And if there were an individual in the Senate who had participated in this conspiracy, it was a subject for the exercise of the sound discretion of the Senate, whether such a person should remain in it. For these reasons, Mr. M. said he was against complying with the two first requests of Mr. S. With regard to the other, although he did not consider it absolutely incumbent on the Senate to grant it, in a case where the gentleman inculpated was present and possessed in himself the ample means of defence; yet when he made the request that he might be so indulged, he could not refuse granting it.

Mr. Hillhouse said he should not go into any consideration of the subject, in answer to the gentleman who had spoken, as to the nature of this case. He was not prepared for such an examination; nor had the Senate reached this stage of the business. He could only observe that in the case of Blount, there was no such testimony admitted, as in the present case. The fact was this. The committee appointed made a certain discovery of a letter alleged to be in the hand writing of Mr. Blount, which could be proved by two Senators present. The declarations of those Senators were not received as testimony; but a magistrate was sent for, and the two Senators were sworn; and there was no testimony received but what would have been legal testimony in a court of justice. They called on Mr. Blount to say whether the letter was in his hand writing; he declined answering; and the call was not enforced. What the gentleman from Massachusetts had read was merely the report of a committee.

Mr. H. said it appeared to him premature to go into this discussion at this time. A person was accused. The report in this case was sufficient ground for proceeding without an indictment. In this respect, therefore, he did not think it necessary to do any thing. The first point to be decided was, whether the person should have the aid of counsel. If so, it was proper that he should have it, as well with regard to the mode of conducting the trial, as on the trial itself. Such was the course pursued in the case of Blount. He should therefore move that John Smith, of Ohio, be heard by counsel not exceeding two. After this, other questions as to time and testimony might arise, on all which the accused ought to be heard.

Mr. Adams did not believe the course recommended by the gentleman from Connecticut correct. It seemed to him extremely improper to bring in counsel to debate with the members of the Senate on every point that might be raised. If this course were adopted, the counsel would become a member of the Senate, and be entitled to make motions, which would be debated by him and the members. So far as the precedent in the case of Blount went—and however he might respect the gentleman from Connecticut he must respect still more the information contained in the record of that case—he was willing to go. If this were a new case, he might be of a different opinion. He believed that in the country from which most of their precedents were derived, it was wholly unprecedented for counsel to be heard on a motion of expulsion. But he had no objection to the allowance of counsel to show why the report should not be adopted. But to place every member of the Senate in the same situation with counsel was highly improper, and yet this would infallibly follow should the ideas of the gentleman prevail. To obviate this difficulty he moved to add "to show cause why the report of the committee should not be adopted"—which was the course pursued in the case of Blount.

Mr. Hillhouse wished to say one word on the difficulty started by the gentleman from Mass. which, in his opinion, could never arise except from the imprudence of members. He presumed that every member would have such a regard to his character as not to enter into litigation with lawyers. The Senate would undoubtedly proceed with its usual solemnity; would hear the defence, and afterwards take the subject up by themselves; in the same way as they did in the case of Blount; in which case the counsel were fully heard, after which the Senate took up the subject and debated it by themselves very largely.

Mr. Bayard said he did not know that the amendment varied materially the original motion, which, if adopted, would leave the whole question as open as under the original motion. For, if adopted, Counsel may come forward and show that the report ought not to be adopted, because the facts set forth in it were not legally proved, because time had not been allowed the accused to adduce testimony, and from other considerations. But he would take the liberty of telling the gentleman from Mass. that he had not taken the amendment which he had proposed from the record in the case of Blount. The resolution adopted in that case was the same as had been moved in this case by the gentleman from Connecticut; and that resolution having been adopted, the additional words, these words now moved as an amendment, were merely the act of the President of the Senate in addressing the counsel. The Journal says "the President then said," &c.

Mr. B. said he considered the course pointed out by the gentleman from Connecticut correct. The only existing motion was to allow Mr. Smith to be heard by counsel, to which there did not appear to be any objection. He should, indeed, think it strange, if there were, as in justice and candor the Senate were bound to give him the same advantages that were allowed to any other person on his defence. It was a maxim of the best lawyers that no man ought to be counsel in his own case; for when we are agitated by those feelings which are unavoidably excited when our lives, our characters or property are at stake, we are seldom able to conduct our case with that coolness and perspicuity often essential to a favorable issue.

As this case too would form a precedent, it ought to be considered what a disparity of talent characterised even the members of the same body. The gentleman from Mass. for instance, might be able to make a powerful defence; while other members, not possessed of the same intellectual attainments, or not accustomed to public speaking, might experience no inconsiderable embarrassment. Such, Mr. B. believed was in some measure the situation of the present party, who was not a professional man, and not so extensively in the habit of public speaking as other members of the Senate.

Mr. B. viewed it premature to decide what course should be taken by counsel. It would be prejudging the case to decide on these points before a hearing; it would be first to punish and then to listen to the defence. If, said he, the benefit of counsel is allowed, let us do it in a handsome, in a liberal manner, worthy the dignity and character of this body; and not in such a way as to exhibit the mere semblance and shadow of justice.

Mr. B. said he did not think it necessary to go into a detail on the requests made by Mr. Smith. As to being furnished with a specification of the charges against him, he thought nothing could be more reasonable. Was he to be suffered to wander in darkness? How could he be prepared for defence until he knew what the charges were? To furnish a specification of the charges preferred against an accused man was consonant to all the proceedings which he knew of, not only in this country, but in every country on earth where there existed a shadow of liberty. Were they to be told that the life of Mr. Smith was not jeopardized; that even his property was not implicated. True. But he would appeal to the honorable feelings of the body, whether his interest in this decision might not be more valuable to him and his posterity, than if he were to be sent to the scaffold and his property be confiscated. Its effect was to deprive him of his honest fame, which would be forever gone. Wherever such an interest existed they were bound to protect the reputation of an individual by the same principles and rules which were provided by the benignant indulgence of the laws in cases where life and property was implicated. Mr. B. could not say that the charges ought to be specified with the minuteness of a special pleader. But they ought to be so specified, that the accused could clearly comprehend and meet them. When, however, he referred to the resolution, he was ready to consider it as sufficiently explicit, and willing to rest this point on that ground.

The next question is, whether Mr. Smith shall be allowed to make any defence, and if so by what rules of evidence it, as well as the charges against him shall be supported. I have read, said Mr. B. the report of the committee. It is certainly an eloquent report. I do not say that I approve all the principles it maintains, but I am willing to allow that it is drawn by the hand of a master. It has, however, one fault, and that is, that it does not bear on the point in question. On abstract principles it is very elaborate; but it leaves the mind, so far as relates to this case, as barren of information as it was before. I do not consider the question to be, whether there was a conspiracy of which Burr was the author. That such a conspiracy did exist I firmly believe; and I further believe that scarcely a man in the U. S. doubts it. Nor is it the question, whether the course pursued against Burr has been as discreet as it might have been, or whether certain alledged subtilities ought to have been discarded by the courts of law. The only question is, whether John Smith did participate in this conspiracy. If he did, even in the smallest criminal degree, I shall have no hesitation in giving my vote for his expulsion. But Mr. Smith declares that he had no criminal participation in it. He says his doors may have been hospitably opened to Aaron Burr, and though appearances may to a certain degree be against him, he had no criminal intent, he contemplated no severance of the union, he meditated no invasion of the territory of a nation in amity with the U. S. Give him an opportunity, and he says he can explain every thing alleged against him. I am not making the defence of John Smith. I am only contending that he ought to be heard. But what signifies hearing a man, if he be not given an opportunity of defence? What is the question? Merely a question of fact, whether he be guilty or innocent of this participation. Will you not allow him to be tried? How? By evidence—And what is the ordinary evidence in such cases? That of witnesses. Suppose he is accused on the testimony of a single individual? I demand, whether you will suffer your zeal to punish the offence, so far to transport you, as to lead you to punish without investigating the evidence? Would not this be a mockery of justice, to say you will hear the defence, and yet not investigate the credibility of the testimony?

In reply to the remark of Mr. Adams that this case was different from ordinary cases, inasmuch as there was no prosecutor or party, Mr. B. said that the committee was to be considered as taking a part in it.

But it was said that from the nature of the case it was necessary to be expeditious, and that the decision did not admit of delay. Mr. B. said this wore too much the semblance of that revolutionary spirit which had been so conspicuously displayed in another country. The only question was a mere question of fact; and instead of determining this on the established principles and rules of common law, gentlemen contend for our taking our own conceits and whims for evidence. If, said Mr. B. you will not take the ordinary rules of evidence, what rules will you take? Will it be said that mere hear-say shall be received; or exparte depositions taken in a case not connected with that under consideration. I beg the House to consider the consequences of such procedure. Though such a decision may be fair in this case who will pretend to say what may not be the consequences of such a precedent? If such a principle is to prevail, what more will be necessary than to send to the woods, take the deposition of a man you know nothing about, and in which there may consequently be the vilest perjury; and receive this as proof, without giving the party accused an opportunity of defending himself. A more dangerous principle cannot be established.

As to the precedent relied upon the gentleman from Connecticut has shewn that the observations of the gentleman from Massachusetts are not correct. [Mr. B. here read extracts from the Journals to shew that what had been ascribed to the Senate was only the act of a committee.]

Mr. B. said he was not, in these remarks, finding fault with the report of the committee, who were only to be considered in the light of a grand jury or inquisition, whose opinion was not final. In the case of Blount, the Senate, after a report of a select committee, had required the same strictness of evidence that is required in criminal cases. It was not possible in a civil or criminal case more strictly to prove a paper than had been done in that instance.

There was, moreover, a strong distinction between the case of Blount and this case. In the first case there was but one point of fact; the letter being proved to be that of Mr. Blount every thing was established. He denied it; when proved stronger evidence could not be adduced.

How different is this case! There is no letter of Mr. Smith that establishes his guilt. He is charged with participating with Col. Burr. How are points which go to establish this participation to be met but by witnesses from Ohio? With regard to one witness, Mr. B. said he was informed that Mr. S. believed himself able to disprove his allegations by other witnesses.

Mr. B. said he would ask gentlemen to bring the case home to themselves. Suppose a deposition taken several hundred miles off, criminating them; and that they had the means of proving it false by distant witnesses. Could any thing be more injurious to them than to precipitate a trial and prevent the party from meeting fairly and fully the accusation against him.

Mr. B. said he had gone further than he had intended when he first rose. He had no other object in rising than to point out the course which he thought ought to be pursued. The present question simply was to allow counsel. He did hope and presume there would be no difficulty on this point. In his opinion the Senate ought not to decide, whether the party should have compulsory process for the attendance of witnesses, until Counsel were heard, although he perceived no defence which could be made by the party without such evidence. He concluded by expressing a hope, that, if it should be found, that Mr. Smith did participate in the conspiracy of Aaron Burr, they would all concur in the final vote they should give.

Mr. Adams said he would not trespass on the time of the Senate by entering into the wide field the gentleman from Delaware had indulged in, when the only question was on the amendment. The gentleman had commenced his remarks by saying that this amendment would make no alteration in the original motion. Well—if it made no alteration in it, was it necessary by a speech of an hour and a half to enter into such a wide discussion? In fact, Mr. Adams said, he did not yet know whether the gentleman meant to vote for the amendment or not. He had not informed them on this point. He had, it was true, told them, the report related to any other than the subject before them. Might he not so far retort as to say that his speech related to any thing but the subject before the Senate?

The remarks of the gentleman related to topics that might be very properly discussed before the final decision of the Senate. As to the admissibility of testimony, Mr. A. did not consider that point as precluded by the motion.

But there were some remarks offered by the gentleman which Mr. A. could not hear and remain silent. The gentleman had observed that he could not say there was in this instance no party; but that the committee was that party, that the committee was an inquisition.

[Mr. Bayard disclaimed any reference to a Spanish inquisition; he merely meant by inquisition a term equivalent to grand jury.]

Mr. Adams said he had no idea of being himself a party in this case. So considering it, he must view every thing said on this point irrelevant. The gentleman asks if we depart from the principles of a court of law, what principles we will follow? Whether we will follow our own conceits, and whims, or mere hearsay? No, sir—said Mr. A. I desire the Senate to take none of them. I wish them to take for their guide a sound discretion, what the constitution requires, and what every man's experience in private life teaches him the value of. It is as necessary here as as any where else. Why take the rules of evidence as prescribed in a court of justice? Are there no other rules? I say those rules are most properly confined there: and the moment we issue from those halls we must take others. No man who has a sense of religion can take them without departing from his faith. Why are we bound by them any more than a man is in his private family? Suppose a man detects his servant in stealing, and tells his other servants to turn him out of his kitchen. Would he listen to the remonstrance that he was acting unjustly, because the act was not proved in a court of law according to the technical rules of evidence, and wait until it was so proved? I presume not. Well, it a man, in all the transactions of life, is not bound by those rules, why are we bound by them, when the constitution gives us a discretion to act as we see fit. Discretion is neither whimsy nor caprice.

But when the gentleman proceeds and enquires whether we are to take exparte depositions, that is another thing. Such depositions have been taken not only against, but for Mr. Smith. Indeed two-thirds of them are of the latter description. The nature of this species of testimony will be weighed, and we may safely trust to the reason and discretion of every Senator to give it its proper weight.

The gentleman says as to the conspiracy of Burr, it is admitted on all hands, there is no question. In so saying, the gentleman undertakes to answer for more than he (Mr. A.) would, as it is very probable, if counsel should be allowed, they would make this the first point. They will tell you that the conspiracy must be first proved by testimony admissible in a court of justice.

The gentleman contends for the ground of precedent in the case of Blount, and says that the depositions of the two Senators was the only evidence received in the Senate on that occasion. Did the gentleman in a court of justice ever hear a judge ask the accused if he wrote a letter containing matter against himself? If he has, it is a kind of court of justice Mr. A. said he had never heard of. This very question was put in the case of Blount. There was no answer. But was it not considered as evidence? If not, why was it asked.

Mr. Adams said he should not enter further into the subject. The gentleman, with great eloquence, had argued in favor of allowing counsel. To that no objection had been made. In support of this request it had been said that a member may be accused who has not the faculty of public speaking. This Mr. A. believed was not the case with regard to the member implicated, but if it were, and counsel should not be allowed he believed that in the opinion of the Senate and of the world he would not be destitute of counsel.

Mr. Anderson observed in support of the amendment, that it specified the subject on which counsel were to be heard. Without such specification there would be no data for them to act on.

Being a member of the committee that brought in the report, although the observations of the gentleman from Delaware were irrelevant to the question before them, Mr. A. said he should take some notice of them. The gentleman, said when he looked around him he could not say there was no party—

[Mr. Bayard explained, and disclaimed any insinuation that any member of the Senate was a party against Mr. Smith. He only meant to say that the committee had an active agency in bringing forward the charges.]

Mr. Anderson then explained the manner in which the business originated at the instance of Mr. Smith [which as we have already stated it is unnecessary to repeat.]

Mr. A. added that when the whole subject came before the Senate, it would be found that the report was not founded on a single witness or deposition; and that the witnesses had been examined by Mr. Smith. He had only thought it proper to say thus much at this time, as the other points introduced were altogether irrelevant.

Mr. Hillhouse said he had no objection to the amendment, as from the explanation of gentlemen it did not appear intended to exclude discussion on any preliminary questions that might be raised. Before he sat down he wished to know whether the gentleman from Massachusetts in his closing observation referred to him: whether he meant to insinuate that he was acting as advocate or counsel for the individual accused. He did nothing but from a sense of impartial justice and the duty he owed his country.

Mr. Crawford saw no reason for restricting the number of counsel, and moved to strike out the restriction.

Mr. Anderson, viewing the allowance in the light of a favor, was for limiting the number of counsel.

Mr. Giles thought it would be right to limit the number of counsel. He wished, however, to ask whether Mr. S. while this business was pending had a right to a vote as a Senator, as this circumstance might greatly influence his mind. The bodies from which they usually derived their precedents, were only considered as bound on a question of expulsion by a sound discretion. Could the Senate lay their hands on a member while such a question was pending? If not, and the ideas avowed by gentlemen should prevail, a decision might be protracted to the full period of the member's time of service. And if they could, the effect would go to deprive a state of half its representation. He made these remarks to shew that this case was extremely different from those cases ordinarily brought before a court of justice.

Mr. Giles said that the case of an impeachment was very different from that of expulsion, for which the constitution had prescribed different modes of procedure. In the former they act in a judicial character, while in the latter they appeared to act in their legislative capacity. From this, it would seem that a very different course ought to be pursued in the two cases. A gentleman had enquired what security there could exist, if the procedure of courts of justice were violated. That, said Mr. G. arising from a sound discretion, which I believe as efficient as that which rests on the technical rules of law, and to guard which against abuse the concurrence of two thirds of the body is requisite.

Mr. Giles said he had one word to say as to the ideas of the gentleman from Delaware. He would shew by his own remarks that he was guided by contradictory principles. He has observed that he is persuaded that all America is satisfied that A. Burr is guilty of a conspiracy. Did this conviction arise from the proceedings at Richmond? No! And yet he is of opinion that he is guilty, in which, I, said Mr. G. concur. It must be therefore on other principles than those of courts of justice. I conclude, therefore, that we must under such circumstances resort to different principles.

Mr. Crawford withdrew his motion.

Mr. S. Smith asked for the yeas & nays, least from the length of time taken up by the gentleman from Delaware, there might be some impression made on the public mind that there existed an objection to the allowance of counsel.

Mr. Bayard said if the gentleman from Maryland had attended to his remarks he would not have made this observation, as they had arisen naturally from the ideas expressed by the gentleman from Massachusetts. He was sensible of the embarrassment suggested by the gentleman from Virginia; he was however also sensible of the justice due to an accused member of the Senate; and if they decided without evidence they would condemn him unheard. To allow him counsel without allowing him the means of defence, would be a mere mockery of justice; it would be to allow the form and deny the substance. They had been told that the Senate ought to be governed by a sound discretion. To shew the light in which the *discretion* of a judge ought to be viewed he would quote the words of Lord Camden.

[Here Mr. B. quoted the strong language of Lord C. on this point.]

Mr. Bayard here recapitulated and expanded several of the arguments previously insisted upon by him.

But, said Mr. B. I am told by the gentleman from Virginia that I have departed from my own rule in what I have admitted with regard to the conspiracy of Mr. Burr. I stated that I had no doubt of the conspiracy of Burr; and the gentleman asks on what ground I have embraced this conviction. I believe it on the same ground that I believe there is such a place as Kentucky or Paris, without any deposition to that effect. But I will go further. In the whole course of the defence of Mr. Smith this conspiracy is admitted. Why, therefore, should we in this case dispute its existence? In all controversies, whatever is not denied is considered admitted. The only real question, therefore, is whether John Smith participated in this conspiracy. If the conspiracy is denied, I say it ought to be proved. I will put a case. Suppose a gentleman charged with participating in a conspiracy set on foot by General Wilkinson. I mean not to insinuate that he has ever been concerned in one, but I have a right to put the case—not meaning to injure that gentleman by intimating the smallest belief in it—but merely putting the case as such a charge has been made in the other House; suppose the individual charged and brought on his trial, and he should aver that he did not participate in such a conspiracy, and declare that no such conspiracy existed. Am I to be told that because this individual is charged with participating in it, it is to be taken for granted that it did exist? Suppose him charged with participating with a man I never heard of, may I not call for proofs of the conspiracy of that man? And have I not a right to call for facts and demand witnesses? I do not, however, presume that the general conspiracy of Aaron Burr will be denied; for the acquitals at Richmond do not negative the charge of a conspiracy as stated by the gentleman from Virginia.

The gentleman from Massachusetts has been called upon for an explanation; but he has not condescended to make an explanation. May I be permitted to repeat the request. Does the gentleman mean to insinuate that any member on the floor from other than public considerations would defend an accused man, or on grounds which he considered wrong. If the gentleman persists in refusing an explanation, I have a right to say that in this case we want no attorney general, and if there is none, that still a prosecutor would not be wanting.

The Vice President called the attention of the Senate to the real question under consideration, and intimated his expectation that gentlemen would confine themselves to it.

Mr. Pope presumed that, after this admonition from the Chair, it would be out of order to reply to the remarks of Mr. Bayard, which he should otherwise have noticed.

The question was then taken on the resolution offered by Mr. Hillhouse, and amended, at the instance of Mr. Adams (to which amendment Mr. H. acquiesced) and carried, by a unanimous vote.

When Wednesday was assigned for hearing Mr. Smith by counsel.