[Samuel Young] to James Kent, c11 November 1814

To the Honorable JAMES KENT, *Esq. Chancellor of the State of New-York*.

SIR,

I HAVE recently observed in the Albany Gazette, your objections, as a member of the Council of Revision, to several of the laws passed at the last session of the Legislature. Understanding that the laws, to which you have objected with so much zeal and sensibility, passed the Senate with the approbation of about three-fourths of the members, and the House of Assembly with nearly two-thirds, and that they received the sanction of every member of the Council of Revision, yourself excepted; I have been led into a careful examination of the principles they contain, and of the reasons upon which your objections are founded.

The extraordinary circumstance of the publication of your objections in a newspaper, authorises an exposure of your errors through the same public medium, if errors you have committed. Had your official labors been confined to their proper repository, the pages of the Council book, I should have deemed that man a saucy intruder, who should have presumed to attract your attention, or disturb your repose by any comments upon them.— But when published to the world by your request, or with your knowledge and approbation; when they thus travel out of the record, they lose their official privilege, become public property, and like the newspaper productions of other men, are the fair subject of remark, of criticism or animadversion. The editors of the Gazette, are your political as well as personal admirers. They too highly appreciate the value of your friendship, to have hazarded its forfeiture by a surreptitious publication. The conclusion is inevitable.

In the remarks which I propose to address to you, I shall maintain a "decent respect" for your official dignity. A Chancellor of the state of New York, is *ex officio* entitled to deference. So strongly do I maintain this opinion, that should it ever happen *in rerum ricissitudone* that an individual whose whole soul was under the dominion of party spirit, who was habitually splenetic and fretful the slave of whim and caprice: who maintained no dignity of character or consistency of conduct: I say, should I live to see such an individual clothed with your official functions and Chancellor of the

State, I would nevertheless treat him with becoming reverence.

The first bill to which you have objected is entitled "An act to encourage privateering associations." This act authorise individuals to associate for the purpose of privateering; necessarily leaving them to comply with the laws of Congress, by which, among other things, they are bound to give bonds in heavy penalties, which become forfeit in case of mal-conduct. The laws of Congress are amply sufficient to prevent or to punish all abuses in privateering: and as the act to which you object gives no other encouragement to privateering than by merely facilitating the formation of associations for that purpose, or, in other words, as its only end and design, is simply to multiply the number of privateers: every fair and reasonable objection to the act is involved in the question, Is privateering immoral or inconsistent with the law of nations? You will readily perceive that the whole controversy is necessarily involved in the *practice* of privateering, and not the *extent* to which that practice may be carried. For it would be an insult to your understanding to suppose that you would gravely decide that it was lawful and proper for our citizens to fit out one hundred privateers, and unlawful and improper for them to fit out one hundred and ten, or any other number.— But as your 2d and 3d objections seem to contemplate difficulties, other than the mere multiplication of privateers, I will attempt in the first place to dispose of those objections, leaving the 1st to be last considered.

I humbly conceive that your second objection to the bill, "Because it is an unnecessary interference with the power of Congress 'to grant letters of marque and reprisal, and to make rules concerning captures on land and water,'" is a *felo de se*: For if Congress have the power "to grant letters of marque," &c. and have exercised that power by enacting laws on the subject, as you admit, it will follow, that those laws are paramount authority, and that no act of any state can have any "interference" with them. Such an act would be perfectly inoperative. No power which is delegated to the general government can be exercised by an individual state, so as to produce an "interference" or clashing of authority. By any state may lawfully make laws, in aid of the general government, and which are calculated to strengthen the national arm. For instance, there is a law of Congress authorising the enlistment of troops; and it would, I apprehend, be not only lawful but praiseworthy for any state to pass laws calculated to promote and encourage enlistments. If, however, any state, on the contrary, should enact that every individual who enlisted should be fined one thousand dollars, or suffer any other disability; such law would

be pronounced by every reasonable man, unconstitutional and void. It follows as a necessary consequence that your language, when you declare that "If one state may encourage, the practice (of privateering) by rewards, another state may equally discourage it by disabilities," is, (to speak with all possible decorum) unconstitutional.

The objection that "the effect of an incorporation is to weaken or destroy individual responsibility," is, in my opinion, equally without foundation. If the law of Congress which regulates privateering, recognizes an association of individuals as a corporate body, then your objection is nugatory, for the law of this state does nothing more; but if, as you know is the fact, the law of Congress does not regard any association of individuals for privateering purposes as a body corporate, but requires of them in all cases, security in their individual capacities, I would ask what protection, calculated "to lessen the sense of legal obligation to good behaviour," can a charter of this state afford? The answer is, none.

But the law is calculated, I admit, to multiply the number of privateers, by giving facility to the organization of privateering associations. This admission brings me back to your 1st objection, and to the discussion of the question, Is privateering immoral or inconsistent with the law of nations? You object, "1st. Because privateering is merely tolerated, and is not approved of either by the maxims of public law, or the opinions of enlightened jurists." You have not given the names of those writers on public law, or those enlightened jurists, by whom the practice of privateering is not approved. I can find nothing in Grotius or Puffendorf, or Barbeycae, or Montesquieu, or in the more modern and approved Vattel, to warrant your inference. As Vattel's Law of Nations is a book of the highest authority, I shall take the liberty of calling your attention to a few passages of that celebrated author. In B. S. C. 8. S. 138. he tells us that a just war "gives the right of doing against the enemy whatever is necessary for weakening him; for disabling him from making any farther resistance in support of his injustice; and the most effectual, the most proper methods may be chosen, provided they have nothing odious, be not unlawful in themselves, or exploded by the law of nature." From your silence on the subject I infer your assent to the justice of the war in which our country is engaged. But permit me again to call your attention to Vattel. In the next section he informs us that in pursuance of the principle of weakening the enemy, we have a right to take away his life in battle. Now, sir, I should humbly conceive, that if in order to weaken the enemy is it lawful to take away his life, *a fortiori* is it lawful to effect the same

object by privateering on his commerce. But let us attend again to the author above quoted. In sec. 142d of the same chapter, he tells us that if an enemy commits enormities, or carries on the war contrary to the law of nations, we have a right to make use of what he calls "a kind of retortion, practised in war under the name of reprisals." To illustrate this principle, he states, that "If a general of the enemy has, without any just reason, caused some prisoners to be hanged, a like number of his men and of the same rank, will be hung up, signifying to him that his retaliation will be continued for obliging him to observe the laws of war." Admitting then for a moment that the destruction of the enemy's commerce by privateering is "odious, and against the law of nature;" yet it is known to you that Great Britain privateers upon us; we have a right, therefore, says Vattel, to retort the injury, in order "to oblige her to observe the laws of war:"

The enormities already committed by the enemy, his full communion with the merciless savage in the work of death, the destruction of our public buildings at the seat of government, and the barbarous threat to law waste and destroy all our assailable cities and districts would fully justify us, in "the opinion of enlightened jurists," in prosecuting the war with the most vindictive severity. How fastidious then, is that morality which inculcates the doctrine that privateering ought not to be encouraged! My intellects are too obtuse, to perceive more than a shade of difference between the consequences of such morality and the most abject submission to the will of G. Britain. The destruction of our capitol alone, would justify us, had we the power, in putting a fire brand into the heart of the enemy's metropolis. See in what terms of reprobation Vattel speaks on this subject. R. S. C. 9 S. 167-8. "The French in the last century ravaged and burnt the palatinate. All Europe resounded with invectives and reproaches on this matter of making war. The court vainly covered it with the design of securing its frontiers. This was an end which could be little answered by laying waste the palatinate. It was well known to be the revenge and cruelty of a haughty and implacable minister. For whatever cause a country be ravaged, the enemy ought to spare those edifices which do honour to human society, and do not contribute to the enemy's power; such as temples, tombs, public buildings, and all works of a remarkable beauty. What advantage is obtained by destroying them? He who acts thus declares himself an enemy to mankind, wantonly depriving them of these monuments of art and models of taste. This is the light in which Bellisarius represented it to Tottila, king of the Goths. We still detest those barbarians for destroying so many wonders of art, when they overran the Roman Empire," Thus you see, that the British, by their ravages,

and particularly by their destruction of our "public buildings," have declared themselves to be *hostis humani generis,* "an enemy to mankind." Shall it be said then, that against such a nation, in such a war, privateering ought not be encouraged? I confess that my feelings revolt at a principle which is calculated to paralize or limit any of our legitimate means of annoying the enemy.

But, sir, you tell us that by the treaty between the United States and Russia, ratified by Congress in 1785, privateering was totally prohibited to either party when at war with the other. From these premises my conclusion would be exactly the reverse of yours. If privateering had not been considered by the contracting parties, as sanctioned by the law of nations, and as a legitimate mode of warfare, a clause for its prevention would not have been inserted. The offer, by either party, to have introduced a clause, which should have prohibited the violation of the law of nations, for instance, the murder of prisoners, would have been a direct insult to the other. Such a proposition would necessarily impute to the nation, to whom it was made, a disposition, in time of war, to disregard the maxims of public law.

But no prohibition against privateering was contained in our treaty with Great Britain.— Doating on her vast naval strength, she never would have assented to the insertion of a clause, calculated to circumscribe her maritime operations. With her thousand ships of war, and a host of privateers, she is now preying upon our commerce, plundering and butchering our citizens, and laying waste with fire and sword our towns and villages: and yet we are gravely told that privateering against her ought not to be encouraged!

Although you contend it ought not to be encouraged, yet you say, that "privateering is merely tolerated." I know not how to understand this expression, unless it means that privateering is a neuter in morality, a mode of warfare perfectly indifferent, and neither right nor wrong. That the morality or immorality of such as extensive mode of warfare, should have remained for centuries *in abeyance, in nubibus, in gremio legis,* and not have been settled by "enlightened jurists," is, in my humble opinion, a solecism in ethics.— But, sir, this is not the case. And when you state that "privateering is not approved of, either by the maxims of public law, or the opinions of enlightened jurists," you are totally incorrect. I know that the *onus probandi* rests upon me, when I thus join issue with the Chancellor of the State. To whom then shall I appeal as a witness? You will readily answer that Vattel is the most orthodox, the most humane, and the most approved writer on public law. To him I submit: and in the whole of his profound and elaborate treatise not one syllable is to be found

which warrants the inference that he does not approve of privateering. But on the other hand he bestows upon it the most express and unequivocal approbation. In B. 3. C. 15. S. 129. he says, "Subjects are not obliged scrupulously to weigh the justice of the war, which indeed they are not always able to obtain a just knowledge of; and in case of doubt, they are to rely on the sovereign's judgment; there is no doubt but they may with a safe conscience serve their country by fitting out privateers, unless the war be evidently unjust."

On this subject I shall say no more; but leave you in the hands of Vattel. If you can extricate yourself from the dilemma in which you are placed I shall be content; if not, mine is not the fault.

On your objections to other laws, I shall beg leave again to address you.

JURIS CONSULTUS.

Document Information
Date:
11 November 1814
Object Type:
Correspondence
Author:
Samuel Young
Recipient:
James Kent
Keywords:
Privateering