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President Jefferson: Subpoenas and Privilege

To the Editor:

In his press talk in Orlando, Fla., President Nixon, for the second time, made an erroneous public statement about what he called the famous subpoena to Thomas Jefferson. This was issued to the third President by Chief Justice John Marshall in the trial of Aaron Burr. Mr. Nixon said that Jefferson rejected the subpoena and sent the court a summary of a letter that was demanded.

The fact does not seem to be generally known that two subpoenas *duces tecum* were issued to Jefferson on Burr's motion. In the first instance the defendant asked for a letter from General James Wilkinson to Jefferson, along with some other papers. Jefferson, in Washington, learned of this motion while it was still being argued in Richmond; and he ordered the document sent to the district attorney, George Hay, before he received the subpoena or read Marshall's opinion. He authorized Hay to withhold such parts of these papers as were not material and whose revelation would be contrary to the public interest. Also, he made it clear that he regarded it as improper for the court to order the President around.

Actually, his physical presence in court was not ordered, though Marshall in his opinion intimated rather unnecessarily that it could be. Jefferson resented and sought to forestall this subpoena, but, having essentially fulfilled its purposes, he cannot rightly be said to have rejected it.

The second subpoena called for the deliver of another letter from Wilkinson. This contained certain passages which, in the opinion of the prosecution, should not be made public. After a good deal of argument, Marshall ruled that the prosecution might not do the deleting but implied that the President himself might. Jefferson struck out passages that reflected on other persons and attested their immateriality. The document was accepted without comment. Thus there was an assertion and recognition of a degree of executive privilege, but there was no rejection of a subpoena and no confrontation.

Jefferson was well aware of the necessity for confidentiality, as every President should be. Since the Presidency was a much feebler institution then than it is now, he had more reason than any present-day successor to guard his prerogatives against encroachment. And he was exceedingly distrustful of both Marshall and Burr.

But his desire to promote the purposes of justice was shown not only by his words but by his actions. When the question first came up in court his spokesman said that he would produce the material documents without a subpoena, and that in fact is just what he did.

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