

**Thomas Jefferson to James Barbour, January 22, 1812,  
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and Edited by Paul Leicester Ford.**

**TO THE GOVERNOR OF VIRGINIA J. MSS. (JAMES BARBOUR.)**

Monticello, January 25, 1812.

Dear Sir, —Your favor of the 14th has been duly received, and I sincerely congratulate you, or rather my country, on the just testimony of confidence which it has lately manifested to you. In your hands I know that its affairs will be ably and honestly administered.

In answer to your inquiry whether, in the early times of our government, where the council was divided, the practice was for the Governor to give the deciding vote? I must observe that, correctly speaking, the Governor not being a counsellor, his vote could make no part of an advice of council. That would be to place an advice on their journals which they did not give, and could not give because of their equal division. But he did what was equivalent in effect. While I was in the administration, no doubt was ever suggested that where the council, divided in opinion, could give no advice, the Governor was free and bound to act on his own opinion and his own responsibility. Had this been a change of the practice of my predecessor, Mr. Henry, the first governor, it would have produced some discussion, which it never did. Hence, I conclude it was the opinion and practice from the first institution of the government. During Arnold's and Cornwallis' invasion, the council dispersed to their several homes, to take care of their families. Before their separation, I obtained from them a capitulary of standing advices for my government in such cases as ordinarily occur: such as the appointment of militia officers, justices, inspectors, &c., on the

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recommendations of the courts; but in the numerous and extraordinary occurrences of an invasion, which could not be foreseen,

I had to act on my own judgment and my own responsibility. The vote of general approbation, at the session of the succeeding winter, manifested the opinion of the Legislature, that my proceedings had been correct. General Nelson, my successor, staid mostly, I think, with the army; and I do not believe his council followed the camp, although my memory does not enable me to affirm the fact. Some petitions against him for impressment of property without authority of law, brought his proceedings before the next Legislature; the questions necessarily involved were whether necessity, without express law, could justify the impressment, and if it could, whether he could order it without the advice of council. The approbation of the Legislature amounted to a decision of both questions. I remember this case the more especially, because I was then a member of the Legislature, and was one of those who supported the Governor's proceedings, and I think there was no division of the House on the question. I believe the doubt was first suggested in Governor Harrison's time, by some member of the council, on an equal division. Harrison, in his dry way, observed that instead of one governor and eight counsellors, there would then be eight governors and one counsellor, and continued, as I understood, the practice of his predecessors. Indeed, it is difficult to suppose it could be the intention of those who framed the constitution, that when the council should be divided the government should stand still; and the more difficult as to a constitution formed during a war, and for the purpose of carrying on that war, that so high an officer as their Governor should be created and

salaried, merely to act as the clerk and authenticator of the votes of the council. No doubt it was intended that the advice of the council should control the governor. But the action of the controlling power being withdrawn, his would be left free to proceed on its own responsibility. Where from division, absence, sickness or other obstacle, no advice could be given, they could not mean that their Governor, the person of their peculiar choice and confidence, should stand by, an inactive spectator, and let their government tumble to

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pieces for want of a will to direct it. In executive cases, where promptitude and decision are all important, an adherence to the letter of a law against its probable intentions, (for every law must intend that itself shall be executed,) would be fraught with incalculable danger. Judges may await further legislative explanations, but a delay of executive action might produce irretrievable ruin. The State is invaded, militia to be called out, an army marched, arms and provisions to be issued from the public magazines, the Legislature to be convened, and the council is divided. Can it be believed to have been the intention of the framers of the constitution, that the constitution itself and their constituents with it should be destroyed for want of a will to direct the resources they had provided for its preservation? Before such possible consequences all verbal scruples must vanish; construction must be made *secundum arbitrium boni viri*, and the constitution be rendered a practicable thing. That exposition of it must be vicious, which would leave the nation under the most dangerous emergencies without a

directing will. The cautious maxims of the bench, to seek the will of the legislator, and his words only, are proper and safer for judicial government. They act ever on an individual case only, the evil of which is partial, and gives time for correction. But an instant of delay in executive proceedings may be fatal to the whole nation. They must not, therefore, be laced up in the rules of the judiciary department. They must seek the intention of the legislator in all the circumstances which may indicate it in the history of the day, in the public discussions, in the general opinion and understanding, in reason and in practice. The three great departments having distinct functions to perform, must have distinct rules adapted to them. Each must act under its own rules, those of no one having any obligation on either of the others. When the opinion first began that a governor could not act when his council could not or would not advise, I am uninformed. Probably not till after the war; for, had it prevailed then, no militia could have been opposed to Cornwallis, nor necessaries furnished to the opposing army of Lafayette. These, Sir, are my recollections

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and thoughts on the subject of your inquiry, to which I will only add the assurances of my great esteem and respect.