and I still think, that upon a mere question whether the accused shall be brought to trial or not, upon an enquiry not into guilt but into the probable cause, the omission of a circumstance which is indeed important, but which does not disprove the positive allegations of an affidavit, ought not to induce its rejection or its absolute disbelief, when the maker of the affidavit is a too great a distance to repair the fault. I could not in this stage of the prosecution absolutely discredit the affidavit, because the material facts alleged may very well be within the knowledge of the witness, although he has failed to state explicitly all the means by which this knowledge is obtained.

Thus, Gen. Wilkinson states that this letter was received from Col. Burr, but does not say that it was in his hand writing, nor does he state the evidence which supports this affirmation. But, in addition to the circumstance that the positive assertion of the fact ought not perhaps, in this stage of the enquiry, to be disregarded, the nature of the case furnishes that evidence.

The letter was in cypher: Gen. Wilkinson, it is true, does not say that a cypher had been previously settled between Col. Burr, and himself, in which they might correspond on subjects which though innocent, neither of them might wish to subject to the casualties of a transpor-

tation from the Atlantic to the Mississippi; but when we perceive that Col. Burr has written in cypher, and that Gen. Wilkinson is able to decipher the letter, we must either presume that the bearer of the letter was also the bearer of its key, or that the key was previously in possession of the person to whom the letter was addressed. In stating particularly the circumstances attending the delivery of this letter, Gen. Wilkinson does not say that it was accompanied by the key, or that he felt any surprise at its being in cypher. For this reason, as well as because there is not much more security in sending a letter in cypher accompanied by its key;—I think it more reasonable to suppose that the key was previously in possession of General Wilkinson. If this was the fact, the letter being written in a cypher previously settled between himself and Col. Burr, is in this stage of the enquiry at least, a circumstance which sufficiently supports the assertion, that the letter was written by Col. Burr.

The enterprise described in this letter is clearly a military enterprize, and must have been intended either against the U. S. or against the territories of some other power on the continent, with all of whom the U. States are at peace.

The expressions of this letter must be admitted to furnish at least probable cause for believing, that the means for the contemplated expedition were provided. In every part of it, we find declarations indicating that he was providing the means for the expedition, and as these means might be provided in secret, I do not think that further testimony ought to be required to satisfy me, that there is probable ground for committing the prisoner on this charge.

Since it will be entirely in the power of the Attorney-General to prefer an indictment against the prisoner, for any other offence which he shall think himself possessed of testimony to support, it is in fact, immaterial whether the second charge be expressed in the warrant of commitment or not; but as I hold it to be my duty to insert every charge alleged on the part of the U. States, in support of which probable cause is shown, and to insert none in support of which probable cause is not shown, I am bound to proceed in the enquiry.

The second charge exhibited against the prisoner, is High Treason against the United States in levying war against them.

As this is the most atrocious offence which can be committed against the political body, so is it the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power: It is that, of which the people of America have been most jealous, and therefore, while other crimes are unnoticed, they have refused to trust the national legislature with the definition of this, but have themselves declared in their constitution that it shall consist, only in levying war against the United States or in adhering to their enemies giving them aid and comfort. This high crime consists of overt acts which must be proved by two witnesses or by the confession of the party in open court.

Under the control of this constitutional regulation, I am to enquire whether the testimony laid before me furnishes probable cause in support of this charge. The charge is, that the fact itself has been committed, and the testimony to support it must furnish probable cause for believing that it has been actually committed, or it is insufficient for the purpose for which it is adduced.

Upon this point too, the testimony of Gen. Eaton is first to be considered. That part of his deposition which bears upon this charge is the plan disclosed by the prisoner for seizing upon New-Orleans, and revolutionizing the western states.

That this plan, if consummated by overt acts would amount to treason, no man will controvert. But it is equally clear, that an intention to commit treason is an offence entirely distinct from the actual commission of that crime. War can only be le-