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Washington Was Right: The Supreme Court Could Have Intervened to Interpret French Treaties

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In 1793, the nascent United States was gripped by an international crisis which threatened its very existence. Overseas, revolutionaries had beheaded Louis XVI and declared France to be a republic, and the perennial bellicosity between England and France had flared up once more. Convinced that the United States was too vulnerable to enter another war, President Washington issued the Neutrality Proclamation requiring “a conduct friendly and impartial towards the belligerent powers.” At home, newly minted French ambassador Edouard “Citizen” Genet was traveling the countryside stirring up pro-French sentiments and demanding that the United States honor its treaty obligations with France. With his cabinet hopelessly fractured on the effect of the intersection of the continued viability of the treaties after the revolution in France and the Neutrality Proclamation, Washington resolved to consult the Justices of the Supreme Court for guidance.

In total, Washington submitted some twenty-nine questions for the Court to consider. On August 8, 1793, the Court sent a letter to President Washington declining to answer any questions on the matter. The letter, in the handwriting of Chief Justice Jay, asserted three reasons for declining to deliver an opinion: the principle of separation of powers, the Supreme Court being a court of last resort, and the fact that the Constitution grants the President the power

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1 Flexner, p. 284.
2 The two treaties were signed at the end of the Revolutionary War. In the first treaty – the Treaty of Alliance – America agreed to protect the French West Indies from attack when called upon to do so. The second treaty – called the Commercial Treaty – allowed French privateers the exclusive use of American ports to bring and sell prizes of war. Flexner, p. 281.
3 Jay, p. 134
4 Ibid. p. 136. The questions ranged from issues such as the legality of France using American ports to arm ships and sell war prizes, the ability of the United States to sell ships to the belligerent, and whether the principle that “free bottoms make free goods” is part of the law of nations. Interestingly, the editors of the Documentary History of the Supreme Court, there is no historical evidence that these specific questions were ever sent or received by the Justices. A search of the Jay papers indicates that the Chief Justice was asked simply whether the Court would answer any questions. See id. at 136-37; see also Jay Papers, # 8445 (July 20, 1793).
to call upon heads of departments only to render opinions. Fortunately for the new country, Washington was able to deftly steer America clear of the ongoing war, and he would later caution against “excessive partiality” towards a single ally.

If John Jay was correct that the Constitution forbids the members of the Supreme Court from giving advice to the other branches of government why did George Washington – the president of the Convention – think that they indeed had the power? Most law students are well versed in the notion of judicial independence and would almost reflexively conclude that Jay was correct. What they do not realize – or are not taught – is that if Jay was correct, then for over two centuries the Justices of the Supreme Court have been violating the very Constitution they have sworn to uphold. This paper concludes that neither is correct. The first section will present the multitude of instances in American history where the Justices have given extrajudicial advice to the other branches. The second section will analyze the text and structure of the Constitution and conclude that it is indeed proper for the Court to render advisory opinions in certain limited circumstances.

‘mischievous and impolitic’

From their earliest days, Justices of the Supreme Court have served in other capacities while on the Court. In fact, fewer than nine months after so vehemently and publicly refusing to give advice to President Washington during the Neutrality Crisis, Chief Justice Jay was appointed Envoy Extraordinary of the United States to his Britannic Majesty. While in England, Jay would negotiate the treaty that bears his name with England. The questionable constitutionality of Jay’s appointment was not lost on the Senate. By a vote of 17-10, the Senate defeated a resolution which read:

5 Jay, p. 179.
7 Jay Papers, #4962 (April 19, 1794).
That to permit Judges of the Supreme Court to hold at the same time any other office or employment, emanating from and holden at the pleasure of the Executive, is contrary to the spirit of the Constitution, and, as tending to expose them to the influence of the Executive, is mischievous and impolitic.\(^8\)

Jay was no stranger to dual service within the Judicial and Executive branches: for nearly six months in 1789-1790, he had served as both Chief Justice and Secretary of State.\(^9\)

This dual office holding was not unique to Jay. In 1799, Chief Justice Oliver Ellsworth was appointed Envoy Extraordinary and Minister Plenipotentiary to France.\(^10\) In fact, he would spend his entire final year as Chief Justice in France. Even one of the most celebrated Justices in the history of the early Court managed to serve in both branches of government at the same time. When he was confirmed by the Senate, Chief Justice John Marshall was the sitting Secretary of State. He did not immediately resign his post. In fact, he remained the Secretary of State for an entire month after he took the bench.\(^11\) Unlike the furore caused by Jay’s nomination, the historical record does not appear to show that the Senate was equally dubious about Ellsworth’s or Marshall’s dual service.

The most famous 20th Century example of the multiple office holding of Justices is Justice Robert Jackson’s service in prosecuting Nazi war criminals in the wake of World War II. Jackson was appointed by President Truman to be the Chief Counsel of what would later become the Nuremberg trials.\(^12\) Like John Jay before him, Jackson’s appointment was challenged on constitutional grounds. A Senate Judiciary Committee cautioned that “the practice of using federal judges for non-judicial activities is undesirable” because it poses a “great danger of

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\(^9\)Jay’s nomination was confirmed by the Senate on September 26, 1789 and he remained the nation’s Secretary of State until March 21, 1790.


\(^11\)Marshall was confirmed by the Senate on May 13, 1799, took office on February 4, 1901, and resigned as Secretary of State on March 4, 1901.

working in diminution of the prestige of the judiciary” and it is a “deterrent to the proper functioning of the judicial branch.” Members of the Court serving with Jackson also questioned the propriety and constitutionality of Jackson’s extrajudicial service. Justice Douglass would later write that he “thought at the time [Jackson] accepted the job that it was a gross violation of separation of powers to put a Justice in charge of an executive function.” Chief Justice Stone also criticized Jackson’s service on much the same grounds.

Jackson was not the only Justice to accept extrajudicial service during World War II. Justice Murphy received a commission as Lieutenant Colonel to the U.S. Army Reserves in 1942. During Court recesses, he would train at Fort Benning. As with Jackson, members of the Court expressed disapproval of this dual service. Justice Frankfurter was so concerned that he persuaded Murphy to recuse himself from consideration of the famous Ex Parte Quirin case. Congress was not too keen on Murphy’s service either. Rehnquist describes “complaints from members of Congress as to the legality of Murphy’s holding two federal positions.”

Questions over the dual office holding of sitting Justices were not limited to extraordinary times of war. In 1984, Congress passed the Sentencing Reform Act which created an independent judicial commission to promulgate uniform sentencing guidelines. The Commission was comprised of seven members – including no fewer than three Federal judges – who were nominated by the President and confirmed by the Senate. Among these first judges was Judge – later Supreme Court Justice – Steven Breyer. The dubious constitutionality of the dual office holding of these Federal judges led to a Supreme Court case which abated the protests.

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17 Rehnquist, p. 235.
by holding that Congress did not improperly delegate the authority to promulgate sentence
guidelines to the judicial branch. 19

‘some notable exceptions’

Throughout the nation’s history, Supreme Court Justices have also been called upon to
conduct investigations and mediations. The first instance occurred in 1896 when Congress
formed the United States Commission on Boundary Between Venezuela and British Guiana.
President Cleveland appointed Justice David Brewer to chair the commission whose purpose was
to investigate and report upon the true divisional line between the Republic of Venezuela and
British Guiana. The commission concluded that no position could be taken without the input
from the two countries. 20

President Cleveland responded by dissolving the Commission once the three nations
executed the Treaty of Washington. The Treaty provided that each country would select two
judges and a fifth judge would be selected by agreement of the parties. In an unprecedented
move, Venezuela selected two United States Supreme Court Justices, Justice Brewer and Chief
Justice Melville Fuller to be its representatives at the arbitration. This represented the first (and
only) time in United States history where Justices of the Supreme Court were required to give
extrajudicial advice by and for a foreign power pursuant to the terms of a treaty.

The next stop in our saga is a return to the volatile World War II era. Like Jay and
Brewer, Justice Owen Roberts was called upon twice to give extrajudicial advice to the
Executive branch. The first instance came in the wake of the Japanese attack on Pearl Harbor.
Fewer than two weeks after the bombing, President Roosevelt signed an executive order to

20 The text of Brewer’s letter can be found at: http://www.guyanaca.com/features/trail_diplomacy_pt2.html#chap10.
establish a commission to investigate the attack.\(^{21}\) The commission’s mandate was determine whether any dereliction of duty contributed to the success of the attack, and who were responsible therefore.\(^{22}\) Roberts next was appointed to head the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas. The Commission’s purpose was to identify and protect works of art in Allied-occupied parts of Europe.\(^{23}\)

The propriety of Justices of the Court being appointed to Presidential commissions surfaced again following the tragic assassination of President John Kennedy. In an attempt to short-circuit the growing belief that an international conspiracy was involved, President Lyndon Johnson appointed Chief Justice Earl Warren to lead a Commission that would later bear his name.\(^{24}\) This time, the appropriateness of extrajudicial service to the Executive branch was questioned by Warren himself. In an interview following his retirement, Warren recalled initially declining President Johnson because “it does get you over into another department of government which is supposed to be separated.”\(^{25}\)

Warren’s acceptance of Johnson’s appointment was made more intriguing because he apparently understood and agreed with the historical and constitutional arguments against extrajudicial service. When asked, Warren said:

I think in years gone by there have been some notable exceptions of that in the history of the Court …. And Washington pointed the way, you know, with his very first year, when he asked the Court about the constitutionality of his treaty with England, I think, and the Court

\(^{21}\) President F. Roosevelt, Executive Order No. 8983 (Dec. 18, 1941), 6 F.R. 6569 (Dec. 20, 1941).
\(^{22}\) Id. As a historical matter, the Commission reported its findings to Congress on January 28, 1942. The Commission discovered that Adm. Husband Kimmel and Gen. Walter Short (the chief Navy and Army officers, respectively) knew that a surprise attack was planned, but they failed to take adequate precautions. See U.S. Congress. Senate Docs. 77th Cong., 2d sess., Jan. 28, 1942. p 10, available at: http://www.ibiblio.org/pha/pha/roberts/roberts.html.
\(^{23}\) The Second Roberts Commission Report is available at: http://www.lexisnexis.com/academic/2upa/lherc/robertsc_pf.asp
told him that they don’t give advisory opinions…. I think it’s wise under our system to be that way."26

While Warren’s history could have used a brush up – it was neither Washington’s first year in office nor did it concern a treaty with England – his recognition and approval of the restraint on the Justices is remarkable given his role in the Warren Commission.

The ‘Stolen’ Election: First Act

A familiar refrain following the 2000 election of George W. Bush was that the election was stolen. The argument proceeded something like this: questionable voting results were certified as accurate by the Republican Secretary of State, and as a court-ordered recount was about to take place, the partisan Supreme Court voted along party lines to stop the recount and “select” the President.27 The outcry from the academy was near universal: some 585-plus law professors signed an advertisement in the New York Times in order to “protest” the “[s]uppressing” of evidence that would prevent these “disturbing facts from being confirmed.”28 The broadside further accused the so-called “political partisans” from “taking power [away] from the voters.”29 What was surprisingly lost on the professorate was that this was not the first time that the Supreme Court had been accused of “selecting” the President after it had been called upon by the parties to decide the results of a contentious election.

The election of 1876 pitted Samuel Tilden of New York against Rutherford B. Hayes of Ohio. After all the votes were count, Tilden won the popular vote by a little over 250,000 votes and he appeared to lead in the Electoral College 196-173. When Congress convened to count the electoral votes, four states had submitted the votes of two different slates of electors. In Florida, after a recount had given Hayes a victory, the Democrats sent to the Senate an alternate slate of 26 Ibid. p. 5.
29 Ibid.
votes signed by the Democrat Attorney General. In nearby Louisiana, two slates were also sent to the Senate after an eight to nine thousand vote Tilden lead evaporated into just a three thousand vote Hayes victory. Parenthetically, the Democrat slate was signed by John McEnery who claimed to be the lawfully elected governor – even though he had been deposed after intervention of federal troops in 1874. In South Carolina, the state supreme court attempted to prevent the Board of Canvassers from certifying a Hayes victory by committing the canvassers to county jail. Lastly, in Oregon, Hayes was certified the winner, but Tilden’s representatives challenged a Republican elector on the grounds that because he was a deputy postmaster, he could not serve as an elector. Because the Democrat governor chose to replace the disqualified Republican elector with a Democrat, this resulted in one slate casting all three votes for Hayes and another casting two votes for Hayes and one for Tilden.

Article II of the Constitution prescribes the method for counting electoral votes. Specifically, section 1 of that Article provides that: “the President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the certificates, and the Votes shall then be counted.” At issue following the 1876 election was the question left unanswered by the text: who was to count the votes? The Democratic-controlled House appointed a committee to investigate the returns. The Republican-controlled Senate similarly appointed a committee to investigate the returns. Perhaps unsurprisingly, the House report concluded that Tilden was the victor; the Senate report concluded that Hayes had won.

30 Rehnquist, p. 105.
31 Rehnquist, p. 108.
32 He could not have served as an elector because Article II, section 1 of the Constitution provides that no “Person holding an Office of Trust or Profit under the United States shall be appointed an elector.” However, state law provided that if an elector was disqualified from serving, another elector could be selected by the voice vote of the other electors.
33 Rehnquist, p. 110.
34 Rehnquist, pp. 113-14.
Congress was at loggerheads to resolve this disputed election in a manner that would appear legitimate. Senate Republicans argued that the Constitution gave the President of the Senate the authority to count the votes.\footnote{Complicating the matter further was the fact that Vice-President Wilson had died in 1875, so the presiding officer of the Senate was now the president pro-tempore of the Senate, Michigan Senator Thomas Ferry.} House Democrats countered that the Constitution gives the power to the House to decide elections where no candidate has a majority of the electoral votes. After debating and defeating a proposed constitutional amendment which would allow the Supreme Court to decide the result, Congress passed the Electoral Commission Act of 1877. The Act provided for a fifteen member commission comprising of five members from each house (five Democrats from the House and five Republicans from the Senate) and five Justices of the Supreme Court consisting of the four most senior Justices and a fifth member of their choosing.\footnote{Electoral Commission Act, § 2, available at: http://www.yale.edu/lawweb/avalon/statutes/elect01.htm. Though the Congressional report couched the selection of the Justices in terms of their geographic variety, (“[t]he composition of the judicial part of the commission looks to a selection from different parts of the republic, while it is thought to be free from any preponderance of supposable bias”), it was well understood that Congress intended to appoint two Justices thought to be sympathetic to each side, and allow them to agree on an “independent” Justice to decide the election. Compare Harper’s Weekly, February 2, 1877, p. 82 (above quotation) with Rehnquist, pp. 118-19.}

The Electoral Commission Act gave unprecedented power to the Supreme Court to decide an election. Amid a storm of public controversy, Congress took the unusual step of trying to defend the constitutionality of the Act to the American public. In their report which was printed in full in Harper’s Weekly, the House and Senate committees promised that the Act was a valid exercise of the Congress’s “necessary and proper” power granted under Article I, section 8 of the Constitution. The Commission, the committee wrote, was constituted for the purpose of providing “a clear and lawful means of performing a great and necessary function of
government.” In the end, the Justices decided upon Justice Bradley, a Republican, who sided with his fellow Republicans and awarded the Presidency to Hayes.

The saga of the “Corrupt Bargain” election of 1876 has several effects on our present endeavor. First, it represents yet another instance where the Justices of the Supreme Court were called upon to give advice to another branch of government. In many respects, the advice given here was more problematic than Jay’s Treaty because the decision of the Commission was final, non-reviewable, and could only be reversed by a majority vote in both houses. A second relevant characteristic of this extrajudicial service by the Justices is rendered to the Legislative branch pursuant to a federal statute. Heretofore Justices had been only called upon by the Executive branch to provide advice.

On the constitutionality of extrajudicial service

Despite Jay’s argument to the contrary, we have seen that approximately ten percent of all Supreme Court Justices – including Jay himself – have given extrajudicial advice to other organs of government. We have seen that the Justices have accepted appointments to assist the both the Executive and Legislative branches as well as foreign governments. On several occasions, the constitutionality of the appointment was questioned by another branch of government, judicial colleagues, and even the members themselves. To recall, Jay stated three main reasons for refusing to assist Washington: the constitutional command that the President call solely on other executive branch officials for advice, the limited jurisdiction of the federal

38 The entire journal of the proceedings of the Electoral Commission can be found at: http://www.archive.org/stream/electoralcommission00presrich#page/n5/mode/2up.
39 Electoral Commission Act, supra note 19. A majority in both Houses was nearly impossible since each was controlled by a different party.
40 To date, there have been 112 Supreme Court Justices. This paper has identified fourteen Justices (Jay, Ellsworth, Marshall, Clifford, Field, Miller, Strong, Bradley, Fuller, Brewer, Roberts, Murphy, Jackson, Warren) who have served in an extrajudicial capacity.
courts, and the separation of powers doctrine. It is to the resolution of that nagging question that this paper now turns.

The text, structure and history of the Constitution and its ratification support the conclusion that the Supreme Court – either the full court or its individual Justices – may give advisory opinions to the other branches of government, but they cannot be required to do so. Jay makes this latter point clear in his letter to Washington when he argues that the Constitution only gives the President the power to call upon heads of departments to render opinions. Specifically, Article II, section 2 provides that the President:

[M]ay require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.

It is therefore clear that the text of the Constitution prevents the President from demanding or requiring that the Court or its members render extrajudicial advice.

The Constitutional history supports this plain meaning of Article II, section 2. During the Convention, delegates voted to send to a committee of five a provision that:

Each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions.\(^1\)

That this provision was considered on the floor of the convention lends credence to Jay’s assertion that the Constitution does not require Justices to give advice. Moreover, the final vote to include Article II, section 2 without a provision allowing the other branches from requiring opinions passed unanimously without reference to the missing language.\(^2\)

\(^{1}\) 1 Elliot’s Debates 249 (Aug. 20, 1787); 2 Farrand’s Records 241 (Pinckney).

\(^{2}\) Id. at 293 (Sept. 7, 1787). The unanimous vote came after an effort by George Mason to postpone consideration so that his plan of a Council of Review could be further debated. See 5 Elliot’s Debates 525 (Sept. 7, 1787).
Jay’s next contention is that the limited jurisdiction of the Court precludes the granting of advisory opinions. Specifically, he refers to “our being Judges of a court in the last Resort.”

The jurisdiction of the Court is controlled by Article III, section 2 of the Constitution. That section provides:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction.

Jay’s statement is factually incorrect: the Supreme Court is not always a court of last resort. In fact, a plausible reading of section 2 might actually have required the Jay Court to answer Washington’s questions at least in some form. Recall that the issue for Washington was a disagreement with a French Ambassador to the United States. The Ambassador was attempting to enforce two treaties that were signed with France which would have allowed the French to outfit their warships in American ports and grant privateering rights to American ships. Article III extends original Supreme Court jurisdiction to “all cases affecting Ambassadors” (emphasis added). Even if a letter-exchange was an improper form of a “case,” there was nothing preventing the Court from hearing the case against the French Ambassador in an official proceeding and making findings of fact which would settle many of Washington’s questions.

This textual reading of Article III is amply supported by the historical record. In Federalist 81, Publius/Hamilton wrote that Supreme Court shall have original jurisdiction over ambassadors because “out of respect to the sovereignties they represent … such questions should be submitted in the first instance to the highest judicatory of the nation.” This notion was also

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43 Jay, supra note 5.
44 Federalist No. 81 (Hamilton), p. 413 (G. Wills, ed.); see also Amar, p. 231 (“Trial in America’s highest court would also symbolize America’s supreme respect for foreign dignitaries.”). In the Judiciary Act of 1789, Congress provided concurrent jurisdiction for trials initiated by Ambassadors but reserved to the Supreme Court the exclusive original jurisdiction in suits against Ambassadors. This setup was affirmed by the Court in United States v. Ravara, 2 U.S. (Dall.) 297 (1793).
understood in the Virginia ratifying convention. There, delegate Edmund Pendleton remarked that this section “settles the original jurisdiction of the Supreme Court, confining it to two cases—that of ambassadors, ministers, and consuls, and those in which a state shall be a party.”

Similarly, in Pennsylvania, Constitution signer James Wilson described the Court’s original jurisdiction over ambassadors as “perfectly unexceptionable.”

From the text and history of Article III’s adoption, it appears quite possible that had President Washington initiated formal proceedings against Ambassador Genet in the Supreme Court, the Court would have been required to hear the case. Moreover, to the extent that relevant issues of treaty construction were raised by the questions submitted by Washington, the Court would have to rule on those as well because Article III, section 1 extends the federal judicial power to “all Cases, in Law and Equity, arising under … Treaties made, or which shall be made.” Also, initiating formal proceedings would also have the effect of taking this case out of the Article II limitation on whom the President could demand opinions from.

‘The Lines of Separation’

Having concluded that Jay was correct that the President could not compel the Court to deliver an advisory opinion, and assuming – though certainly not deciding – that the hypothetical case of United States v. Genet was not within the Court’s jurisdiction, the final reason cited by Jay that prevented the Court from giving advisory opinions is “[t]he Lines of Separation … their being in certain Respects checks on each other.” This is perhaps the most significant of Jay’s argument because it has severe implications: if the Constitution actually forbids Justices from agreeing to give advice, then each Justice highlighted above has violated the strict mandate of the

45 3 Elliot’s Debates 518 (June 18, 1788).
46 2 Elliot’s Debates 492 (Dec. 7, 1787).
47 Ibid.
Constitution. Fortunately for these Justices, the text and history of the Constitution contemplates a discretionary power of Justices to render extrajudicial advice.

A proper starting place is the text of the Constitution itself. Specifically, Article I, section 6 provides that:

No Senator or Representative shall, during the Time for which he was elected be appointed to any civil Office under the Authority of the United States … and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Under this section, a sitting legislator is barred from serving in either the executive or judicial branches. Conversely, members of the Executive and Judicial branch cannot simultaneously be a member of the Legislative branch. What is conspicuously missing from this section is a statement barring members of the judicial branch from simultaneously serving in the Executive branch.

The reason why the Constitution does not bar members of the judiciary from serving in the executive branch lies with the purpose of the section. According to one preeminent scholar, section 6 provided “anticorruption rules” designed to “prevent presidents from seducing congressmen with government sinecures.”

In other words, the executive was not able to “bribe individual legislators with double salaries or make-work jobs.” Similarly, a member of the judicial branch was barred from service in the legislature (and vice-versa) because the Constitution gives to the Congress the power to increase the salaries of the federal judiciary.

Under this scheme, a member of the judiciary can serve in the executive branch because the

48 Amar, p. 78.
49 Ibid. p. 182.
50 Article III, section 1 provides that: “The Judges … shall, at states Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” Thus, members of the federal judiciary are shielded from Congressional retribution in the form of a pay cut, though Congress can increase compensation at will. See Amar, p. 181.
executive branch neither directly controls the salaries of the judiciary, nor possesses the ability to remove members of the federal judiciary from office.\(^{51}\)

The history of the Constitution’s formation supports and confirms this idea that the Constitution does not – nor was it intended to – prevent members of the federal judiciary from serving in the executive branch. At the time of the Constitution’s drafting, the state constitutions of two New England states – Massachusetts and New Hampshire – required its supreme court to give advisory opinions to both the executive and judicial branches.\(^{52}\) Even in these states whose constitutions provided for advisory opinions, each had provisions in its constitution to require strict separation of powers.\(^{53}\) Though these two states were in a minority, the point is that the notion that service of a federal judge to the executive branch is antithetical to a government that requires separation of powers appears to be quite dubious. In fact, the only delegate from either Massachusetts or New Hampshire who opposed the signing of the Constitution in Philadelphia was Elbridge Gerry.\(^{54}\) Far from believing that the Court would wield less power than that of his home state, Gerry stated in a letter transmitting the proposed Constitution to the Massachusetts convention that, in his opinion, the judicial branch would be “oppressive.”\(^{55}\)

\(^{51}\) Article III, section 1 provides that “Judges … shall hold their Offices during good Behaviour.” Therefore, any federal judge can only be removed by Congress through the official judicial procedure known as impeachment. \(\text{See}\) Amar, p. 222.

\(^{52}\) \(\text{See}\) MA Const. Pt. 2, Ch. III, Art. II (“Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions); NH Const. Pt. 2, Art. 74 (“Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.”). For an interesting historical view on the history and practice of requesting advisory opinions, \(\text{see}\) Jonathan D. Persky, “Ghosts that Slay”: A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155 (2005).

\(^{53}\) \(\text{See}\) MA Const. Pt. 1, Art. XXX (“In the government of this commonwealth, … the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men”); NH Const. Pt. 1, Art. 37 (“In the government of this state, the three essential powers thereof … ought to be kept separate from, and independent of, each other….“).

\(^{54}\) Massachusetts delegate Caleb Strong was present at the federal Convention but was too ill to sign the document. In Massachusetts, he was a supporter of the Constitution during the state’s ratification convention.

\(^{55}\) MA Debates, p. 25.
The ratification debates shine some light on the contemporary understanding. In Pennsylvania, James Wilson, a drafter of the Constitution and later Supreme Court Justice, remarked that while:

[i]t is true that there is a provision made in the Constitution of Pennsylvania, that the judges shall not be allowed to hold any other office whatsoever … but this, sir, is not introduced as a principle into this Constitution.\(^{56}\)

Meanwhile, in New York, even Brutus, an ardent opponent of the Constitution, was forced to “admit” that “the maxim, that the legislative, executive and judicial departments in government should be kept distinct … cannot be perfectly preserved.”\(^{57}\)

Perhaps more instructive of the contemporary understanding surrounding the propriety of extrajudicial service and advice by members of the Court than the ratification debates is the actions of Congress. Recall that when Jay’s appointment as special envoy to England was up for confirmation by the Senate, a strongly worded resolution was proposed specifically to bar Supreme Court Justices from holding a position within the executive branch. The resolution referred to the practice of appointing Justices to serve at the request and pleasure of the executive is contrary only to “the spirit of the Constitution.” Never did the resolution allege the more egregious act of violating the text and plain meaning of the Constitution. The Senate defeated that motion by a vote of 17-10.

The defeat of the resolution by the Senate is prima facie evidence that the Constitution was neither intended nor understood to bar extrajudicial service by members of the Supreme Court. Of the ten Senators who favored the resolution, only six represented states which sent delegates to the Convention. The six supporters comprised both Senators from Jefferson’s pro-French Virginia (future President James Monroe and John Taylor) and both Senators from the

\(^{56}\) See supra note 46, at 514.

\(^{57}\) Storing, pp. 190-91.
final original state to ratify the convention, North Carolina (Benjamin Hawkins and Alexander Martin). The remaining two were New York’s Aaron Burr and South Carolina’s Pierce Butler, who had signed the Constitution in Philadelphia.

Those in opposition to the resolution represented a broad coalition of Senators from eleven of the original thirteen states. Among them were four members of the Convention and three other members who were present at state ratifying conventions. Even Connecticut Senator Oliver Ellsworth, who would later become Chief Justice of the Supreme Court, voted against the resolution. Following the defeat of the resolution, Jay’s confirmation passed 18-8 with Senator James Gunn of Georgia changing his vote and Senator Moses Robinson of Vermont abstaining.\textsuperscript{58}

Perhaps settling all debate, fewer than five years later when President John Adams nominated sitting Chief Justice Oliver Ellsworth to lead an American contingent to France to settle “all controversies” with that country, a similar resolution was not considered by the Senate. When the votes were cast, Ellsworth’s nomination was overwhelming approved by a vote of 23-6. Among the 23 supporters were two Senators (James Gunn of Georgia and Alexander Martin of North Carolina) who had supported the earlier resolution condemning the practice of appointing Supreme Court Justices to serve in the Executive branch.\textsuperscript{59}

\textsuperscript{58} For the vote totals, see \textit{supra} note 8. The names and information of the Senators were taken from the \textit{Biographical Directory of the United States Congress: 1774- present} available at: http://bioguide.congress.gov.

\textsuperscript{59} For the vote totals and text of the nomination, see \textit{supra} note 10, at p. 318.
Conclusion

After considering the text and history of the Constitution, coupled with over two centuries of practice, it appears that John Jay’s letter to President Washington was not a correct statement of the law. The plain text of the Constitution does not prevent members of the federal judiciary from simultaneously serving in the executive branch – in fact, the Constitution does not even require that the service be ad hoc or of limited duration. Moreover, the contemporary understanding at both the ratification conventions and the early Senate was that neither the text nor the spirit of the Constitution was violated when a member of the judiciary – the Chief Justice no less – served at the pleasure of the President.

To be sure, there are important limitations to this power. Jay was correct that the judiciary is an independent department which cannot be forced to give advice or otherwise serve the other branches. Therefore, any advisory power that the Supreme Court has is purely discretionary. Secondly, the case or controversy requirement of Article III remains a real limitation on the jurisdiction of the Court to deliver binding opinions of parties before it. Further, the institutional legitimacy of the judicial branch is an important consideration that the Justices need to pay heed to before accepting extrajudicial service. Tocqueville believed that the American practice that a “judge can only pronounce a decision when litigation has arisen” was “at once most favorable to liberty and public order.” There is no reason to believe that this sentiment and characteristic of the American judicial system has lost its luster in the century-and-three-quarters since Toqueville toured the countryside. Therefore, as a prudential matter, Justices have appropriately limited the amount of service that they have given.

Another important limitation flows from the structure of the government itself. If a Justice were to be nominated by the President to be an ambassador or other official, the

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60 Tocqueville, pp. 73, 75.
Constitution mandates the advice and consent of the Senate under Article II, section 2. Even if a President chose to avoid the advice and consent provision altogether and appoint a Justice to an extrajudicial post by Executive Order (as some have done), the Congress ultimately retains the power to impeach that Justice without concurrence of the executive under Article I, section 3. The confluence of these two sections ensures that the Congress can act to prevent any “mischievous and impolitic” intercourse between the executive and judicial branches. These limitations lend credence to the entire theme of this paper: that while the Constitution opens the door to extrajudicial service by federal judges, it does not open it very far.
WORKS CITED


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