From the Bag

Two Advisory Opinions by Chief Justice Oliver Ellsworth

William R. Casto

TODAY ADVISORY OPINIONS are anathema to the federal judiciary, but the early justices of the Supreme Court were not so loath to provide extrajudicial advice to the Executive Branch. Although the justices famously refused to render an advisory opinion on one occasion during the Neutrality Crisis of 1793, their refusal was an exception (albeit an exception that was to become the rule) to their ordinary practice. John Jay, the first Chief Justice of the United States, gave the Executive Branch advisory opinions on a wide variety of subjects before the 1793 refusal. After the Neutrality Crisis, the Court's third Chief Justice, Oliver Ellsworth, continued the practice.[1]

In 1796, Ellsworth wrote an advisory opinion on a looming constitutional dispute between the President and the House of Representatives. Representative Edward Livingston of New York had introduced a resolution that would have required President Washington to submit to the House the documents and correspondence relevant to the negotiation of the Jay Treaty, purportedly to assist the House in deciding whether to appropriate funds related to the treaty. As Professor David Currie has noted, "debate on this resolution lasted an entire month and was one of the most impressive and fundamental ever conducted in Congress."[2] Five days after he became Chief Justice, Ellsworth wrote an opinion letter to Connecticut Senator Jonathan Trumbull, concluding that the House had no constitutional role in treaty making and was thus bound to appropriate

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1 *See* WILLIAM CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 178-83 (1995); WILLIAM CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL (publication forthcoming); STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997).

2 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 at 212 (1997).

the funds.[3]

Two years later, Ellsworth advised the Secretary of State on the constitutionality of the recently enacted Sedition Act, which made it a criminal offense to "write, print, utter or publish ... any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame [them] ... or to bring them ... into contempt or disrepute; or to excite against them ... the hatred of the good people of the United States, or to stir up sedition within the United States ...."[4] This latter advisory opinion is particularly significant because at that time the Secretary of State had cabinet responsibility for supervising the U.S. Attorneys who would bring prosecutions under the Act. Moreover there was a likelihood that Chief Justice Ellsworth, while riding circuit, would preside over prosecutions.[5]

Chief Justice Ellsworth's two advisory opinions follow.

Oliver Ellsworth to Jonathan Trumbull (March 13, 1796)[6]

Philadelphia March 13. 1796.

Dear Sir,

The grant of the Treaty making power is in these words "The President with the advice & consent of the Senate shall make Treaties." The power goes to all kinds of Treaties, because no exception is expressed; and also because no Treaty making power is elsewhere granted to others, and it is not to be supposed that the constitution has omitted to vest sufficient power to make all kinds of Treaties which have been usually made, or which the existance or interests of the nation may require.

The effect of Treaties is declared in these words "all __ Treaties made under the authority of the United States shall be supreme laws of the land." The Constitution gives them this effect; and they do not therefore need or derive it from congressional resolutions or statutes. The instant the President & Senate have made a Treaty, the Constitution makes it a law of the land; and of course, all persons & bodies in whatever station or department within the jurisdiction of the United States are bound to conform their actions & proceedings to it.

Such a treaty ~~instantly~~ ipso facto repeals all existing laws so far they interfere with it. This is an inseperable attribute of a Statute or what has the effects of one; but on the other hand a Treaty can not be repealed or annulled by Statute because it is a compact with a foreign power, and one party to a compact can not dissolve it without the consent of the other.

All "legislative", or statute making "power" given by the constitution is given to Congress. And one object specially named to which its exercise may extend is "the

3 For a discussion of the 1796 advisory opinion, *see* Casto, The Supreme Court in the Early Republic at 97-98.

4 1 Stat. 596 (July 14, 1798).

5 For a discussion of the 1798 advisory opinion, *see* Casto, The Supreme Court in the Early Republic at 148-50.

6 George Washington Papers (Microfilm ed., Series 4, Reel 108). The letter is docketed under the subject "treaty making power." *Id.* Images of the letter are also available from the collection of Washington's papers at the Library of Congress's website. *See* http://memory.loc.gov/ammem/gwhtml/gwhome.html.

regulation of Trade & intercourse with foreign nations." And as relative to this object, the discretion of Congress is unlimited, except that they are forbidden to tax exports, and can not repeal Treaties, they not being in their nature repealable.

These Treaty & Statute making powers are both essential to regulate commerce with foreign nations. The latter because a Treaty can not always be obtained, and even when it is obtained there will be left, reasoning from universal experience, much ground for Statutes to operate upon which the Treaty has not covered. The former is essential because it alone can regulate & secure the privileges to our commerce within the jurisdiction of the other party. But however essential this power is it can not be exercised with any European Nation without regulating & securing at the same time privileges to be enjoyed by the commerce of such nation within our jurisdiction. If so, then is the right to exercise the power in such a manner necessarily included in the grant of the power itself; and of course, according to the foregoing observations, the President & Senate have it. Understanding the two powers as I do, and as until the present occasion they have been, I believe, universally understood, and uniformly practiced on they are reconcileable, and respectively competent to the ends for which they were granted.

The claim of the House of Representatives to participate in or control the Treaty making power is as unwarranted as it is dangerous. It has no support but from the usage of the British House of Commons the reason of which does not here apply. The Prerogatives of the Crown & the rights of Parliament are what usages have made them, and are acknowledged to be such that a Treaty made by the King has not the effect of a law of the land. If in its matter it exceeds a narrow construction of his Prerogative of peace & war, and either interferes with existing laws or contains stipulations which require laws to be passed, it is of right examinable by Parliament, and may be validated or defeated according to their opinion of its expediency. Which may be seen by their debates in many cases, and particularly & fully in the debates of the Commons of 1787 on the French commercial Treaty of the preceeding year, where it was advanced by Sir Grey Cooper and apparently acquiesced in by M^r. Pitt & the House, that the Treaty was to be regarded as a collection of propositions from the King for their deliberation & adoption or rejection. And in such cases if upon examination they conclude to adopt the Treaty, which they almost invariably do, it is usual to concur in a resolution imparting that they concur with his Majesty; and then pass laws to give the Treaty effect. To assist them in examining the expediency of a Treaty they frequently apply for & receive papers which were used in the negociation. The House of Representatives have no such examination to make, nor does it appear from M^r. Livingston's motion or otherwise that they have before them any legitimate object of enquiry to which the papers can apply. They have indeed a right to impeach or to originate a declaration of war, and might for those purposes have possible use for some of the papers had in the late negociation, but neither of those objects are avowed by the House nor are they to be presumed.

That an appropriation is necessary to carry the Treaty into effect is an accidental circumstance not common to commercial Treaties, & does not give the House any more right to examine the expediency of the Treaty or controul its operation than they would have without this circumstance. Their obligation to appropriate the requisite sums does not result from any opinion they may have of the expediency of the Treaty, but from their knowledge of its being a Treaty, an authorised & perfect compact which binds the Nation & its Representatives. The obligation is indispensable, as it is to appropriate for the

President's Salary, or that of the Judges or in many other cases where fidelity to the Constitution does not leave an option to refuse. And I believe they will appropriate in the present case tho' they should not receive, what I apprehend they can not without a mischiefous precedent, the negociation papers.

Thus Sir, have I sketched a few thoughts on the subject you proposed, & I beg you to accept of frankness instead of Form.

I am, dear Sir,
With much esteem
Your obed$^{t.}$ hum^{l} Serv^{t}
Oliv^{r} Ellsworth
Hon$^{ble.}$ M$^{r.}$ Trumbull

Oliver Ellsworth to Timothy Pickering (December 12, 1798)[7]

Dear Sir

I thank you for sending me the Charge of that pains-taking Judge Addison,[8] who seems to be a light shining in darkness tho' the darkness comprehends him not as He is doubtless correct in supposing that the Sedition Act does not create an offense, but rather by permitting the truth of a libel to be given in justification causes that in some cases, not to be an offence which was one before; nor does it devise a new mode of punishment, but restricts the power which previously existed, to fine & imprison. And as to the constitutional difficulty who will say that negating the right to publish slander & sedition is "abridging the freedom of speech & of the press," of a right which ever belonged to it? As well there is how Congress, if prohibited to authorise punishment for speaking in any case, could authorise it for perjury, of which nobody has yet doubted?

If a repeal of the act is to take place this session, I think the preamble, in order to prevent misapprehension, & withall to make a little saving for our friend ~~Mershall~~ Marshall's address, should run thus. Whereas the increasing danger & depravity of the present time require that the law against seditious practices should be restored to its former vigor: therefore & c.

I congratulate you on the late success of the British. Not that they had not power enough before, but because the French had too much; and besides, if the latter had obtained the victory they would not have thank'd God for it.

With Sincere respect & esteem
I am, Sir
Your most obed$^{t.}$ hum^{l} Serv^{t}
Oliv^{r} Ellsworth
Windsor Dec$^{r.}$ 12, 1798
Hon$^{ble.}$ M$^{r.}$ Pickering

7 Pickering Papers, Massachusetts Historical Society, Boston, MA.

8 Pennsylvania state judge Alexander Addison subsequently included his grand-jury charge, delivered at the September Sessions in 1798, in an appendix to his reports. *See* Alexander Addison, Reports of Cases in the County Courts of the Fifth Circuit, and in the High Courts of Errors & Appeals, of the State of Pennsylvania, 1791–1799, and Charges to Grand Juries of Those County Courts 270-89 (1800). Addison concluded that the Sedition Act "does not create any new offence; for every thing forbidden by it appears to me to have been, before, an offence at common law." *Id.* at 277.