

America's First Independent Counsel

THE PLANNED CRIMINAL PROSECUTION OF CHIEF JUSTICE JOHN JAY

William Casto

MAY A CRIMINAL PROSECUTION be commenced against the Chief Justice of the United States Supreme Court, in the Supreme Court itself? What a wildly implausible notion. Nevertheless, one of the nation's most capable and sophisticated attorneys, who was in effect the country's first independent counsel, once wrote a formal "opinion of counsel" assuring the French Ambassador that such a prosecution could go forward. This bizarre episode transpired in 1793, when federal judges dabbled in public partisan politics more than they do today.¹

In 1793 John Jay was Chief Justice, and the nation was in the throes of its first major foreign affairs crisis under the Constitution. That

year the French Revolution was in full swing, Louis XVI was beheaded, and war broke out in Europe between France and Great Britain. In America, the war created a heated political controversy. Americans remained grateful for the significant French military and financial assistance during the American Revolution, and these feelings of gratitude were amplified by the French Revolution. Like the United States, France had overthrown its royal government and seemed to embrace Republican principles. Most Americans firmly supported the French cause, but many others – particularly the merchant classes – wished the country to adopt a policy of strict neutrality that would be more favorable to Great Britain.

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¹ I have treated this and related incidents in William Casto, *THE SUPREME COURT IN THE EARLY REPUBLIC* 71-87 & 137-39 (1995). Unless otherwise footnoted, citations to the sources quoted or referenced in the present article may be found in my book. Other good discussions of the incident are found in Alexander DeConde, *ENTANGLING ALLIANCE: POLITICS AND DIPLOMACY UNDER GEORGE WASHINGTON* (1958), and Harold C. Syrett, *Introductory Note*, in 15 *THE PAPERS OF ALEXANDER HAMILTON* 233-39 (Harold C. Syrett, ed. 1969) (hereinafter cited *HAMILTON PAPERS*). For a recent discussion of American law and politics in 1793, including the Chief Justice's actions, see Stewart Jay, *MOST HUMBLE SERVANTS* (1997) (hereinafter cited *JAY*).

Today a Chief Justice of the United States would remain relatively aloof from such a crisis, but Chief Justice Jay was an eager participant in the public debate over the government's proper attitude toward the warring European powers. He consistently favored a policy that tilted toward Great Britain.

Although the United States had a Treaty of Alliance with France, which dated from the Revolution, Jay favored a policy of strict neutrality. Indeed, at the request of Secretary of Treasury Alexander Hamilton he drafted a neutrality proclamation for the President's signature, which called for a rule of strict neutrality and urged that criminal prosecutions be commenced against Americans who violated his proposed rule. Jay urged these prosecutions notwithstanding the fact that, in his capacity as a circuit judge, he expected to preside over the anticipated criminal trials. President Washington ultimately issued a Proclamation of Neutrality similar to Jay's draft but written by the Attorney General. Jay also wrote advisory opinions in favor of strict neutrality that were published in the form of grand jury charges in the nation's newspapers and were sent by the Washington Administration to Europe as white papers justifying the government's position.

The "Neutrality Crisis" got totally out of hand when Edmond Genet, the new French Ambassador, arrived in America. Genet, who came to be known as Citizen Genet, was a young and enthusiastic revolutionary who came to America with countless schemes to embroil the United States in the European War. As soon as he landed, he began encouraging Americans to attack France's enemies by land and sea. His most successful project was to launch a privateer fleet that attacked British shipping up and down the East Coast. Privateering has long since faded into desuetude,

but it was widely practiced in the eighteenth century. During times of war, private merchants would be commissioned by governments to prey upon enemy shipping and would be permitted to pocket the proceeds of their lawful depredations. Numerous privateers were commissioned by Citizen Genet, and their British prizes began streaming into American ports. The British minister was furious and bombarded the federal government with protests. Genet responded that the Treaty of Alliance gave France a legal right to wage a maritime campaign against British shipping from American ports.

President Washington and the pro-British members of his cabinet resolved, however, to maintain their position of strict neutrality. The President adamantly refused to interpret the Treaty of Alliance in a way favorable to France. Citizen Genet was infuriated and let it be known that if the President did not change his position, Genet would appeal over his head directly to the American people. These were strong words indeed from the representative of the people of France. Just a few months earlier an appeal over the head of the King of France had culminated in the King losing his head.

The pro-British faction in the federal government immediately recognized Genet's gaffe as political dynamite. Genet was asking the people of the United States to choose between George Washington and France, and their inevitable choice was obvious. As the saying goes, Washington was first in war, first in peace, and first in the hearts of his countrymen. The problem was: How to publicize Genet's threat.

Alexander Hamilton mentioned the threat in an anonymous political essay² – what we would call today an unsigned op-ed piece – but that did not get the job done. In politics,

² Alexander Hamilton, *No Jacobin No. 1*, DUNLAP'S AMERICAN DAILY ADVERTISER, July 31, 1793, reprinted in 15 HAMILTON PAPERS 145.

anonymous charges always have been and always will be a dime a dozen. In August, Chief Justice Jay and Senator Rufus King raised the curtain of anonymity by signing their own names to a brief notice in which they affirmed that

Certain late publications render it proper for us to authorize you to inform the Public, that a report having reached this City from Philadelphia, that Mr. Genet, the French Minister, had said he would appeal to the People from certain decisions of the President; we were asked on our return from that place, whether he had made such a declaration – we answered, That He Had, and we also mentioned it to others, authorizing them to say that we had so informed them.³

The notice was published and republished in the nation's leading newspapers.

This public statement by two of the country's most respected public officials stunned the nation. Supporters of Genet tried to rally to his defense. For example, a writer in the *Virginia Gazette* was quick to condemn the politics of the attack. The writer wondered "how far it comports with the *official* characters of the Chief Justice, and a Senator of the United States to become the trumpeters of such intelligence?" The writer concluded that the "object indubitably was, to transfer the honest affections of the American people from the cause of France, to the cause of Britain."⁴

Citizen Genet was furious and vehemently denied the Chief Justice's assertion. Throughout the fall numerous charges and countercharges were published in the nation's newspapers, including a second report from Chief Justice Jay and Senator King explaining the factual background that had originally led them to conclude that Genet had indeed

threatened an appeal to the people.⁵ Finally Genet took a step that has become distressingly familiar in American politics. He sought a judicial solution to an essentially political controversy. He demanded that the government have Chief Justice Jay indicted on the charge of criminal libel against a foreign diplomat. The crime of seditious libel was well established in the eighteenth century, and the offense was especially heinous when directed at a foreign ambassador whom the United States was obliged to protect from attack.

In response to Genet's formal request, Secretary of State Jefferson referred the matter to Attorney General Edmund Randolph. In the referral, Jefferson related that President Washington had considered the request and, in effect, wished to remain neutral. Consistent with this neutrality, Jefferson directed Randolph "to proceed in this case according to the duties of your office, the laws of the land, and the privileges of the parties concerned." After considering the matter, Randolph refused to prosecute, and explained, "I do not hold myself bound, nor do I conceive that I ought, to proceed against any man in opposition to my decided judgment." He did not, however, completely foreclose the possibility of a criminal prosecution. In a concluding sentence, he advised Genet "that any other gentleman of the profession, who may approve and advise the attempt, will be at no loss to point out a mode which does not require my intervention."

At first glance, there might be a tendency to believe that the fix was in – that there was to be a formal exchange of correspondence officially answering Genet's request in terms of measured neutrality but subject to a clear private understanding that the Chief Justice and

3 Letter from John Jay & Rufus King (Aug. 12, 1793), *THE DAILY ADVERTISER*, Aug. 14, 1793, reprinted in 15 *HAMILTON PAPERS* 233.

4 *A Uniform Federalist*, *VIRGINIA GAZETTE*, Sept. 9, 1793, quoted in JAY at 148.

5 John Jay & Rufus King, *To the Public*, *THE DAILY ADVERTISER*, Dec. 2, 1793, reprinted in 15 *HAMILTON PAPERS* 236 n.10.

Senator King were not to be prosecuted. Other evidence indicates, however, that there was no such private understanding. When Jay and King learned of the neutral referral to the Attorney General and his suggestion of a private prosecution, they wrote an angry letter to President Washington. Although all copies of this letter were subsequently destroyed, King wrote in a private memorandum that Randolph and Jefferson were “treated with much severity in it” and that the letter included a “charge of injustice” against President Washington. Genet’s insistence upon a criminal prosecution obviously was a political hot potato.

As for Genet, he took Randolph’s advice and immediately consulted Peter Du Ponceau and Joseph Thomas, two Philadelphia lawyers who were sympathetic to France. Little is known about Thomas, but Du Ponceau had a distinguished career.⁶ He was a Frenchman who came to America during the Revolution as an aide to Baron Von Steuben. After the War, he settled in Philadelphia and became one of the city’s most respected attorneys. In the 1790’s he was known for his support of the French Revolution and frequently represented the French government’s interests in judicial proceedings.

Du Ponceau and Thomas were, in effect, the nation’s first independent counsels. If a comparable situation were to arise today, Genet’s allegations against Jay and King would fall within the scope of the Independent Counsel statute’s discretionary investigation provisions.⁷ Attorney General Randolph personally argued the government’s cases before the Supreme Court and also represented private litigants before the Court. Therefore his consideration of Genet’s request might easily

have “result[ed] in a personal, financial, or political conflict of interest.” As for King, he would fit into the statute’s more specific “Member of Congress” provision.

Du Ponceau and Thomas were subject to fewer institutional restraints than are modern independent counsels. They basically were plaintiff’s attorneys who had a political ax to grind and were appointed for that reason. They immediately informed their client that they were “decidedly of opinion that [Jay and King] have committed an offense not only against the local law of this Country, but against the Law of Nations, for which they may be indicted and punished.” They were undecided where “the prosecution ought to be instituted” but were inclined to think that “the Supreme Court has original jurisdiction.”

Whether this bizarre prosecution against the Chief Justice of the United States in his own court was formally commenced is unknown, but the case apparently could have been filed there. As Du Ponceau noted in his opinion, the Constitution vests the Supreme Court with original jurisdiction over “all cases affecting ambassadors.” Nor did Genet need the government’s permission to institute a criminal action. There was a well-established common law mode of prosecution, called an appeal, that authorized private persons to commence and prosecute criminal actions. Some four years later a newspaper editor was convicted for libeling Sir John Temple, the British Consul General. A contemporary newspaper reported that Sir John, himself, prosecuted the case.⁸

With this advice in hand, Genet wrote his fiancée that he was determined that Jay and King “will not get away with this.” He continued, “I will file for myself at the supreme court

6 See Howard Knott, *Du Ponceau, Pierre Etienne*, 5 *DICTIONARY OF NATIONAL BIOGRAPHY* 525 (A. Johnson & D. Malone, ed., 1930).

7 28 U.S.C. § 591(c)(1) & (2).

8 *United States v. Greenleaf*, unreported (C.C.D.N.Y. 1797), discussed in *STATE GAZETTE OF NORTH CAROLINA*, May 3, 1797.

and will obtain justice if it is still held in the United States.”⁹ At the same time, Genet arranged for Brockholst Livingston, a New York lawyer, to have witnesses brought from New York to Philadelphia, which was then the nation’s capital, for proceedings in the Supreme Court.

The course of events, however, rapidly overtook and foreclosed Genet’s plan. Like many modern independent counsel prosecutions, no conclusive judgment was ever entered on the merits. In February 1794, less than two months after Genet’s lawyers began planning the prosecution, Jean Fauchet arrived in Philadelphia with orders from the French government to replace Genet and ship him home to be guillotined. When President Washington magnanimously refused to permit this deadly repatriation, Fauchet determined to attempt a settlement of Genet’s embarrassing prosecution. Fauchet rightly understood that he had a certain amount of leverage in the settlement negotiations. When the two men met, he reminded Genet that under French law Genet’s mother and sisters were subject to execution if he persisted in embarrassing the French govern-

ment with his planned prosecution. And so the matter was concluded.

AFTERWARDS

After agreeing to drop the planned prosecution, Citizen Genet retired from public life, married the daughter of the Governor of New York, and lived as a gentleman farmer in New York until his death in 1834. Chief Justice Jay did not attend another session of the Supreme Court. Instead he crossed the Atlantic to negotiate a controversial treaty with Great Britain. Upon his return he resigned his chief justiceship to become Governor of New York for six years. In 1801 he retired from public life and, like Citizen Genet, lived as a gentleman farmer in New York until his death in 1829. Mr. Du Ponceau continued practicing law and was generally regarded as one of the nation’s most learned constitutional lawyers and the nation’s foremost international lawyer. At the same time, he earned international acclaim as a gifted linguist and philologist. He was elected president of the American Philosophical Society in 1828 and held that office for the last sixteen years of his life. *GP*

⁹ Edmond Genet to Cornelia Clinton (Dec. 24, 1793) (available in Genet Papers, Library of Congress).