

Handout B: Excerpts from Hamilton's Opinion as to the Constitutionality of the Bank of the United States (1791)

The Secretary of the Treasury having perused with attention the papers containing the opinions of the Secretary of State and Attorney General, concerning the constitutionality of the bill for establishing a National Bank, proceeds, according to the order of the President, to submit the reasons which have induced him to entertain a different opinion...

Now it appears to the Secretary of the Treasury that this general principle is inherent in the very definition of government, and essential to every step of progress to be made by that of the United States, namely: That every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society...The circumstance that the powers of sovereignty are in this country divided between the National and State governments, does not afford the distinction required. It does not follow from this, that each of the portion of powers delegated to the one or to the other, is not sovereign with regard to its proper objects. It will only follow from it, that each has sovereign power as to certain things, and not as to other things. To deny that the government of the United States has sovereign power, as to its declared purposes and trusts, because its power does not extend to all cases would be equally to deny that the State governments have sovereign power in any case,

because their power does not extend to every case. The tenth section of the first article of the Constitution exhibits a long list of very important things which they may not do. And thus the United States would furnish the singular spectacle of a political society without sovereignty, or of a people governed, without government...

Whence it is meant to be inferred, that Congress can in no case exercise any power not Included in those not enumerated in the Constitution. And it is affirmed, that the power of erecting a corporation is not included in any of the enumerated powers.

It is not denied that there are implied well as express powers, and that the former are as effectually delegated as the latter...

To return: It is conceded that implied powers are to be considered as delegated equally with express ones. Then it follows, that as a power of erecting a corporation may as well be implied as any other thing, it may as well be employed as an instrument or mean of carrying into execution any of the specified powers, as any other instrument or mean whatever...

There are two points in the suggestions of the Secretary of State, which have been noted, that are peculiarly incorrect. One is, that the proposed incorporation is against the laws of monopoly, because it stipulates an exclusive right of banking under the national authority; the other, that it gives power to the institution to make laws paramount to those of the States.

Handout B: Page 2

But, with regard to the first: The bill neither prohibits any State from erecting as many banks as they please, nor any number of individuals from associating to carry on the business, and consequently, is free from the charge of establishing a monopoly; for monopoly implies a legal impediment to the carrying on of the trade by others than those to whom it is granted.

And with regard to the second point, there is still less foundation. The by-laws of such an institution as a bank can operate only on its own members can only concern the disposition of its own property, and must essentially resemble the rules of a private mercantile partnership. They are expressly not to be contrary to law; and law must here mean the law of a State, as well as of the United States. There never can be a doubt, that a law of a corporation, if contrary to a law of a State, must be overruled as void unless the law of the State is contrary to that of the United States and then the question will not be between the law of the State and that of the corporation, but between the law of the State and that of the United States.

Another argument made use of by the Secretary of State is, the rejection of a proposition by the Convention to empower Congress to make corporations, either generally, or for some special purpose...

The Secretary of State will not deny, that, whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to express and elect more or less than was intended. If, then, a power to erect a corporation in any case be deducible, by fair inference, from the whole or any part of the numerous provisions of the Constitution of the United States arguments drawn from extrinsic circumstances regarding the intention of the Convention must

be rejected.

Those of the Attorney General will now properly come under view...

Having observed that the power of erecting corporations is not expressly granted to Congress, the Attorney General proceeds thus:

“If it can be exercised by them, it must be

“1. Because the nature of the federal government implies it.

“2. Because it is involved in some of the specified powers of legislation.

“3. Because it is necessary and proper to carry into execution some of the specified powers.”

To be implied in the nature of the federal government, says he, would beget a doctrine so indefinite as to grasp every power.

This proposition, it ought to be remarked, is not precisely, or even substantially, that which has been relied upon. The proposition relied upon is, that the specified powers of Congress are in their nature sovereign. That it is incident to sovereign power to erect corporations, and that therefore Congress have a right, within the sphere and in relation to the objects of their power, to erect corporations. It shall, however, be supposed that the Attorney General would consider the two propositions in the same light, and that the objection made to the one would be made to the other...

A general legislative authority implies a power to erect corporations in all cases. A particular legislative power implies authority to erect corporations in relation to cases arising under that power only. Hence the affirming that, as incident to sovereign power, Congress may erect a corporation in relation to the collection of their taxes, is no more to affirm that they may do whatever else they please, than the saying that

Handout B: Page3

they have a power to regulate trade, would be to affirm that they have a power to regulate religion; or than the maintaining that they have sovereign power as to taxation, would be to maintain that they have sovereign power as to everything else.

The Attorney General undertakes in the next place to show, that the power of erecting corporations is not involved in any of the specified powers of legislation confided to the national government... to lay and collect taxes, &c.; to borrow money on the credit of the United States, to regulate commerce with sovereign nations; between the States, and with the Indian tribes, to dispose of and make all needful rules and regulations respecting the territory of other property belonging to the United States. The design of which enumeration is to show, what is included under those different heads of power, and negatively, that the power of erecting corporations is not included...

The heads of the power to lay and collect taxes are stated to be:

1. To stipulate the sum to be lent.
2. An interest or no interest to be paid.
3. The time and manner of repaying, unless the loan be placed on an irredeemable fund.

This enumeration is liable to a variety of objections. It omits in the first place, the pledging or mortgaging of a fund for the security of the money lent, an usual, and in most cases an essential ingredient...

The heads of the power to regulate commerce with foreign nations, are stated to be:

1. To prohibit them or their commodities from our ports.
2. To impose duties on them, where none existed before, or to increase existing; duties on them.

3. To subject them to any species of custom-house regulation.

4. To grant them any exemptions or privileges which policy may suggest.

...The following palpable omissions occur at once:

1. Of the power to prohibit the exportation of commodities, which not only exists at all times, but which in time of war it would be necessary to exercise, particularly with relation to naval and warlike stores
2. Of the power to prescribe rules concerning the characteristics and privileges of an American bottom, how she shall be navigated, or whether by citizens or foreigners, or by a proportion of each
3. Of the power of regulating the manner of contracting with seamen; the police of ships on their voyages, &c., of which the Act for the government and regulation of seamen, in the merchants' service, is a specimen.

That the three preceding articles are omissions, will not be doubted there is a long list of items in addition, which admit of little, if any question, of which a few samples shall be given.

1. The granting of bounties to certain kinds of vessels, and certain species of merchandise; of this nature, is the allowance on dried and pickled fish and salted provisions
2. The prescribing of rules concerning the inspection of commodities to be exported. Though the States individually are competent to this regulation, yet there is no reason, in point of authority at least, why a general system might not be adopted by the United States.
3. The regulation of policies of insurance; of salvage upon goods found at sea, and the disposition of such goods.
4. The regulation of pilots.

Handout B: Page 4

5. The regulation of bills of exchange drawn by a merchant of one State upon a merchant of another State. This last rather belongs to the regulation of trade between the States, but is equally omitted in the specifications under that head

The last enumeration relates to the power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States.

The heads of this power are said to be:

1. To exert an ownership over the territory of the United States which may be properly called the property of the United States, as in the western territory, and to institute a government therein, or
2. To exert an ownership over the other property of the United States.

The idea of exerting an ownership over the territory or other property of the United States, is particularly indefinite and vague... It is admitted, that in regard to the western territory, something more is intended; even the institution of a government, that is, the creation of a body politic, or corporation of the highest nature; one which, in its maturity, will be able itself to create other corporations. Why, then, does not the same clause authorize the erection of a corporation, in respect to the regulation or disposal of any other of the property of the United States...

Hence it appears, that the enumerations which have been attempted by the Attorney General, are so imperfect, as to authorize no conclusion whatever; they, therefore, have no tendency to disprove that each and every of the powers, to which they relate, includes that of erecting corporations, which they certainly do, as the subsequent illustrations will snore and more evince.

It is presumed to have been satisfactorily shown

in the course of the preceding observations:

1. That the power of the government, as to the objects intrusted to its management, is, in its nature, sovereign.
2. That the right of erecting corporations is one inherent in, and inseparable from, the idea of sovereign power.
3. That the position, that the government of the United States can exercise no power, but such as is delegated to it by its Constitution, does not militate against this principle.
4. That the word necessary, in the general clause, can have no restrictive operation derogating from the force of this principle indeed' that the degree in which a measure is or is not necessary cannot be a test of constitutional right, but of expediency only.
5. That the power to erect corporations is not to be considered as an independent or substantive power, but as an incidental and auxiliary one, and was therefore more properly left to implication, than expressly granted.
6. That the principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to incorporate for purposes within the sphere of the specified powers.

And lastly, that the right to exercise such a power in certain cases is unequivocally granted in the most positive and comprehensive terms...

It shall now be endeavored to be shown that there is a power to erect one of the kind proposed by the bill...The proposed bank is to consist of an association of persons, for the purpose of creating a joint capital, to be employed chiefly and essentially in loans. So far the object is not only lawful, but it is the mere exercise of a right which the law allows to every individual...The bill

Handout B: Page 5

proposed in addition that the government shall become a joint proprietor in this undertaking, and that it shall permit the bills of the company, payable on demand, to be receivable in its revenues; and stipulates that it shall not grant privileges, similar to those which are to be allowed to this company, to any others. All this is incontrovertibly within the compass of the discretion of the government. The only question is, whether it has a right to incorporate this company, in order to enable it the more effectually to accomplish ends which are in themselves lawful...

To designate or appoint the money or thing in which taxes are to be paid, is not only a proper but a necessary exercise of the power of collecting them...No part of this can, it is presumed, be disputed...

The institution of a bank has also a natural relation to the regulation of trade between the States, in so far as it is conducive to the creation of a convenient medium of exchange between them, and to the keeping up a full circulation, by preventing the frequent displacement of the metals in reciprocal remittances. Money is the very hinge on which commerce turns. And this does not merely mean gold and silver; many other things have served the purpose, with different degrees of utility. Paper has been extensively employed.

It cannot, therefore, be admitted, with the Attorney General, that the regulation of trade between the States, as it concerns the medium of circulation and exchange, ought to be considered as confined to coin. It is even supposable that the whole or the greatest part, of the coin of the country might be carried out of it.

The Secretary of State objects to the relation here insisted upon by the following mode of reasoning: To erect a bank, says he, and to regulate

commerce, are very different acts. He who creates a bank, creates a subject of commerce, so does he who sows a bushel of wheat, or digs a dollar out of the mines, yet neither of these persons regulates commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling.

This making the regulation of commerce to consist in prescribing rules for buying and selling this, indeed, is a species of regulation of trade, but is one which falls more aptly within the province of the local jurisdictions than within that of the general government, whose care they must be presumed to have been intended to be directed to those general political arrangements concerning trade on which its aggregated interests depend, rather than to the details of buying and selling. Accordingly, such only are the regulations to be found in the laws of the United States whose objects are to give encouragement to the enterprise of our own merchants, and to advance our navigation and manufactures. And it is in reference to these general relations of commerce, that an establishment which furnishes facilities to circulation, and a convenient medium of exchange and alienation, is to be regarded as a regulation of trade.

The Secretary of State further argues, that if this was a regulation of commerce, it would be void, as extending as much to the internal commerce of every State as to its external. But what regulation of commerce does not extend to the internal commerce of every State?

...The relation of a bank to the execution of the powers that concern the common defense has been anticipated. It has been noted, that, at this very moment, the aid of such an institution is essential to the measures to be pursued for the protection of our frontiers.

It now remains to show, that the incorporation

Handout B: Page 6

of a bank is within the operation of the provision which authorizes Congress to make all needful rules and regulations concerning the property of the United States...

The support of government—the support of troops for the common defense—the payment of the public debt, are the true final causes for raising money. The disposition and regulation of it, when raised, are the steps by which it is applied to the ends for which it was raised, not the ends themselves. Hence, therefore, the money to be raised by taxes, as well as any other personal property, must be supposed to come within the meaning, as they certainly do within the letter, of authority to make all needful rules and regulations concerning the property of the United States...

There is an observation of the Secretary of State to this effect which may require notice in this place:—Congress, says he, are not to lay taxes ad libitum, for any purpose they please, but only to pay the debts or provide for the welfare of the Union. Certainly no inference can be drawn from this against the power of applying their money for the institution of a bank. It is true that they cannot without breach of trust lay taxes for any other purpose than the general welfare; but so neither can any other government. The welfare of the community is the only legitimate end for which money can be raised on the community. Congress can be considered as under only one restriction which does not apply to other governments, they cannot rightfully apply the money they raise to any purpose merely or purely local.

But, with this exception, they have as large a discretion in relation to the application of money as any legislature whatever. The constitutional test of a right application must always be, whether it be for a purpose of general or local nature. If the former, there can be no want of constitutional

power. The quality of the object as how far it will really promote or not the welfare of the Union must be matter of conscientious discretion, and the arguments for or against a measure in this light must be arguments concerning expediency or in expediency, not constitutional right. Whatever relates to the general order of the finances, to the general interests of trade, etc., being general objects, are constitutional ones for the Application of money.

A bank, then, whose bills are to circulate in all the revenues of the country, is evidently a general object, and, for that very reason, a constitutional one, as far as regards the appropriation of money to it...

A hope is entertained that it has, by this time, been made to appear, to the satisfaction of the President, that a bank has a natural relation to the power of collecting taxes—to that of regulating trade—to that of providing for the common defense and that, as the bill under consideration contemplates the government in the light of a joint proprietor of the stock of the bank, it brings the case within the provision of the clause of the Constitution which immediately respects the property of the United States.

Under a conviction that such a relation subsists, the Secretary of the Treasury, with all deference, conceives that it will result as a necessary consequence from the position that all the special powers of government are sovereign, as to the proper objects that the incorporation of a bank is a constitutional measure, and that the objections taken to the bill, in this respect, are ill-founded.

But, from an earnest desire to give the utmost possible satisfaction to the mind of the President, on so delicate and important a subject, the Secretary of the Treasury will ask his indulgence, while he gives some additional illustrations of cases in which a power of erecting corporations

Handout B: Page 7

may be exercised, under some of those heads of the specified powers of the government, which are alleged to include the right of incorporating a bank.

i. It does not appear susceptible of a doubt, that if Congress had thought proper to provide, in the collection laws, that the bonds to be given for the duties should be given to the collector of the district, A or B. as the case might require, to inure to him and his successors in office, in trust for the United States, that it would have been consistent with the Constitution to make such an arrangement; and yet this, it is conceived, would amount to an incorporation.

ii. It is not an unusual expedient of taxation to farm particular branches of revenue—that is, to mortgage or sell the product of them for certain definite sums, leaving the collection to the parties to whom they are mortgaged or sold...

3. Suppose a new and unexplored branch of trade should present itself, with some foreign country. Suppose it was manifest that to undertake it with advantage required an union of the capitals of a number of individuals, and that those individuals would not be disposed to embark without an incorporation, as well to obviate that consequence of a private partnership which makes every individual liable in his whole estate for the debts of the company, to their utmost extent, as for the more convenient management of the business—what reason can there be to doubt that the national government would have a constitutional right to institute and incorporate such a company? None. They possess a general authority to regulate trade with foreign countries. This is a mean which has been practiced to that end, by all the principal commercial nations, who have trading companies to this day, which have subsisted for centuries. Why may not the United States, constitutionally, employ the means usual

in other countries, for attaining the ends intrusted to them?

A power to make all needful rules and regulations concerning territory, has been construed to mean a power to erect a government. A power to regulate trade, is a power to make all needful rules and regulations concerning trade. Why may it not, then, include that of erecting a trading company, as well as, in other cases, to erect a government?

...The very general power of laying and collecting taxes, and appropriating their proceeds—that of borrowing money indefinitely—that of coining money, and regulating foreign coins—that of making all needful rules and regulations respecting the property of the United States. These powers combined, as well as the reason and nature of the thing, speak strongly this language: that it is the manifest design and scope of the Constitution to vest in Congress all the powers requisite to the effectual administration of the finances of the United States. As far as concerns this object, there appears to be no parsimony of power...

The fact, for instance, that all the principal commercial nations have made use of trading corporations or companies, for the purpose of external commerce, is a satisfactory proof that the establishment of them is an incident to the regulation of the commerce...

It has been stated as an auxiliary test of constitutional authority to try whether it abridges any pre-existing right of any State, or any individual. The proposed investigation will stand the most severe examination on this point. Each State may still erect as many banks as it pleases. Every individual may still carry on the banking business to any extent he pleases.

Another criterion may be this. Whether the institution or thing has a more direct relation, as to its uses, to the objects of the reserved powers

Handout B: Page 8

of the State governments than to those of the powers delegated by the United States. This, rule, indeed, is less precise than the former, but it may still serve as some guide. Surely a bank has more reference to the objects intrusted to the national government than to those left to the care of the State governments. The common defense is decisive in this comparison.

There are, indeed, a variety of observations of the Secretary of State designed to show that

the utilities ascribed to a bank, in relation to the collection of taxes, and to trade, could be obtained without it; to analyze which, would prolong the discussion beyond all bounds. It shall be forborne for two reasons. First, because the report concerning the bank, may speak for itself in this respect and secondly, because all those observations are grounded on the erroneous idea that the quantum of necessity or utility is the test of a constitutional exercise of power...