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ADJUTANT GENERAL'S OFFICE,
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The following opinion of the Hon. Reverdy Johnson, as Special Assistant to the Attorney General of the United States, is published for the information of all concerned :

BALTIMORE, *April 6, 1874.*

To Bvt. Brigadier General ALBERT J. MYER,
Chief Signal Officer, Washington, D. C.

SIR : The several questions upon which you have desired my opinion, I have considered with the care demanded by their importance.

The questions are these:

First. Is the act of the 24th July, 1866, entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," constitutional? And are the subsequent acts of 10th June, 1872, and 3d March, 1873, also constitutional?

Second. The Western Union and other telegraph companies having accepted the terms of the act of 24th July, 1866, what are the rights of the United States and the obligations of the companies by virtue of the same?

I proceed to consider these questions in their order.

The authority of Congress to pass the acts in question is under the provision in the eighth section of the first article of the Constitution of the United States, which gives to that body power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

These powers, like all others vested in Congress, unless they are expressly restricted by some other provision in the Constitution, or by their very nature, are unlimited in regard to the subject with which they deal. And it is equally true that they are intended to continue as long as the Government exists. This commercial clause was designed to avert the mischief resulting from conflicting commercial regulations by the several States. It is, we know, historically true that such regulations, more than any other one cause, led to the adoption of the Constitution. Indeed, the peace and prosperity of the States demanded that legislation upon the subject should be made impossible. The end for which the power was vested in Congress, it was evident, could not be accomplished by the States. Their jurisdiction extended only over their respective limits. No regulation made by them separately could exceed those limits. Commerce, therefore, with foreign nations and among the several States, could only be regulated by a power possessing general jurisdiction. The theory of the Constitution—and all the powers with which Congress is clothed are in accordance with that theory—is that every power which could not be exercised by the States separately should be vested in Congress. The object of the Convention was to establish a government for a great nation, and was, of course, to repose in it every authority necessary to attain that result and to secure union and harmony at home as well as peace abroad. In relation to the powers so conferred, the Supreme Court has, over and over again, declared that they are to be construed as if there were no State governments. The constituency of the General Government are the people of the whole country—

the constituency of the State governments are the people of the States, respectively. In the language of Chief Justice Marshall in the case of *McCulloch vs. Maryland*, 4 Wheaton, 406, "If any proposition could command the universal assent of mankind, we might expect it would be this: that the Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the Government of all; its powers are delegated by all; it represents all and acts for all." Every power incidental to those expressly granted is as much granted as the expressly granted power. And every power not limited is intended to exist during the entire continuance of the Government. The design of the framers of the Constitution was that it should be for all time, unless it should be constitutionally modified. Nor, in the exercise of the incidental powers which Congress possesses, are they limited to the use of the means known to exist at the date of the Constitution. Whatever means, therefore, may at any time, through experience, or by the discoveries of science, or in any other way, be found out, may be resorted to. To apply these remarks to the subject before me: The matters to be regulated are, first, Foreign commerce; second, Commerce among the States; and third, Commerce among the Indian tribes. Whatever powers are incidental to the regulation of the first, are equally incidental to the regulation of the second and third. This seems to me to be obvious. The term is found in the same section and in the same clause of the Constitution. Whatever, therefore, is commerce among the States may be regulated by Congress, as well as whatever is commerce with foreign nations. What, then, is commerce, as the term is here used? Is it traffic alone, or is it not also intercourse, and the means by which traffic and intercourse may be carried on? If any doubt existed upon such a point, it was removed by the decision of the Supreme Court of the United States in the case of *Gibbons vs. Ogden*, 9 Wheaton, 1. In that case the Court said that "Commerce undoubtedly is traffic, but it is something more—it is intercourse;" and also said, "all America understands, and has uniformly understood, the word commerce to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed." Whether the power be exclusively vested in the United States, or remains for any purpose in the States, is a proposition which I need not examine. It is, however, I think, clear from the opinion from which I have quoted that the judges who decided that case thought that the power was exclusive. Subsequent decisions of the same tribunal, or rather the opinions of some of the judges, leave this point in doubt. But there has been a uniform concurrence of views upon this point—that where, under the authority of the commercial clause, Congress has regulated to any extent commerce with foreign nations or among the several States, such regulation displaces all existing similar or inconsistent State regulations, and prohibits their adoption as long as the Congressional legislation remains.

Whatever, therefore, is a regulation by Congress, and tends to accomplish the end for which the power was given, must be constitutional. No authority claimed under a State, in conflict with it, has any validity. Nothing that a State can do, by legislation or otherwise, can in the slightest degree limit the power. In the case already quoted, as well as in the case of *McCulloch vs. Maryland*, 4 Wheaton, it was held that the question, what means Congress can resort to to accomplish the purpose of any granted power, is a matter entirely within its discretion. The language of the Court in the latter case, page 421, is, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to

that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional." This discretion belonging to Congress, the manner of exercising it is for them to decide. The object of the act of 24th July, 1866, as declared in its title, is to secure to the Government the use of telegraph lines "for postal, military, and other purposes." The power to establish post offices and post roads, and to declare war, to raise armies and provide navies, was expressly vested in Congress. Whatever, therefore, could aid in any way the work of the Army or the Navy or the postal service is within the discretionary power of Congress. That the telegraph will assist in accomplishing these results is clear. In time of war or of threatened war rapid communication between the Government and the Army may be all-important. And so in relation to the mails and the Navy. It may be vital that a fleet or a ship should sail on a certain day; that any impediments, by violence or otherwise, to the transmission of the mails may be removed at the earliest period, and this can be best accomplished through the means of information furnished by the telegraph. The operation, too, of the Signal Service, the beneficial use of which is now so universally acknowledged, cannot be accomplished by any other mode than by telegraph. Its beneficial use depends upon the receipt in Washington of information of the state of the weather in every part of the country. This information enables the Bureau to predict from day to day, with reasonable precision, the state of the weather for the next twenty-four hours. This scientific prediction may be most important to the commercial as well as to the naval marine of the country. When may a fleet or ship sail with a reasonable hope that they will encounter no extraordinary peril from the winds and waves? and when may they expect such perils? This knowledge can only be distributed throughout our ports by telegraph operated by the Bureau, or controlled by it so far as its dispatches are concerned. That the assistance of the telegraph is indispensable to these objects is obvious, and it is equally obvious that the mode in which this assistance is to be rendered should be placed in the hands and under the exclusive control of the Government. This is the purpose of the act of 1866 and the subsequent acts. Their constitutionality, therefore, in my judgment, is free of all reasonable doubt.

The next question under this head is: Can the United States themselves lay a telegraph line along the several railroads for their own use? To give them the power to communicate by telegraph and deny them the right to establish a telegraph line seems to me to be simply absurd. That the railroads in the country have been constructed for the most part under the authority of State charters in no manner affects the question. If the United States would have had the authority, as I think they clearly would, to construct telegraph lines over the sites occupied by the railroads, they cannot be deprived of the right to establish such lines over or along the railroads, if, by so doing, they in no way injure the working of the roads. Upon the whole, then, in reference to the question submitted to me, I am of opinion that the acts referred to of 24th July, 1866, 10th June, 1872, and 3d March, 1873, are constitutional.

Second. The Western Union and other telegraph companies having accepted the terms of the act of the 24th July, 1866, what are the rights of the United States and the obligations of the companies? The act in question conferred great privileges upon the companies. It authorized them to construct their lines through the Territories of the United States, and granted them valuable portions of the same. The rights secured to the United States are: that the telegrams of every department of the Government shall have priority over all other business, and the rates for such transmission are to be annually fixed by the Postmaster General.

What those rates are to be is submitted to his sole judgment. The object of the act was to give to the United States the authority to use the lines generally. No limitation of the time within which such right is to be exercised is provided for. Day or night, and at any period of the day or night, the right may be exerted. Any restriction upon it might be prejudicial to the interests of the Government, and cannot, therefore, be supposed to have been intended. It may be all-important to send communications to the different branches of the Army, wherever they may be, at an instant's notice; and so in relation to the Navy. To give to the companies the authority to say when such communications shall be forwarded would be to submit to them the interests of the Government. This could never have been designed.

And upon no rule of interpretation can the act be so construed. That the companies must have, if this right is in the United States, operators at their several stations, day and night, ready to receive and transmit all Governmental dispatches that may be handed in, is within the general terms of the contract; nor is the inconvenience to the companies occasioned by this obligation greater than that which is occasioned the officers of the Government. In the Signal Bureau some one of the operators must be on hand at all times during the twenty-four hours to receive or transmit all dispatches necessary to accomplish the objects of the Bureau. The sentinels in the Army are to be posted day and night. The same is true of the watches in the naval and commercial marine. It is no answer, therefore, to the rights claimed by the United States that its enjoyment of them will cause trouble to the agents of the companies. It is a trouble, if trouble it be, which the companies have agreed to assume, and a trouble, too, which at times may be vitally important to the true interests of the Government. And for this trouble the companies have been well compensated. The privileges granted to them, and the property secured to them, are of great value, and may in truth be said to be essential to their welfare. I am, consequently, of opinion that the Government has a right at all times, day or night, to have their messages transmitted by the companies who have assented or may assent to the act of 24th July, 1866. I am also of opinion that the Government has a right to drop their telegrams at all intermediate stations between the place from which they are sent and the place of their ultimate destination. The right to transmit involves the right to drop, as the dropping is a practice well known and used in the transmission of telegrams.

I understand that the Western Union Company has been advised that the rights of the Government and their own are secured by the contract growing out of the act of 1866, and that the same cannot be repealed or modified by the United States. Although the United States have not attempted to exercise such a right, and the question is not before me, yet I deem it due to the subject to say that the idea is founded upon a misapprehension of the Constitution.

The 10th section of its first article provides that "no State shall pass any law impairing the obligation of contracts." But this restriction, by its very terms, applies only to State legislation. What Congress may do, and is authorized to do, rests upon grounds irrespective of this provision. That such is the correct view, several judges of the Supreme Court of the United States have more than once declared in official opinions, and I am not aware that any judge of that tribunal has ever expressed a different view. The only limitation upon the power of Congress is to be found in the 5th constitutional amendment, which declares that "private property" shall not "be taken for public use without just compensation." But what is proposed by the Government in this instance is not to exercise the right of eminent domain by appropriating

private property for its own use, but to insist that the companies shall comply with their engagements entered into under the authority of the act of July 24, 1863, and for which they have been fully compensated. But conceding, for argument sake, that there is a contract between the Government and the companies who assented to the act of 1866, and that the same is protected by the constitutional clause first referred to, it is still evident that the same will not be in any way impaired by the Government not sending their dispatches through those companies, or by constructing a telegraph line for itself. As to the first, the Government has not agreed to send their telegrams by the companies. They have only reserved the right to do so. They may, therefore, not send any, or only a portion, of their dispatches, as they may think best.

Secondly. By constructing a line for itself, running near or in juxtaposition with the existing lines, they will not violate any such supposed contract. The States may authorize competing railroads, or canals, or bridges. The question of the right in the latter instance was decided in favor of the right by the Supreme Court of the United States in the case of the Charles River Bridge vs. Warren Bridge, 11 Peters, 536. If a State has the authority here adjudged, *a fortiori* have the United States. I am, therefore, clearly of the opinion that the Government may construct a line of its own, and transmit all messages which it may have occasion to transmit, and that the same will, in no respect whatever, interfere with any right of the existing companies.

I remain, with regard, your obedient servant,

REVERDY JOHNSON,
Assistant Attorney General.

BY ORDER OF THE SECRETARY OF WAR:

E. D. TOWNSEND,
Adjutant General.

OFFICIAL:

Assistant Adjutant General.