

AMERICAN CONSTITUTIONALISM  
VOLUME I: STRUCTURES OF GOVERNMENT  
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Supplementary Material

Chapter 4: The Early National Era – Judicial Power and Constitutional Authority

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*John Jay, Letter to George Washington on Advisory Opinions (1793)*<sup>1</sup>

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*Some New England states allow the executive to request advisory opinions from the judges of the state supreme courts on legal issues of concern to the government. Such advisory opinions do not resolve any existing cases or controversies or settle the legal rights of any individual parties, but they provide guidance to government officials on bills under consideration or actions being contemplated. Article III of the U.S. Constitution states that the “judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .” The U.S. Constitution says nothing about the possibility of federal judges providing advisory opinions. The initial jurisdiction granted to the federal courts by the Constitution and early federal statutes was quite limited, and many cases and controversies involving federal law or treaties never reached the U.S. Supreme Court. President George Washington appealed to the justices of the Supreme Court to stand ready to provide advisory opinions to the executive to guide government conduct through these tangled issues. Chief Justice John Jay, speaking for his brethren, eventually declined, concluding that such extrajudicial actions were inconsistent with the role of the federal judiciary as an independent branch of government.*

*Is Jay right that it would be inappropriate for federal judges to provide advisory opinions? What damage might such opinions do? Is the president sufficiently advised by the attorney general and other executive branch officials? Why are advisory opinions “extrajudicial”? Are advisory opinions different than other extrajudicial tasks that the president might ask the justices to perform? In 1794, Chief Justice John Jay traveled to England as a special envoy to the president to negotiate the Jay Treaty, which settled many of the outstanding issues with Britain resulting from the American Revolution. Why might Jay have been willing to perform that service for the president but not issue advisory opinions? Does the Constitution prohibit advisory opinions?*

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*Secretary of State Thomas Jefferson to Chief Justice John Jay and Associate Justices (July 18, 1793)*

. . . [Q]uestions [regarding foreign affairs] depend for their solution on the construction of our treaties, on the laws of nature and nations, and the laws of the land, and are often presented under circumstances *which do not give a cognizance of them to the tribunals of the country.* Yet their decision is so little analogous to the ordinary functions of the executive, as to occasion much embarrassment and difficulty to them. There President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their *advice on these questions?* . . .

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<sup>1</sup> Excerpt taken from John Jay, *The Correspondence and Public Papers of John Jay*, ed. Henry P. Johnston, vol. 3 (New York: G.P. Putnam’s Sons, 1891), 512-514.

*Chief Justice John Jay to President George Washington (July 20, 1793)*

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... We are not only disposed, but desirous, to promote the welfare of our country in every way that may consist with our official duties. We are pleased, sir, with every opportunity of manifesting our respect for you, and are solicitous to do whatever may be in our power to render your administration as easy and agreeable to yourself as it is to our country. . . .

*Chief Justice John Jay to President George Washington (August 8, 1793)*

We have considered the previous question. . . . These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.

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