The Case for John Jay’s Nomination as First Chief Justice

Benjamin Lyons

Students of early American history are generally aware that John Jay (1745–1829) served as the first chief justice of the United States Supreme Court; yet few have found much significance in that fact. The Court over which Jay presided did not issue any timeless opinions, or leave an otherwise notable legacy. Consequently, little has been written about Jay or his contribution to early American law. It would be unfair, however, to fault the first justices for this outcome, for structural weaknesses in the early Court gave them relatively few opportunities to display their talents. Scarcely any federal laws had been passed, for instance, when the Court first sat in February 1790. It was months before appellate cases made their way up through the lower courts. Moreover, the Judiciary Act of 1789 mandated that the justices spend much of each year riding circuit on the lower court of appeals. The justices were nevertheless among the most distinguished jurists in the country. Jay’s selection as first chief justice merits particular attention as his unusual qualifications shed fresh light on the parameters of early American law.¹


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When George Washington made his federal nominations, in early fall 1789, a seat on the Supreme Court was widely regarded as one of the most prestigious positions in the new government—and the president took such appointments seriously. “No part of my duty,” he had written in May, “will be more delicate . . . than that of nominating . . . persons to offices.” He was determined to nominate “those persons only, who, upon every consideration, were the most deserving, and who would probably execute their several functions to the interest and credit of the American Union.” He took particular care in filling out the judiciary, describing it as “the chief-Pillar upon which our national Government must rest” and stating that it was “the invariable object of my anxious solicitude to select the fittest characters to expound the Laws and dispense justice.”

The president had no shortage of applicants to choose from. William Cushing, chief justice of the Massachusetts Superior Court; John Rutledge, chief judge of the South Carolina Court of Chancery; and John Blair, chancellor of the Virginia Court of Chancery, all received appointments as associate justices of the Supreme Court. When it came to the office of chief justice, however, the president turned to Jay, a diplomat from the state of New York, whose only experience as a judge was a brief stint as chief justice of New York (1776–1778), during a period when the turmoil of war prevented the court from conducting much business. The president nevertheless expressed “singular pleasure” with his nomination and added his hope that Jay would not “hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the Key-Stone of our political fabric.”

What “talents” or “knowledge” was Washington referring to?

As historians of early America are aware, Jay was more than a diplomat. He was among the most distinguished revolutionaries of his era. Educated at King’s College in New York and admitted to the bar in 1768, he had been a rising star in colonial legal circles when the Revolution began. At the age of 28 he was elected to the First Continental Congress. He had gone on to serve as president of the Continental Congress (1778–1779), United States minister to Spain (1779–1782), co-negotiator of the Treaty of Paris (1782–1783), and secretary for foreign affairs

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(1784–1789). In the latter capacity, he had guided the foreign policy of the United States through a period when most of his peers were busy with local politics, serving abroad, or in retirement. He had also played a critical role in promoting and securing the ratification of the new Constitution. 4

Given these accomplishments, Jay’s appointment can be explained in part as a reward for his service to the revolution—and that was certainly one reason. But why the Supreme Court? What reason did Washington have for expecting that Jay would “execute” the duties of chief justice “to the interest and credit of the American Union?” To answer those questions, this article focuses attention on Jay’s use of law during his diplomatic career. In so doing, it emphasizes the law of nations—the rules of conduct for European diplomacy in the early modern era. Jay’s perspicacity in using that law to promote the survival of the new nation, the article suggests, offers ample evidence of his suitability for the office of chief justice, and of Washington’s wisdom in choosing Jay for that role. 5


5 George Washington to James Bowdoin, supra note 3.
The Law of Nations
According to William Blackstone (1723–1780), the law of nations was

a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.

The law’s content, Blackstone went on to say, was derived from two sources: “history and usage” and “such writers of all nations and languages as are generally approved and allowed of.” By “history and usage” Blackstone meant a set of customary norms that had come into formation over preceding centuries in Europe as a means of resolving routine points of conflict. By contrast, “writers of all nations” were European legal philosophers who in recent centuries had published lengthy treatises on the law of nations, in hopes of strengthening its theoretical foundations, while also opining on points of controversy.6

Leaders of the American Revolution were familiar with the “writers of all nations,” but they knew little about the *customary law* of diplomacy. For one thing, customary law was generally unwritten and learned through experience. More importantly, it was the exclusive purview of “free and independent states,” who alone had the right to use the procedures that it prescribed and to enjoy the protections that it afforded. As former colonists, no one in the revolutionary leadership had ever conducted formal diplomatic negotiations with other states. That work had always been done on their behalf by representatives of the British crown in London.7


7 For American reliance on the treatises, see Benjamin Franklin’s oft-cited letter of December 19, 1775, in which Franklin thanked a friend by the name of Charles Dumas for having sent him three copies of Vattel’s *Law of Nations*, one of which Franklin had circulated among the members of Congress. “It came to us in good season,” Franklin wrote, “when the circumstances of a rising State make it necessary frequently to consult the law of nations.” Francis Wharton, ed., *The Revolutionary Diplomatic Correspondence of the United States* (Washington, DC: United States Government Printing Office [GPO], 1888), vol. 2, 64 (hereinafter cited as RDC). American merchants were familiar with the customary laws of commerce, and some military officers had gained exposure to the law of war during the Seven Years War, but no one had experience with diplomacy.
That dearth of experience was consequential for the Revolutionary government because the customary laws of diplomacy were complex and required sophistication and experience to use effectively. At its base, it was a code of honor tied to the sovereign, whose reputation embodied that of the state. Reputation, in turn, functioned as a kind of strategic asset—a wellspring of credit and good faith—on the basis of which other states in the European system would agree to form alliances or provide assistance in time of need. For this reason, tremendous rhetorical effort was spent in maintaining the sovereign’s status as a paragon of integrity—integrity that stabilized an otherwise highly unstable environment.  

The routine conduct of statecraft was governed by rigid protocol and formulas that served at least three core purposes. First, they established the relative dignity and stature of the various sovereigns in Europe. Next, they drew a distinction between formal and informal communication—the former implicated the honor of the sovereign while the latter did not. Finally, they policed the boundary between domestic transactions on the one hand, which were subject to domestic law, and “political” transactions on the other, which were governed by the law of nations. The norms and procedures that statesmen used for these purposes were precise and sophisticated, and their proper use established their practitioners as bona fide members of the community of states. Like most aspects of customary law, they were unwritten and learned through experience.

A principal task of the statesmen who conducted foreign affairs was to secure the interests of their sovereign while doing as little damage as possible to his or her public reputation. Statesmen did this by using pretexts—public statements that sought to justify their actions while obscuring their underlying motives and objectives. Statesmen were skilled not only at employing such pretexts, they were also adept at evaluating the strength of those used against them. They kept score

8 William James Roosen, The Age of Louis XIV: The Rise of Modern Diplomacy (Cambridge, MA: Schenkman Publishing Company, 1976), 72, writes that in the 17th century, one can say either that “the state was the personification of the ruler or that the ruler embodied the state.” Daniela Frigo, ed., Politics and Diplomacy in Early Modern Italy: The Structure of Diplomatic Practice, 1450–1800 (New York: Cambridge University Press, 2000), 21, adds that in the 18th century, “the principles of ‘distinction’ and ‘honour’ . . . dominated relations among . . . European powers.”

9 For the dearth of scholarship on this subject, see note 6. For the development of diplomatic protocol in the Renaissance and early modern eras, see Harold Nicolson, The Evolution of Diplomatic Method (New York: Macmillan, 1954), 1–46. See also William Cresson’s reference to “The bewigged and bestarred courtiers gathered about the green cloth of European council tables, had long conducted the business of diplomacy according to a ritual developed through centuries of familiar contact,” in Francis Dana, a Puritan Diplomat at the Court of Catherine the Great (New York: L. MacVeagh, 1930), 238. While most aspects of customary law were unwritten, key provisions of the law were recorded in the text of major European treaties, which helped to establish legal precedent.
and used the results to judge their counterparts’ integrity and good faith. They also retaliated as interest demanded and circumstances allowed. Historians of international law often dismiss the system as hopelessly corrupt and compromised, yet it was the law of that era, and it posed a major impediment to the conduct of early American diplomacy.\(^\text{10}\)

**Early Congressional Diplomacy**

Over time, members of Congress adopted two divergent ways of compensating for their dearth of experience in this field. One faction, often associated with the Lee family of Virginia and the Adams family of Massachusetts, scorned the European system and sought to establish a new political and diplomatic order founded on principles of free trade and republican virtue. An example of their approach is the Model Treaty of 1776, which sought to secure foreign support through the use of commercial treaties alone, not military alliances. Another example was the conduct of Arthur Lee, an early emissary to France and Spain who quarreled incessantly with his colleagues over points of virtue and was eventually recalled.\(^\text{11}\)

Partly in response to the failures of the first approach, a growing number of revolutionaries adopted a more conservative approach and, especially after the signing of the Franco-American Treaty of Alliance in 1778, came to rely heavily on the guidance and support of the French foreign ministry. An example of this disposition was seen in spring 1779 when members of Congress approached the first French minister to the United States and “begged [him] to instruct them on . . . the usages and rules established between the Powers of Europe . . . and to

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\(^{11}\) For a discussion of the competing congressional approaches to diplomacy, see Cresson, *Francis Dana*, 124–25, 148, 153. For Arthur Lee’s diplomacy, see Louis W. Potts, *Arthur Lee: A Virtuous Revolutionary* (Baton Rouge: Louisiana State University Press, 1981). The Model Treaty, drafted by John Adams in the spring and early summer of 1776, was premised on the expectation that European nations would recognize the United States and support the Revolution in exchange for liberal trading privileges, and without the need for a formal military alliance. It was a useful starting point for negotiations with France, but did not yield the kind of widespread support that Adams had hoped for.
give them [his] advice.” It can also be seen in rules that Congress adopted in June 1781 that mandated that all of the American commissioners in Europe “undertake nothing in the negociations for peace or truce without . . . [the] knowledge and concurrence [of the French Court]; and ultimately to govern yourselves by their advice and opinion.”

By the midpoint in the War of Independence, these competing approaches were evidenced by the diplomacy of John Adams, the newly appointed American commissioner of peace, and Benjamin Franklin, the United States minister to France. Adams was a far more capable and moderate minister than Arthur Lee had been; yet he was still hostile to European protocol and suspicious of France. Within weeks of his arrival in 1780, he so thoroughly offended the French foreign minister, Charles Gravier, comte de Vergennes, that Vergennes cut off all communication—and even requested Adams’s recall. Franklin, by contrast, was a model of congeniality and urbane sophistication, who enjoyed the full support of the French court. He had little interest, however, in the technical aspects of diplomacy, and was content to rely on the advice of Vergennes, who, he argued, merited the Americans’ full confidence.

**Jay’s Adoption of European Diplomatic Norms**

Jay would avoid both of these extremes. He became involved in diplomacy rather accidentally in December 1778, when he was elected president of the Continental

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Congress shortly after arriving in Philadelphia on a short-term mission from New York. According to a practice of rotation that was in use at the time, the office of president was supposed to go to Philip Schuyler, a distinguished member of the New York delegation; but as Schuyler was away from Congress at the time, Jay was elected until Schuyler would return—which he never did. The new office put Jay in immediate and frequent contact with Conrad Gérard, French minister to the United States, who was a lawyer and an expert in diplomatic law. It also placed Jay at the center of a diplomatic controversy that would vex Congress in the months ahead, and indeed for the rest of the war.\footnote{See Editorial Note, “John Jay’s Presidency of the Continental Congress,” in Nuxoll, \textit{SPJJ}, 1: 549–51.}

In January 1779, Gérard received instructions from Paris asking him to ascertain the terms of peace that the United States would demand of England in the event that George III became amenable to negotiations. Independence was a given, but Vergennes wanted to know what other demands the Americans might make. Gérard broached the subject in early February and immediately encountered conflict over the Americans’ claims to a western border on the Mississippi River. At the heart of the quarrel was the question of whether the territory west of the Appalachian Mountains was an essential part of the United States—and thus guaranteed to them by the Franco-American treaty of alliance—or rather a disputed region, the disposition of which would depend on future events and the allies’ relative strength at the end of the war.\footnote{Article 11 of the treaty of alliance guaranteed to the United States its “Possessions” as well as any “additions or conquests” that it might obtain during the war—but it did not define either term. See Hunter Miller, ed., \textit{Treaties and Other International Acts of the United States of America} (Washington: DC: GPO, 1931–1948, vol. 2, 39–40. For the instructions that Gérard received in January, see Vergennes to Gérard, October 26, 1778, in Meng, \textit{Despatches}, 356.)}

As Gérard made clear, the French court disputed the United States’ title to the region and urged Congress \textit{not} to make its acquisition an absolute condition of peace. The reason, he intimated, was that France’s principal ally in Europe, the court of Spain, desired the region as a buffer between the United States and their dominions in New Spain (modern-day Mexico). The dispute occupied much of Congress’s time over the next eight months. In the end, though the Americans failed to reach an accommodation with Gérard, they did agree to send Jay to
Spain as an accredited emissary, to resolve the dispute and to request diplomatic recognition and a badly needed loan or subsidy. Jay departed Philadelphia in October 1779 and arrived in Spain the following January. He would remain in that country for nearly two and a half years.¹⁶

Jay’s diplomacy in Spain incorporated Franklin and Adams’s strengths while skillfully avoiding their weaknesses. Like Franklin, Jay was unfailingly courteous in his demeanor and won the respect of his European counterparts. Like Adams, he was suspicious of European courts and guarded in his approach to negotiations. However, unlike either Adams or Franklin, Jay embraced European protocol and became expert in its use. Jay’s conduct on arrival in the Spanish port city of Cádiz provides an early example of his skill. Rather than proceeding immediately to the capital city of Madrid, Jay penned a letter to the Spanish prime minister, announcing his arrival. The letter was a model of the diplomatic genre, expounding at length on the attributes of Carlos III. The “exalted reputation which his Majesty has acquired . . .” Jay wrote,

> have enduced the People of the united States to repose the highest Confidence in the Proofs they have received of his friendly Dispostion towards them; and to consider every Engagement with this Monarchy, as guaranteed by that Faith, and secured by that Ingenuousness, which have so gloriously distinguished his Majesty, and this Kingdom, among the other Princes & Nations of the Earth.

The purpose of the letter, however, was strategic, and designed to force the Spanish to state in writing whether or not they would receive Jay as an accredited diplomat.¹⁷

In an equally elaborate response, Spanish Prime Minister José Moñino y Redondo, conde de Floridablanca, informed Jay that “until the Proportion, which must be concerted on those Points [of treaty], is determined on . . . it will not be proper that your Exc’ should explain a formal Character which must depend on a future acknowledgement, and Treaty.” The answer, Jay quickly discerned, pointed to the

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¹⁶ France and Spain were joined by a strategic alliance known as the Family Pact, which originated in 1733, and was reaffirmed in 1743 and again in 1761, to counterbalance Great Britain’s naval power. For some dated analysis, see Vicente Palacio Atard, El Tercer Pacto de Familia (Madrid: Marsiega, 1945).

¹⁷ To Floridablanca, March 6, 1780, Nuxoll, SPJJ, 2: 51. “Being apprehensive that if present I should probably be amused with verbal answers capable of being explained away . . .” Jay wrote, “I thought it more prudent that my first application should be by Letter than in Person.” To the President of Congress (Samuel Huntington), Nuxoll, SPJJ, 2: 49–50.
issue of the Mississippi and “[when] divested of the gloss which its politeness spreads over it, gives us . . . to understand that our Independence shall be acknowledged . . . not . . . because we are Independent which would be candid and liberal but because of the previous considerations we are to give for it.” It was in that context that Jay proceeded to the Spanish court and began his negotiations.18

Jay also differed from his peers in the rigor and thoroughness with which he reported his conduct to Congress. European diplomacy was rigidly hierarchical, and policy was set by the sovereign or by ministers acting in the sovereign’s name. Resident diplomats were expected to send frequent and detailed dispatches, enabling the court to adjust policy as needed. The earliest American emissaries had been notably lax in this regard, and members of the Continental Congress did little to help matters, being averse to creating hierarchical structures that might enable it to craft policy more efficiently. Adams and Franklin were somewhat better, though still not as thorough or scrupulous as a trained European statesman would have been.19

Jay, by contrast, conducted himself as if part of a highly efficient system of state. “I know it to be my duty as a public servant,” he once wrote, “faithfully to execute my instructions without questioning the policy of them.”20 If Congress was going to give him instructions, he appeared to reason, then they needed accurate information. The reports that he sent from Spain—which were often delayed by the lack of secure means of transportation—could reach hundreds of folio pages in length. They included copies of all relevant documents, notes or transcriptions of important conversations, and, of course, Jay’s own thoughts and analysis.21

18 From Floridablanca, February 24, 1780, in Nuxoll, SPJJ, 2: 41. To the President of Congress (Samuel Huntington), Nuxoll, SPJJ, 2: 49–50.
19 The diplomatic career of Silas Deane, for example, was destroyed when his fellow emissary, Arthur Lee, accused him of misappropriating funds. Although Lee could not prove his accusations, Deane fell anyway because he had not kept records of his transactions and could not prove his innocence. For examples of European diplomatic reporting, see Meng, Despatches; and Marvin L. Brown, ed., American Independence through Prussian Eyes: A Neutral View of the Peace Negotiations of 1782–1783: Selections from the Prussian Diplomatic Correspondence (Durham, NC: Duke University Press, 1959).
For Adams’s reports on events in Europe and “Franklin’s somewhat negligent and dilatory methods of dependence upon the French envoy in America” for the same purpose, see Cresson, Francis Dana, 125.
For the weakness in Congress, see George Wood, Congressional Control of Foreign Relations During the American Revolution, 1774–1789 (Allentown, PA: H. R Haas, 1919).
20 Jay to the President of Congress, September 20, 1781, in Nuxoll, SPJJ, 2: 561–62.
21 For an example of Jay’s reports to Congress, “To the President of Congress (Samuel Huntington)” Madrid, November 6, 1780, in Nuxoll, SPJJ, 2: 325–43.
The quality and depth of Jay’s analysis also distinguished him from his predecessors. Those attributes were partly a facet of his temperament and character, but they also emerged more impressively through the circumstances that he confronted in Spain. Soon after Jay’s departure from Philadelphia, Congress took the precipitous step of drawing funds on his name in anticipation of his securing a loan or subsidy from Spain. Congress accomplished this by paying its creditors with “bills of exchange” issued in Jay’s name. Bills of this kind circulated as currency until they reached the person named on the bill—in this case, Jay—who was expected to exchange the bill for hard currency or specie within a fixed period of time—usually six months. If the specie were not forthcoming, the holder of the bill would issue a public “protest” that would destroy the credit of the named entity. (Congress had drawn on Jay in his official capacity, so that it was the credit of the United States that was in danger in this case.)

As it turned out, the first of Congress’s bills reached Jay in April, just as his negotiations with Floridablanca were about to begin. The bills put him in the position of a supplicant, needing to plead for aid in order to prevent the destruction of American credit. Floridablanca quickly seized on Jay’s predicament to strengthen his position in the pending negotiations. He agreed to cover the immediate bills, while hinting that additional funds might be available later in the year. Meanwhile, he urged Jay to ponder how the United States might repay Spain for its assistance—rights to the Mississippi River being the only compensation that Carlos III would accept.

These circumstances triggered one of the most difficult diplomatic contests of the war. The amounts that Congress had drawn on Jay were trivial in comparison to the value of the trans-Appalachian west, and yet the credit of the United States that was in danger in this case.

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22 Congress’s resolutions were passed on November 23, 1779, and instructions to Jay were passed on November 30. See Worthington Ford, ed., Journals of the Continental Congress, 1774–1789 (Washington, DC: GPO, 1904–1937), vol. 15, 1285, 1288–89, 1299–1300, 1326–27. See also From the Committee of Foreign Affairs, December 11, 1778, in Nuxoll, SPJJ, 2:5.
was still on the line. Over the coming months, as Floridablanca began to withhold funds, Jay was left to devise an effective response. Acting under extreme pressure, he turned the negotiations into a contest over national honor—reasoning, successfully, that Carlos III would suffer a greater loss of reputation by allowing the United States to default under these circumstances than the Americans would for having drawn funds on Spain without prior permission. The reports in which he conveyed his strategy to Congress demonstrate careful reasoning, thorough analysis, and an astute knowledge of moral and legal obligations in early modern diplomacy. The details cannot be reviewed here, but Jay left Spain two years later with American credit and claims to the Mississippi River intact.\textsuperscript{23}

In sum, Jay adopted European methods of diplomacy and employed them with skill and effect. He was publicly polite and sensitive to rank and protocol, yet also shrewd and alert to the stratagems being employed against him. Domestically, he accepted the position assigned to him, executed his duties, and deferred to Congress. Throughout, he exercised constant judgment in searching out the position that would enable him to advance the interests of his country, without violating law or protocol, or otherwise damaging the reputation of the United States. These methods not only strengthened his diplomacy, but enhanced the Americans’ claim to statehood. Jay reasoned that if the United States were going to claim to be free and independent states, it was necessary that its representatives act the part.\textsuperscript{24}

\textbf{A Capacity for Independent Judgment}

One of the clearest evidences of Jay’s effectiveness is the confidence that he earned among members of Congress. At the conclusion of Jay’s first year in Spain, Congress

\textsuperscript{23} For a more complete account of these negotiations, see Benjamin Lyons, “The Law of Nations in John Jay’s Negotiations with Spain, 1780–1782,” in Gabriel Paquette & Gonzalo M. Quintero Saravia eds., \textit{Spain and the American Revolution: New Approaches and Perspectives}\ (New York: Routledge, 2019).

\textsuperscript{24} The pressure that Jay faced during these months is reflected in a letter that he wrote in October 1781, after Congress conveyed its approval of his conduct during the first phase of the negotiations. “When I considered,” he wrote, “that almost the whole time since I left America, had afforded me little else than one continued series of painful perplexities and Embarrassments . . . — That I had been engaged in difficult & intricate negotiations, often at a loss to determine where the line of prudence was to be found, & constantly exposed by my particular situation, to the danger of either injuring the dignity and Interest of my country on the one hand, or trespassing on the overrated respectability and importance of this Court on the other— I say, Sir, That on considering these things, the approbation of Congress gave me most singular and cordial Satisfaction.” Jay to the President of Congress, October 3, 1781, Nuxoll, \textit{SPJJ}, 2: 592. See David Golove and Daniel Hulsebosch, “A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition.” \textit{New York University Law Review} 85:932 (October 2010): 943–44 for the argument that statehood in this era was “performed” through competent legal conduct.
penned one of the few letters of commendation that it sent to emissaries abroad during the revolution: “Throughout the whole course of your negociations and transactions,” the letter read, “in which the utmost address and discernment were often necessary to reconcile the respect due to the dignity of the United States with the urgency of their wants and the complaisance expected by the Spanish court, your conduct is entirely approved by them.”  Two weeks later, Congress ratified its approval by unanimously adding Jay to an expanded commission of peace.

Jay also won the respect of both Franklin and Adams. Throughout his tenure in Spain, Jay corresponded often with Franklin, who once wrote: “The Papers that accompanied [your recent letter], gave me the Pleasure of seeing the Affairs of our Country in such good Hands, and the Prospect from your Youth of its having the Service of so able a Minister for a great Number of Years.” As for Adams, he wrote after the conclusion of preliminary peace negotiations in 1782: “[A] man and his office was never better united, than Mr. Jay and the Commission for Peace. . . . The Thanks of Congress, in sound Policy and in perfect Justice ought to be given to Mr. Jay for his Able and faithful Execution of his Trust both in Spain and for Peace.”

The attributes that have been discussed thus far begin to explain why Jay would have been entrusted with a high office in the postwar era. Jay possessed one other quality that eminently suited him for a position on the Supreme Court—a capacity for independent judgment. As a general rule, early modern diplomats were strictly forbidden from acting outside the scope of their instructions. Yet, occasionally an emissary had to act on and decide an unexpected matter before advice could be received from his home court. Events of this kind were relatively uncommon in Europe, as couriers could travel between most courts in a matter of days. However, such exigencies became more frequent during the American Revolution, as the distance between Europe and North America made a timely exchange of letters difficult or impossible.

25 The President of Congress to John Jay, May 28, 1781, Nuxoll, SPJJ, 2: 450
27 Franklin to Jay, October 2, 1780, in Nuxoll, SPJJ, 2: 279; and John Adams to Jonathan Jackson, November 17, 1782, in Lint, ed., The Papers of John Adams, vol. 14, 63.
As noted above, Jay was committed to the principle of ministerial subservience. It was his duty, he wrote to Congress, “to be guided by my own judgment only in matters referred to my discretion.” On at least two occasions, however, he felt compelled by circumstances to exceed his instructions—and in one case, to break them. The first event took place during the summer and early fall of 1781. As noted above, the Spanish court was strongly opposed to American navigation rights on the Mississippi River. They were particularly incensed that the Americans claimed a right to sail through the river’s mouth and into the Gulf of Mexico—even though they had not claimed, and would not control, any territory along the southernmost portion of the river, below the 31st parallel. 

By early 1781, Congress had learned of this issue from Jay’s report, and in order to facilitate Jay’s negotiation they voted to amend his instructions, permitting him now to “recede” from navigation rights below the 31st parallel, provided that Spain guarantee American navigation rights above that line in return—and recognize American independence. The instructions left Jay in a difficult position for two reasons. First, he was only allowed to make the concession if Spain “unalterably” insisted on it—and it was up to him to decide whether or not this was the case. Second, Floridablanca had begun to intimate that even if Congress made concessions vis-à-vis the Mississippi, Carlos III might defer recognition of American independence until after the war was over.

In the end, Jay concluded that he had no choice but to concede the navigation rights as Congress had instructed, for it had become evident that Floridablanca already knew of the revised instructions from his informants, and was waiting for Jay to put them into effect. Yet Jay still needed to ensure that the United States obtained Spanish recognition of American independence in return. He handled the issue by making the territorial concession conditional on the immediate conclusion of a treaty of amity and commerce with the United States (an act that would ipso facto confer diplomatic recognition). If Spain failed promptly to conclude a treaty with the United States, Jay informed Floridablanca, “the united States will cease to consider themselves bound by any Propositions or offers which I may now make in their behalf.”

28 Jay to the President of Congress, September 20, 1781, in Nuxoll, SPJJ, 2: 561–62. The British enjoyed the right to navigate the full length of the river by virtue of the Treaty of Paris (1763), and the Americans claimed to have inherited Britain’s prerogative. The concession was to be conditional on Spain’s guaranteeing American navigation rights above the 31st parallel. A history of the dispute is recounted in Jay’s report to the President of Congress, October 3, 1781, Nuxoll, SPJJ, 2: 580–99.


30 Propositions for a Treaty with Spain, September 22, 1781, in Nuxoll, SPJJ, 2: 569.
As it turned out, Jay’s strategy was effective. Carlos III declined to conclude a treaty with the United States, and Congress’s concession was thus nullified. It is important to stress, however, that Jay had no authority for adopting that strategy, or making the concession conditional. He took a significant risk in doing so, and could have lost the confidence of Congress if his strategy had failed. The fact that he succeeded was due largely to the traits already outlined. He subjected the decision to rigorous analysis, outlining every aspect of the controversy, the options before him and the ramifications of each. He submitted his reasoning to Congress and also conveyed his decision to Floridablanca in writing, coupling it with a lengthy written explanation in order to prevent any subterfuge or misrepresentation by the Spanish court.  

The second and more consequential example of Jay’s deviation from his instructions occurred during the preliminary negotiations of the Treaty of Paris (1783). At Franklin’s request, Jay left Spain in May 1782 and traveled to Paris to assist with the negotiations. He was thus present in early August when one of the British emissaries in Paris received a draft commission from London purportedly authorizing him to begin formal negotiations with the American commissioners of peace. The event indicated a serious disposition toward peace on the part of George III. It also suggested a willingness on the part of Great Britain to recognize American statehood, for under the law of nations peace negotiations could only be conducted by bona fide states. The exchange of credentials, necessary to mark the start of the pending negotiations, would constitute an implicit recognition of American independence.

Jay and Franklin reviewed the commission and discovered that the British were actually trying to evade that concession. The commission was drafted in a style appropriate for domestic transactions—rather than negotiations between independent states. Moreover, the emissary was authorized to negotiate with the “colonies” of North America, rather than the “United States.” As noted above, the American commissioners were under orders from Congress to “undertake nothing in the negotiations for peace or truce without . . . [the] knowledge and concurrence [of the French Court].” In compliance with that rule, they brought the document to Vergennes and asked for his opinion. Vergennes reviewed it with the aid of his staff and, to Franklin and Jay’s surprise, advised them to accept it—asking only

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31 See again, To the President of Congress, October 3, 1781, Nuxoll, SPJJ, 2: 580–99. Spain did not recognize the independence of the United States until after the war had ended.

32 For a detailed analysis of Jay’s role in these negotiations, see Benjamin Lyons, “The Law of Nations in the Negotiation of the Treaty of Paris (1783),” forthcoming in the Journal of the Early Republic.
that the British emissary accept their commission, in which they were named as representatives of the United States, in exchange.  

Franklin would have complied with Vergennes’ advice, and begun to negotiate, but Jay refused, declaring that “to treat under the description of Colonies, would be descending from the Ground of Independence.” He would not negotiate, delaying the negotiations for over two months. That action alone was a violation of Congress’s instructions. A month later, Jay took matters a step further. Suspecting (correctly) that the French hoped to delay the concession of American independence until Spain had recovered Gibraltar, Jay sent a secret emissary to inform the British prime minister that though the Americans were determined to fulfill their treaty obligations with France, “yet it was a different thing to be guided by their or our Construction of it.”

By sending this message, Jay not only violated his instructions, he also acted without the knowledge or concurrence of Franklin, who was ill at the time. Yet, as before, Jay’s strategy was effective. In late September, the British cabinet yielded and issued a revised commission, in standard diplomatic form, authorizing their emissary in Paris to negotiate with “the United States of America.” The concession did not constitute an irrevocable recognition of American independence, but it was an important step in that direction. More importantly, it put the pending negotiations on a legal footing. Commitments made by the negotiators were now binding on their respective sovereigns in a way that would not have been the case if they had acted on the British emissary’s first commission. Within two months, the negotiators had signed a preliminary agreement that would become the basis of the definitive treaty the following year.

None of this is to say that Jay’s actions were beyond dispute. His conduct in Paris was particularly controversial, and several historians have charged him with

34 Jay to the Secretary for Foreign Affairs, November 17, 1782, Nuxoll, SPJJ, 3: 244, emphasis in the original. In April 1779, Louis XVI signed a military convention with Carlos III, in which he promised, in exchange for military assistance, to perpetuate the war until Spain had recovered Gibraltar. The United States was not party to this agreement, and the French feared that if the Americans obtained their independence prematurely, they might drop out of the war, thus strengthening Britain’s hand and preventing Spain from achieving its objective—which in turn might prolong the war.
35 When George Washington heard the news, he wrote, “[I]t is a great point gained,” one that must have caused George III “severe pangs at the time he put his hand to [it].” Washington to Robert Livingston, January 8, 1783, in John C. Fitzpatrick, ed., The Writings of George Washington (Washington, DC: GPO, 1931–1944), vol. 26, 17–18.
bad faith and a betrayal of the French. Yet the risks that motivated his conduct were real, and his understanding of the customary law of diplomacy was solid. Although he violated his instructions, he did not violate the law of nations, nor did he betray any treaty obligations of the United States. Rather, he displayed a capacity to make high-stake decisions in the face of intense opposition. The quality of his judgments is evident not only in the firmness with which he acted, but in the fruitful effect of his actions and the retroactive approbation that he earned from his peers. In this case, Congress responded by appointing him secretary for foreign affairs—a position that he would hold for the first five years of independence.  

**Defending American Claims to Statehood**

One last factor fills out Jay's qualifications and helps to explain the conviction with which he acted during his term abroad. As noted above, theoretical treatises on the law of nations—Blackstone's "writers of all nations"—were intellectual commentaries that had little direct impact on the conduct of early modern diplomacy. Nevertheless, the theories that they espoused were useful to Americans in that 1) they were based on principles of natural law that were accessible to novice revolutionaries on the far side of the Atlantic; 2) they offered a moral guide to diplomacy that was attractive to idealistic Americans who were seeking to distinguish their cause from the ordinary conduct of statecraft in Europe; and 3) they advanced a theory of statehood that was based on moral contract, rather than dynastic lineage, and thus offered the United States a novel but still reasonable basis for asserting membership in the European community of states.

Theories of this kind were of limited value to Americans who did not combine them with an astute use of customary law. When combined with customary law, however, they offered a basis or legal framework on which to construct an independent posture in diplomacy. Jay had two advantages in this realm. First, as already discussed, he embraced European diplomatic protocol. In addition, Jay possessed an unusually deep knowledge of the philosophies that undergirded the treatises. Most of his peers were superficially conversant with theories of natural law, but Jay was an expert in their application.  

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law—enough to employ them in rhetorical fashion when occasion demanded—but few had studied the underlying philosophies in any depth. Jay, by contrast, had studied at King’s College in New York City, the president of which was arguably the foremost American expert in natural law theory during the colonial era. 38

Jay’s convictions regarding the natural law basis of American statehood were evident as early as 1774 when he argued, during the first Continental Congress, that George III’s conduct did not yet constitute a breach of contract. Two years later, when Congress approved independence on natural law grounds, Jay wholeheartedly concurred, and he carried those convictions into his diplomacy. They are most clearly evidenced in a letter that he wrote to Vergennes in fall 1782, defending his refusal to act on the first British commission. “When the United States became one of the Nations of the Earth,” Jay wrote, “they publish the Stile or name by which they were to be known & called, and as on the one Hand they became subject to the Law of Nations, so on the other they have a Right to claim and enjoy its Protection & all the Privileges it affords.” 39

The letter is significant in that it establishes the origin of American statehood in 1776—not in 1778, when the Franco-American treaty of alliance was signed, or in 1783, when the British conceded American independence. The date mattered, Jay argued, because it meant that the legal rights that the United States possessed during the Revolution did not depend for their validity on the recognition of any state of Europe. Chief among those rights was the authority to render independent legal judgments in diplomacy—a right that Jay was not only determined to defend but also to exercise.

38 Craig Yirush, Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675–1775 (New York: Cambridge University Press, 2011), notes the superficiality of Americans’ knowledge of natural law on page 266. For an example in practice, see Alexander Hamilton’s The Farmer Refuted, February 23, 1775, in which he urged his readers, “Apply yourself, without delay, to the study of the law of nature. I would recommend to your perusal, Grotius, Puffendorf, Locke, Montesquieu, and Burlemaqui,” in Harold C. Syrett, ed., The Papers of Alexander Hamilton (New York: Columbia University Press, 1961), vol. 1, 86. David Armitage, notes that the natural law arguments in the Declaration of Independence were received in Europe with “deafening silence,” “The Declaration of Independence and International Law,” The William and Mary Quarterly, Third Series, 59:1 (January 2002), 50. Samuel Johnson of Connecticut (1696–1772) was the founding president of King’s College. His particular specialty was moral philosophy, on which many of the treatises were based.

In sum, Jay’s conduct overseas demonstrated all of the qualities that Washington alluded to in nominating Jay for the office of chief justice. He displayed integrity in the way that he executed congressional orders, while also placing Congress in a position to evaluate the quality of his work. He displayed a profoundly practical knowledge of the laws that governed European diplomacy, in both its customary and theoretical forms. Finally, in his penchant for reasoned analysis he displayed not only a judicial temperament, but a talent for rendering quality independent judgments in consequential cases affecting the nation as a whole.

**Relevance to the Supreme Court**

Washington never recorded his exact reason for choosing Jay for the office of chief justice—though evidence suggests that he first offered Jay his choice of position in the new government. In 1833 (four years after Jay’s death), Jay’s
son William published a biography in which he stated that Washington had offered Jay his choice of office. Evidence can also be found in a remark that Washington made to James Madison in August 1789, stating that he had “had some conversation with Mr. Jay respecting his views to Office.” Popular rumors circulated in 1789 that Jay was choosing between the office of chief justice and that of secretary of state.  

The notion that Washington would make such an offer made perfect sense at the time, for during the years immediately preceding his nomination, Jay had functioned essentially as a prime minister for the United States in matters related to foreign affairs. Although the office of secretary of foreign affairs had no executive authority, the quality of Jay’s reports to Congress and the depth of his expertise was such that Congress almost invariably did as he recommended. The political stature that came with that role, combined with Jay’s contribution to the Constitution, made it a foregone conclusion that he would receive a prominent position in the federal government. 

For his part, Jay later explained his preference for the judiciary in 1794 when he wrote to Washington, “If the Judiciary was on its proper Footing, there is no public Station that I should prefer to the one in which you have placed me—it accords with my Turn of Mind, my Education & my Habits.” Not only did Jay have a judicial turn of mind, but he came to the bench at a time when the Court played a larger role in foreign affairs than it does today. That role was evident prospectively in Article III, Section 2, of the Constitution, which defined the “Judicial Power” as extending to:

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41 The secretary of the French legation wrote, “Mr. Jay especially has already acquired a particular ascendancy of the members of Congress. All the important business passes through his hands; he makes his report on it, and it is rare that Congress is of an opinion different from his own,” Louis Guillaume Otto to the Comte de Vergennes, December 25, 1785, in Giunta, Emerging Nation, 2, 968. For Jay's contribution to the Constitution, see Ellis, Quartet, supra note 4. Jay was among the most influential advocates for a Constitutional convention, and later played a crucial role in securing its ratification in New York.

all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made . . . to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

It was also born out in the actual cases that came before the Court in the 1790s involving foreign citizens or entities, as well as the legal obligations of the United States.

Jay had a hand in all of these decisions, including Ware v. Hylton, which upheld the supremacy of treaties over state laws that had sought during the Revolution to nullify debts owed to British merchants. The most defining feature of his brief tenure on the bench was in Jay’s distinctive perspective on American statehood. Jay’s reading of the law of nations and his experience overseas had produced in him a deep conviction that—though the United States had fought for independence as a collective group of states, each of which claimed sovereignty—at least with respect to the conduct of foreign affairs, it was necessary for the United States to identify itself as a singular entity.

Jay’s views on this issue were eloquently expressed in his opinion in Chisholm v. Georgia in which he wrote that, since the Declaration of Independence, “the people” of the United States had “consider[ed] themselves, in a national point of view, as one people; and . . . manag[ed] their national concerns accordingly.”

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43 Article III, Section 2, of the United States Constitution. See especially Casto, Early Republic; and Casto, Foreign Affairs and the Constitution in the Age of Fighting Sail (Columbia, SC: University of South Carolina Press, 2006). For the law of nations in Jay’s work as chief justice, see his Draft Charge to the Grand Jury of Richmond, VA, and his opinions in Ware v. Hylton and Glass v. Sloop Betsey, in Nuxoll, SPJJ, 5: 494–99; 512–31; and 599–600.

44 Evidence for Jay’s concern on this issue can be found in his, An Address to the People of the State of New-York, on the Subject of the Constitution. Nuxoll, SPJJ, 4: 682, in which he wrote: “Prior to the revolution we had little occasion to enquire or know much about national affairs, for although they existed and were managed, yet they were managed for us, but not by us.” For the influence of foreign affairs on the drafting of the Constitution, see the entirety of Golove & Hulsebosch, “Civilized Nation,” 932–1066.
Although the practical effect of that decision was immediately overturned by the 11th Amendment (which prohibited states from being sued by citizens of another state) the date of national origin that Jay articulated was adopted by Lincoln in his Gettysburg address and has now become part of the national creed. It was that vision, and Jay’s ability to render the judgments that came with it, that qualified him to head the “Department” that Washington described as the “Key Stone of the National Fabric.”

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45 *Chisholm v. Georgia* held that individuals could sue states in federal court, thus voiding the principle of sovereign immunity. Jay’s opinion is in Nuxoll, *SPJ*, 5: 466–76. The opening line of the Gettysburg Address locates the origins of the “nation” in 1776—“four score and seven years” prior to 1863.