

## JUDGE CLAYTON'S REVIEW

*Of the Report of the Committee of Ways and Means, to whom was referred so much of the Message of the President, as relates to the Bank of the United States, which report was, in the House of Representatives of the U. States, read and laid on the table, April 13, 1830.*

### NO. II.

But says the Report, "the earliest and the principal objection urged against the Constitutionality of the Bank, was, that Congress had not the power to create Corporations. *That Congress has a distinct and substantive power to create Corporations, without reference to the objects entrusted to its jurisdiction, is a proposition which never has been maintained: but that any one of the powers expressly conferred upon Congress, is subject to the limitation, that it shall not be carried into effect by the agency of a Corporation, is a proposition which cannot be maintained, in the opinion of the Committee.*"

Congress and their Committees have lately set up many things which they assert cannot be denied, and, unfortunately for the people, they seem to carry the matter one step further. They are determined they *shall* not be denied. But if they would waive their power, in the naked sense of that word, and submit to reason and facts many a 'proposition' against their doctrines, may not only be 'maintained' but the doctrines themselves be proven gross and wicked usurpations.

We shall attempt to 'maintain' that Congress cannot carry into effect, by the agency of a Corporation, at least, any of the powers 'expressly conferred' upon it, which is said to call for the aid of a Bank. The argument is now narrowed down to this point, by the concession of the Committee, where we intend to hold them, that the Corporation must be in aid of a power 'expressly conferred' upon Congress. Now let us have the *express*

...that the Bank is intended to serve. We say boldly there is none. That the Bank never has been used to carry into effect an express power, but that it is itself an implied power employed solely to carry into effect another implied power, a doctrine that even the Committee will not contend for. But this will be called mere assertion, we will therefore proceed to the proof and to this end it will be necessary to enumerate every power conferred upon Congress.

They are contained in seventeen distinct heads, under the 8th Section of the 1st Article of the Federal Constitution. The 17th and last clause of this section must be mentioned first, because it is exclusively by the force of this, that the power is claimed and attempted to be used. It is as follows: "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." It is peculiarly necessary to mark that the clause just quoted, in language that cannot be misunderstood, has reference to powers expressly mentioned, viz. the foregoing powers such as had just been enumerated, and all other vested powers. And it must be borne constantly in recollection that the right to incorporate a Bank is not pretended to be an express grant, but an incidental power to carry into effect some one or more of the said "foregoing powers" expressly conferred. And that to effect even this object it must be necessary and proper in the sober popular sense of those words, for they were addressed by a sober popular assembly, to an equally sober and intelligent people. We will now give the other powers preceding the one first above mentioned.

1st. The Congress shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare of the United States: but all duties, imposts, and excises, shall be uniform throughout the United States.

2d. To borrow money on the credit of the United States.

3d. To regulate Commerce with foreign nations, and among the several States, and with the Indian tribes.

4th. To establish a uniform rule of Naturalization, and uniform laws on the subject of Bankruptcies, throughout the U. States.

5th. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6th. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7th. To establish Post Offices and Post Roads.

8th. To promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries.

9th. To constitute tribunals inferior to the Supreme Court, &c.

10th. To declare war, grant letters of marque and reprisal, &c.

11th. To raise and support armies.

12th. To provide and maintain a navy.

13th. To make rules for the government and regulation of the land and naval forces.

14th. To provide for calling forth the militia to execute the laws, &c.

15th. To provide for organizing the militia, &c.

16th. To exercise exclusive Legislation, &c. (in the district of Columbia.)

Now here are all the "foregoing powers" to the 17th clause first quoted, and they are absolutely, for we speak with due caution, all the powers granted to Congress, with which the subject under discussion has the remotest connection, we call upon our antagonist to point out the "express power," not an implied power, which a Bank is necessary and proper to execute. We say, without any hesitation, not one of the foregoing express powers is contained in the Bank charter, on the contrary every one of them have been, or attempted to be, executed by other well known laws. But let us annihilate this subject a little further—by stripping a question of all unnecessary matter, we sometimes bring the point right up to full view, and there is no getting away from its broad open gaze. Without any fear of opposition, we affirm with great confidence that the 4th, 6th, 7th, 8th, 9th, 10th, 13th, 14th, 15th, and 16th, of the "foregoing powers" have nothing to do with the question, either expressly or impliedly, and may therefore be dismissed from the debate. The 11th and 12th, are included in the 1st, under the power "to provide for the common defence" and (according to our construction of that much disputed phrase) "the general welfare."

And while on this subject we will take occasion barely to say, that so far as an army and navy, and their necessary support by the means placed within the powers of Congress can promote the general welfare of the United States, in the "common defence" and support of the legitimate powers of the General Government, they were intended to be the appropriate instruments, and that no other general welfare was meant, but that which was within the expressly granted powers. For if any other secret power lying out of the conferred powers was designed to lurk within that expression, it was not only a most wicked act, on the part of the Convention, but it was treacherous to the last degree, for a limited government was alone the object of their trust, and so the framers of the Constitution distinctly declared, when they delivered it over to their constituents.

Then, to return to the subject, the 1st, 2d, 3d, and 5th, clauses, only remain from which to extract the right. They alone are the express powers that the stock-holders of the Bank are to carry into effect for the government. The government virtually acknowledges that it is not able to execute the 1st, 2d, 3d, and 5th, powers of said 8th section of the Constitution, and therefore, thinks it proper and necessary to vest these powers in a Bank Corporation for that purpose.

Before we proceed any further in this investigation, we must insist upon the following principles to which we must request a constant reference of our future arguments.

1st. That all acts of the Legislature are either general or special, public or private, the first being, as Mr. Blackstone states, an universal rule, that regards the whole community, and the second respecting only particular persons and private concerns.

2d. That all acts passed for the purpose of carrying into effect any of the powers of the Constitution must be general, because they regard the whole community and no one citizen can have greater rights or advantages from the law than another.

3d. That a general and special act cannot

be blended together, because it would produce this most unjust and therefore wicked consequence, that while the whole community were under either the burthens or blessings of the law, in its general operation, some one or more of the same community would, under its special provisions, share or suffer more than his due.

4th. That no Legislative body, having, itself, nothing more than a delegated power, can confer that power upon any other body.

5th. That all offices of government must be executed for the sole benefit of the people, the officer receiving a stated emolument for his services, and that any office or agency created for the purpose of executing a general power, in which the officer is permitted to make what he pleases off the community for his services or of which the officer and government agree to share the profits, is not only unjust but, in a republic, is infamous.

6th. That the powers conferred upon the General Government were never intended to be the subjects of speculation, or transfer but must always abide within the immediate reach and control of the constituted authorities to be executed by well known laws subject to alteration and repeal, as the public exigencies may require, & to be executed by public functionaries with well defined duties, and duties, that relate directly to the power to be executed and intirely unconnected with any concern, over which the government has no jurisdiction.

7th. That the public functionary cannot draw to himself a separate interest from the power confided to his trust, over and above what belongs equally to all the rest of the citizens, and if he does, it is a gross perversion of every fair principle of free and equal government and a corrupt traffic of the peoples rights; and Lastly—That the incidental power, as has already been named & conceded, must be to carry into effect an express power, and that one incidental power cannot be exercised to carry into effect another that is itself merely incidental.

With these principles always present upon the recollection, let us proceed. The Bank charter is either a general act or it is a special act. If it is a general act, it particularly to specify the power intended to be executed. It ought to regard exclusively the interest of the whole community. It ought to be executed by a well known public officer, directly amenable to the government. It ought at all times to be within the control of the Legislature to be altered or repealed at pleasure, for something might arise that would make it extremely dangerous to have the powers of the Constitution out of the reach of that body: and lastly, no private persons should profit individually by the exercise of the power. Now, we ask, are these the features of the Bank charter? Every candid man must answer in the negative and consequently it is no general act. We think no one will be disposed to deny this position, that all powers are made for the benefit of the whole and no favored few should have more than their share. But what is the consequence of the Bank law? The stockholders get not only the full advantages of the power they are made the instruments of executing, in common with the rest of their fellow citizens, but they derive a separate and distinct advantage, to a most dangerous extent, in a private manner, from the operation of the law—not in salary—not as officers for well ascertained services, but in whatever they can make, in sheer, rank, licensed, speculation, from the losses and misfortunes of that very community, the powers of whose government they are pretending to execute. This is sharing the benefits of government with a vengeance! Can any one be brought to believe that a community, of even tolerable understanding, in organizing their government, left a power within that government so circumstanced, that it could not be executed, without conferring another power on a set of private sharpers to speculate on, nay to rob, them at pleasure?

If it is a special act, then every one must perceive it is clearly unconstitutional, according to the Committee's own admission, "that Congress has no distinct and substantive power to create Corporations out of the objects of their jurisdiction."

The above reasoning applies to the case if it should be considered a general and special act united. If it is constitutional to pass a special act, solely for the benefit of individuals, and no one can doubt this point, it is not the less so from being joined with another object. If mingled with one or a thousand other subjects, it can never lose its unconstitutional cast. So much, at least, of its private and special infirmity must stick to it through all its changes, and if it should not infect and taint its associates, it must itself remain fatally impure. And see what would be the consequence if a contrary principle prevailed. A corrupt Congress, and such a term need startle no one who has been a close observer of passing events, has nothing to do, if it wishes to pass an unconstitutional act, but to unite it with some simple constitutional power, even though it should be an implied one, and it goes down like the poison that is smothered in a sugared sweet-meat. For instance, no one doubts the jurisdiction of the several States over the roads, rivers, bridges and ferries within their respective limits. Now suppose a company, like the Bank stockholders, should petition Congress to incorporate them with exclusive privileges to open all the rivers, turnpike the roads, erect bridges, and establish ferries throughout the United States, for which they agree & pledge themselves to transport all the military stores of the government, collect and transmit its funds from place to place, carry the mail, give great facilities to commerce, and all for nothing, and, "in the opinion" of a committee of Congress, the privilege is considered necessary and proper to carry into effect the important powers just mentioned. Does any man, not hardened and abandoned to the "American System," believe that such an unconstitutional measure could be sanctified by the mere suggestion that "a proposition cannot be maintained" that denies to Congress, "the agency of the corporation" to carry into effect "powers expressly conferred" on that body? Where would be the difference between this case and the Bank question? We will shew hereafter that the States have as much right to the regulation of their "monetary" concerns, for they can no more do without money than the General Government, as they have to that of their roads and rivers, and Congress can with equal right vest the one as the other in private individuals.

If the principle were not sanctioned by sound reason, which we are free to confess would be a fatal support to it with some modern politicians, yet we have the decision of

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the Supreme court that the Legislature cannot delegate its authority to any other person. (See the case of *Wayman & Clark vs. Southard & Starr.*)

If Congress have the right to carry into effect any *expressed power*, they, themselves, must do it by an express act of their own body, stating particularly the power intended to be executed. It cannot be executed by the legislation of any one else for them, or by any method tantamount to legislation, nor can they do it *jointly* with any other body. We do not intend to say that laws cannot be executed by officers, by courts, or by agents. Let us not be misunderstood; we admit if the power is necessary to be executed, persons may be appointed to do so; but then the power must be expressed and his authority distinctly defined, the officer or agent must be as distinctly appointed and his agency as clearly described. He must not have a *carte blanche* to execute the power, and we challenge an instance of any other kind of legislation, in any other well regulated representative government in the known world. Now let any one look at the charter of the Bank, and find in that instrument, if he can, the general and "*expressed power*" intended to be carried into effect. Let him find, if he can, the officer and his duties defined who is to execute that power. Is it not very remarkable, indeed passing strange, that an act of should be passed to carry into effect an "*express power*," and upon consulting that act it no where appears; nay it turns out to be a private act privileging a set of great capitalists to enter into speculations co-extensive with the Union, to the utter ruin of all the other monied establishments of twenty-four sovereign States. If a stranger were told that we had an act to carry into effect the 1st, 2d, 3d and 5th powers of the 8th section of the constitution, does any one imagine he would go to the bank charter to find that act? And if he did, what would be his astonishment when told, that true, the powers are not expressed in that instrument but the directors and the government understand each other. They are licensed to make what money they can, but in the mean time they must, by their regulations, see that the above powers are executed. Is not this delegating power, especially when it is known, as will be shewn hereafter, that these powers cannot be resumed by the government for and during the limit of the charter?

Besides, are the bank officers known as officers of the general government? Are they amenable like the other officers? Nay, are they appointed by the government, except, in part, as another stockholder? Where are they responsible for misconduct? Is it any thing more than a simple contract between the government and an individual? Every Tyro knows that a corporation is nothing but a person in law. And the Supreme court has determined, in the celebrated "*Dartmouth College*" case, that charters of incorporation are nothing but contracts, which to legislate concerning, is a violation of the constitution, because it "*impairs the obligation of contracts.*" Who believes the Convention ever, in the remotest degree, supposed that some of the most formidable powers conferred on Congress were to be executed by a mere simple contract?