

# The Sunday Mails

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**P**RESIDENT JEFFERSON consistently refused congressional pleas to declare days of thanksgiving or prayer, privately citing both the establishment clause and the limited enumeration of federal powers.<sup>1</sup> President Madison proclaimed such occasions whenever he was asked,<sup>2</sup> though he later attempted to minimize his actions<sup>3</sup> and ultimately seemed to disavow them entirely. “Altho’ recommendations only,” he wrote in an undated memorandum some time after returning to private life, Thanksgiving proclamations “imply a religious agency, making no part of the trust delegated to political rulers.”<sup>4</sup>

That, however, was after Madison left the Presidency. In November 1814, responding to a congressional request that he recommend a “day of public humiliation and fasting and of prayer to Almighty God for the safety and welfare of these States, His blessing on their arms, and a speedy restoration of peace,” President Madison in a proclamation redolent with religious sentiment invited his fellow citizens to join in a special day of gratitude, repentance, and prayer.<sup>5</sup> Two days before that day arrived South Carolina Congressman Samuel Farrow adjured the House to build upon this tradition by putting a stop to the

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- 1 See Jefferson to Rev. Samuel Miller, Jan 23, 1808, in Paul Leicester Ford, ed, 11 *The Writings of Thomas Jefferson* 7-8 (1897).
- 2 E.g., James D. Richardson, 1 *A Compilation of the Messages and Papers of the Presidents* 513, 532, 560 (US Congress, 1900) [hereafter cited as Richardson]. Richardson reveals no comparable proclamations by either Monroe or John Quincy Adams.
- 3 Madison to Edward Livingston, Jul 10, 1822, in Gaillard Hunt, ed, 9 *The Writings of James Madison* 98, 101 (Putnam, 1908).
- 4 See Elizabeth Fleet, Madison’s “Detached Memoranda,” 3 *Wm & Mary Q* (3d Series) 534, 560 (1946). See also Irving Brant, *James Madison: Commander in Chief* 28, 198 (Bobbs-Merrill, 1961).
- 5 1 Richardson at 558.

“unnecessary, inadmissible and wicked” practice of transporting and opening mail on Sunday. His reasons were frankly spiritual:

You have set apart the day after to-morrow to be spent throughout the nation in prayer. By your laws, ... you command many thousands of citizens ... to be laboriously employed each and every hour of the next Sabbath, and to spend every Sabbath in the year in the same way. It appears to me that you might as well suspend either the one practice or the other, (stop praying or violating the Sabbath), unless you are of the opinion that by those laws and rules you have enacted, you have the power to repeal that decretal order of Heaven that commands you “to keep holy the Sabbath day.”<sup>6</sup>

Representative Kilbourn reported that some had branded this initiative “an attempt to blend the affairs of Church and State.”<sup>7</sup> Solicited for his opinion, Postmaster General Return Meigs argued that, especially in wartime, “the nation must sometimes operate by a few of its agents, even on the Sabbath.”<sup>8</sup> The House voted nearly two to one that it was “inexpedient” to alter the existing practice.<sup>9</sup>

Renewing the proposal after the wartime emergency was past, New York Representative James Tallmadge invoked worldly as well as spiritual concerns in its favor. “It had for its basis the unequivocal command of the Supreme legislator,” he said, “and it was fraught with blessings to mankind.” For

[t]he cessation of labor through one day out of seven, serves greatly to relieve and refresh both man and beast, and thus to fit them more effectually to perform the duties of the ensuing week.<sup>10</sup>

The Postmaster General insisted it was still necessary to transport the mail on Sunday.<sup>11</sup> A House committee offered an olive branch: There was no such need for Sunday *delivery* once the mail reached its destination, and the law should be amended accordingly. The committee handsomely added that while it agreed on “the importance of a religious observance of a Christian Sabbath” it was not for the United States to enforce it; the whole subject was committed to the states, “so far as the rights of conscience, and the provisions of their respective constitutions will permit.”<sup>12</sup>

Nothing was done, however; and when the matter was pressed again in 1829 the new Postmaster General, John McLean, stuck to his predecessor’s guns.<sup>13</sup> Richard M. Johnson of Kentucky spoke vigorously against the proposal in the Senate. Legislation forbidding Sunday mails would be improper, “as it would have a tendency to unite religious institutions with the Government”; the petitions Congress had received on the subject “were but the entering wedge of a scheme to make this Government a religious instead of a social and political institution.” It made no difference

6 28 Annals of Congress 1064-65 (Gales & Seaton, eds, 1834) [hereafter cited as Annals]. The best treatment of this little known debate is John G. West, Jr., *The Politics of Revelation and Reason*, ch 3 (Kansas, 1996).

7 28 Annals at 1075.

8 *Id.* at 1076-77.

9 *Id.* at 1146-47. Earlier efforts to invoke state Sunday laws against postal activities had foundered, not surprisingly, on the supremacy clause. See *Commonwealth v Knox*, 6 Mass 76, 78 (1811); Oliver W. Holmes, *Sunday Travel and Sunday Mails: A Question which Troubled our Forefathers*, 20 NY Hist 413, 413-15 (1939). See also 2 Stat 592, 595, § 7 (Apr 30, 1810) (making it a federal offense to obstruct the mails).

10 29 Annals at 1123.

11 30 Annals at 1046-47.

12 *Id.* at 1048-49.

13 5 Register of Debates in Congress, App 26-27 (Gales & Seaton, eds, 1829) [hereafter cited as Cong Deb].

which day of the week Congress was asked to set apart; “the principle was wrong,” for “they were asked to legislate on religious grounds” – not simply to establish a day of rest, but to enforce “the law of God.”<sup>14</sup> Johnson’s committee report was a major manifesto in support of the separation of church and state:

That some respite is required from the ordinary vocations of life, is an established principle, sanctioned by the usages of all nations, whether Christian or Pagan. One day in seven has also been determined upon as the proportion of time; and in conformity with the wishes of the great majority of citizens in this country, the first day of the week, commonly called Sunday, has been set apart to that object. The principle has received the sanction of the National Legislature, so far as to admit a suspension of all public business on that day, except in cases of absolute necessity, or great public utility. ... It should, however, be kept in mind, that the proper object of government is to protect all persons in the enjoyment of their religious as well as civil rights; and not to determine for any whether they shall esteem one day above another, or esteem all days alike holy.

We are aware that a variety of sentiment exists among the good citizens of this nation on the subject of the Sabbath day; and our Government is designed for the protection of one as much as for another. The Jews, who, in this country, are as free as Christians, and entitled to the same protection from our laws, ... pay religious homage to the seventh day of the week, which we call Saturday. ...

The transportation of the mail on the first day of the week, it is believed, does not interfere with the rights of conscience. The petitioners for its discontinuance appear to be actuated from a religious zeal, which may be commendable if confined to its proper sphere; but they assume a position better suited to an ecclesias-

tical than to a civil institution. They appear, in many instances, to lay it down as an axiom, that the practice is a violation of the law of God. Should Congress, in their legislative capacity, adopt the sentiment, it would establish the principle, that the Legislature is a proper tribunal to determine what are the laws of God. ... Among all the religious persecutions with which almost every page of modern history is stained, no victim ever suffered but for the violation of what government determined the law of God. To prevent a similar train of evils in this country, the constitution wisely withheld from our Government the power of defining the divine law. It is a right reserved to each citizen; and while he respects the rights of others, he cannot be held accountable to any human tribunal for his conclusions. ...

Under the present regulations of the Post Office Department, the rights of conscience are not invaded. Every agent enters voluntarily, and, it is presumed, conscientiously, into the exercise of his duties, without intermeddling with the conscience of another. Post offices are so regulated as that but a small proportion of the first day of the week is required to be occupied in official business. ... While the mail is transported on Saturday, the Jew and the Sabbatarian may abstain from any agency in carrying it, from conscientious scruples. While it is transported on the first day of the week, another class may abstain, from the same religious scruples. The obligation of government is the same to both of these classes; and the Committee can discover no principle on which the claims of one should be more respected than those of the other. ...

It is the opinion of the Committee, that the subject should be regarded simply as a question of expediency, irrespective of its religious bearing. ...<sup>15</sup>

It was; the Senate squelched yet another proposal to stop the Sunday mails.<sup>16</sup>

<sup>14</sup> 5 Cong Deb at 42-43.

<sup>15</sup> Id at App 24-25; American State Papers (Post Office) 211-12 (Gales & Seaton, 1832) [hereafter cited as Am St P].

<sup>16</sup> 5 Cong Deb at 43. The following year Johnson, now in the House, filed a second report against a renewal of the proposal, finding in the Constitution no grant of authority to “determine what part of time, or whether any, has been set apart by the Almighty for religious exercises.” Id at 229 (Mar 4 & 5, 1830).



It's all there, isn't it? – the whole modern understanding of the establishment clause. The state may accommodate religious needs of its citizens without running afoul of the Constitution;<sup>17</sup> the fact that legal prohibitions coincide with spiritual ones does not prevent the state from adopting them for legitimate secular reasons;<sup>18</sup> it is not the business of government to take sides in religious disputes or to promote religion as such.<sup>19</sup> Above all Johnson's amazing report, along with the actions of Presidents Jefferson and Madison,<sup>20</sup> illustrates beyond peradventure that the notion that the establishment clause does more than prevent erection of a national church is no modern heresy; it enjoyed powerful support in the Senate in 1829.

As Johnson's report reveals, opponents of the Sunday mails did not confine themselves to the argument that Congress should enforce their understanding of divine law. They also contended, with more plausibility, that existing law abridged the religious freedom of postal employees. For a statute first enacted in 1810 expressly required every postmaster to keep his office open and staffed on every day on which mail might arrive and to deliver mail on demand "at all reasonable

hours, on every day of the week."<sup>21</sup> A contemporaneous House committee, agreeing that the mail should continue to be transported on Sunday, urged repeal of this provision on the ground that no law should require citizens "to perform certain duties on the Sabbath, which they conscientiously believe to be morally wrong."<sup>22</sup> Representative McCreery, dissenting from a second report filed by Johnson in 1830 in the House,<sup>23</sup> likewise argued that the offending provision "either drives every man who feels himself morally bound to observe the Sabbath in a religious manner from the service of his country, ... or subjects him to the hard terms of remaining in office at the expense of his principles."<sup>24</sup>

Johnson's answer that the postal agent "enters voluntarily ... into the exercise of his duties" (quoted in the text just above) overlooked the doctrine of unconstitutional conditions, which had been recognized in substance from the beginning.<sup>25</sup> If the law really put postal workers to the choice between their religion and their job, it raised the still vexing question whether the first amendment entitled the religious to exemptions from generally applicable laws.<sup>26</sup> If Johnson was right that postmen with religious objections were not required to

17 *Corporation of Presiding Bishop v Amos*, 483 US 327 (1987).

18 *McGowan v Maryland*, 366 US 420 (1961).

19 *Engel v Vitale*, 370 US 421 (1962); *Stone v Graham*, 449 US 39 (1980).

20 I shall have more to say about religion and Presidents Jefferson and Madison in a forthcoming issue of the *Green Bag*. See David P. Currie, *God and Cæsar and President Madison*, 3 *Green Bag* 2d (forthcoming Autumn 1999).

21 2 Stat 592, 595, § 9 (Apr 30, 1810); 3 Stat 102, 105, § 11 (Mar 3, 1825).

22 See Am St P (Post Office) at 212, 213.

23 See note 16.

24 Am St P (Post Office) at 231. See also 6A Cong Deb at App 1 (Sen Frelinghuysen); West, *The Politics of Revelation and Reason* 143-44, 158 (cited in note 6): "[F]ederal law effectively nullified the right of postal workers to follow their individual scruples ... ."

25 See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801* at 62 (Chicago, 1997).

26 Compare *Wisconsin v Yoder*, 406 US 205 (1972), with *Employment Div v Smith*, 494 US 872 (1990).

work on their Sabbath, however, the objection loses most of its force.<sup>27</sup>

I shall have a few harsh words for Mr. Johnson in another context,<sup>28</sup> but he outdid himself on this occasion. There are times when one feels proud to be an American. *GB*

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27 In 1912 Congress decreed that “post offices of the first and second classes shall not be open on Sundays for the purposes of delivering mail to the general public, but this provision shall not prevent the prompt delivery of special delivery mail.” 37 Stat 539, 543 (Aug 24, 1912).

28 In addition to his concern to preserve first amendment values, Johnson was a major Court-basher who sought, among other things, to require an extraordinary majority of the Justices to invalidate state or federal laws. See 41 Annals at 28.