gainst some positive law, means any thing, it shall be that the misconduct for which a judge or any other officer may be impeached, is either made punishable by, or in violation of an act of Congress, for we are not to be regulated either by the common law or a State law. What then would be the result? I have pointed out several infamous ones of great enormousness, in violation of an act of Congress, and yet, under this doctrine, he is to be permitted to purline his wicked courses until every possible offence is defined by statute. This too would teach us that we have done wrong heretofore; for it is the law that when a judge was impeached and convicted from either a misdemeanor or offence pending on the bench, although there is no law of the United States forbidding them. Indeed I do not know that there is any law punishing either, in New-Hampshire, where the offence was committed. It would be one of the comfort that their were impeachable at all. I however am not known where—certainly not in England. Blackstone's commentaries is punishable there by the ecclesiastical authority, but the temporal magistrate never had any power over it, until it was given by a Statute of James I. and even then the power was not to be exercised by the courts, but only by justice of the peace, and from that the case in Maryland, where a small time may be imposed.

But the attorney general of Maryland, (Mr. Martin) admits that offences may be of so heinous a nature that they are without carries infamy with them, and that though no connected in the discharge of duty, yet if done in a private state, the party may be impeached and removed from office. This though not very material to the present question, may serve us in shewing how inapplicable the doctrine is, that the offence must be against a State law or the common law. I will impeach that in New-Hampshire there is no law punishing the fine bearing—In Maryland a magistrate is authorized to impose a fine of thirty-three cents, and that is not punishable, the offender may be put in the pillory and receive thirty-nine lashes. The punishment is infamous, and if inflicted on a judge, according to the idea of the gentleman, he is to be impeached and removed from office. If the fine offence is committed in New-Hampshire, the judge is not to be removed, not because he has been guilty of a higher offence, but because he has done his law punishing it. If then the time has to be made the criterion, a judge in Maryland is to be removed from office for that which he might do with impunity in another State.

"A county this year, is little farther—There was once in the state of Connecticut, and may be yet for aught I know, a celebrated code called the *blue Laws*. Under the provisions of this code, if a lover in a fall, shot a young man, a flap was tied up and publicly whipped, because, on returning from a long journey, he met his wife on a Sunday at the front door and killed her. This was deemed a high offence, and was punishment accordingly. Now if we are to be governed by the blue laws, I truly tell the laws of Connecticut will be repealed, and that our grave judges may be allowed to kill whom and when they please, as to their wilions shall seem meet, without incurring the pains and penalties of impeachment. This, I may be somewhat ludicrous, but I hope it is not therefore the less illustrative of the absurdity of the doctrine now contended for. It has been said that the offences for which a judge may be impeached, ought to be defined, and that grave judges may be allowed to kill whom and when they please, as to their wilions shall seem meet, without incurring the pains and penalties of impeachment. This, I may be somewhat ludicrous, but I hope it is not therefore the less illustrative of the absurdity of the doctrine now contended for. It has been said that the offences for which a judge may be impeached, ought to be defined by the constitution, but it is not the constitution that defines the offence of the bearing on the bench, although there is no law of the United States forbidding them. Indeed I do not know that there is any law punishing either, in New-Hampshire, where the offence was committed. It would be one of the comfort that their were impeachable at all. However, I am not known where—certainly not in England. Blackstone's commentaries is punishable there by the ecclesiastical authority, but the temporal magistrate never had any power over it, until it was given by a Statute of James I. and even then the power was not to be exercised by the courts, but only by justice of the peace, and from that the case in Maryland, where a small time may be imposed.

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articles and not upon the evidence; and this allegation contains an admission from them, that it appears the guilt of the party is established. It shall be my endeavor to shew that there is no material variance between the charges as laid in the articles, and the evidence brought to support them; but that they are amply and fully proved by the very best testimony which could be adduced.

One of the learned counsel in consequence of the evidence has declared that he discovered but a single truth in it, which was that the judge had formed an opinion, and that he had acted upon the law; and that gentleman at the same time contended, that the land labored with great zeal, and with much display of talents, to convince the judge that he could be in no possible wrong in this. Unfortunately for their learned gentlemen, even that truth is not established, and if it be established to the article it will be found that the judge is not charged for having formed an opinion, or for having reduced that opinion to writing, but for "having delivered an opinion in writing on the question of law, on the confiscation of property in the defence of the accused, *ruthlessly* determined, tending to prejudice the minds of the jury against the prisoner, and thereby consulted had been in his defence."

In this we find no charge against him for having formed an opinion, or for having reduced it to writing, and every thing beyond the mere fact of having formed themselves the trouble of proving what I am force every member of the house of the duty yesterday and before, that there was no impropriety in a judge's forming an opinion on any subject, particularly on the legal or political. It is not however unusual for advocates to attempt to draw the attention from the material points in dispute, for the purpose of fixing it on points which are not material. Such has been the course pursued by our adversaries. But, Mr. President, the charge against the judge does not rely upon the trial of John Fries for treason, but upon his conduct in the trial of the jury against him, by delivering an opinion to them upon the law, before they had heard the evidence and before he was, what ought to be, the judge, they had to sample, the unremovable right to decide as well the law as the fact. It is the right and duty of judges to inform juries of the law of the country, for whatsoever, but it is an unwarrantable proceeding, it is an unauthorised affronting of the jury, for a judge to deliver that opinion to the jury in a criminal trial, which he is to decide upon, before the conflict of the prisoner have been heard in his defence.

I did not intend to hear the fact delivered by the counsel, but I did expect to hear it would be admitted, and admitted it must be, indeed. This however, has not been done; and they have had to spend a great deal of time in proving an impossibility I had almost said an absurdity. They have declared that the judge had formed an opinion known, but that it became public by some that call the warm and improper expression, "Mr. Lewis's will is impolitic. What are the facts, as proved without the slightest contradiction? The judge Chase handed the written opinion down to the bar. That it was read to the bar, among of Mr. Lewis, who at the time requested it, immediately and distinctly, that it from him declaring that his hand should never be accused of receiving a prejudged opinion in any case. Mr. Lewis said, "I see it is known by Mr. Lewis! He refused to read it, and threw it from him with the warm and improper expression mentioned by writing from a high fend of the injury done his client. Mr. Lewis, it was made public by judge Chase, to all indefinitely prove beyond the publicity of the bar, and to the ears of the whole panel of jurors. But permit me here to meet one of the honorable counsel (Mr. Hopkinson) who contended, that the defend my friend who fell opened that case, (Mr. Randolph) The learned counsel avails himself, he says, of the difference between a general opinion and a particular opinion, and he says, he was particular case, and infists that judge Chase's was nothing more than an opinion upon the law, and that he applied it in the most direct terms to Fries's case; that he knew there was no controversy about the facts, and that the only defence must rest upon the construction which the jury would give to the constitution and the law of treason. He he publicly pronounced the opinion he was the jury, upon the by-benders, if I do not prove all this, then I will yield to the gentleman, and admit, indeed the whole impeachment.

In order to prove this, I might rely faithful with referring the Senate to the clear and pointed testimony of Mr. Lewis, Mr. Dallas and Mr. Tilghman. But as Mr. Rawle and Mr. Meredith do not recollect so much as their other gentlemen, and it has therefore been argued that the former must be mistaken, because it is said that their memory at the moment gave a colour

not warranted by the facts, I shall not rely solely on the information derived from them. But I mean to shew that Mr. Lewis and Mr. Dallas are supported in their testimony by the judge himself, while Mr. Rawle and Mr. Meredith are pointedly contradicted by him. In truth, it would from as if the counsel for the accused had entirely forgotten that he had ever filed the affidavit, or that he had read it. We allege that the judge delivered the opinion, and that he spoke directly to Fries's case in the hearing of the jury; they deny this. We have proved it by Mr. Lewis and Mr. Dallas, they rely on Mr. Rawle and Mr. Meredith who have contradicted it. Let us hear the judge himself.

In the 14th page of the answer the judge says, it was he that delivered that on the 21st of April, 1800, (acknowledged by all to be the 8th day of the memorable contest) that the verdict Fries was brought into court, and placed in the prisoner's box for trial, but before the jury was impanneled so try him, this respondent informed the counsel in writing on the question of law, on the confiscation of property in the defence of the accused, *ruthlessly* determined, tending to prejudice the minds of the jury against the prisoner, and thereby consulted had been in his defence."

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counsel for the prisoner; and this they have not been permitted even to attempt for the benefit of Fries, who is their himself and his friend. Let him himself and his friend ought, not the necessity of proving our testimony. This is the excise offered by the judge in the 13th page of his answer, and it has been reiterated over and over again by his counsel at the bar. Let us examine it, and determine for ourselves, whether it is could be the motive. In the 10th page of the answer, it is stated, that the indictment against Fries was found by the grand jury, on the 16th day of April, 1800, and "*that, the trial was appointed to be had on the 21st day of the same month.*" Thus we days between the indictment and the trial, and that fixed for trial, agreeably to the judge's statement. The court was in session every day, and we have proved, and that Mr. Lewis and Mr. Dallas, both being extensively engaged in business, were present every day. If this trial was to Fries was intended, and there was a desire to accommodate the prisoner, the opinion of the court, in order that new testimony might be procured, or, would naturally suppose, that some opportunity of conferring with the counsel presently, might have been embraced, and this special favor might have been hourly offered. But what is the fact? This information was never given until the day arrived, which was fixed for the trial; nor until after the prisoner was brought into court. Is this the proper construction to be the motive which actuated the judge? Surely not—why delay? Is the very latest moment preceding the trial? Why deliver the opinion *publicly*, not only in the hearing of the counsel, but of the jury, and every other person present? Why, if he intended the prisoner will agree with me, that the reason assigned, is as little to be relied on, as the replication, an unworthy evasion.

The counsel (Mr. Hopkinson) who first addressed the court in favor of the accused, viewed this part of the subject in a different light. He very ingenuously offered another excuse. He considered it a great favor that the judge delivered his opinion, but it was intended to give the counsel an opportunity of cross-examining, but he says the judge declared the opinion to be delivered for the purpose of drawing the attention of the counsel to those particular points, which it would be necessary for them to argue, in order that the error of one point might be corrected if it was an error. This he called a very great alleviation, and supposed that some other ways ought to be thankful for it. Such a reason appears to be very ingenious, but in my judgment the disadvantages generally are much greater. On that occasion, however, it is one of no moment, and could not be intended to give any advantage to the prisoner, for he informs the counsel meant to take. One of them was Mr. Lewis, who was in the hearing and we are told that judge Chase had the benefit of his notes, as well as those of the district attorney. He knew therefore perfectly well, that the prisoner, or those who he had peremptorily decided against them. In fact, he should be considered as having drawn the attention of counsel, to those points, which had been relied on at the former trial. This perfectly consistent with the idea of his like the other nothing more than an excuse.

Let us see too, how this reason or excuse will correspond with the principles contained in defence of the judge, and very much dwelt on by his advocates. In the 13th page of the answer, he says, the judge states that there were more than one hundred civil causes, then depending in the court, and he concluded that the ends of justice and the ends of the court's opinion would tend to the saving of time. Now permit me to ask if any man whatever could be so silly, if any gentleman supposes it was the intention of the court to draw the attention of the counsel to the particular points stated in the judge's opinion? I will tell you what I intended, that if the counsel were to attempt to confute the opinion, the opinion was erroneous, no time whatever could be saved, as the very attempt would shew that the opinion contained that time which the judge deemed so precious.

I have therefore proved that the opinion was publicly delivered; that it was applied by the judge in direct terms to the case of Fries; that it was delivered in hearing of the jury, who were to decide upon his life and death, thus tending to prejudice their minds against him; and I flatter myself I have also proved the entire futility of those excuses, which have been seen up for him, as well by himself as by his counsel.

Much has been said with a view to convince the court that the opinion was delivered was a correct one, and that it was therefore perfectly justifiable. For my part I consider it totally immaterial in my present inquiry, whether the crime of treason as laid in the judge's opinion was correct or not; for even if it was correct, the time and manner of delivering it, was such as to prejudice the jury against him. It is a misdemeanor, a high misdemeanor in a judge, wantonly to give an opinion upon any case which is to come before him, and obviously to the swearing of the jury; and the offence is made much greater by the opinion being publicly declared in the presence of the jury, who ought to come to the trial of every cause with minds wholly free from prepossession against either party.

Although the judge has said in his answer, that no gentleman of established reputation for legal knowledge would deliberately give a contrary opinion,

yet I have not the slightest apprehension, but any little reputation that I may possess, can be in any manner affected by my expressing, as I now do, my entire conviction that the doctrine of treason as laid down in Fries's case, is perfectly consistent with the spirit and meaning of the constitution. It is my intention at this time to enter into an argument to prove this, for I have before said, that I consider it quite immaterial in the present discussion; but I will offer some few observations, to demonstrate that the Senate is there was nothing very unreasonable in the opinion expressed by Mr. Lewis and Mr. Dallas, to shew that the constitution was not a Tory, and that the judge's construction.

The constitution declares, that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid & comfort." John Fries was indicted for levying war against the United States, and the facts I believe were, that he, with some others, did in a forcible manner, rescue some prisoners from the marshal of Pennsylvania. This was called a resistance to a law of the United States, and by construction, was determined at the former trial to be the treason of levying war. It was in response to this construction of the constitution that Mr. Lewis and Mr. Dallas wished to be heard. It was certainly not a very extraordinary wish on the subject, for it ought to be recollected that we are *a* government of limited and delegated powers, and that the constitution of the United States should not be a construction unwarranted by its letter. After the decisions had taken place in the former trial, the counsel for the prisoner, (I mean in the cases of Vigol and Mitchell) contended that the court had declaring that to resist a law of the United States should be treason, but impudencesary, punishable by fine and imprisonment, and that this was provided by the act of 1789, that to rescue prisoners from the custody of the marshal, was punishable by fine and imprisonment. Mr. Lewis and Mr. Dallas were desirous of shewing, that Fries's case came within the provisions of these laws, and that it was not of such a nature as to fetch his life. They also wished to have an opportunity of proving, that the terms *levying war against* not to receive the same construction here as in England. To convince the Senate that they were not unreasonable in supposing, that the construction given by the court has not been unanimously sanctioned, I shall take the liberty of referring to an author of great reputation, and I believe our adversaries' will not refuse to receive his opinion. Tucker's Virginia, in his valuable edition of Blackstone's commentaries, in the appendix to the 1st vol. under the head of Treason, after reciting that part of the constitution, proceeds in the following words:

"It is probable that no part of the constitution of the U. S. was supposed to be less susceptible of various interpretations than that which defines and limits the offence of treason against the U. S. the text is short, and until construed, it might appear very different from the artificial reasoning and subtle refinements which have been used, and say that *that* instrument is to be regarded as the work of the people of the U. S. both collectively and individually, it might seem reasonable that the interpretation of the language, if not unequivocal plain, was where particular, to be construed as it would be the thoughtful man, who may happen to be called upon to decide it. The technical men are not very apt to respect the opinions of such persons, but are addicted in the same habits with themselves, the probability is, that the opinion of such a tribunal would overwhelm a hundred thousand, will overwhelm one of the very first community, unless the bitter should deem it an object worthy of their attention to express their opinion, in some way that will be considered as injurious upon the few who dissent from them.

"As new tangled and artificial treasons have been in fashion, the principles which violent factions in free states have generally adopted, have been the majority on each other, the convenient have, with great judgment, contrived to hurtle to their peculiar dangers, by inserting a constitutional definition of the crime."†

"Judge Wilson, in the first charge which he delivered in the federal circuit, after the adoption of the constitution, proceeded himself thus on the subject. "It will be remembered, that treason is a term brought to treason a new and great importance, when it was introduced into the government of the U. S. Under this government, treasons have not only a legal but a constitutional security against the arbitrary and capricious construction of the crime. Treasons implications arbitrary and *construction* have been the most tremendous engines of despotic or legislative tyranny!"

"Judge Iredell, in a similar occasion in South-Carolina, observes—Treasons consist in *two articles only*; levying war against the U. S. or adhering to their enemies giving them aid and comfort. The *plain definition* of this crime was justly deemed of such moment to the

* *Article 3.*
† *2 Federalist, No. 43.*
‡ *Carey's American Museum, vol. 1, page 46.*