Let us now examine the opposite side. What has been the conduct of France? She always, even in 1792, took the ground of a power aggressed on, offended much, and much endangered by those aggressions. She avowed, before the war with England, her right and duty to retaliate on the Hanse towns the perversions of their resources, which *neutral* Britain committed in January, 1793. She took measures of regular indemnity from England on the 1st of February, 1793, by an open declaration of war. In May, 1793, France issued her first general order touching neutral trade, and though it was *to save her bread*, and she avowed the right, duty and *necessity* of retaliation, or *of using the resources of neutrals to save her country, to prevent England from using those neutral resources to ruin her country*, yet France did not add *the penalty of confiscation* of neutral property, as England does; but, agreed to pay for the neutral property taken in retaliation of English abuses. In the same spirit, grounded upon the same defensive grounds, avowing the same principles, it will be found that the legislative proceedings, executive acts, official communications and soundest publications of France from 1792, inclusively, to the memorable decrees of Berlin, Milan, and Bayonne, all avow the right, duty and necessity of retaliation. The government of France, incommoded, injured, justly provoked and deeply endangered by illegitimate British perversions of the vast supplies, purchases, ships and men of neutrals to her own gain or power, and *to the destruction of the French*—France, we say, under these circumstances, contends for the right, duty and necessity to retaliate; and unhappily for the neutrals, she at length adds that ruinous confiscation, in these neutral cases, which Britain had *long before* adopted and enforced in her first aggressions. Thus does a fair and calm review of the history of neutral spoliations *prove* to us, that England from 1792 till the last week of 1806, never even pretended, that France had so *abused and perverted* neutral trade, as to give her a color of pretension "to *retaliate*;" while France, from 1792, to that day, always maintained the charge of aggression against England in all her acts, and in the most steady, explicit, and open manner. The principle of retaliation has never carried France to the lengths of England. She is not like England in the invariable and odious practice of taking either American, or French, or other foreign seamen by impressment, or rather capture, out of our vessels. She has never extended her claims on persons sailing in our vessels, to passengers. Her Milan decree, with the exception of the wrecked vessel, is not executed by final and effectual confiscation, as are *all* the orders of council of G. Britain. Various other differences in the conduct of England and France exist. It is true, we believe, that as Britain assured our ministers in December, 1806, that she would act towards us as we should permit France, so France in 1808 has said she will follow that example of England, and confiscate under the Milan decree, if we do not resist similar English anterior aggressions, affording, by a new and solemn fact, another serious evidence, that *original aggression of pernicious example* is the real characteristic of the English conduct, and *an imitative retaliation* the characteristic of the conduct of France. England, by claiming and insisting on a right of retaliation against reason, justice, and public law, gives the most unfortunate sanction to the conduct of France, so far as she has that law on her side.

There is a fact in our own conduct, which is conclusive upon the subject of first aggression and retaliation. In 1794, President Washington, to avoid *our* retaliating on England by a sequestration of property to pay for her illegitimate seizures, sent a special mission to England to obtain redress, and even General Hamilton did not then suggest, nor did General Washington propose to send such a minister for such a purpose to France. It would have appeared very extraordinary indeed thus formally to demand redress of England, if she were correctly retaliating the anterior aggressions of the French, and to be totally inattentive to prevention and redress in the case of the French. In Mr. Jay's negociations and treaty, no trace is to be found of a single idea relative to retaliations by the English for any suggested French original aggressions. Mr. Pickering was then and afterwards as enthusiastic a friend of France as any person in America. He did not then pretend she had given cause for retaliations in 1793. It is also true and is well known to Mr. Monroe, Mr. Jay and others of both parties, at this time alive, that General Hamilton was extremely anxious to go to England, in order to be the instrument of our demand of a discontinuance of original British aggressions, reparation for the past and security for the future. His baggage was notoriously begun to be packed, but his appointment was prevented, and the duty was assigned to Mr. Jay. So extreme was the anti-American spirit at that moment in the British *public* circle, here, so bent were they on neutral spoliation, that it was asserted among them, in the most emphatic manner, that "*Mr. Jay*, (our special minister to England for redress) *would not be* allowed to set his foot on shore." It is a curious fact, that after such sentiments and conduct in 1794, Mr. Hamilton and Mr. Pickering should hazard the idea, in 1798, that France was the *first* aggressor on neutral commerce, and England, consequently, a mere justifiable retaliator. It is submitted to our countrymen to consider the facts and observations in these papers in their due and very serious relation to the recent letter of Mr. Senator Pickering to the governor of Massachusetts. It will appear to that great commercial state and to our whole country, that the strong and decided encouragement openly given to the misconduct of Great Britain by Mr. Hamilton, Mr. Pickering and other persons in the same pernicious habits, are among the real and most efficient causes of her refusing to us redress and indemnity for the past and security against future violations of our neutral commercial rights. *Nay—the present jeopardy of G. Britain is chargeable in a very considerable degree, to these and similar characters, who have taught her by their pamphlets, reports, speeches and conversations to believe, that as the neutrals would bear any ill treatment, she might go on, till she has at length excited the utmost indignation of the neutrals and the most awful spirit of revenge and retaliation in the rest of the civilized world.* It is best, even now for England to be persuaded of these truths. What Hamilton could not effect, Pickering cannot accomplish. Nor Jefferson or Madison, Clinton or Monroe would be persuaded that England has ever had one particle of ground to retaliate, tho' Hamilton rose from the dead. The only part for England now to act towards the United States is *to be regular and just*. We require not favor, nor even liberality, though such temper and conduct would certainly go further to promote her American interests than any other. No Senate, no House of Representatives can possibly exist, which will concede to England, against their own knowledge and memories, a right to retaliate on us for the retaliations of the European continental powers. Even in 1798, when the impressions of President Adams against France, the labored publications and incessant exertions of Mr. Hamilton and the official advantages & statements of Mr. Pickering, favored England; the legislature of the United States would not sanction the idea, that France was the originator of neutral spoliations, and England, as she first pretended in her treaty rider of 1806, the mere and justifiable retaliator.

The conduct of Great Britain in 1794, in advancing ideas of *countervailing* duties was an abuse of the idea of commercial retaliation. She excluded us from her colonies, shut out *all* our manufactures, prohibited many articles of our produce, highly dutied others, and refused all foreign goods in our vessels; and because we gave a small encouragement to our own vessels, by a duty on cargoes in foreign vessels, of one per cent. more than in our own, and small tonnage duty, she determined to retaliate or "*countervail*" those two duties, and and *to maintain all her other burdens on our vessels, produce and manufactures*. There has been a craft in that country towards us like that of *Ulysses*. It is a kind of wisdom, which has never worn well, since the days of that Greek. Hence it has been, that no writer has ever assumed the signature of *the cunning Ulysses*. No nation has ever followed the commercial devices of the British government, whose sordid merchants clamor, in their rival meetings, that we, their best and then indeed their only customers, "*grow too rich*," though their own commerce had trebled in the time and though they enjoyed all the trade of the world which we did not possess. Americans! think not I am harsh. It was in this *unhappy* spirit that the king and council of Great Britain, introduced for the first time in their Parliamentary history the 35th section of their act of the 17th June, 1793, whereby all impediments from ministerial responsibility, and from the rights of their legislature, to *a complete prostration of neutral commerce with their enemies in innocent articles* were unobservedly removed. With that law in their hands, a British ministry could safely riot—could insolently wanton in *the rich spoils of neutral trade*. Were this base act of June, 1793, and its base repetition in 1803, retalliations of the Berlin, the Milan or the Bayonne decrees of 1806, 1807 and 1808? Ye *little* pirates of the states of Barbary! hide your diminished heads. Ye *children* in the game of plunder, go to London to learn infractions of the christain decalogue. Britain will teach you that for every hundred of *our free bodies*, which ye infidels have taken, in thirty years of American trade, she, a christian power, has taken ten-fold the number in a quarter of the time. Britain will teach you, that all your much noised plunder of the Christain world, in centuries past, is less by far, than what her "*corsairs*" have torn from us alone in fifteen years. Britain will teach you that the pious heads of an established christian church can openly vote for these *pirate* laws, and humbly solicit, for their brothers and their sons, formal commissions, civil, military, and judicial, to perpetrate their execution!

Americans! look at this statement; and tell me plainly, if it be not true. Tell me then on what strange grounds, ye ever hoped that France, a witness of our *former* non-resistance, would cease to plunder too. By your peace measures of strong coercion—your interdiction of the manufactures of Britain, the exclusion of her dangerous navy from your waters, and the withholding of all our supplies to their people and their artists, ye have proved to the European world, that wholesome measures of redress at length engage our councils.

JURISCOLA.

REPORT

OF THE

ATTORNEY GENERAL

Of the U. States, in the case of the Mandamus lately issued by the Judges of the Circuit Court of the U. S. for the district of South Carolina.

Sir,

I have read and considered the papers and documents referred to me relative to the case of a *mandamus*, issued by the circuit court of the United States for the district of South Carolina to compel the collector of the port of Charleston to grant clearances to certain vessels.

The first question that naturally presents itself, is, whether the court possessed the power of issuing a *mandamus* in such a case?

A *mandamus* in England is styled a prerogative writ, and in that country is awarded solely and exclusively by the court of King's Bench.

The constitution and laws of the United States establish our judicial system. To these we must refer in order to ascertain the jurisdiction of the respective courts, the extent of their powers, and the limits of their authority.

The "Act to establish the judicial courts of the United States," passed on the 24th September, 1789, declares and defines the jurisdiction of the several courts thereby created, and among these the jurisdiction of the circuit courts. Upon a careful and attentive perusal, it will be found to delegate to the circuit courts no power to issue writs of *mandamus*. In the thirteenth section of that act this authority is expressly given to the supreme court of the United States. In like manner it is specially provided by the act of the 3d of February, 1801, that the supreme court shall have power to issue writs of *mandamus*. This last act having been repealed and the former revived, the question must rest on the true construction to be given to the original act.

The eleventh section defines and limits the jurisdiction of the circuit courts. It is specially appropriated to this single object. There are no expressions in this section which can fairly be interpreted to confer the authority of issuing writs of *mandamus*. Nor can the power be either implied or inferred from any language it contains. It is true, the proceeding by *mandamus* in England is on the crown side, as it is termed, of the court of King's Bench. But it is a prosecution relative to a civil right to enforce it, and to obtain prompt redress; and not to punish criminally as in the case of an offence. The provision therefore that the circuit courts "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, *except when the act otherwise provides, &c.*" cannot warrant such a proceeding. Besides the same act does provide that the supreme court shall issue writs of *mandamus*—An authority given perhaps because its jurisdiction extended all over the United States.

The fourteenth section, immediately succeeding that which gives this authority in plain and positive terms to the supreme court, solely, if not exclusively, (and the affirmative frequently, and in this case justly, I think implies a negative) contains the following provision: "All the before mentioned courts of the U. States (including the supreme, as well as the circuit and district courts) shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions." This clause cannot affect the case, I conceive. The mandamus is a writ, which we have seen is specially provided for by law. This section was evidently not designed to give any additional jurisdiction to either of the courts, but merely the means of executing that jurisdiction already granted to them respectively. The issuing of a *mandamus* in the case under consideration was an act of original jurisdiction. Precisely as much so, as it would have been in the supreme court, to have exercised the power in the case of Marbury vs. Madison. In that case the supreme court declared, that to issue a mandamus to the Secretary of State, would be, to exercise an original jurisdiction, not given by the constitution, and which could not be granted by Congress. The constitution having enumerated or declared the particular cases in which the supreme court should exercise original jurisdiction, though there were no negative expressions, the affirmative they considered implied them. It was on this principle alone they refused to exert their authority.

The practice, I believe, has uniformly been, so far as I can trace it from the books of reports, that have been published, or from recollection and experience on the subject, to apply to the supreme court for a *mandamus*. This court it is true have determined not to issue the writ, when it would be an act of original jurisdiction. But this I apprehend, can afford no ground for the circuit court's assuming an authority, which the supreme court have declined, unless by a legislative act the power be delegated to them. This power is not inherent nor necessarily incidental to a court of justice, even of general jurisdiction. For in England but a single one of several courts having general jurisdiction, possesses the authority. Neither the chancery, the common pleas, nor the exchequer, though classed among the kings superior courts, and having general jurisdiction over the realm, can exercise this power. It is the peculiar privilege of the king's bench alone. Our circuit courts have merely a local and subordinate jurisdiction. Their analogies therefore with the four courts of England, having general and superior jurisdiction, must be very weak, and still weaker their claim to the pre-eminent distinction of the king's bench, which possesses solely the exclusive authority of issuing the mandamus.

For these reasons I am induced to believe from the best consideration I have been enabled to give the subject, that the circuit court of South Carolina had not authority to issue a mandamus to the collector of the port of Charleston.

It is scarcely necessary to remark, that when a court has no jurisdiction, even consent will not give it, and much less will the mere tacit acquiescence of a party, in not denying their authority.

Independent of this serious and conclusive objection to the proceeding adopted by the court, there are others entitled to consideration. For supposing the court did not err in the exercise of jurisdiction, and admitting the British doctrines on the subject without restriction or limitation could be extended to this country, there are legal exceptions to the course they have pursued, supported by English authority.

In the first place, the law gave the collector complete discretion over the subject. According to the opinion he might form, he possessed competent authority to grant or refuse a clearance. And I apprehend where the law has left this discretion in an officer, the court, agreeably to the British practice and precedents, ought not to interpose, by way of *mandamus*.

Secondly. In this case there was a controling power in the chief magistrate of the United States. There was in fact, an express appeal given to the President by the very words of the act of Congress, which outhorises the collectors to detain vessels, "until the decision of the President of the United States be had thereupon." By the *mandamus* the reference to the President is taken away, and the collector is commanded to clear the vessel without delay. Agreeably to the English authorities under such circumstances, it is not the course I believe to issue a *mandamus*.

Thirdly. The parties it seems had their legal remedy against the collector, and it is not usual, if not unprecedented, to grant a *mandamus* in such a case.

Fourthly. A *mandamus* is not issued to a mere ministerial officer to compel him to do his duty. The court will leave the parties to their remedy by action, or even by indictment. In England, in a very late case, they decided that they would not grant a *mandamus* to a ministerial officer, such as the treasurer of a county, for the proper remedy was by indictment.

I am aware of a precedent in which it seems to be admitted that a *mandamus* may issue to the commissioners of excise, to compel them in a proper case to grant a *permit*. This case is more analogous to the one now before us than any other, I have been able to discover, after a diligent research. But in this instance the point was not made, nor the question argued. Besides, the commissioners of excise in England form a board for superintending the collection of that branch of the revenue. They constitute in many respects a court of inferior jurisdiction, which in particular cases takes cognizance in a summary way, of offences against the excise laws. A mandamus might be granted to such a tribunal when it would not be issued to a mere ministerial officer, acting under them in the collection of the revenue.

It results from this view of the subject that the mandamus issued by the circuit court for the district of South Carolina, was not warranted by any power vested in the circuit courts by statute; nor by any power necessarily incident to courts, nor countenanced by any analogy between the circuit courts and the court of kings-bench, the only court in that country possessing the power of issuing such writs. And it further appears that even the court of kings-bench, for the reasons assigned, would not, agreeable to their practice and principles have interfered in the present case by *mandamus*.

It might perhaps with propriety be added that there does not appear in the constitution of the United States any thing which favors an indefinite extention of the jurisdiction of courts, over the ministerial officer within the executive department. On the contrary, the careful discrimination which is marked between the several departments, should dictate great circumspection to each, in the exercise of powers having any relation to the other.

The courts are indubitably the source of regal redress for wrongs committed by ministerial officers, none of whom are above the law. This redress is to be administered by due and legal process in the ordinary way. For there appears to be a material and an obvious distinction, between a course of proceeding, which redresses a wrong committed by an executive officer, and an interposition by a mandatory writ, taking the executive authority out of the hands of the President, and prescribing the course, which he and the agents of any department must pursue. In one case the executive is left free to act in his proper sphere, but is held to strict reponsibility; in the other all responsibility is taken away, and he acts agreeably to judicial mandate. Writs of this kind if made applicable to officers indiscriminately, and acts purely ministerial, and executive in their nature, would necessarily have the effect of transferring the powers vested in one department to another department. If in a case like the present, where the law vests a duty and a discretion in an executive officer, a court can not only administer redress against the misuse of the authority, but can previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the constitution perhaps defeated, which makes it the duty of the President to take care, that the laws be faithfully executed. I do not see any clear limitation to this doctrine, which would prevent the courts from compelling by mandamus all the executive officers, all subordinate to the President at least, whether charged with legal duties in the treasury or other department, to execute the same according to the opinion of the judiciary and contrary to that of the executive. And it is evident that the confusion arising will be greatly increased by the exercise of such a power, by a number of separate courts of local jurisdiction, whose proceedings would have complete and final effect, without an opportunity of control by the supreme court. So many branches of the judiciary, acting within their respective districts, their courses might be different, and different rules of action might be prescribed for the citizens of the different states, instead of that unity of