



Ours are the plans of fair delightful peace,  
Unwarped by party rage, to live like Brothers.

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*Opinion of the Circuit Court*  
on the motion to issue a  
**SUBPOENA DUCES TECUM**  
for the  
PRESIDENT OF THE U. STATES.

The object of the motion now to be decided is to obtain copies of certain orders understood to have been issued to the land and naval officers of the U. S. for the apprehension of the accused; and an original letter from Gen. Wilkinson to the President in relation to the accused, with the answer of the President to that letter, which papers are supposed to be material to the defence. As the legal mode of effecting this object, a motion is made for a subpoena duces tecum to be directed to the President of the U. States.

In opposition to this motion a preliminary point has been made by the counsel for the prosecution. It has been insisted by them that, until the grand jury shall have found a true bill, the party accused is not entitled to the subpoena, or to the aid of the court to obtain his testimony.

It will not be said, that this opinion is now for the first time advanced in the U. States; but certainly, it now is for the first time advanced in Virginia. So far back as any knowledge of our jurisprudence is possessed, the uniform practice of this country has been to permit any individual who was charged with any crime, to prepare for his defence, and to obtain the process of the court, for the purpose of enabling him so to do. This practice is as convenient, and is as consonant to justice as it is to humanity. It prevents in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive, that would be the inevitable consequence of withholding from a prisoner the process of the court, until the indictment against him was found by a grand jury. The right of an accused person to the process of the court, to compel the attendance of witnesses seems to follow necessarily from the right to examine those witnesses, and wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. It is not doubted, that a person who appears before a court, under a recognizance, must expect that a bill will be preferred against him, or that a question concerning the continuance of a recognizance, will be brought before the court. In the first event, he has the right, and it is perhaps his duty to prepare for his defence at the trial. In the second event, it will not be denied that he possesses the right to examine witnesses on the question of continuing his recognizance. In either case, it would seem reasonable that he should be entitled to the process of the court, to procure the attendance of his witnesses.

The genius and character of our laws and usages, are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial. The objection that the attorney may refuse to proceed at this time, and that no day is fixed for the trial, if he should proceed, presents no real difficulty. It would be a very invidious excuse to a prisoner who had failed to prepare for his trial, to say that he was not certain the attorney would proceed against him. Had the indictment been found at the last term, it would have been in some measure uncertain whether there would be a trial at this, and still more uncertain on what day that trial would take place; yet subpoenas would have issued returnable to the first day of the term, and if, after its commencement, other subpoenas had been required, they would have issued returnable as the court might direct. In fact all process to which the law has affixed no certain return day, is made returnable at the discretion of the court.

General principles then, and general practice, are in favor of the right of every accused person so soon as his case is in court, to prepare for his defence, and to receive the aid of the process of the court to compel the attendance of his witnesses.

The constitution & laws of the U. States will now be considered for the purpose of ascertaining how they bear upon the question.

The 8th amendment to the constitution gives to the accused in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor. The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration that the accused shall be disabled from preparing for it, until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision, which entitles him to a compulsory process as soon as he is brought into court.

This observation derives additional force from a consideration of the manner in which this subject has been contemplated by Congress. It is obvious by the intention of the national legislature that in all capital cases, the accused shall be entitled to process before indictment found. The words of the law are, "and every such person or persons accused or indicted for the crimes aforesaid (that is of treason or any other capital offence) shall be allowed and admitted in his aid office to make any proof that he or they can produce, by lawful witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."

This provision is made for persons accused or indicted. From the imperfection of human language, it frequently happens that sentences which ought to be the most explicit, are of doubtful construction, and in this case the words "accused or indicted" may be construed to be synonymous, to describe a person in the same situation, or to apply to different stages of the prosecution. The word *or* may be taken in a conjunctive or a disjunctive sense. A reason for understanding them in the latter sense, is furnished by the section itself. It commences with declaring, that any person who shall be accused and indicted of treason, shall have a copy of the indictment, and at least three days before his trial. This right is obviously to be enjoyed after an indictment, and therefore the words "accused and indicted." So with respect to the subject clause which authorizes a party to make his defence and directs the court on his application to assign him counsel.—The words relate to any person "accused and indicted." But when the section proceeds to authorize the compulsory process for witnesses, the phraseology is changed. The words are "and every such person or persons accused or indicted," &c. thereby adapting the expression to the situation of an accused person both before and after indictment. It is to be remarked too, that the person so accused or indicted is to have "the like process to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them." The fair construction of this clause would seem to be that with respect to the means of compelling the attendance of witnesses to be furnished by the court, the prosecution and defence are placed by the law on equal ground.—the right of the prosecutor to take out subpoenas or to avail himself of the aid of the court, in any stage of the proceedings previous to the indictment, is not controverted.—This act of Congress, it is true, applies only to capital cases; but persons charged with offences not capital have a constitutional and a legal right to examine their testimony, and this, ought to be considered as declaratory of the common law in the cases where this constitutional right exists.

Upon immemorial usage then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion

that any person charged with a crime in the courts of the United States, has a right before, as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience might be avoided by this construction, no mischief which is perceivable can be produced by it. The process would only issue, when according to the ordinary course of proceeding the indictment would be tried at the term to which the subpoena is made returnable, so that it becomes incumbent on the accused to be ready for his trial at that term.

This point being disposed of, it remains to enquire whether a *Subpoena Duces Tecum* can be directed to the President of the U. States, and whether it ought to be directed in this case.

This question originally consisted of two parts. It was at first doubted whether a subpoena could issue in any case to the chief magistrate of the nation; and if it could, whether that subpoena could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the gist of his testimony.

While the argument was opening, the attorney for the U. States avowed his opinion that a general subpoena might issue to the President, but not a subpoena *Duces Tecum*. This terminated the argument on that part of the question. The court, however, has thought it necessary to state briefly the foundation of its opinion that such a subpoena may issue.

In the provisions of the constitution, and of the statute which gave to the accused a right to the compulsory process of the court there is no exception whatever. The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them, but one who would not be a witness. If an exception to the general principle exists, it must be looked for in the law of evidence. The exceptions furnished by the law of evidence (with one only reservation) so far as they are personal, are those only whose testimony could not be received. The single reservation alluded to, is the case of the King. Although he may perhaps give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate of the U. States, in respect to the personal dignity conferred on them by the constitution of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate.

By the constitution of the United States, the President as well as every other officer of the government, may be impeached, and may be removed on conviction of high crimes and misdemeanors.

By the constitution of G. Britain the crown is hereditary, and the monarch can never become a subject.

By that of the U. States, the President is elected from the mass of the people, and on the expiration of the time for which he is elected, returns to the mass of the people again.

How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the dignity of the executive chief, will be perceived by every person. In this respect, the first magistrate of the union may more properly be likened to the first magistrate of a state—at any rate, under the former confederation; and it is not known ever to have been doubted, that the chief magistrate of a state might be served with a subpoena ad testificandum.

If in any court of the U. S. it has ever been decided, that a subpoena cannot issue to the President, that decision is unknown to this court.

If upon any principle, the President could be construed to stand exempt from the general provisions of the constitution, it would be because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting, and if it

should exist at the time when his attendance on a court is required, it would be shewn on the return of the subpoena, and would rather constitute a reason for not obeying the process of the court, than a reason against its being issued. In point of fact it cannot be doubted, that the people of England have the same interest in the service of the executive government, that is, of the cabinet council, that the American people have in the service of the executive of the United States, and that their duties are as arduous & as unremitting. Yet it has never been alleged that a subpoena might not be directed to them.

It cannot be denied, that to issue a subpoena to a person filling the exalted station of the chief magistrate, is a duty which would be dispensed with much more cheerfully than it would be performed; but if it be a duty, the court can have no choice in the case.

If then, as is admitted by the counsel for the U. States, a subpoena may issue to the President, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the power to obtain. The guard furnished to this high officer to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued, and not in any circumstances which is to precede their being issued.

If in being summoned to give his personal attendance to testify, the law does not discriminate between the President and a private citizen, what foundation is there for the opinion, that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case as testimony, must depend on the character of the paper, not on the character of the person who holds it. A subpoena *Duces Tecum* then may issue to any person to whom an ordinary subpoena may issue, directing him to bring any paper of which the party praying it has a right to avail himself, as testimony, if indeed that be the necessary process for obtaining the view of such paper.

When this subject was suddenly introduced, the court felt some doubt concerning the propriety of directing a subpoena to the chief magistrate, and some doubt also concerning the propriety of directing any paper in his possession, not public in its nature, to be exhibited in court. The impression that the questions which might arise in consequence of such process, were more proper for discussion on the return of the process than on its issuing, was then strong on the mind of the judges, but the circumspection with which they would take any step which would in any manner relate to that high personage, prevented their yielding readily to those impressions, and induced the request that those points, if not admitted, might be argued. The result of that argument is a confirmation of the impression originally entertained. The court can perceive no legal objection to issuing a subpoena duces tecum, to any person whatever, provided the case be such as to justify the process.

This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion, is a motion not to its inclination, but to its judgment, and its judgment is to be guided by sound legal principles.

A subpoena duces tecum, varies from an ordinary subpoena only in this, that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister states, whose system of jurisprudence is erected on the same foundation with our own, this process we learn, issues of course. In this state it issues not only of course, but with leave of the court. No case, however, exists, as is believed, in which the motion has been found-

ed on an affidavit, in which it has been denied, or in which it has been opposed. It has been truly observed, that the opposite party can regularly take no more interest in the awarding a subpoena duces tecum, than in the awarding an ordinary subpoena. In either case he may object to any delay, the grant of which may be implied in granting the subpoena, but he can no more object regularly to the legal means of obtaining testimony, which exists in the mind, than in the papers of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an amicus curiae, to prevent the court from making an improper order, or from burdening some officer by compelling an unnecessary attendance. This court would certainly be very unwilling to say, that upon fair construction the constitutional and legal right to obtain its process to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence. The literal distinction between the cases, is too much attenuated to be countenanced in the tribunals of a just and humane nation. If then the subpoena be used with or without enquiry into the manner of its application, it would seem to trench on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence, within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right, to apply for papers deemed by himself to be material. In the one case the accused is made the absolute judge of the testimony to be summoned; if in the other, he is not to judge absolutely for himself, his judgment ought to be controuled only so far as it is apparent that he means to exercise his privileges, not merely in his own defence, but for purposes which the court ought to discountenance. The court would not lend its aid to motions obviously designed to manifest disrespect to the government, but the court has no right to refuse its aid to motions for papers to which the accused may be entitled and which may be material in his defence.

These observations are made to shew the nature of the discretion which may be exercised. If it is apparent that the papers are irrelevant to the case, or that for state reasons they cannot be introduced into the defence; the subpoena *duces tecum* would be useless; but if this is not apparent; if they may be important in the defence; if they may be safely read at the trial; would it not be a blot in the page which records the judicial proceedings of this country, if in a case of such serious import as this, the accused should be denied the use of them?

The counsel for the U. S. take very different views of this subject, and insist that a motion for process to obtain testimony, should be supported by the same full and explicit proof of the nature and application of that testimony, which would delay public justice; which would arrest the ordinary course of proceeding, or which would in any other manner affect the rights of the opposite party. In favor of this position, has been urged the opinion of one, whose loss as a friend and as a judge, I sincerely deplore; whose worth I feel, and whose authority I shall at all times greatly respect. If his opinion was really opposed to mine, I should certainly revise, deliberately revise, the judgment: But I perceive no such opposition.

In the trials of Smith and Ogden, the court in which Judge Patterson presided, required a special affidavit in support of a motion made by the counsel for the accused for a continuance, and for an attachment against witnesses who had been summoned and had failed to attend.

Had this requisition of a special affidavit been made as well a foundation of an attachment, as for a continuance, the cases would not have been parallel; because the attachment was considered by the counsel for the prosecution merely as a mean of punishing the contempt, and a court might certainly require stronger