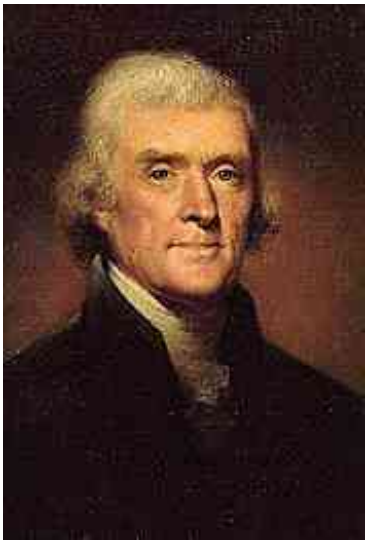
To Justice William Johnson Monticello, June 12, 1823

DEAR SIR,



-- Our correspondence is of that accommodating character, which admits of suspension at the convenience of either party, without inconvenience to the other. Hence this tardy acknowledgment of your favor of April the 11th. I learn from that with great pleasure, that you have resolved on continuing your history of parties. Our opponents are far ahead of us in preparations for placing their cause favorably before posterity. Yet I hope even from some of them the escape of precious truths, in angry explosions or effusions of vanity, which will betray the genuine monarchism of their principles. They do not themselves believe what they endeavor to inculcate, that we were an opposition party, not on principle, but merely seeking for office. The fact is, that at the formation of our government, many had formed their political opinions on European writings and practices, believing the experience of old countries, and especially of England, abusive as it was, to be a safer guide than mere theory. The doctrines of Europe were, that men in numerous associations cannot be restrained within the limits of order and justice, but by forces physical and moral, wielded over them by authorities independent of their will. Hence their organization of kings, hereditary nobles, and priests. Still further to constrain the brute force of the people, they deem it necessary to keep them down by hard labor, poverty and ignorance, and to take from them, as from bees, so much of their earnings, as that unremitting labor shall be necessary to obtain a sufficient surplus barely to sustain a scanty and miserable life. And these earnings they apply to maintain their privileged orders in splendor and idleness, to fascinate the eyes of the people, and excite in them an humble adoration and submission, as to an order of superior beings. Although few among us had gone all these lengths of opinion, yet many had advanced, some more, some less, on the way. And in the convention which formed our government, they endeavored to draw the cords of power as tight as they could obtain them, to lessen the dependence of the general functionaries on their constituents, to subject to them those of the States, and to weaken their means of maintaining the steady equilibrium which the majority of the convention had deemed salutary for both branches, general and local. To recover, therefore, in practice the powers which the nation had refused, and to warp to their own wishes those actually given, was the steady object of the federal party. Ours, on the contrary, was to maintain the will of the majority of the convention, and of the people themselves. We believed, with them, that man was a rational animal, endowed by nature with rights, and with an innate sense of justice; and that he could be restrained from wrong and protected in right by moderate powers, confided to persons of his own choice, and held to their duties by dependence on his own will. We believed that the complicated organization of kings, nobles, and priests, was not the wisest nor best to effect the happiness of associated man; that wisdom and virtue were not hereditary, that the trappings of such a machinery, consumed by their expense, those earnings of industry, they were meant to protect, and, by the inequalities they produced, exposed liberty to sufferance. We believed that men, enjoying in ease and security the full fruits of their own industry, enlisted by all their interests on the side of law and order, habituated to think for themselves, and to follow their reason as their guide, would be more easily and safely governed, than with minds nourished in error, and vitiated and debased, as in Europe, by ignorance, indigence and oppression. The cherishment of the people then was our principle, the fear and distrust of them, that of the other party. Composed, as we were, of the landed and laboring interests of the country, we could not be less anxious for a government of law and order than

were the inhabitants of the cities, the strongholds of federalism. And whether our efforts to save the principles and form of our constitution have not been salutary, let the present republican freedom, order and prosperity of our country determine. History may distort truth, and will distort it for a time, by the superior efforts at justification of those who are conscious of needing it most. Nor will the opening scenes of our present government be seen in their true aspect, until the letters of the day, now held in private hoards, shall be broken up and laid open to public view. What a treasure will be found in General Washington's cabinet, when it shall pass into the hands of as candid a friend to truth as he was himself! When no longer, like Caesar's notes and memorandums in the hands of Anthony, it shall be open to the high priests of federalism only, and garbled to say so much, and no more, as suits their views!

With respect to his farewell address, to the authorship of which, it seems, there are conflicting claims, I can state to you some facts. He had determined to decline re-election at the end of his first term, and so far determined, that he had requested Mr. Madison to prepare for him something valedictory, to be addressed to his constituents on his retirement. This was done, but he was finally persuaded to acquiesce in a second election, to which no one more strenuously pressed him than myself, from a conviction of the importance of strengthening, by longer habit, the respect necessary for that office, which the weight of his character only could effect. When, at the end of his second term, his Valedictory came out, Mr. Madison recognized in it several passages of his draught, several others, we were both satisfied, were from the pen of Hamilton, and others from that of the President himself. These he probably put into the hands of Hamilton to form into a whole, and hence it may all appear in Hamilton's hand-writing, as if it were all of his composition.

I have stated above, that the original objects of the federalists were, 1st, to warp our government more to the form and principles of monarchy, and, 2d, to weaken the barriers of the State governments as coordinate powers. In the first they have been so completely foiled by the universal spirit of the nation, that they have abandoned the enterprise, shrunk from the odium of their old appellation, taken to themselves a participation of ours, and under the pseudo-republican mask, are now aiming at their second object, and strengthened by unsuspecting or apostate recruits from our ranks, are advancing fast towards an ascendancy. I have been blamed for saying, that a prevalence of the doctrines of consolidation would one day call for reformation or revolution. I answer by asking if a single State of the Union would have agreed to the constitution, had it given all powers to the General Government? If the whole opposition to it did not proceed from the jealousy and fear of every State, of being subjected to the other States in matters merely its own? And if there is any reason to believe the States more disposed now than then, to acquiesce in this general surrender of all their rights and powers to a consolidated government, one and undivided?

You request me confidentially, to examine the question, whether the Supreme Court has advanced beyond its constitutional limits, and trespassed on those of the State authorities? I do not undertake it, my dear Sir, because I am unable. Age and the wane of mind consequent on it, have disqualified me from investigations so severe, and researches so laborious. And it is the less necessary in this case, as having been already done by others with a logic and learning to which I could add nothing. On the decision of the case of Cohens vs. The State of Virginia, in the Supreme Court of the United States, in March, 1821, Judge Roane, under the signature of Algernon Sidney, wrote for the Enquirer a series of papers on the law of that case. I considered these papers maturely as they came out, and confess that they appeared to me to pulverize every word which had been delivered by Judge Marshall, of the extra-judicial part of his opinion; and all was extra-judicial, except the decision that the act of Congress had not purported to give to the corporation of Washington the authority claimed by their lottery law, of controlling the laws of the States within the States themselves. But unable to claim that case, he could not let it go entirely, but went on gratuitously to prove, that notwithstanding the eleventh amendment of the constitution, a State could be brought as a defendant, to the bar of his court; and again, that Congress might authorize a corporation of its territory to exercise legislation within a State, and paramount to the laws of that State. I cite the sum and result only of his doctrines, according to the impression made on my mind at the time, and still remaining. If

not strictly accurate in circumstance, it is so in substance. This doctrine was so completely refuted by Roane, that if he can be answered, I surrender human reason as a vain and useless faculty, given to bewilder, and not to guide us. And I mention this particular case as one only of several, because it gave occasion to that thorough examination of the constitutional limits between the General and State jurisdictions, which you have asked for. There were two other writers in the same paper, under the signatures of Fletcher of Saltoun, and Somers, who, in a few essays, presented some very luminous and striking views of the question. And there was a particular paper which recapitulated all the cases in which it was thought the federal court had usurped on the State jurisdictions. These essays will be found in the Enquirers of 1821, from May the 10th to July the 13th. It is not in my present power to send them to you, but if Ritchie can furnish them, I will procure and forward them. If they had been read in the other States, as they were here, I think they would have left, there as here, no dissentients from their doctrine. The subject was taken up by our legislature of 1821 - '22, and two draughts of remonstrances were prepared and discussed. As well as I remember, there was no difference of opinion as to the matter of right; but there was as to the expediency of a remonstrance at that time, the general mind of the States being then under extraordinary excitement by the Missouri question; and it was dropped on that consideration. But this case is not dead, it only sleepeth. The Indian Chief said he did not go to war for every petty injury by itself, but put it into his pouch, and when that was full, he then made war. Thank Heaven, we have provided a more peaceable and rational mode of redress.

This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly, perhaps, because it in some measure bore on myself. Among the midnight appointments of Mr. Adams, were commissions to some federal justices of the peace for Alexandria. These were signed and sealed by him, but not delivered. I found them on the table of the department of State, on my entrance into office, and I forbade their delivery. Marbury, named in one of them, applied to the Supreme Court for a mandamus to the Secretary of State, (Mr. Madison) to deliver the commission intended for him. The court determined at once, that being an original process, they had no cognizance of it; and therefore the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery. The object was clearly to instruct any other court having the jurisdiction, what they should do if Marbury should apply to them. Besides the impropriety of this gratuitous interference, could anything exceed the perversion of law? For if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of the deed. Although signed and sealed, yet as long as it remains in the hands of the party himself, it is in fieri only, it is not a deed, and can be made so only by its delivery. In the hands of a third person it may be made an escrow. But whatever is in the executive offices is certainly deemed to be in the hands of the President; and in this case, was actually in my hands, because, when I countermanded them, there was as yet no Secretary of State. Yet this case of Marbury and Madison is continually cited by bench and bar, as if it were settled law, without any animadversion on its being merely an obiter dissertation of the Chief Justice.

It may be impracticable to lay down any general formula of words which shall decide at once, and with precision, in every case, this limit of jurisdiction. But there are two canons which will guide us safely in most of the cases. 1st. The capital and leading object of the constitution was to leave with the States all authorities which respected their own citizens only, and to transfer to the United States those which respected citizens of foreign or other States: to make us several as to ourselves, but one as to all others. In the latter case, then, constructions should lean to the general jurisdiction, if the words will bear it; and in favor of the States in the former, if possible to be so construed. And indeed, between citizens and citizens of the same State, and under their own laws, I know but a single case in which a jurisdiction is given to the General Government. That is, where anything but gold or silver is made a lawful tender, or the obligation of contracts is any otherwise impaired. The separate legislatures had so often abused that power, that the citizens themselves chose to trust it to the general, rather than to their own special authorities. 2d. On

every question of construction, carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed. Let us try Cohen's case by these canons only, referring always, however, for full argument, to the essays before cited.

1. It was between a citizen and his own State, and under a law of his State. It was a domestic case, therefore, and not a foreign one.
2. Can it be believed, that under the jealousies prevailing against the General Government, at the adoption of the constitution, the States meant to surrender the authority of preserving order, of enforcing moral duties and restraining vice, within their own territory? And this is the present case, that of Cohen being under the ancient and general law of gaming. Can any good be effected by taking from the States the moral rule of their citizens, and subordinating it to the general authority, or to one of their corporations, which may justify forcing the meaning of words, hunting after possible constructions, and hanging inference on inference, from heaven to earth, like Jacob's ladder? Such an intention was impossible, and such a licentiousness of construction and inference, if exercised by both governments, as may be done with equal right, would equally authorize both to claim all power, general and particular, and break up the foundations of the Union. Laws are made for men of ordinary understanding, and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure. It should be left to the sophisms of advocates, whose trade it is, to prove that a defendant is a plaintiff, though dragged into court, torto collo, like Bonaparte's volunteers, into the field in chains, or that a power has been given, because it ought to have been given, et alia talia. The States supposed that by their tenth amendment, they had secured themselves against constructive powers. They were not lessoned yet by Cohen's case, nor aware of the slipperiness of the eels of the law. I ask for no straining of words against the General Government, nor yet against the States. I believe the States can best govern our home concerns, and the General Government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the constitution for the limitation of both; and never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as at market.

But the Chief Justice says, "there must be an ultimate arbiter somewhere." True, there must; but does that prove it is either party? The ultimate arbiter is the people of the Union, assembled by their deputies in convention, at the call of Congress, or of two-thirds of the States. Let them decide to which they mean to give an authority claimed by two of their organs. And it has been the peculiar wisdom and felicity of our constitution, to have provided this peaceable appeal, where that of other nations is at once to force.

I rejoice in the example you set of seriatim opinions. I have heard it often noticed, and always with high approbation. Some of your brethren will be encouraged to follow it occasionally, and in time, it may be felt by all as a duty, and the sound practice of the primitive court be again restored. Why should not every judge be asked his opinion, and give it from the bench, if only by yea or nay? Besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it is impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority.

The close of my second sheet warns me that it is time now to relieve you from this letter of unmerciful length. Indeed, I wonder how I have accomplished it, with two crippled wrists, the one scarcely able to move my pen, the other to hold my paper. But I am hurried sometimes beyond the sense of pain, when unbosoming myself to friends who harmonize with me in principle. You and I may differ occasionally in details of minor consequence, as no two minds, more than two faces, are the same in every feature. But our general objects are the same, to preserve the republican form and principles of our constitution and

cleave to the salutary distribution of powers which that has established. These are the two sheet anchors of our Union. If driven from either, we shall be in danger of foundering.

To my prayers for its safety and perpetuity, I add those for the continuation of your health, happiness, and usefulness to your country.