NATIONAL INTELLIGENCER,

AND

WASHINGTON ADVERTISER.

VOL. VII. | WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. | No. 1054.

FIVE DOLLARS PER ANNUM | MONDAY, JULY 20, 1807. | PAID IN ADVANCE.

National Intelligencer.

[Having given the speech of Mr. Randolph on the motion for a subpoena Duces Tecum, we now lay before our readers the reply of MR. WIRT, on the opposite side.]

MR. WIRT. The counsel for the prosecution, do not deny that the general subpoena *ad testificandum*, may be issued to summon the President of the United States, and that he is as amenable to that process as any other citizen. If his public functions disable him from obeying the process, that would be a satisfactory excuse for his non-attendance *pro hac vice*; but does not go to prove his total exemption from the process. We think farther, sir, that a man standing in the situation of the prisoner, has also the right to demand all papers material for his defence, wheresoever they may be, the disclosure of which will not compromit the national safety; but then the papers required, must be shewn to be material for his defence. The subpoena *ad testificandum*, is a matter of right, and the prisoner might have demanded it from the clerk without the intervention of the court; but here is a motion for a subpoena *duces tecum*, to compel the President to produce certain papers of state, the materiality of which is not shewn.

I shall contend first, sir, that the *subpoena duces tecum* is not a process of right: that the motion for it, is a motion addressed to the discretion of the court; and that the court may award or withhold it as they see fit.

In the next place, I shall contend that this discretion of the court should be controled and determined only by the relevancy and materiality of the papers required.

And, thirdly, that in the present instance, the relevancy and materiality of the papers required, is so far from being shewn, that from every thing which appears, they are both immaterial, and entirely irrelevant.

I shall proceed to shew in the first place that the *subpoena duces tecum* is not a process of right; but that the application for it, is addressed merely to the discretion of the court.

MR. WICKHAM. That is admitted, sir: we admit that it is an application to the sound discretion of the court.

MR. WIRT. I thank you for the admission, sir, you have relieved me from the unnecessary trouble of so much of my argument. It being conceded then, that this is an application to the discretion of the court, the question naturally presents itself, by what circumstances should that discretion be controled and determined? Should it be by the mere wish of the prisoner? If so, it is in vain that the court possesses any discretion on the subject: the only discretion exercised about it, is, the discretion of the prisoner; he has but to ask and have: and by his mere wish, he changes this from a process flowing from the discretion of the court, into a process of absolute right. Consider this wide and bold doctrine on the ground of expediency:—would you summon any private individual from the remotest part of the United States, to produce a paper on the mere wish of the prisoner, without his defining the paper and shewing how it bore upon his defence. If you would, you put the pursuits and the peace of every individual in the U. S. at the mercy of the prisoner's caprices and resentments. This argument from inconvenience, assumes an attitude of the most awful and alarming importance, when you extend it to a case like this before the court. A prisoner seldom has any cordial amity for the government by which he is prosecuted for a crime. The truth is, that he feels himself in a state of war with that government; and the more desperate his case, the more ardent will be his spirit of revenge.—Would you expose the offices of state to be ravaged at the mere pleasure of a prisoner? Who, if he feels that he must fall, would pant for nothing more anxiously than "to grace his fall and make his ruin glorious" by dragging down with him the bright and splendid edifice of the government. Sir, if Aaron Burr has the right, at his mere wish, to call one paper from the government, he has the same right to call any other; and so, one after another, might divulge and proclaim to the world, every document and secret of state; however delicate our foreign relations might be, and however ruinous the disclosure to the honor and prosperity of the country. These, sir, are topics offered to the discretion of the court. It is certainly much to be wished, that a rule could be devised, which while it should protect the rights of the prisoner, should also protect the public offices from being wantonly and unnecessarily violated. I think there is such a rule; it is this:—It is by requiring that the prisoner who calls for a paper, should shew that the paper applies to his case, and is requisite for his defence. When he shall have done this, I hold that he will be entitled to call for any paper, It will then rest with the President of the U. S. the officer appointed by the people to watch over the national safety—to say whether that safety will be endangered by divulging the paper.—Surely, sir, justice to the prisoner requires no more than that he should possess such papers as are material for his defence; and will not the court require that he should shew that materiality before they give way to his call; if they do it, if they say that it is enough for the prisoner to wish a paper, to have it; they put themselves as well as the chief magistrate of the union, in danger of becoming the mere ministers of the prisoner's whim, or malice and resentment. By adopting the rule which I have proposed, they avoid these consequences and do all that justice requires for the prisoner.

When this subject was first mentioned, it was said by one of your honors that it is usual to award the *subpoena duces tecum* on the mere motion of the party, unsupported by any affidavit as to the purpose for which the paper was required. This is true, sir; such an affidavit is not generally required; but why is it not? because the relevancy and materiality of the paper are admitted by the adverse council, or are palpable from the nature of the issue and of the paper required. The docket, for example, presents the case of a writ of right or an action of ejectment; the name of the action, shews that the title of land is in question—one of the parties move for a *subpoena duces tecum* directed to the clerk of another court, and requiring him to bring up a deed or a will which forms a link in the chain of his title. The adverse counsel if he be present, admits by his silence the propriety of the motion: or if his silence has not that effect the nature of the issue and of the paper required shews at once the relevancy & materiality of the latter. Hence it has happened, that these motions are usually unsupported by affidavit. But is this the case here; the relevancy and materiality of the papers called for, are not admitted by us:—are that relevancy and materiality palpable from the nature of the points in issue and the papers required? Let us see if they be. The two charges against the prisoner are first of high treason; and secondly, misdemeanor, in setting on foot an expedition against the territories of a nation with whom we are at peace; for the purpose of his defence, he says he wants a letter from gen. Wilkinson to the President; which letter contains a declaration of his guilt—and also certain orders from the department of war, which he says directed the burning and destruction of himself, his people and his property. Now, sir, what possible tendency can either of these papers have to acquit the prisoner of the treason or the misdemeanor. As to the orders which have been depicted as being so sanguinary and despotic, I affirm, with the power of proof to support me, that such orders never were given; though if it be true, that Aaron Burr had placed himself in a state of war with his country: was aiming a blow at the vitals of our government and liberty, and that blow could be averted in no other way, I hold that his destruction would have been a virtue, a great and glorious virtue. Affairs, however, had not reached that desperate crisis. We have seen the orders, sir, and at a proper time will produce them; the very orders to lieut. Shaw, which the prisoner has so often mentioned, as having been published in the Natchez Gazette; those orders are not as he has described them, they are simply orders to apprehend Aaron Burr, and *if it shall become necessary for that purpose to destroy his boats*. These are the bloody orders which have been so often mentioned with looks of such tragic and mysterious import? Suppose the orders was as barbarous as he has described them, and that the emergency did not justify them: they prove the administration wrong: but do they prove or tend to prove Aaron Burr innocent. If the President were on his trial, for having issued these orders, it would be necessary to hear the orders themselves, in order to ascertain their merits or demerits. But the question is not now as to the guilt or innocence of the President, it is as to the guilt or innocence of Aaron Burr, on the charges of treason and misdemeanor, and whether the President has acted right or wrong does not and cannot affect the question of Burr's guilt or innocence. The charges against him are to be proven by witnesses on behalf of the U. S. if these witnesses do not prove the charges, there is an end of the enquiry: but if they do, I ask whether it be possible that his production of the President's orders even in his own terms, will remove that evidence of his guilt? Every judgment must answer no: and if so, the orders are clearly immaterial for his defence. But altho' the affidavit does not attempt to shew, wherein these orders are material for the prisoner's defence, Mr. Martin has attempted to supply this omission by his argument. It seems these orders were so lawless that Burr had a right to resist them; and whatever he has done has been in self defence against these orders. It would be easy, sir, to expose the flimziness and fallacy of this pretext by a reference to dates, the man cannot have a very chronological head who can impute crimes throughout 1805, 1806, to orders issued in the last month of the last year, or the beginning of 1807. But without stopping to analize more minutely, this strange anachronism, let us enquire into this doctrine of resistance which Mr. Martin has advocated. I am not an advocate for passive obedience and non-resistance. I do not think as Mr. Martin has asked, that a man becomes a God when he becomes a president: I think he does not become a God even by becoming a king or an emperor: on the contrary, I think that a man, who, in a government like ours, even aspires to become one, *approaches in point of character, a class of beings very opposite to Gods*. But ascending again to our President, he is bound by his oath of office to take care that the laws shall be carried into effect. By the particular act of Congress which prescribes the punishment of the misdemeanor charged on the prisoner, the President is authorised and required to call on the naval and military force of the country to defeat the enterprize: in the present instance he has done so and given orders for the apprehension of the offender: and we are told that Aaron Burr, instead of submitting himself to the laws and justice of his country, had a right to resist these orders. That Aaron Burr was to be the judge, whether he should obey, or not, orders proceeding from the lawfully constituted authorities of his country: and that if he thought them unlawful he had a right to resist them by force: if this be so, there is an end of government: every individual in the country, I presume, has, at least the same rights with Aaron Burr: and if he has this right of submitting to, or resisting the laws and officers of the government as he pleases, every body else has the same right: then where is the use of our constitution, laws or officers, we might as well abolish them all, and return to a state of nature. But, sir, neither Aaron Burr nor any other individual carries about him this dispensing power. It is clear that the very act of resistance, of which Mr. Martin has spoken, was itself an act of treason. Before the orders can be material for his defence on this ground, it must be determied that he had the right of resistance, but as I presume it to be impossible, that the court can entertain this latter opinion, I conclude that the orders in question, cannot be relevant or material to his defence in this light; and no other has been presented or I believe can be presented.

Let us now consider the letter from gen. Wilkinson to the President, and enquire how that touches either of the issues in which the prisoner is involved, and how the production of the original letter is to operate to his benefit. If the letter be material at all, a copy will answer every purpose. The letter I presume, from the use made of it by the President, is a public document, and is lodged in the department of state. The law of the U. S. which establishes this office, contains the following clause:

"And be it further enacted, that the said secretary shall cause a seal of office to be made for the said department of such devise as the President of the U. S. shall approve; and all copies of records and papers in the said office, authenticated under the said seal, shall be evidence equally as the original record or paper."—1 vol. laws of U. S. chap. xiv, p. 5.

Hence a copy of this letter will answer every purpose of the original;—and it will be no more competent to gen. Wilkinson to deny the authenticated copy than the original. But let us see of what use a copy of this letter can be to him? We know nothing of this letter, except from the message of the President to which the counsel on the other side have referred us: and by this message it appears that it was from this letter connected with others that the President inferred the prisoner's guilt; a letter, then, which according to the only account we have of it, contributes to establish the prisoner's guilt, is required for the purpose of proving his innocence!—But this letter we learn, not from the affidavit, but from argument, is required for the purpose of confronting gen. Wilkinson, if he should trip in his evidence—At present then, there is confessedly no issue to which this letter applies; but one may possibly occur by gen. Wilkinson's departing in his narrative from the statements of his letter. Now, sir, suppose a man should move you for a subpoena *duces tecum* in a civil question; stating, indeed, that there was at present no suit to which the paper could apply; but that he apprehended one might be brought, in which it might be material: now where is the difference between such a motion and the very remote probability that gen. Wilkinson will produce an occasion for this letter, in contradicting by his parol testimony, the statement of his letter:—but let us press this point a little further: no one pretends to know any thing of the details of this letter; all we know of it, is derived from the President's message; and from that all we learn of it, is, its general character, that it goes to prove the guilt of Burr: Now in order to produce any collision between this letter and Wilkinson's parol evidence; the letter must have an opposite character; that is it must go to shew the innocence of Burr. If Wilkinson continues to avow the guilt of Burr, there will be no contradiction between his testimony and his letter, and consequently there can be no confrontation between them, beneficial to the prisoner; there can be a confrontation in no other event, than that of his deposing to Burr's innocence. The result of the argument is that Burr, apprehensive that the evidence of gen. Wilkinson may be favorable to him,—wishes the general's letter for the purpose of destroying that evidence and proving his own guilt. Again, sir—I have never seen or heard of an instance of this process being required to bring forward any paper, but where such a paper was in its nature evidence; for which either party had an equal right to call, and to use it when produced. But it is obvious that in this case and in the present state of things we could not use the letter of gen. W. as evidence; altho' the opposite party should obtain his subpoena *duces tecum* for this paper and would seem thereby to have made it evidence and introduced it into the cause, yet after it comes, we cannot use it—hence, there is no reciprocity in it—the paper is not at present evidence, and therefore is not within the principle on which this process is awarded. One more remark on this letter and I have done with it—I am not more an advocate for the needless multiplication of state secrets, than the gentlemen who has preceded me. It looks too much like the mysteries of monarchy—and I hate monarchy with all its mysteries, as I do the mysterious movements of those who are lovers of monarchy. Yet it is obvious that there may be cases in which the very safety of the state may depend on concealing the views & operations of the government. I will instance in this very letter: I do not know what it contains; but it is from the general who commands on the Spanish frontier. That the state of our affairs was & is with Spain not the most amicable is well understood—we know that our affairs in that quarter wear even at this time the most lowering aspect—suppose this letter should contain a scheme of war—a project of attack—would it be proper to divulge and proclaim it even to Spain herself. If the letter contains such thing, I have no doubt that the President ought and will conceal at least so much of it. This, however, will be a question with him, when the paper shall be called for; and a question which he alone is competent to decide.

From what has been said, I take it to be clear that the relevancy and materiality of these papers for the prisoner's defence, are not palpable by comparing the nature of the papers with the nature of the issues; and being neither self-evident nor admitted, I hold that the party is bound to shew at least by his affidavit wherein they are relevant and material. This he has not pretended to do, in the affidavit offered to the court; for in that he has merely stated, in terms the most loose and vague, that he believes these papers may be material for his defence. Sir, he might take the same oath as to any paper in the offices of state, without the possibility of proving him foresworn; for he swears merely to a conjecture; and whether he entertains it or not can never be decisively known to any one but himself. Will you lay open the public offices to be ransacked by conjectural affidavits? Will you adopt a precedent which will put it in the power of the enemies of the government at any time and without the hazard of punishment, to explore your offices with the worst of views and harrass the officers themselves at their discretion. Sir, I wish the prisoner to have a fair trial. I wish him to possess every atom of evidence which can contribute to his acquittal. But these papers appear to me not calculated to touch the issue; and still less calculated to do the prisoner any good. If he thinks otherwise where can be the difficulty of his shewing by an affidavit at least some probability of their doing him service. If he knows the nature of those orders and that letter so well as to have ascertained to his own sitisfaction, that they may do him service, where can be the harm of his setting out in his affidavit the character of the papers and shewing how they may be brought to bear upon his case—when he shall have done so, the court will have something for its discretion to act upon—at present they have nothing but the prisoner's faint conjecture, and the discretion would appear to me not very sound which would be determined by a consideration like that.

I can see but one possible objection to the particular affidavit which I require, which is, that the prisoner would thereby unmask his defence—but in the case of the U. States vs Smith, a particular affidavit was required by Judge Paterson setting out what it was expected to prove by the witnesses; and although it was objected in that case that by demanding such an affidavit he compelled the accused to unmask his defence, he nevertheless demanded the affidavit—and in that case, as in this, although the materiality of the evidence was supported by some of the ablest advocates on the continent, the court determined against its materiality, and the cause went on without it. But in the present instance an objection as to unmasking the defence would be an objection merely of form because the gentlemen have by their arguments, in fact taken off the mask, and state the manner in which they expect this evidence to apply—we have examined their expectations and I hope found them baseless.

I conclude, sir, that this is an application to the discretion of the court—that justice to the prisoner requires only, that he should have all papers from the officers of state which he shall shew to be material and relevant to his defence; that he has not shewn them to be so in this case; and that, therefore, the process should be withheld until he does shew them to be so. I know of no other rule which, while it will protect the rights of the prisoner will also save the officers from needless, wanton & wicked violations.

I cannot take my seat, sir, without expressing my deep and sincere sorrow at the *policy* which the gentlemen in the defence, have thought it necessary to adopt. As to Mr. Martin I should have been willing to impute this fervid language to the sympathies and resentments of that friendship which he has taken such frequent occasions to express for the prisoner, his '*honorable friend*'—in the cause of friendship I can pardon zeal even up to the point of intemperance. But the truth is, sir, that before Mr. Martin came to Richmond, this policy was settled; and on every question incidentally brought before the court, we were stunned with invectives against the administration. I appeal to your recollection, sir, whether this policy was not manifested even so early as in those new and until now unheard of challenges to the grand jury for favor? Whether that policy was not followed up with increased spirit in the very first speeches which were made in this case, those of Mr. Botts and Mr. Wickham on their *previous* question pending the attorney's motion to commit? Whether they have not seized with avidity every subsequent occasion, and on every mere question of abstract law before the court, flew off at a tangent from the subject, to launch into declamations against the government—exhibiting the prisoner continually as a persecuted patriot—a Russel or a Sidney bleeding under the scourge of a despot, and dying for virtue's sake! If there be any truth in the charges against him, how different were the purposes of his soul from those of a Russel or a Sidney! But I forbear to press this subject! I beg to know what gentlemen can intend, expect or hope from these perpetual philippics against the government? Do they flatter themselves that this court feel political prejudices which will supply the place of argument, and innocence on the part of the prisoner? Their conduct amounts to an insinuation of the sort—but I do not believe it—on the contrary, I feel the firm and pleasing assurance that as to the court the beam of their judgement will remain steady, although the earth itself should shake under the concussion of prejudice. Or is it on the bye-standers, that the gentlemen expect to make a favorable impression, and do they use the court merely as a canal, through which they may pour upon the world their undeserved invectives against the government. Do they wish to divide the popular resentment and diminish thereby their own quota? Before the gentlemen arraign the administration let them clear the skirts of their client. Let them prove his innocence. Let them prove that he has not covered himself with the clouds of mystery and just suspicion; let them prove that he has been all along moving erect & fair in open day, and that these charges against him are totally groundless and false: *that* will be the most eloquent invective which they can pronounce against the prosecution, but until they prove his innocence, it shall be in vain that they attempt to divert our minds to other objects, and other enquiries—we will keep our eyes on Aaron Burr until he satisfies our utmost scruple. I beg to know, sir, if the course which gentlemen pursue is not disrespectful to the court itself? Suppose there are any foreigners here accustomed to regular