

interpretation, and "the President 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." Jefferson's letter included twenty-nine questions to which the President sought answers. Washington, recognizing that the Court might in the future have to rule on some of the matters he now posed in the abstract, proposed that the judges strike out any question that circumstances "would forbid them to pronounce on."

Several state constitutions not only permitted but actually required their highest courts to provide advisory opinions to either the legislature or executive in particular circumstances; some states, most notably Massachusetts, still allow advisory opinions today. Washington, therefore, was not seeking to embarrass the Court, but merely expected that it would act according to an already established tradition. Jay, however, recognized the danger of Washington's request: if the Court rendered an advisory opinion on a hypothetical question, it would be bound to follow its decision when confronted with a real case whose particular circumstances might call for a completely opposite judgment. Jay also knew that the Philadelphia Convention had rejected a proposal allowing Congress or the president to require advisory opinions from the Court, based on the Massachusetts model, although the president had been given authority to require written opinions from heads of the executive departments.

Jay delayed responding until the full Court met for the August term, and on August 8, with the full concurrence of his brethren, he turned down the request. The line of separation between branches drawn by the Constitution, he wrote,

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.

The Court's decision involved more than a rigid adherence to separation of powers. The whole country seemed divided between pro-French and pro-British factions, with feelings running quite high. Had the Court rendered an advisory opinion, it might well have plunged into the very political storms it sought to avoid. The wisdom of not answering abstract questions of law proved well founded when in the following term, in *Glass v. Sloop Betsey*, it had to rule on one of the questions submitted by Washington.

The case involved a French privateer who, in violation of American neutrality, had brought a captured ship into an American port. The Court ordered the prize returned to its owners. Although the question had not been raised in argument, the Court went on to answer what had been one of the president's questions, holding that French consuls could not exercise admiralty jurisdiction over such prizes in the United States. "No decision of the Court," wrote Charles Warren in his classic, *The Supreme Court in United States History*, "ever did more to vindicate our international rights [and] to establish respect amongst other nations for the sovereignty of this country." The force of the *Betsey* decision might well have been undermined had the Court issued an earlier advisory opinion, for then it could have been seen merely as the political act of one branch of government in carrying out a policy that it had helped devise, and not as an independent decision of law.