

THE COURT PROCEEDINGS OF 1806 IN KENTUCKY AGAINST AARON BURR AND JOHN ADAIR

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The proceedings instituted near the close of the year 1806 in the District Court of the United States for the Kentucky District by Colonel Joseph Hamilton Daveiss, the District Attorney, against Aaron Burr, Vice-President of the United States during the first term of Thomas Jefferson, and, also against John Adair, who later served as Governor of Kentucky, from 1820 to 1824, were fairly well reported in the newspapers of the time and an account of these proceedings, with the events which gave rise to them, may be found in virtually all the standard histories of Kentucky. For fulness, vivacity, and interest, none of these accounts quite equals the narrative embodied in the celebrated pamphlet by the prosecuting attorney, Colonel Daveiss, entitled *A View of the President's Conduct Concerning the Conspiracy of 1806*, which was published at Frankfort, Kentucky, in 1807. Fortunately for historical students, this pamphlet, which has become excessively rare, has been reprinted in the *Quarterly Publication of the Historical and Philosophical Society of Ohio*, at Cincinnati, and is available in the publications of that Society. Vol. XII, 1917, Nos. 2 and 3.

Several years ago, while engaged in the preparation of a Life of Colonel Joseph Hamilton Daveiss, which remains to be completed, the writer made a transcript of the official record of these two companion cases, the original of which is preserved in Order Book "G", in the office of the Clerk of the United States District Court for the Eastern District of Kentucky, at Frankfort, Kentucky. Since this official record, so far as known, has never before been published, it has been thought worth while to give it a place in the pages of THE FILSON CLUB HISTORY QUARTERLY,

and the manuscript copy has accordingly been placed at the disposal of the editor:—

DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF KENTUCKY—Order Book G, November and December, 1806.
Order Book G, page 65:

Saturday, November 8, 1806.

Present—The Honorable Harry Innes

United States, Plffs. } against } Aaron Burr, Deft. }	On Motion &c.
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The Attorney for the United States on the third day of this Term having made a motion for the Caption and Examination of the said Burr &c.

The Court this day delivered the following Opinion which is ordered to be entered of Record to-wit,

The motion made by Mr. Attorney on the third day of this term is predicated upon the 5th Section of the Act of Congress entitled an "Act in addition to the Act for the punishment of certain crimes against the United States."

"That if any person shall within the Territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprize to be carried on from thence against the territory or dominions of any foreign prince or State with whom the United States are at peace, every such person so offending, shall, upon conviction, be adjudged guilty of a high Misdemeanor, and shall suffer fine and Imprisonment at the discretion of the Court in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars, nor the term of imprisonment be more than three years."

The evidence in support of the motion is in the following words vizt: J. H. Daveiss, Attorney for the said United States in and for said District, upon his corporal oath doth depose and say, That the deponent is informed and doth verily believe that a certain Aaron Burr, Esquire, late Vice-President of the said United States, for several months past hath been, and is now engaged in preparing and setting on foot and in providing and preparing the means for a military expedition and enterprize within this District for the purpose of descending the Ohio and Mississippi there with and making war upon the subjects of the King of

Spain who are now in a state of peace with the people of these United States, to-wit on the Provinces of Mexico on the westwardly side of Louisiana which appertain and belong to the King of Spain, an European Prince with whom these United States are at peace.

And said deponent further saith that he is informed and fully believes, that the above charge can and will be fully substantiated by evidence provided this Hon. Court will grant compulsory process to bring in witnesses to testify thereto.

And this deponent further saith that he is informed and verily believes that the agents and emisaries of the said Burr have purchased up and are continuing to purchase large stores of provisions as if for an army—while the said Burr seems to conceal in great mystery from the people at large his purposes and projects, and while the minds of the good people of this District seem adgitated with the current rumour, that a military expedition against some neighbouring power is preparing by said Aaron Burr.

Wherefore said attorney on behalf of said United States prays that due process issue to compel the personal appearance of the said Aaron Burr in this Court, and also of such witnesses as may be necessary in behalf of the said United States, and that this Hon. Court will duly recognize the said Aaron Burr to answer such charge as may be preferred against him in the premises, and in the mean time that he desist and refrain from all further preparation and proceeding in the said armament within the said United States or the territories or dependencies thereof.

J. H. Daveiss, Attorney for United States.

November 5, 1806, affirmed to in Open Court.

Attest—T. Tunstall, C. K. D. C.

The question to be considered—Has this Court a power to award process against the accused and to compel the attendance of witnesses upon this motion—and if the Court has such power,—Is the evidence adduced sufficient to warrant the measure.

Four kinds of proceeding have been known and pursued in order to convict persons of crimes and misdemeanors, 1st By an application to a Justice or Judge out of Court,—2nd By preferring an indictment to a Grand Jury—3rd By a presentment of the Grand Jury—and the 4th By Information.

The present application is not embraced by either of those modes of proceeding—, It is a new case resting on the discretion of the Court, and as this decision may be considered a precedent in future, I have thought it my duty to take time and mature the subject, because the proposed measure being preventative—no injury would arise by a little delay.

No instance has occurred (within my recollection since I have become acquainted with Judicial proceedings where a crime or misdemeanor has been committed), of a motion being made to a Court to award process to arrest the offender in the first instance; neither have I knowledge of the existence of a law to authorize it.

In any case where a Court awards process it is predicated upon some previous act already done, which gives the Court cognizance of the subject and brings the case in a legal shape before that tribunal, this being performed, the power to adopt every necessary measure to attain the object and end of the law and to perfect justice is vested in a Court.

The magnitude of this case, not only as it relates to the community—but to the accused, requires that the proceedings be pursued with regularity, caution and circumspection.—If the facts stated in the affidavit be true, the project ought to be prevented, and the offender punished—yet in doing this, the regular legal steps, pointed out by usage or by law, ought to be pursued. If on the other hand the accused be innocent, the strong arm of power ought to be confined within its proper limits—the known rules of proceeding—And on no occasion but *extreme necessity* ought a Judge to be induced to exercise a power which rests on discretion.—The law then becomes unknown, and the best Judge may be considered a Tyrant, because it then depends upon his whim and his caprice—It will not be uniform, but it is liable to change with the opinion of every Judge.

These reflections extend to the general principle arising out of this case.—Admit however that they are erroneous—To award process would be improper—it would be an act of oppression; Because there is not legal evidence before the Court to authorize an arrest of the person accused. The evidence is the oath of a person, who has been informed by one not upon oath, that the deponent believes the fact to be true. I have no doubt of the truth of the affidavit—that is, that the deponent has been informed of the fact stated—and it is possible the fact as stated is

true—yet it is not legal evidence, and not being legal evidence the Court cannot act upon it.

Upon this view of the Subject, I am compelled to declare: that as the case is a new one—as no precedent has been shewn to justify such a proceeding—as the law is silent upon the Subject—and as there are two other modes of proceeding which are regular and well understood, vizt., by applying to the Judge out of Court and obtaining a warrant upon legal evidence—or by the Court ordering a Grand Jury to be summoned instanter and preferring an Indictment—this motion is overruled.

Wherefore the attorney for the United States prayed the Judge to issue his warrant to the Marshall of this District to cause to come here a Grand Jury, which Warrant is in the following words, to-wit:

United States of America, Kentucky District Court.

Pursuant to a rule of the Court of said District, I hereby direct and require you, that without delay, either by yourself or faithful Deputy to summon and cause to come here Twenty four freeholders of the body of said District; to be empannelled as a Grand Jury for the said District.

For which this shall be your sufficient Warrant.

Given under my hand and Seal as Judge of said District this 8th of November, 1806.

Harry Innes (*SEAL*)

To Joseph Crockett
Marshal of said District.

And thereupon the said Marshal caused to come immediately twenty four freeholders to be sworn and empannelled in and for the body of the said District, to-wit, Hubbard Taylor, Foreman, William Taylor, George Thompson, Joshua Barbee, Robert Alexander, William Trigg, Henry Lee, James Knox, Thomas Arnold, Nicholas Lafon, George Greir, Harman Bowmar, John Payne, John Machir, Nathaniel Hart, John Patrick, Jacob Fishback, William Harp, George Madison, Richard Apperson, Norbourn B. Beall, John McKinley, John Overton & John Brown, who being elected, tried and sworn as the manner is—the said attorney moved the Court to adjourn the said Jury until Wednesday the ninth day of the present term, and to compel the appearance of certain witnesses to give testimony before said Jury upon an Indictment preferred by said attorney against Aaron

Burr Esquire—It is therefore ordered that the said Jury be adjourned and Witnesses Subpoenaed accordingly to the ninth day of this term.

Order Book G, page 77:

Wednesday, November 12th, 1806.

Present—The Honorable Harry Innes

United States, Plffs. against Aaron Burr, Deft.	}	On Motion &c.	}	[This caption erased.]
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The Grand Jury empanelled and sworn to enquire &c., on the *third* (6th) day of this term; and who were adjourned over to this day, being called appeared in Court agreeable to adjournment.

And thereupon came also the attorney for the United States, and suggested to the Court that, altho all the Witnesses actually summoned on behalf of the United States attended, yet he could not now proceed on the enquiry intended for the Grand Jury—because Davis Floyd a Witness on behalf of the United States for whom the Marshal had been sent with a Subpoena to Jeffersonville his usual residence, could not be had during the Session of the Indiana Legislature, now in Session, of which he was a member, and that his attendance was indispensable.

It is thereupon ordered that the Grand Jury be discharged &c.

Order Book G, page 127:

Tuesday, November 25th, 1806.

Present—The Honorable Harry Innes.

This day came the attorney for the United States and moved the Court to award a warrant to summon a Grand Jury to appear here on Tuesday the twenty fifth day of this Term to enquire upon the breach of the laws of the United States alluded to in the affidavit filed on the sixth day of this Term by the said Attorney and upon such other matters as may be submitted to them. And on the farther motion of the said attorney for the United States, stating that it was necessary to have Subpoenas issued to compell the attendance of witnesses to give testimony to the said Grand Jury to support the indictments he intends to prefer against the sd. Aaron Burr Esquire, It is ordered that the clerk issue Subpoenas upon the request of the said attorney for Witnesses.—

Order Book G, page 230:

Tuesday, December 2nd, 1806.

Pursuant to an order made on Tuesday, the twentieth day of this Term, directing the Marshal under a warrant from the Judge to cause to be empannelled a Grand Jury, they were accordingly on this day empannelled by the marshall and being called are as follows, towit, Abraham Hite (foreman), William Steele, George Madison, John Patriek, Thomas Lewis, Richard Apperson, Peter B. Ormsby, Nathaniel Hart, Joseph Winlock, Abraham Owen, Richard Davenport, Elijah M. Covington, Robert Johnson, Nicholas Lafon, John Kenton, Nicholas Miller, Richard Price, George Greir, John Bacon, Richard Fox, Thomas Johnston, Thomas Respas, and Francis Ratcliff, who were sworn as a Grand Jury of the United States in and for the body of the Kentucky District, to enquire &c.; they received a charge delivered by the Judge, and then retired from the barr to consider &c., and in a short time returned & informed the Court that they had no presentments to make nor had the attorney for the United States prefered any indictments to them. The attorney then on behalf of the United States moved the Court that the Grand Jury be adjourned until tomorrow morning ten o'clock, as he would have then indictments to prefer for their consideration.

Order Book G, page 243:

Wednesday, December 3rd, 1806.

On the Motion of the attorney for the United States, It is ordered that an attachment issue against John Adair for a contempt to the court in failing to attend as a witness on yesterday in behalf of the said United States to give testimony to the Grand Jury of the United States in and for the Kentucky District when he had been legally summoned by the Marshal so to do, and that the said attachment be made returnable as soon as executed.

Order Book G, page 246:

Wednesday, December 3, 1806.

The Grand Jury of the United States in and for the Kentucky District, who were adjourned until today, being called appeared in court agreeable to the adjournment. Whereupon the attorney for the United States prefered to them an indictment against

John Adair,—and there not being sufficient time to go through with the enquiry—It was ordered by the Court that the Grand Jury be adjourned until tomorrow morning ten o'clock.—

Ordered that the Court be adjourned until tomorrow ten o'clock.—

Harry Innes.

Order Book G, page 248:

Thursday, December 4th, 1806.

United States, Plaintiffs, Against John Adair, Defendant.	}	On an Attachment for Contempt &c.
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This day came the defendant John Adair, and it appearing to the satisfaction of the Court, that it was not a contempt by him to the Court offered—It is therefore ordered that all further proceedings on the said attachment be discontinued.

Order Book G, page 261:

Thursday, December 4th, 1806.

The Grand Jury who had been adjourned until today being called appeared in court agreeable to adjournment and thereupon the said Grand Jury returned into court the indictment which was preferred to them on yesterday against John Adair, "Not a true Bill," which is in the following words, to-wit, United States of America, Kentucky District to-wit: The Grand Jury empanelled and sworn in and for the body of said District do on their oaths present, That a certain John Adair, farmer of the County of Mercer, in said district, did at said County & district on the first day of August last past in the present year One thousand eight hundred and six with force and arms then and there willfully and unlawfully and from evil premeditation set on foot and prepare for a military expedition and enterprize then and there against the dominions of the King of Spain who is an European Prince at peace with the Said United States, to-wit, The provinces of Mexico in North America which appertain to the dominions of the said King of Spain, contrary to the laws of the said United States in such cases provided and against the peace and dignity of the said United States.

Daveiss for United States.

The Attorney for and on behalf of the said United States then preferred to the said Grand Jury an Indictment against Aaron

Burr. And there not being sufficient time to go through with the inquiry, It is ordered by the Court that the Grand Jury be adjourned until tomorrow morning ten o'clock.

Order Book G, page 267:

Friday, December 5th, 1806.

The Grand Jury who had been adjourned until today being called appeared in Court agreeable to adjournment.—The said Grand Jury then delivered to the Court the indictment which was preferred to them on yesterday against Aaron Burr, "Not a true Bill," which is in the following words, to-wit:

"United States of America Kentucky District to-wit: The Grand Jury of the United States in and for the Body of the said District do on their oaths present, That a certain Aaron Burr, late of the City of New York and vice president of the Said United States, did with force and arms at the County of Fayette in said District on the twenty-fifth day of November last past willfully and unlawfully, and from evil premeditation, then and there set on foot & prepare for a military expedition against the dominions of the King of Spain who is an European Prince at peace with the said United States, to-wit, against the provinces of said King in North America, contrary to the laws of the said United States in such cases provided and against the peace and dignity thereof.—And the Jurors aforesaid upon their oath aforesaid do further present that the said Burr did at said district, to wit, at the County of Jefferson on the day and in the year aforesaid then and there willfully and unlawfully with force and arms, prepare and provide the means for carrying on a military expedition and enterprize against the dominions of the King of Spain aforesaid who is at peace with the said United States, to-wit, the provinces in North America which are of the dominions of the said King of Spain, contrary to the laws of the United States in such cases provided and against the Peace and dignity of the said United States. And so the Jurors aforesaid upon their oath aforesaid do say that the said Aaron Burr is guilty of the misdemeanors aforesaid contrary to the laws of the said United States and against the peace and dignity thereof.

"J. H. Daveiss for said U. States."

And the said Grand Jury then delivered to the Court the following written report to-wit—The Grand Jury are happy to

inform the Court that no violent disturbance of the Public Tranquility or breach of the laws has come to their knowledge.

We have no hesitation in declaring that having carefully examined and scrutinized all the testimony which has come before us, as well on the charges against Aaron Burr, as those contained in the indictment preferred to us against John Adair, that there has been no testimony before us which does in the Smallest degree criminate the conduct of either of those persons, nor can we from all the inquiries and investigation of the Subject discover that anything improper or injurious to the interest of the Government of the United States or contrary to the laws thereof is designed or contemplated by either of them—December fifth one thousand eight hundred and six.

Abra. Hite, Foreman,

Wm. Steele	Thomas Lewis	Richard Davenport
George Madison	Rich'd Apperson	E. M. Covington
John Patrick	P. B. Ormsby	Abraham Owen
Robert Johnson	George Greer	Thomas Johnston
Richd. Fox	Nicholas Lafon	Richard Price
John Kenton	Nathl. Hart	N. Miller
John Bacon	J. Winlock	Thos. Respass

And the said attorney for and on behalf of the said United States having no more indictments to prefer, the said Grand Jury were discharged.

Ordered that the Court be adjourned until tomorrow ten o'clock.

Harry Innes.