

James Madison to Thomas Ritchie, December 18, 1825. Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.

TO THOMAS RITCHIE. MAD. MSS.

Montpellier, Decr. 18, 1825

Dear Sir Yours of the 10th inst: was recd a few days ago & I give it the earliest answer which circumstances have permitted.

It has been impossible not to observe the license of construction applied to the Constitution of the U. States; and that the premises from which powers are inferred, often cover more ground than inferences themselves.

In seeking a remedy for these aberrations, we must not lose sight of the essential distinction, too little heeded, between assumptions of power by the General Government, in opposition to the Will of the Constituent Body, and assumptions by the Constituent Body through the Government as the Organ of its will. In the first case, nothing is necessary but to rouse the attention of the people, and a remedy ensues thro' the forms of the Constitution. This was seen when the Constitution was violated by the Alien and Sedition Acts. In the second case, the appeal can only be made to the recollections, the reason, and the conciliatory spirit of the Majority of the people agst. their own errors; with a persevering hope of success, and an eventual acquiescence in disappointment unless indeed oppression should reach an extremity overruling all other considerations. This second case is illustrated by the apparent call of a majority of the States & of the people

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for national Roads & Canals; with respect to the latter of which, it is remarkable that Mr. Hamilton, himself on an occasion when he was giving to the text of the Constitution its utmost ductility, (see his Report on the Bank) was constrained to admit that they exceeded the authority of Congress.

All power in human hands is liable to be abused. In Governmts. independent of the people, the rights & interests of the whole may be sacrificed to the views of the Governmt. In Republics, where the people govern themselves, and where of course the majority Govern, a danger to the minority, arises from opportunities tempting a sacrifice of their rights to the interests real or supposed of the Majority. No form of Govt. therefore can be a perfect guard agst. the abuse of Power. The recommendation of the Republican form is that the danger of abuse is less than in any other; and the superior recommendation of the federo-Republican system is, that whilst it provides more effectually against external danger, it involves a greater security to the minority against the hasty formation of oppressive majorities.

These general observations lead to the several questions you ask as to the course which, in the present state of things, it becomes Virginia to pursue.

1. "Ought an amendment of the Constitution, giving to Congress a Power as to Roads & Canals, to be proposed on her part; and what part taken by her if proposed from any other quarter?"

Those who think the power a proper one, and that it does not exist, must espouse such an amendment; and those who think the power neither existing nor proper, may prefer a specific grant forming a restrictive precedent, to a moral certainty of an exercise of the power, furnishing a contrary precedent. Of the individual ways of thinking on this point, you can probably make a better estimate than I can.

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2. "Ought a proposed amendment to comprize a particular guard agst. the sweeping misconstruction of the terms, 'common defence and general welfare.'"

The wish for such a guard is natural. But the fallacious inferences from a failure however happening, would seem to require for the experiment a very flattering prospect of success. As yet the unlimited power expressed by the terms, if disjoined from the explanatory specifications, seems to have been claimed for Congress rather incidentally & unimpressively, than under circumstances indicating a dangerous prevalence of the heresy. Gov. Van Ness alone appears to have officially adopted it; and possibly with some unexpressed qualification. Has not the Supreme Court of the U. S. on some occasion disclaimed the import of the naked terms as the measure of Congressional authority? In general the advocates of the Road & Canal powers, have rested the claim on deductions from some one or more of the enumerated grants.

The doctrine presenting the most serious aspect is that which limits the claim to the mere "appropriation of money" for the General Welfare. However untenable or artificial the distinction may be, its seducing tendencies & the progress made in giving it a practical sanction, render it pretty certain that a Constitutional prohibition is not at present attainable; whilst an abortive attempt would but give to the innovation a greater stability. Should a specific amendment take place on the subject of roads & canals, the zeal for this appropriating power would be cooled by the provision for the primary & popular object of it; at the same time that the implied necessity of the amendment would have a salutary influence on other points of Construction.

3. "Ought Virga. to protest agst. the Power of internal improvement by Roads & Canals; with an avowal of readiness to acquiesce in a decision agst. her by $\frac{3}{4}$ of her Sister States?"

By such a decision is understood a mere

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expression of concurrent opinions by $\frac{3}{4}$ of the State Legislatures. However conciliatory the motives to such a proposition might be, it could not fail to be criticised as requiring a surrender of the Constitutional rights of the majority in expounding the Constitution, to an extra Constitutional project of a protesting State. May it not be added that such a test, if acceded to, would, in the present state of Public Opinion, end in a riveting decision against Virginia?

Virginia has doubtless a right to manifest her sense of the Constitution, and of proceedings under it, either by protest or other equivalent modes. Perhaps the mode as well suited as any to the present occasion, if the occasion itself be a suitable one, would be that of instructions to her Representatives in Congs. to oppose measures violating her constructions of the Instrument; with a preamble appealing, for the truth of her constructions to the contemporary expositions by those best acquainted with the intentions of the Convention which framed the Constitution; to the Debates & proceedings of the State Conventions which ratified it; to the universal understanding that the Govt. of the Union was a limited not an unlimited one; to the inevitable tendency of the latitude of construction in behalf of internal improvements, to break down the barriers against unlimited power; it being obvious that the ingenuity which deduces the authority for such measures, could readily find it for any others whatever; and particularly to the inconclusiveness of the reasoning from the sovereign character of the powers vested in Congs., and the great utility of particular measures, to the rightful exercise of the powers required for such measures; a reasoning which however applicable to the case of a single Govt. charged with the whole powers of Govt. loses its force in the case of a compound Govt. like that of the U. S., where the delegated sovereignty is divided between the General & the State Govts.; where one sovereignty loses what the other gains; and where particular powers & duties may have been withheld from one, because deemed more proper to be left with the other.

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I have thrown out these hasty remarks more in compliance with your request than from a belief that they offer anything new on the beaten subject. Should the topics touched on be thought worthy on any account of being publicly developed, they will be in hands very competent to the task. My views of the Constitutional questions before the public are already known as far as they can be entitled to notice, and I find myself every day more indisposed, and, as may be presumed, less fit, for reappearance on the political Arena.