National Intelligencer.

& WASHINGTON ADVERTISER.

VOL. VIII. WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. NO. 1159.

FIVE DOLLARS PER ANNUM, FRIDAY, MARCH 18, 1808. "PAID IN ADVANCE."

IN THE SENATE OF THE UNITED STATES.

WEDNESDAY, FEBRUARY 24th, 1808.

Debate on the bill for the punishment of treason and other crimes and offences against the United States.

Mr. Pope moved that the further consideration of the bill be postponed until the first Monday in December next. The President having put the question—

Mr. Pope said that after the very able and ingenious argument of the honorable chairman of the committee (Mr. Giles) who reported the bill, it was with very great reluctance and diffidence that he rose to offer his view of the question.

The bill however assumed a principle entirely new, and went to create offences which had been, he believed, heretofore unknown in the general government or any of the state governments. The importance as well as novelty of the subject, rendered a full discussion of its merits necessary, before the House pronounced a final decision. A sense of duty therefore prompted him, feeling a conviction that the measure was unconstitutional and inexpedient, to express his sentiments on the subject.

Questions of this kind, said Mr. Pope, whatever may be their ultimate fate, answer one good purpose. They invite an examination of first principles—they lead us to explore the foundation of our political fabric, and the boundaries which the people of these states have drawn around the powers of Congress. We should have constantly in view that the people are the fountain of all power, and when we are about to do any act, it is our duty to enquire whether we have received from that fountain any grant of power to authorize it. Before I proceed to investigate the merits of this bill I must beg leave to strip this debate of one subject, with which it has been encumbered, and which I think ought not to have been introduced to play upon the question before us. I mean the judiciary and the independence of judges. Many observations have been made on this subject, the relevancy of which I have not perceived; for whether their independence be retained or diminished, I presume their judicial functions will not be altered. The orbit in which the constitution has destined the judiciary to move will remain the same.

On the subject of the independence of the judiciary I have never indulged much theoretic speculation. My impressions are rather the result of education and habit, than of a thorough examination of the principles on which they are predicated. After the declaration of American independence the people of the several states in forming their constitutions introduced this principle of an independent judiciary; and at the time the federal constitution was adopted, it appears to have been a favorite one with all parties. For my part I have considered the constitution defective in not providing for the removal of judges by address, for any reasonable cause which does not constitute matter of impeachment. The American people have incorporated into their systems of government such features of the British government as were supposed to favor the liberty of the subject.

It seems to have been supposed at the time this subject was before the nation, to be necessary to interpose some barrier to protect the rights of the minority against the persecuting spirit of an overbearing majority, and to secure an accused individual against oppression and injustice from the strong arm of power. The independence of the federal judiciary was deemed a valuable safe-guard against the encroachments of the federal government on the rights of the people, and the sovereignty of the states. The value and importance of this principle here was probably estimated in a great measure by its supposed effects in the British government. To protect the weak against the strong; to secure to every man, whatever may be his condition, equal and impartial justice is certainly the legitimate end of every government. To accomplish this great object, it seems to have been thought necessary to give our judicial tribunals such a degree of independence as would enable them to administer justice to all without respect to persons, uninfluenced or overawed by any power or party in the government. Whether this principle is correct in the full extent to which it has been carried by our constitution, it would be perhaps premature for me now to decide, inasmuch as we have reason to expect that the question will be presented to us in a distinct and independent form. I shall regret to see our judges the tools of an administration, or associated with an opposition for the purpose of embarrassing it. Whenever a judge profanes the temple of justice by acting the part of a political partizan, he ought to be execrated by every honest man in the nation.

I shall rest here on the present occasion, laying entirely out of view the independence of the judiciary, and will proceed to enquire whether we have the power to legislate as proposed by the bill. The House will please to mark the essential difference between the constitutions of the several states and the constitution of the United States. The former are limitations of power; the latter a special grant of power. The legislatures of the several states have all power not expressly prohibited. The Congress of the United States has no power but what is expressly given. But while I notice this distinction, let it not be understood that I am opposed to fair and liberal construction.

It will not be amiss to retrospect the state of things before the federal constitution was adopted. The states were united by a compact purely federal—the old Congress had no authority to enforce their laws or ordinances by acting upon the people individually. Its acts were binding on the states, and depended on their agency to carry them into effect. This form of government was found by experience to be inefficient, and the present constitution was presented to the view of the American people. This is partly federal, partly national. It authorizes Congress to carry their powers into effect by an agency on the people; and it will be recollected that of this national consolidating feature the people were most jealous, and against it the opposition was principally directed. It was apprehended that this government would accumulate powers by implication until it would swallow up the state governments in one great consolidated empire. It will be recollected that before the present constitution was adopted, the states respectively had power to punish all crimes committed within their respective jurisdictions, and all powers not granted to this government having been reserved to the states and the people, it follows that all crimes are cognizable by the states, except such as are specified in the federal constitution.

In the enumeration of powers granted to Congress the constitution contains the following provision: "To constitute tribunals inferior to the supreme court; to *define* and punish piracies and felonies committed on the high seas, and offences against the law of nations." Here a power is expressly given both to define and punish; but when the constitution speaks of the crime of treason a very different phraseology is made use of. It seems to have been deemed necessary to give Congress a power to punish treason, but the framers of our constitution, warned by the history of other nations of the abuses and oppressions which had been committed in prosecutions for this offence, that treasons had been the great engine by which violent parties in free governments had borne down each other, deemed it of importance to the liberties of the people to oppose a barrier to this danger by inserting in the constitution a definition of the crime. This definition is as follows: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." This definition was considered clear, precise and determinate, and certainly intended to be as fixed and immutable as the constitution itself. The constitution then proceeds: "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court—"The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted." The constitution has not only provided a barrier against legislative tyranny, but by fixing the proof necessary for conviction, has furnished innocence a great security against that odious class of beings, so common in despotic governments, called spies and informers.

The last clause I have read merits particular notice. It gives to Congress power to declare the punishment of treason, but none to define it. In the clause respecting piracies and felonies a power is expressly given both to *define* and *punish*. These several parts of the constitution which I have read seem by necessary implication to negative the power of Congress to define this crime. It is certainly our sacred duty to expound this instrument according to the will of those who framed it, as far as that will can be fairly collected; whether then the exposition I have given is tested by the constitution itself or by the sense of the American people after it was framed, and before it was finally ratified, the result will be the same. It is well known that the work called the Federalist was written by several members of the convention that framed this constitution; in one of the numbers comprised in that work the same construction is given to this clause for which I contend; and the author assigns the reasons why power is given to Congress to define piracies, &c. and none to define treason. This exposition of the clause respecting treason is also maintained by col. George Nicholas and Mr. Edmund Randolph, in their speeches in the Virginia convention, and Mr Randolph, it will be recollected, was a member of the convention who framed this constitution. Still further to corroborate the opinion I have advanced, I will beg leave to read the observations of judge Wilson on this subject in one of his lectures to his students. I rely much on the opinion of judge Wilson; he was also a member of the convention, a man of eminent talents, and if his judgment was under any bias, it was rather in favor of increasing than diminishing the powers of the federal government. He expresses himself as follows:

"Treason is unquestionably a crime most dangerous to the society and most repugnant to the first principles of the social compact. It must however be observed that as the crime itself is dangerous and hostile to the state, so the imputation of it has been and may be dangerous and oppressive to the citizens. To the freest governments this observation is by no means inapplicable, as might be shewn at large by a deduction historical and political, which would be both interesting and instructive; but at present we have not time for it.

"To secure the state and at the same time to secure the citizens; and according to our principles, the last is the end and the first is the means, the law of treasons should possess the two following qualities: 1st. It should be determinate. 2d. It should be stable."

After reciting the observations of the celebrated Montesquieu on the crime of treason, he proceeds:

"In point of precision and accuracy with regard to this crime, the common law, it must be owned, was grossly deficient. Its description was uncertain and ambiguous; and its denomination and penalties were wastefully communicated to offences of a different and inferior kind. To lop off these numerous and dangerous excrescences and to reduce the law on this important subject to a designated and convenient form, the famous statute of treasons was made in the reign of Edward the third, on the application of the Lords and Commons. This statute has been in England, except during times remarkably tyrannical or turbulent, the governing rule with regard to treasons ever since. Like a rock, strong by nature and fortified as successive occasions required, by the able and the honest assistance of art, it has been impregnable by all the rude and boisterous assaults which have been made upon it at different quarters, by ministers and by judges; and as an object of national security, as well as of national pride, it may be styled the legal Gibraltar of England."

In a subsequent part of the same lecture he observes:

"This statute was a safeguard from the arbitrary constructions of courts: It was a shelter from judicial storms, but it was no security against legislative tempests. No parliament, however omnipotent, could bind its successors, possessed of equal omnipotence; and no power higher than the power of parliament was then or is yet recognized in the judicial system of England. What was the consequence? In the furious and sanguinary reign of Henry the 8th, the malignant spirit of inventing treasons revived, and was carried to such a height of mad extravagance, that, as we have seen on another occasion, the learned as well as the unlearned, the cautious as well as the unwary, the honest as well as the vicious, were entrapped in the snares. Admonished by the history of such times and transactions as these, when legislators are tyrants or tools of tyrants, the people of the United States have wisely and humanely ordained that treason against the United States shall consist, &c. In this manner the citizens of the union are secured effectually from even legislative tyranny; and in this instance, as in many others, the happiest and most approved example of other times has not only been imitated, but excelled. This single sentence comprehends our whole of national treason; and as I mentioned before, is transcribed from the statute of Edward the 3d."

In addition to the opinions which I have cited I will beg leave to add that of judge Tucker, whose learning, ability, and political sentiments intitle it to very high respect. It will be recollected also that the attention of the American people was particularly awakened to an examination of this constitution after it was framed, and before it was ratified. During that period every section, clause & line was strictly scrutinized, and I believe in no instance did the constitution receive the construction now contended for. Before the statute of Edward the 3d. the judges had great latitude of discretion in defining treason, and being tools of the crown, the subjects were harassed and oppressed to such a degree that the lords and commons procured this famous statute of treasons to be passed in order to render this crime so definite and certain that people could understand it, and to abridge the arbitrary discretion of the judges. We are therefore compelled to believe that the wisdom of that parliament was exerted to make as clear and precise a definition of this crime as the English language would enable them. This definition of this species of treason which consists in levying war stood the test of nearly 600 years experience without amendment. If the English courts have in any instances departed from this definition, we must attribute it to the violence of the times in which the decisions were given rather than to any defect in the law. The experience of the world has proved that in all countries the tone of public feeling will in some degree influence all the operations of government, & hence it appears that when a nation is agitated by danger from foreign or domestic enemies the laws are executed with more rigor than in a time of perfect tranquility. Although we have reason to felicitate ourselves that we are exempt from the great evils and oppressions incident to dispotic governments; yet I fear that party spirit when it runs high will not only influence the general course of our political affairs, but too often tinge the decisions of our judicial tribunals. I believe however that the evils felt in Great Britain from prosecutions for this crime were produced by the unprincipled pliability of parliament in manufacturing new and artificial treasons, during the reigns of tyrannical princes, and especially that of the celebrated monster Henry the 8th, than to any other cause. If any shades of difference are to be found in the decisions of our own courts, or any contrariety of opinion among learned men on the subject of treason, it is rather to be attributed to the prevalence of party spirit or contrariety of intellect, than to any real defect in the constitutional definition of the crime. This constitution was framed but a few years after the close of our glorious revolution, when the feelings & prejudices of the American people were very strong against every thing British. Strange then, that those who drafted this instrument in their zeal to guard the people from oppression should have borrowed from a British statute a definition which experience had proved to be defective. Let it be remembered too that the convention who framed it was composed of some of the first statesmen & patriots that ever adorned any age or nation, & we must presume that if they could have devised a better definition, they would certainly have done it. My own opinion is, that every definition of crime should be concise, and that confusion and uncertainty is generally increased by amplification. If however all America has hitherto misunderstood this clause in the constitution, and we have a power to legislate on the subject, and it is expedient to do so, I will cheerfully lend my feeble aid to remedy the evils which are supposed by the committee to exist.

Permit me however first to examine the ground on which this power is claimed. The honorable chairman (Mr. Giles) has told us that our right to declare what act or acts shall amount to a levying of war is derived from that clause in the constitution which gives Congress power to make all laws which shall be necessary and proper, for carrying into execution the powers previously granted, and all other powers vested by the constitution in the government of the United States or in any department or office thereof. This is carrying the doctrine of implication much further than has ever been contended for. I have never understood this clause as containing any separate and independent grant of power, but as auxiliary merely. Before we can bottom any measure on this clause, it is necessary to connect it with some power granted to or vested in this government—we cannot surely imply a power to amend defects in the constitution, and yet the course of reasoning of the honorable chairman, however plausible and ingenious, if it proves any thing, tends to prove that such a power is implied, and that inasmuch as treason is not sufficiently defined by the constitution, Congress has a right to define it, or which I consider the same thing, to explain the term levying war. If the constitution is defective, it belongs to the people, not to Congress, to provide a remedy. It is our duty to exercise power granted, and not to assume what we may deem necessary for the general welfare. It ought to be remembered that the people have already been alarmed by this doctrine of implication. The tocsin has been sounded, and they have, at least by implication, evinced their hostility to this latitude of construction. I presume gentlemen will not pretend to derive a power to pass this bill from the supposed expediency of the measure. I recollect to have heard some years ago a sentiment expressed by some character of high standing, whose name I have forgotten, that constitutionality and expediency were convertible terms, very much censured. It is very dangerous to indulge this doctrine of expediency at the expence of the fundamental principles of our government. The plea of expediency is too often resorted to, to justify the greatest outrages. It was on the broad and indefinite ground of expediency that Great Britain seized on the fleet of Denmark, and that the great belligerents of Europe have prostrated the maritime rights of neutral nations. This plea of expediency, when at war with the sacred principles of our government ought never to be excused or palliated, but in extreme cases, in times of great public danger. At a moment when a government is agitated and convulsed, when its very existence is at stake, I should perhaps be as little pleased with the squeamish politician who would be stickling for constitutional niceties—but rather be disposed to admire the bold statesman, who would step forth and use the means necessary to dissipate the impending storm. A state of things is possible in all governments, when all the general rules and maxims established for the security of liberty must bend to the supreme law, the safety of the nation. Our constitution has anticipated such a state. But such is not now our situation—we are not legislating for a moment or to meet a particular emergency—we are passing a general permanent law, by which the conduct and trials of our citizens are to be regulated.

The honorable chairman made some observations about cabalistic words, by which he supposes some may have been misled, the drift of which I confess I did not comprehend. I presume that the framers of our constitution would not have used any but appropriate words and phrases. Much has been said about common law and English books, calculated more to prejudice than convince. To ascertain the meaning of any legal or technical phrases we resort to English law books, as we do to an English dictionary and English writers, to ascertain the meaning of any English word or phrase. The reports of the decisions of our own courts will gradually supersede the use of British authorities.

The honorable chairman emphatically asks, what is levying war? And I might in turn inquire what is war, and where do we find the meaning of the term or word? The constitution says, we shall have power to declare war. To ascertain what constitutes war we must resort to different writers on the subject. War may be waged between nations in many different ways. It might take a volume to explain the different warlike attitudes which nations may assume towards each other, and a man may be guilty of levying war in various ways. Levying war is the act or fact which