THE MISSISSIPPI DEMOCRAT.

"The best Government is that which governs least."

VOL. II. CARROLLTON, WEDNESDAY, AUGUST 19, 1846. NO. 36

[CONTINUED.]

Mr. CALHOUN made the following REPORT:

(To accompany bill S. No. 216.)

The Special Committee, to whom was referred the memorial of the Memphis Connection, have had the same under consideration, and submit for the consideration of the Senate the following report:

Having now shown what is the restriction imposed or the power by the terms "among the States," your committee will next proceed to consider what power is conferred on Congress within that restriction by the terms "to regulate commerce."

They are of the opinion, after due reflection, that they confer on it all the powers which, by a fair interpretation, belonged to them, as fully as the States themselves possessdd it, except such, if there be any, as may be prohibited by the constitution from being exercised, either expressly or impliedly. That they confer on Congress all the power to regulate commerce with each other, with that exception, would seem to be so clear as hardly to admit of doubt, as the words by which it is delegated are used without qualification or condition. But, if there should be room for doubt, it would be removed by adverting to the reason for delegating the power. It was not to limit or prohibit it as a power of a dangerous character, and which on that account, ought to be restricted or prohibited. On the contrary, it was regarded as one of the utmost utility, and on the proper control of which the prosperity of the States essentially depended; and it was accordingly for the purpose of obtaining such control, as well as to prevent collision among the States, and not to restrict or prohibit it, that it was delegated to the federal government, as their common representative and organ, in their external relations with each other and foriegn nations. When it is added that such is admitted to be the true construction in reference to the latter and that the phraseology is the same in reference to both, it would seem to exclude the possibility of doubt as to its being so also in reference to the former. The difference between the two cases is, that the power is divided in its exercise between the law-making and treaty-making organs of the government in regulating commerce with foreign nations, while in that of regulating it among the States it is vested exclusively in the law-making, as from necessity it must be, where the treaty-power among federal States is delegated to their common government.

It remains now to be considered what power would a fair interpretation of the terms "regulate commerce" confer no Congress? Or, to express it more fully, what powers did the framers of the constitution intend to delegate to it in using those terms? Your committee regard it as fortunate that, in their endeavor to ascertain what power they intended to delegate, they are not thrown on the vague meanings of the terms as used in common parlance. There are few words in the language, when thus used, more vague than the verb *to regulate*. It has, as commonly used, all the shades of meaning, from the mere power of prescribing rules to that of having absolute and unlimited control over the subject to which it is applied. Nor is the term *commerce* free from ambiguity when so used. It sometimes means trade simply; a . at other, trade and transit, or navigation when the transit is by water. But the case is different when they are applied to constitutional or legal subjects. When so applied, their meaning is so much more precise that they may be regarded as almost technical. They occupy a large space both in our own code of laws, and that of the country from which we derive our origin and language. And what contributes still more to the precision of their meaning is, that they occupied a prominent place in the discussion which proceded and led to the Revolution that seperate the two countries, particalarly as it relates to the distinction between the power to lay taxes and that to regulate commerce. The latter, it was admitted, belonged to the parent country, while the former was denied and resisted. Many of the framers of the constitution, who were able statemen and learned lawyers, took an active part in this discussion, and were familiar with the meaning of the terms, as politically and legally applied at the time. Under such circumstances, it is a fair presumption that in using them, in which they had been in delegating the power, they intended to attach a meaning to them similar to that in which they had been in the habit of employing them in their political discussions, and in which the States had been accustomed to use them in legislating on the subject of regulating commerce prior to, and subsequent to, the Revolution.

Assuming such to be the case, your committee are brought to the question, What powers were the States accustomed to exercise in regulating their commerce before and at the time of the adoption of the constitution, as far as they relate to safety and facility? The answer will solve the question as to the true meaning of terms, and the kind of powers intended to be delegated to Congress in reference to them.

In order to understand why the States exercised the kind of powers they were accustomed to do, at and before the adoption of the constitution, for the safety and facility of their commerce, it is necessary to bear in mind that they were then confined to the Atlantic coast, along which they extended from New Brunswick to Florida; and that their commerce with each other was confined to the coast and its bays.—On turning to their legislation during that period, it will be found that the powers they exercised for that purpose were restricted to theestablishment of light houses, buoys, beacons, and public piers. They are all of a description well adapted and necessary to guard against the dangers and impediments to which such a commerce as they then carried on was exposed; while they were, at the same time, such as would be neglected, or not established at all, unless the public took charge of them; because individuals had neither adequate motive nor power to establish or attend to them. That the power to establish them refers to that of regulating commerce, may be certainly inferred from the motives and object of their establishment; and that commerce, in legal language, embraces navigation as well as trade, may, with not less certainity, be inferred from the same circumstance, as they relate directly and exclusively to navigation. If we turn from the legislation of the States prior to the adoption of the constitution to that of the federal govrenment, it will be found that it confirms not only the correctness of these inferences, but all that your committee has stated in this connexion, as they will next proceed to show.

So important was the power to regulate commerce,and especially among the states, regarded, that it was among the first subjects which claimed the attention of the government after it went into operation.—On the 7th of April, 1789, just a month after the commencement of the government, an act of Congress became a law by the approval of the President, entitled "An act for the establishment of light houses, buoys, beacons, and public peirs;" that is, moles raised for the shelter of vessels against storms or ice. It provides that all the expenses, which shall accrue for the support and maintenance and repairs of such as were erected, placed, or sunk by the States, before the passing of the act for the safety and ease (facility) navigation, shall be defraved out of the treasury of the United States, with the proviso that the expense should not be paid by the U. States after one year, unless they should be ceded and vested in the United States by the States to which they belonged, with lands and tenements appertaining to them. It also provided for the erecting of a light-house near the entrance of the Chesapeake bay, and for the expense of keeping, rebuilding, and repairing of the the establishment. These provisions furnish conclusive proof that the States under the power regulate commerce established light-houses, buoys, beacons, and public piers; that Congress regarded the power as delegated to it, to the same extent; that the object of the power was the increased safety and facility of commerce along the coast; that it appertained especially to the regulation of commerce among the States, as the portion of the ocean in its vicinity is the great common highway of the commerce of the States bordering on it; and that it embraced navigation as well as trade. It may be added, in confirmation of the construction which places this establishment under the control of the government, that it accords with tne practice of the government of the country from which we derive our language and origin; with this difference, that there the establishment was principally under the control of incorporated companies or individuals, but subject to the legislation of Parliament, as must have been well known to the framers of our constitution.

In carrying the power into execution, Congress has studded the coast with light houses and beacon-lights, to guide in safety the mariner by night on his voyage, against the danger of capes, reefs, and shallows, and has thickly planted buoys at the mouths of harbors and inlects, to point out the narrow channels through which he may safely pass into them. It has gone further, and constructed public piers, (including harbors of protection,) where vessels can take shelter against storm and ice, and annually expends a large sum in repaing, supporting, and enlarging the establishment. To this add that the power, to this extent, has been exercised by Congress from the beginning of the government until the present time, without interruption or being seriously questioned as to its constitutionality, either in or out of Congress, during that long period, and it may be safely inferred that they have not erred in placing the construction they have on it.

Having now shown that the power to regulate commerce, fairly construed, embraces the establishment of the light houses, buoys, beacons, and public piers, for the increased safety and facility of the commerce of the Atlantic coast, your committee will next proceed to consider the question, whether it may not be constitutionally applied to increase the safety and facility of the commerce of the Mississippi and its waters.

It is admitted that the framers of the constitution, in delegating the power, had in contemplation the Atlantic coast only. At the time, but a very small portion of our population had passed the Alleghany mountains into the valley of the Mississippi, as has been stated, and none had reached the St. Lawrence and its Lakes. There was not a single State situated wholly within the valley. Indeed, the greater part, including the whole of its right bank, and all on both banks below the 31st parallel, belonged to Spain, who claimed the exclusive right to navigate the river to the south of it, and a right in common with us to the residue. In such a state of things, it is not probable that the navigation of a river so full of obstructions, and with a current too rapid for ascending navigation, with the power then used for propelling vessels on its waters, ever occurred to the framers of the constitution, while deliberating on delegating the power in question. But, although their attention was directed to a particular case, they were too wise to provide a remedy applicable exclusively to it, by restricting it to the coast navigation, or to the establishment of light houses, buoys, beacons, and public piers. They looked to the future, and provided one of a more comprehensive character, and calculated to remedy the evil in whatever form it might appear.

Great changes have since occurred.—We have acquired the entire valley of the Mississippi, and have the exclusive control of its commerce. What was then an almost uninhabited wilderness, now contains nearly one-half of the population of the whole Union, and many great and flourishing States. Its commerce, then of small amount, and carried on in frail boats of small tonnage, and impelled by a power too weak to ascend its stream, now rivals that of the coast in amount, the cost and size of the vessels by which transported, cheapness of freight, rapidty of transit, and the force by which they are impelled—a force so great as to completely overcome its turbid and rapid current. It has done more. It has so intimately united the navigation of the river and the gulf, that vessels navigating the one may the other, so as to pass and repass to and from each other in one continuous voyage; just as if (for all practical purpose) the Mississippi was a part of the gulf, or an inland sea.

In consequence of these great changes, the reasons which influenced the framers of the consitution to delegate to Congress the power to regulate commerce among the States are now applicable to the States bordering on the Mississippi and its great tributaries, as it were then to those bordering on the Atlantic coast. If it was necessary to delegate it in reference to the latter, to prevent embarrassment and collision between them in consequence of each other, the necessity is equally urgent in reference to those bordering on the Mississippi, for the same reasons. Indeed, it may be said to be more so; because numerous States grouped together on a large stream and its tributaries, and depending on its navigation exclusively, as the medium of their commerce with each other and the rest of the world, would be much more exposed to embarrassments and collisions, without a common power to regulate their commerce, than those stretched out on a long line of seacoast. The latter might possibly manage each to regulate its own commerce, without a common power; but without such a power the former would almost necessarily be involved in continued conflict and hostilities. So, again, the necessity of a common power to regulate commerce among them, in reference to the safety and facility of its navigation, is greater in relation to the States on the borders of the Mississippi, including its tributaries, than on the coast; as the dangers and impediments to which it is exposed are greater, while, from their character, they may be more effectually guarded against by being removed.

So urgent, indeed, is the necessity of a common power to regulate its commerce, that it may be safely affirmed that it would require a confederation among the States on its borders for that purpose, as the only means of preserving peace and preventing the most deadly conflicts among them, destructive alike to their commerce and prosperity, had not the constitution divested the States of the power, and delegated it to the federal government. If to these urgent reasons for a common power to regulate the commerce of the Mississippi, including its great tributaries, we add, that the States directly interested are positively prohibited by the constitution from entering into any treaty, alliance, or confederation, and, of course, from adopting the only means by which such a power could be created by them, and that the river is made, by the same instrument, the common highway in fact for all their "vessels bound to or from one State shall not be obliged to enter, clear, or pay duties in another," the conclusion is irresistable, that its commerce comes as fully within the power to regulate commerce as that of the coast itself. There is, indeed, nothing in the terms by which it is delegated, or in the nature of the power, or the reasons for delegating it, which can possibly exclude it.

Assuming it, then, as unquestionable, that the power is as applicable to the one as the other, it follows necessarily that the right of Congress to establish light houses, buoys, beacons, and public piers, as far as they may be necessary for the safety and facility of navigation, is as full and perfect in reference to that of the Mississippi, as that of the Atlantic coast. Thus far, there can be no doubt. Indeed, they have been established on the lakes of the St. Lawrence, where they are as necessary as on the coast, without objection or question, although their commerce was as little in contemplation of the framers of the constitution, as has been stated, as was that of the Mississippi.

The doubt, then, if doubt there be, is reduced to the single point that the dangers to which the navigation of the Mississippi is exposed are, from their character, such as cannot be guarded against by light houses, buoys, beacons, and public piers, except to a very limited extent. They consist of obstructions in its channel, and can only be well guarded against by removing them. The question, then, is, whether the power to regulate commerce among the States, which authorises the establishment of light houses, buoys, beacons, and public piers on the coast of the Atlantic and the lakes, with their gulfs and bays, does not also authorise the removal of snags, logs, and other obstructions, which endanger or impede the navigation of the Mississippi?

Your committee, after full and impartial consideration, can see no reason which would authorise the one, that would not the other. The dangers to be guarded against are not only as great in reference to the navigation ef the Mississippi, as has been shown, but the reason why the government should have charge of its improvement is no less strong. If light houses, buoys, beacons and public piers, would be neglected, if not placed under its charge, because neither individuals nor States would have adequate inducement or power to establish them; so likewise the removal of snags, and other obstructions, which endanger or impede its navigation, would be neglected, and for the same reason, if not put also under its charge. The only difference, indeed, between them. is, that in the one case the money is appropriated to make visible, or designate, the cause of danger, by establishing light houses, beacons, or buoys, while in the other it is appropriated to remove them. But it would seem impossible to doubt that the right to make them visible, or to designate their place, in order that they might be avoided, involves that of removing them where practicable; and that the right of removing them involves that of pointing them out, to be avoided. Whether the one or the other should be adopted in either case, is not a question of right, but one of expediency, depending on their respective practicability, cheapness, and inefficiency. Reverse the cases, and who can doubt, if the dangers against which light houses, buoys, and beacons were intended to warn were of a nature that they could be removed as cheaply, or more so, than they could be pointed out, but that the same power which would authorise the former would also authorise the latter; or that the power to remove the cause of danger, would not authorise the warning against it, if it could not be removed?

Having now shown that the power to regulate commerce among the States is as applicable to that of Mississippi as it is to that of the Atlantic coast, and that the removal of the obstructions which endanger or impede its navigation is as fully embraced by it, as the establishment of light houses, buoys, beacons, and public piers, your committee will next proceed to consider how far that power, as applied to the improvement of its navigation, extends.

They are of the opinion it extends to the removing of all obstructions within its channel, the removal of which would add to the safety and facility of its navigation; including such as might endanger or impede it by sliding in or of projecting from its bank, or islands, over the channel. It includes (to be more specific) the removal of snags, logs, rocks, shoals, sandbanks, bars, including the one at its mouth, and trees projecting over or liable to slide into its channel, where the removal would improve or secure its navigation. These all are either within the channel of the river, or hanging over it, or in danger of sliding into it, so as to obstruct it as the common highway of the commerce of the States on its borders; and, as it may truly be added now, through the power of steam, of the States having intercourse by continuous navigation with them, on the gulf and even Atlantic coast.

They are also of the opinion it extends to the removal of like obstructions in its great navigable tributaries, including such as have three or more States bordering on their navigable waters; but not to those whose navigable waters are embraced within one, or farthest, two States. Why the former is embraced, and the latter not, they will next proceed to consider, beginning with the case of rivers whose navigable waters are confined to a single State.

They are not embraced, because, in the first place, the power, as has been shown, is restricted to the regulations of the external commerce of the States with each other, to the exclusion of their internal. And, in the next, because the commerce of such rivers is under the exclusive control of the States within whose limits their navigable waters are confined, except that no vessel from another State, coming or going, can be compelled to enter, clear, or pay duties, under the provisions of the constitution already quoted; and except, also, that vessels from other States shall not be subject to any regulation or law in navigating them, to which the vessel, of the State to which they belong or not, under the provisions of the same instrument, which secures to the citizens of each State, in all others, "all the privileges and immunities to which their own citizens are entitled." With these exceptions,the navigation of all such rivers, as far as commerce is concerned, is as much under the control of the State within which its navigable waters are confined, as its canals, railroads, or turnpikes. Indeed, these are subject to the latter exception, and not to the former, only because not applicable.

The case of a river whose navigable waters are confined to two States, whether by dividing or flowing through them, requires more particular and full explanation. The provision of the constitution already cited, which exempts vessels bound to or from one State from entering, clearing, or paying duties in another, would make all such streams, in effect, common highways of all the State, and bring them exclusively under the common highways of all the States, and bring them exclusively under the control of the federal government, as far as the power to regulate commerce among the States is concerned; as much so, indeed, as the Mississippi itself, were it not for another provision in the same instrument. They allude to that which provides that "no State shall, without the consent of Congress, enter into any agreement or compact with another State;" and which of course permits (with such consent) *one* State to enter into compact or agreement with *another*.

To understand the intention of the framers of the constitution for inserting this provision, and its bearing on the point under consideration, it is necessary to view it in connection with another provision of the instrument, already cited. They refer to that which prohibits the State from entering into any treaty, alliance, or confederation, in any case whatever; plainly because it would be both dangerous and inconsistent with their federal relations to permit it. In order to prevent so important a provision from being eluded, the provision immediately under consideration was inserted, prohibiting the States from entering into agreements or compacts in any case whatever, except one State with another State, or with a foreign power; and to prevent the abuse even of that limited power, the consent of Congress is required. Such is the prohibition, and the reason for it. The reason for the exception is, that without it the prohibition would substitute the federal authority for that of the States, for the adjustment and regulation of all the various subjects in which the several States may have a mutual interest in adjusting and regulating, including such as the one under consideration, and thereby would give greater extension and minuteness to the authority of the federal government than was desirable or consistent with the objects for which it was instituted. Under the exception it is left to the States, when only two are interested in the navigation of a river, or any other object, to take it under their exclusive jurisdiction and control by an agreement or compact between them, with the consent of Congress; as much as it would be under that of one, if it was confined exclusively to one instead of extending to two.

The case is different where three or more States may be directly interested in the navigation of a river. Such cases are withdrawn from the control of the States, and are embraced by the power of Congress to regulate commerce among the States, for reasons too obvious to repeat, after what has been stated. It is only necessary to add, in this connexion, the reasons are as applicable to the rivers falling into the ocean and the lakes, including their gulfs and bays, as to those falling into the Mississippi and its tributaries.

Your committee will next proceed to consider whether harbors or canals around falls or other obstructions of the Mississippi, including its great tributaries, (meaning thereby those in whose navigation three or more States are interested.) are embraced in the power, taking them in the order they stand.

They are of the opinion that harbors, except for shelter or naval stations, are not. Their reason for thinking so is, in the first place, because, as far as they have been able to ascertain, the States in the exercise of the power of regulating commerce never extended it to the improvement or construction of harbors for commerce, neither subsequent to nor before the Revolution, while colonies. They have not been able to find a single instance of the exercise of the power on their part which would warrant the conclusion that such harbors were included in the power, and, they may add as pertinent to the subject, very few cases in the legislation of the country from which we draw our origin and language that countenances an extension of the power, so far as to embrace them; and in the next, that the early acts of Congress afford no evidence that it regarded harbors of commerce to be embraced in it. The first appropriation they have been able to find, even for harbors for shelter, was made in 1822, more than thirty years after the commencement of the government; and that, at first, only authorised "the construction of two public piers, of sufficient dimensions to be a shelter to vessels from ice." They refer to the break-water near the mouth of the Delaware. The next appropriation was in 1823, to survey the entrance of the harbor of Presque Isle, on Lake Erie, with the view of removing obstructions at its mouth. In was not until 1827 that appropriations were made professedly for the improvement of harbors, and not until 1828, when a regular and expensive system was commenced of constructing and improving them as a part of the system of internal improvement.

But as strong as these reasons are, there is another still more so, drawn from the nature of the power and early practice of the government. The power, as has been stated, is restricted exclusively to the regulation of the external commerce of the States with each other, as separate and distinct communities; and cannot, as such, act within the limits of the States beyond what is indispensable to this execution. But so careful were the framers of the constitution to guard against the abuse of power, that they have not left it to inference to determine to what extent it is indispensable for that purpose. They have, by a provision of the instrument, fixed the precise limits. Your committee refer to that already cited, which exempts vessels bound to or from one State from being obliged to enter, clear, or pay duties in another; and thereby securing to that extent, and no further, a free ingress and egress of the vessels of all the States within and from the limits of each other. But, with that exception, the harbors of a State are as completely under the control of the State, and as subject to its laws and legislation, as any other portion of its territory; and the vessels of other States are as subject to them as those belonging to their own citizens. Strictly speaking, then, the power to regulate commerce among the States is a power wholly *inter alios;* so much so, indeed, as to require this additional, or, as it may be fairly called, supplemental power, to secure to the vessels of other States the right to enter, clear, and be exempt from duty, both in their ingress and egress. The conclusion would seem to follow, irresistibly, that a power so strictly *inter alios* cannot be extended so as to embrace the improvement or construction of commercial harbors. The case of harbors for shelter is different.—They relate directly to the safety of commerce, in its transit from State to State, and are in character and object the same as public piers, and come, as such, fairly under the power to regulate commerce.—The case is also different in reference to naval stations or harbors. They come under another power—that "to provide and maintain a navy."

But if additional evidence should be required to show that commercial harbors are not embraced by the power, another provision of the constitution, and the practice of the government under it, will furnish conclusive proof. Your committee refer to that which provides that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage." We find in this provision a material difference between the power reserved to the States to lay, with the consent of Congress, duties on imports and exports, on the one hand, and on tonnage on the other. In the former it is expressly provided that the proceeds shall pass into the treasury of the United States, while in the other it is left without any such provision at the disposal of the State imposing them. There must be a reason for the distinction; and it would be difficult to assign any other than that it was intended to reserve to the States the power to collect duties on tonnage, with the