

**James Madison to Thomas Jefferson, June 27, 1823.  
Transcription: The Writings of James Madison,  
ed. Gaillard Hunt. New York: G.P. Putnam's Sons,  
1900-1910.**

**TO THOMAS JEFFERSON. MAD. MSS.**

Montpellier, June 27, 1823

Dear Sir I return the copy of your letter to Judge Johnson inclosed in your favor of the — instant.<sup>1</sup> Your statement relating to the farewell Address of Genl. Washington is substantially correct. If there be any circumstantial inaccuracy, it is in imputing to him more agency in composing the document than he probably had. Taking for granted that it was drawn up by Hamilton, the best conjecture is that the General put into his hands his own letter to me suggesting his general ideas, with the paper prepared by me in conformity with them; and if he varied the draught of Hamilton at all, it was by a few verbal or qualifying amendments only.<sup>2</sup> It is very inconsiderate in the friends of Genl. Washington to make the merit of the Address a question between him & Col: Hamilton, & somewhat extraordinary, if countenanced by those who possess the files of the General where it is presumed the truth might be traced. They ought to claim for him the merit only of cherishing the principles & views

1 See Jefferson to William Johnson, Oct. 27, 1822, and June 12, 1823.— *Jefferson's Writings* (P. L. Ford), xii., 246, 252, n.

2 See *ante*, VI., No. 106, n.; also *Writings of Washington* (W. C. Ford), xii., 123; xiii., 194, 277.

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addressed to his Country, & for the Address itself the weight given to it by his sanction; leaving the literary merit whatever it be to the friendly pen employed on the occasion, the rather as it was never understood that Washington valued himself on his writing talent, and no secret to some that he occasionally availed himself of the friendship of others whom he supposed more practised than himself in studied composition. In a general view it is to be regretted that the Address is likely to be presented to the public not as the pure legacy of the Father of his Country, as has been all along believed, but as the performance of another held in different estimation. It will not only lose

the charm of the name subscribed to it; but it will not be surprizing if particular passages be understood in new senses, & with applications derived from the political doctrines and party feelings of the discovered Author.

At some future day it may be an object with the curious to compare the two draughts made at different epochs with each other, and the letter of Genl. W. with both. The comparison will shew a greater conformity in the first with the tenor & tone of the letter, than in the other; and the difference will be more remarkable perhaps in what is omitted, than in what is added in the Address as it stands.

If the solicitude of Genl. Washington's connexions be such as is represented, I foresee that I shall share their displeasure, if public use be made of what passed between him & me at the approaching expiration of his first term. Altho' it be impossible to question the facts, I may be charged with indelicacy, if not breach of confidence, in making them known; and the irritation will be the greater, if the Authorship of the Address continue to be claimed for the signer of it; since the call on me on one occasion, will favor the allegation of a call on another occasion. I hope therefore that the Judge will not understand your communication as intended for the new work he has in hand. I do not know that your statement would justify all the complaint its public appearance might bring on me; but there certainly was a species of confidence at the time in what passed, forbidding publicity, at least till the lapse

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of time should wear out the seal on it, & the truth of history should put in a fair claim to such disclosures.

I wish the rather that the Judge may be put on his guard, because with all his good qualities, he has been betrayed into errors which shew that his discretion is not always awake. A remarkable instance is his ascribing to Gouverneur Morris the Newburg letters written by Armstrong, which has drawn from the latter a corrosive attack which must pain his feelings, if it should not affect his standing with the Public. Another appears in a stroke at Judge Cooper in a letter to the Education Committee in Kentucky, which has plunged him into an envenomed dispute with an antagonist, the force of whose mind & pen you well know. And what is worse than all, I perceive from one of Cooper's publications casually falling within my notice, that, among the effects of Judge Johnson's excitement, he has stooped to invoke the religious prejudices circulated agst. Cooper.

Johnson is much indebted to you for your remarks on the definition of parties. The radical distinction between them has always been a confidence of one, and distrust of the other, as to the capacity of Mankind for self Government. He expected far too much, in requesting a precise demarkation of the boundary between the Federal & the State Authorities. The answer would have required a critical commentary on the whole text of the Constitution. The two general Canons you lay down would be of much use in such a task; particularly that which refers to the sense of the State Conventions, whose ratifications alone made the Constitution what it is. In exemplifying the other Canon, there are more exceptions than occurred to you, of cases in which the federal jurisdiction is extended to controversies

between Citizens of the same State. To mention one only: In cases arising under a Bankrupt law, there is no distinction between those to which Citizens of the same & of different States are parties.

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But after surmounting the difficulty in tracing the boundary between the General & State Govts. the problem remains for maintaining it in practice; particularly in cases of Judicial cognizance. To refer every point of disagreement to the people in Conventions would be a process too tardy, too troublesome, & too expensive; besides its tendency to lessen a salutary veneration for an instrument so often calling for such explanatory interpositions. A paramount or even a definitive Authority in the individual States, would soon make the Constitution & laws different in different States, and thus destroy that equality & uniformity of rights & duties which form the essence of the Compact; to say nothing of the opportunity given to the States individually of involving by their decisions the whole Union in foreign Contests. To leave conflicting decisions to be settled between the Judicial parties could not promise a happy result. The end must be a trial of strength between the Posse headed by the Marshal and the Posse headed by the Sheriff. Nor would the issue be safe if left to a compromise between the two Govts. the case of a disagreement between different Govts. being essentially different from a disagreement between branches of the same Govt.. In the latter case neither party being able to consummate its will without the concurrence of the other, there is a necessity on both to consult and to accommodate. Not so, with different Govts. each possessing every branch of power necessary to carry its purpose into compleat effect. It here becomes a question between Independent Nations, with no other *dernier* resort than physical force. Negotiation might indeed in some instances avoid this extremity; but how often would it happen, among so many States, that an unaccommodating spirit in some would render that resource unavailing.

We arrive at the agitated question whether the Judicial Authority of the U. S. be the constitutional resort for determining the line between the federal & State jurisdictions. Believing as I do that the General Convention regarded a provision within the Constitution for deciding in a peaceable & regular mode all cases arising in the course of its operation, as essential to an adequate System of Govt. that it intended the Authority vested in the Judicial Department as a final resort in relation to the States, for cases resulting to it in the exercise of its functions, (the concurrence of the Senate chosen by the State Legislatures,

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in appointing the Judges, and the oaths & official tenures of these, with the surveillance of public Opinion, being relied on as guarantying their impartiality); and that this intention is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U. S. shall extend to all cases arising under them: Believing moreover that this was the prevailing view of the subject when the Constitution was adopted & put into execution; that it has so continued thro' the long period which has elapsed; and that even at this time an appeal to a national decision would prove that no general change has taken place: thus believing I have never yielded my original opinion indicated in the "Federalist" No. 39 to the ingenious reasonings of Col: Taylor agst. this construction of the Constitution.<sup>1</sup>

1 *Construction Construed*, by John Taylor, of Caroline. Richmond 1820.

I am not unaware

that the Judiciary career has not corresponded with what was anticipated. At one period the Judges perverted the Bench of Justice into a rostrum for partizan harangues. And latterly the Court, by some of its decisions, still more by extrajudicial reasonings & dicta, has manifested a propensity to enlarge the general authority in derogation of the local, and to amplify its own jurisdiction, which has justly incurred the public censure. But the abuse of a trust does not disprove its existence. And if no remedy of the abuse be practicable under the forms of the Constitution, I should prefer a resort to the Nation for an amendment of the Tribunal itself, to continual appeals from its controverted decisions to that Ultimate Arbiter.

In the year 1821, I was engaged in a correspondence with Judge Roane, which grew out of the proceedings of the Supreme Court of the U. S.<sup>1</sup> Having said so much here I will send you a copy of my letters to him as soon as I can have a legible one made, that a fuller view of my ideas with respect to them may be before you.

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1 *Ante*, pp. 25, 65.

I agree entirely with you on the subject of seriatim opinions by the Judges, which you have placed in so strong a light in your letter to Judge Johnson, whose example it seems is in favor of the practice. An argument addressed to others, all of whose dislikes to it are not known, may be a delicate experiment. My particular connexion with Judge Todd, whom I expect to see, may tempt me to touch on the subject; and, if encouraged, to present views of it wch. thro' him may find the way to his intimates.

In turning over some bundles of Pamphlets, I met with several Copies of a very small one which at the desire of my political associates I threw out in 1795. As it relates to the state of parties I inclose a Copy. It had the advantage of being written with the subject full & fresh in my mind, and the disadvantage of being hurried, at the close of a fatiguing session of Congs. by an impatience to return home, from which I was detained by that Job only. The temper of the pamphlet is explained if not excused by the excitements of the period.

Always & Affectionately yours.