stood, that I shall object to their being unnecessarily produced.

Mr. *Botts*. It will take four days at least to interchange letters between this city and Washington, and two or three days to copy the papers. So that six days will be totally lost to us: In the mean time, 30 or 40 witnesses, and 16 Grand Jurymen (they might perhaps require them) would be detained here; and after all, the attorney's application to the government might be unavailing.

Mr. *Hay*. Since then gentlemen, sir, will press this subject; I ask no more than that they will wave this discussion till to-morrow.

The court was then adjourned till to-morrow, 11 o'clock.

June 13.

On Wednesday last an uncommonly animated and eloquent discussion commenced on the subject of Col. Burr's motion for a writ of subpœna *duces tecum*, to summon the President of the United States to produce as evidence the original letter of General Wilkinson (dated the 21st day of October, 1806, and referred to in his message to Congress in January last;) together with copies of the orders which were issued by his directions to the naval and military officers of the U. States, commanding them to suppress the conspiracy imputed to Aaron Burr.

Mr. *Hay* contended that a preliminary question ought to be decided; whether in the situation in which Col. Burr now stands, before any bill of indictment has been found against him, he could, as a matter of right, move for any subpœnas for witnesses in his favor. He solemnly declared it was not his wish, nor that of the gentlemen associated with him in the prosecution, to withhold from Col. Burr any testimony requisite for his defence; that he firmly believed those who administered the government were disposed to furnish every paper proper, to be produced for the purpose of enabling the accused to prove his innocence if he could. He stated therefore that he had written to the President, requesting him to send on the documents which were wanted; and he doubted not they would be furnished. But, as the gentlemen on the other side insisted on the subpœna duces tecum as a process to which they had a right, and founded their motion on a supposition that the President would refuse these documents, he would examine the foundation of the right for which they contended.

The court consented that the previous question should be first discussed.

Mr. *Hay* then opened the debate, and endeavored to demonstrate that the motion made by col. Burr was premature; that he stood before the court, at present, only as a person bound in a recognizance to answer the charge of a misdemeanor when it should be exhibited; that, no bill having yet been sent to the grand jury, no charge was yet exhibited against him; that as therefore no trial depending, he could not with propriety demand subpœnas for witnesses, although they had been issued to him by the courtesy of the clerk, and it was the usual practice to do so in similar cases. Mr. H. laid down this broad proposition that no person accused has a right to subpœnas until he is on his trial, that is, until the grand jury have found a bill of indictment against him. He denied that any law could be shewn which gave that right; and asserted that the complicated provisions of the common law, and the Acts of Congress might be searched in vain to support it; that the amendment to the constitution of the United States which entitles every person charged with a crime to compulsory process to obtain his witnesses, applied to a differeent stage of the proceedings, not to the preliminary measures which had been taken with regard to Aaron Burr; that the intention of that amendment was to secure a fair and impartial trial; but an examination before a magistrate or an enquiry before a grand jury was not a trial. In order to shew the prematurity of the motion, he asked, if the President was actually summoned and attended, what could be done with his evidence? It could not be used unless the trial should come on; unless the bills of indictment should be found true bills.

He suggested another difficulty, that no day could be appointed on which the process should be returnable. He acknowledged that on a motion to commit, a prisoner is entitled to examine witnesses on his behalf; but there was no such motion now before the court, tho' it would be made if Gen. Wilkinson did not arrive. On a motion to commit, a prisoner may examine witnesses if they are present, but has not a right to have such a motion postponed on account of their absence.

Mr. *Wickham* on the other side, insisted that the motion was only made through a spirit of accommodation, for the clerk was bound to issue the subpœna at the request of Col. Burr. He declared that this was the first time he had ever known the doctrine advanced that a person accused was not entitled to subpœnas for his witnesses. He observed that the United States had had subpœnas for witnesses on their behalf; that the right to the same process attached to Col. Burr at the moment when after having been seized by lawless and arbitrary force, he was brought before the Chief Justice for examination; that in the trial of Smith and Ogden at N. York, which resembled this, subpœnas were issued in their favor to summon Mr. Madison and General Dearborn, who failed to attend, in consequence of which an attachment was moved for against them; that in the argument of that case, no person doubted the power of the clerk to issue the subpœnas, but the court divided on the question concerning the attachment. He said it was true that Mr. Hay might or might not send the bills to the grand jury; but if he might send them, Col Burr might want the witnesses in his defence; that the motion to commit which had been made the other day, was not relinquished, but only suspended; that the argument relative to the return day of the proces was not of any weight, for the court could appoint a day, and had done it in hundreds of instances; and that if on a motion for commitment, a prisoner cannot have a continuance, that is the strongest reason for his being prepared with testimony to meet it. He concluded with saying that the rule that a person accused had a right to subpœnas for witnesses in his favor, had been settled ever since the days of Magna Charta.

Mr. *Martin* cited some parts of a report of Ogden's trial to confirm the observations made by Mr. Wackham.

Mr. *Hay* said the gentlemen were mistaken as to the subpœnas in Ogden's case; that they were not issued before the indictments were found; that Mr. Wickham had misrepresented his argument in supposing that he denied the power of the clerk to issue subpœnas in this stage of the prosecution; that he had stated that it was the practice to issue them; but practice and right are different things—He called for any authority on the point.

Mr. *Wickham* contended he was right as to Ogden's case, because it proved that subpœnas issued for a prisoner were not irregular. He acknowledged that no authority could be produced, for no such question as that made by Mr. Hay had ever been raised before.

Mr. *Hay* said he was willing to submit the question to the court.

Mr. *Botts* read an act of Congress which proves the right of a person accused as well as of a person indicted to have subpœnas.

The court seemed inclined to decide the point against Mr. Hay; but desired it to be reserved as a part of the argument on the main question, in the opinion of the court on which the previous question would be involved; and directed col. Burr's counsel to commence their argument in support of their motion for a subpœna duces tecum to the President of the United States.

Mr. *Martin* then delivered a very animated harangue, of which we are able to give only a brief abstract at present. It consisted in a great measure of impassioned declamation on the wrongs which he alledged Col. Burr had sustained, intermingled with sarcastic insinuations against Gen. Wilkinson and the President of the United States. In the beginning of his argument he proceeded on the supposition that Mr. Hay denied that the President could be summoned as a witness in any case; but the Chief Justice having informed him that Mr. Hay did not contend for such a doctrine, but only that he could not be summoned to produce the papers requested; he acknowledged he had misunderstood that gentleman and proceeded to argue that those papers ought to be produced.

With respect to Wilkinson's letter to the president, he said it was wanted to confront him in case he should be introduced as a witness, and to shew that he had given contradictory statements at different times concerning Col. Burr's transactions; that the affidavit filed by Col. Burr in support of his motion was sufficient together with the opinion of his counsel, that the letter was material to authorise him to demand its production. As to the orders which the President had issued; he admitted that they might have applied for copies of those official copies and that every citizen had a right to demand them without applying for a writ of subpœna duces tecum; but that the Secretary of the Navy (he presumed by the President's directions,) had refused those for which he had been applied to, and the other Secretaries would probably act in the same manner. The process desired was therefore necessary to obtain them. The object for which they were wanting he candidly stated to be to shew *that those orders were illegal, unconstitutional, arbitrary and oppressive; that Col. Burr had a right to resist them; and that the armed assemblage of men under his command, (if such an assemblage ever existed) was only for purposes of self defence and resistance to oppression!*

Mr. *Martin* further stated that the opposition of counsel for the United States to this motion would leave an impression on the public mind that the President would be sorry if Col. Burr should prove to be innocent, because he had in his address to Congress prejudged and declared him guilty; that he had denounced him as a traitor, had let loose against him the bloodhounds of persecution and hunted him into the toils; that the President had himself occasioned all the clamor against him, and ought not to be permitted to withhold any papers which vindicate a citizen whose life was in danger; that, if he did withhold them, and Colonel Burr should be condemned, he would be a *murderer* and so recorded in the register above.

He insisted that the circumstance that Wilkinson's letter to the President was confidential could not prevent it being disclosed as evidence in a criminal prosecution. He cited the Dutchess of Kingston's case, and M'Nally on evidence, p. 239, in support of this doctrine; and laid it down as a general rule that no secrets but those communicated professionally to an attorney could be lawfully kept on an occasion of this nature. If there had been a verbal communication to the President, he could have been compelled to reveal it in giving in his testimony as a witness; if so, why should he not produce this letter?

He said that he doubted whether the testimony of General Wilkinson would be correct, that he had already violated his oath to support the constitution, and was interested to establish the guilt of Burr to excuse himself. It was therefore peculiarly necessary to confront him with this letter.

Mr. *Martin* also observed that any inconvenience which might attend the production of these papers ought to be disregarded; because the law gave Col. Burr a right to demand them. But, in fact, there would be no inconvenience. They did not want the personal attendance of the President; he might comply with the subpœna by sending the original letter, and the copies required,

Mr. *M'Rae* in answer to Mr. Martin, regretted that he had used such intemperate language, and wandered so much from the subject; observing that he would not follow his example and indecorously declare in arguing this plain and simple question any opinion on the guilt of Col. Burr.—He repelled the complaints of persecution which had so often been repeated. He said that precedents might have been produced to support them in objecting to the right of summoning the President (particularly Judge Chase's opinion in the trial of Cooper for a libel) as a witness in any case; but the counsel for the U. S. to shew that they felt no spirit of persecution, had waved that objection, and seemed to shelter themselves under that opinion, if it was law; it being their own opinion that no man is so elevated, but he may be a witness if his evidence is such as may legally be admitted. He doubted not that, when the subject was fully understood, it would be found that the President's conduct had entitled him to the praise of his country.

Mr. *M'Rae* proceeded to examine the grounds of the motion for the production of the documents demanded. He objected to the affidavit of Col. Burr; that he had only sworn that the letter may be material; whereas he ought to have sworn that he believed it to be material; and moreover ought to have shewn in what respect it is material.—It was therefore too vague and uncertain and not sufficiently special to support the motion.

He contended that Mr. Martin's rule concerning confidential communications was too narrow; that certainly the law would not compel Mr. Jefferson to reveal private confidential communications made to him in his official character. It was unnecessary to argue to prove that this doctrine is founded in the soundest policy.

He cited *Marbury v. Madison*, 1 Cranch 144, 166, to shew that specific information ought to be given of the nature of the papers required. He said if the President is to be summoned, it must be on the ground that he is in possession of the letter. If it is a private letter it ought not to be produced; if public, it is filed in the Department of State, and it is not in the President's possession. It is not suggested that the President has any personal evidence to give; it therefore is not necessary to direct the subpœna to him, but rather (even if the doctrine they contended for is correct) to the Secretary of State.

Mr. M'Rae remarked that the council for the prosecution would consent that a copy certified from that department, should be read if the court should be of opinion that the original letter is admissible as evidence. It had been said that Gen. Wilkinson might object to a copy; but the cause was under his control; if he objected, it would be frivolous, for in a few days the original could be produced, which would prove the correctness of the copy.

Mr. *Martin* begged leave to make a single observation omitted before; that it was a familiar practice to get copies of the orders of government; particularly in trials of vessels for violating the non-intercourse laws; that in such cases where instruction given by officers of government were produced, the only question was whether orders violating the law could justify those acting under them; not whether such orders were admissible as evidence.

Mr. *Botts* next spoke, and was followed by Mr. Wirt on Wednesday, by Messrs. Hay and Randolph on Thursday, and by Mr. Martin again on Friday. Sketches of the substance of their speeces will be given in due time.

WILMINGTON.

TUESDAY, JUNE 30, 1807.

On Monday the 15th inst. General Wilkinson made his appearance before the Federal Court, at Richmond, and gracefully bowing to the bench and surrounding spectators, took his stand behind Col. Burr's counsel. Col. Burr's countenance is said to have been marked by a hau hty contempt; that of Gen. W. was calm, dignified, and commanding. After taking the oath, &c. Gen. W. attended the Marshal to the jury room. A desultory conversation then ensued, as to the testimony proper to be sent to the grand jury, the counsel for Col. Burr insisting that no papers should be received by the grand jury, but through the medium of the court. The Chief Justice then delivered the opinion of the court, which was, *that the grand jury should inspect no papers but what were necessary to connect the narrative of the witness.* Mr. Wyllie (the reputed Secretary of Burr) was then called into court, and interrogated with respect to a cyphered letter in the hand of the counsel for the prosecution. He refused to answer certain questions put to him, on the ground that he should thus criminate himself. A long and desultory argument then ensued, which was determined by a promise from Col. Burr's counsel to produce their authorities before the court on the following day, to shew that Wyllie could not be compelled to answer such questions as might in his opinion tend to criminate himself. The court then adjourned.

Four indictments were sent to the grand jury, two of them against A. Burr, for treason and for a misdemeanor, and two against Herman Blannerhassett, for like offences.

Judge Marshal gave a lengthy opinion on the motion for issuing a writ of Subpœna duces tecum, in which he made use of this expression:

"*If this prosecution shall terminate, as it is expected and wished on the part of the United States, in the conviction of Aaron Burr.*" After the Chief Justice had pronounced it, Mr. M'Rae said he hoped he had misunderstood a part of the opinion which he had just heard; he hoped the court was incapable of saying that the government of the United States wished the prosecution to terminate in the conviction of Aaron Burr; he denied this be to the wish of himself, and believed that it was not the wish of the gentlemen with whom he had the honor to act. If he had understood the court correctly, he hoped the expression was written inadvertently and accidently; for nothing would wound his feelings more than that his honor should believe that it was their wish that Aaron Burr, should be found guilty, at any rate, whether really guilty or innocent.

The Chief Justice answered, that gentlemen had repeatedly declared their conviction that Aaron Burr *was guilty*. If so, they must wish him to be convicted.

Mr. M'Rae. Our declarations have been only as to our opinions concerning the evidence.

The Chief Justice, before the court adjourned, declared that he *had struck out of his opinion the expression that the United States wished Mr. Burr to be convicted*; that he had done this to prevent its being misunderstood; for his meaning was not that they wished him to be convicted whether guilty or not; but that, as the counsel believed him guilty, they must necessarily wish him, to be convicted, if guilty.

On Tuesday, Mr. Hay read the annexed letter from the President of the U. States, respecting the Attorney's application to him for certain letters and papers supposed to be material to the defence of Col. Burr:

Washington, June 12th, 1807.

"SIR,

YOUR letter of the 9th is this moment received. Referring the necessary right of the President of the United States, to decide, independent of all other authority, what papers, coming to him as President, the public interests permit to be communicated, and to whom I assure you of my readiness, under that restriction, voluntarily to furnish on all occasions, whatever the purposes of Justice may require. But the letter of Gen. Wilkinson of Oct. 21st, requested for the defence of Col. Burr, with every paper relating to the charges against him, which were in my possession when the attorney general went to Richmond in March, I then delivered to him; and I have always taken for granted he left the whole with you. If he did, and the bundle retains the order in which I had arranged it, you will readily find the letter desired, under the date of its receipt, which was Nov. 25; but lest the attorney gen. should not have left those papers with you, I will this day write to him to forward this one by post. An uncertainty whether he is at Philadelphia, Wilmington or Newcastle may produce delay in his receiving my letter, of which it is proper you should be apprised. But as I do not recollect the whole contents of that letter, I must beg leave to devolve on you the exercise of that discretion, which it would be my right and duty to exercise, by withholding the communication of any parts of the letter, which are not directly material for the purposes of justice.

With this application, which is specific, a prompt compliance is practicable; but when the request goes to 'copies of the orders issued in relation to Col. Burr, to the officers at Orleans, Natchez and by the secretaries of the war and navy departments,' it seems to cover a correspondence of many months with such a variety of officers civil and military all over the United States as would amount to the laying open the whole executive books. I have desired the secretary of war to examine his official communications, and on a view of these we may be able to judge what can and ought to be done towards a compliance with the request. If the defendant alledges that there was any particular order which, as a cause, produced any particular act on his part, then he must know what the order was, can specify it, and a prompt answer can be given. If the object had been specified, we must then have had some guide for our conjectures as to what part of the executive records might be useful to him. But, with a perfect willingness to do what is right, we are without the indications which may enable us to do it. If the researches of the Secretary of War should produce any thing proper for communication and pertinent to any point we can conceive in the defence before the court, it shall be forwarded to you. I salute you with esteem and respect.

TH: JEFFERSON."

George Hay, Esq.

After reading the President's letter, some observations were made respecting the testimony of Dr. Bollman and Mr. Wyllie going