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Chapter 10

Oliver Ellsworth

“I have sought the felicity and glory of your Administration”

William R. Casto

In March 1797, President Washington retired from public office, and Oliver Ellsworth, the chief justice of the United States, bid the president a cordial farewell. In a private letter, Chief Justice Ellsworth noted that he had sought with “ardor . . . the felicity and glory of your Administration.” Undoubtedly, Ellsworth was referring in part to his service in the Senate from 1789 to 1796, but he penned these words at the end of his first year as chief justice. Surely no justice of today’s Supreme Court would claim to have sought with ardor the felicity and glory of a particular president’s administration. Chief Justice Ellsworth, however, probably did not distinguish in this regard between his legislative and judicial service. Certainly his letter contains not the slightest hint of such a distinction. As a senator and then as chief justice, he consciously sought to support the Federalist administrations of George Washington and John Adams.

This theme of support was an omnipresent facet of Ellsworth’s chief justiceship. Just five days after being sworn into office, he wrote a detailed private advisory opinion on President Washington’s legal obligation to comply with a request by the House of Representatives for confidential papers related to the Jay Treaty. Similarly, he had no qualms about advising cabinet-level officers on issues related to criminal and civil litigation impressed with a national interest. Moreover, Ellsworth—like his fellow Federalist justices—used grand jury
charges to deliver lectures on politics and to provide public advisory opinions on pressing issues of the day. Finally, he assumed without objection a number of minor nonjudicial duties and spent the last year of his chief justiceship in Europe as a commissioner to negotiate an end to the undeclared quasi war with France.

Ellsworth’s Personal and Intellectual Background

Ellsworth’s long career of public service and support for the establishment began in Connecticut, where he was born in 1745 in the wake of the Great Awakening. As a consequence of the Great Awakening, Connecticut was riven by a struggle between conservative Old Lights, who essentially opposed change, and evangelical New Lights, who sought to reinvigorate Calvinism. Among other things, the New Lights emphasized the importance of receiving grace in an actual and personal regenerating experience with God. Ellsworth was the second son of a prosperous (but not wealthy) New Light farming family, and his parents intended that he should enter the ministry. Following this plan, he received his college preparatory education from Joseph Bellamy, the colony’s leading New Light minister, and attended Yale College for two years. He then attended the College of New Jersey (Princeton) where he was graduated in 1766. After graduation he returned to Connecticut and spent a year under the tutelage of John Smalley, a respected New Light minister known for preparing graduates for the ministry. Ellsworth decided, however, against the ministry and after a brief stint as a teacher turned to the law. Although Ellsworth became a lawyer, his early religious studies—especially under Joseph Bellamy—imbued him with a thoroughgoing Calvinism that completely dominated his understanding of human society.

Although Ellsworth became a lawyer rather than a minister, he was a deeply religious individual who cleaved to his parents’ and teachers’ strict Calvinism throughout his life. As a young man, he personally experienced God’s grace and made a public profession of his regeneration. He never ceased being a serious student of religion, and in later years as the head of his family he presided over daily prayer meetings within the privacy of his home. Shortly after Ellsworth’s retirement from the federal bench, a young Daniel Web-
ster noted with obvious respect that Ellsworth was “as eminent for piety as for talents” and that his piety made him an “ornament” to the profession.4

Ellsworth was trained in the strict Calvinist tenets of the Westminster Confession of Faith—the same creed that Max Weber posited as the purest basis for the Protestant work ethic. He epitomized this work ethic, but his calling was more in public service than in commerce. Because the Westminster Confession attained a certain amount of gloss throughout the eighteenth century, the most reliable sources for the substance of Ellsworth’s faith are found in two bookends to his adult life. At the end of his life stands A Summary of Christian Doctrine and Practice, written by Ellsworth and fellow members of the Connecticut Missionary Society. At the beginning of his life is the work of Joseph Bellamy, especially The Wisdom of God in the Permission of Sin.5

The Westminster Confession, Joseph Bellamy, and A Summary of Christian Doctrine all envisioned an all-powerful God and a thoroughgoing doctrine of predestination. At the same time, “men are totally depraved; and, in themselves, utterly helpless.” Individuals cannot earn their salvation. They can only hope that God will unilaterally pardon their inherent sinfulness. Even those whom God elects for salvation are personally undeserving “because, the personal ill-desert of believers remains and [even] faith itself, which interests them in it, is the gift of God.”6

This rigorous, unbending model of God’s pervasive omnipotence combined with man’s inherent depravity had obvious implications for the governance of human society. In 1790, Nathan Strong, who had been Ellsworth’s minister when Ellsworth lived in Hartford, noted that “human nature must be taken by the civil governor as he finds it.” Ten years later, Ellsworth reiterated this idea when he insisted in a conversation with a French philosopher that any comprehensive plan of government must take into account “The Selfishness of Man.” This concern about selfishness is little more than a restatement of the Calvinist doctrine that condemned humankind as inherently depraved. Even the phraseology is taken from the New Lights’ Calvinism that defined sin exclusively in terms of selfishness.

Among other things, Ellsworth’s Calvinist pessimism about human nature led him to distrust democracy and juries chosen by random ballot.7 At the Constitutional Convention, he favored the election of
senators by state legislatures because “more wisdom [would] issue from the Legislatures; than from an immediate election of the people.” Similarly, he initially favored the idea that the Constitution should be approved by the state legislatures rather than by the people in conventions because “more was to be expected from the legislatures than from the people.” This pervasive distrust of the general populace surfaced again while he was drafting the Judiciary Act of 1789. In private conversations he expressed a dislike for using random ballots to select juries because “a very ignorant Jury might be drawn by Ballot.”

At first glance, the doctrine of inherent depravity presents immense obstacles to good government. After all, rulers are themselves human beings. Calvinist theology, however, provided an escape from this cul de sac. Ellsworth’s teacher at Princeton, his former pastor in Connecticut, and other Calvinist theologians took the position that righteous rulers were personally selected to their positions by God. This theology of divine appointment was embraced by Ellsworth in Senate debates. Therefore good government was possible, but good government came from God’s intervention rather than from the good works of men.

In theory, Ellsworth’s firm belief in and strict compliance with this rigid, monolithic theology might have made him an unbending, true believer who could break no compromise. In fact, however, he was a gifted politician who thoroughly understood the art and utility of compromise. Therefore unless he was quite a hypocrite, he must have been able to reconcile his active participation in shaping political compromises with his unbending personal beliefs. The theoretical basis for such a reconciliation is Joseph Bellamy’s extended essay *God’s Wisdom*, which was published in 1758 immediately before Ellsworth entered Bellamy’s tutelage and which Bellamy undoubtedly incorporated into young Oliver’s studies. *God’s Wisdom* was a rigorously logical theodicy that remained ruthlessly true to Calvinist doctrine in explaining the existence of evil. Bellamy explained that the course of human events follows a perfectly predestined plan conceived by a perfect God to craft the best possible world. This plan, however, is “as absolutely incomprehensible by us as it is by children of four years old.” As part of this plan God had decided that the permission of sin is the best method for instructing man in God’s perfection and man’s imperfection. Only individuals who thoroughly understand their sin-
fulness are fit to be saved by God. Thus Bellamy’s basic message was optimistic. We should not be disheartened by the presence of evil in the world. To the contrary, sin is part of God’s plan, and all will come right in the end.¹⁰

The skeptical optimism of God’s Wisdom provides a wondrously flexible tool for comprehending life’s travails. Inevitable tribulations are accepted on faith as part of God’s unknowable plan. In the political arena, a politician who is, himself, saved may nevertheless deal freely with the unsaved and even participate in apparently sinful compromises with the confident faith that all is part of the plan. These implications are consistent with the history of Connecticut politics in the wake of the Great Awakening. Initially, the colony’s New Lights were persecuted in the 1740s by the Standing Order, but the New Lights quickly became effective manipulators of the political system. They were careful to distinguish themselves from the radical separatists and Baptists and made it clear that they were Calvinists who intended to work within the existing religious and political order. By the end of the 1760s, they had effective political control of the colony and retained this control throughout Ellsworth’s life.¹¹

In 1762, the New Lights’ growing political power was recognized when Ellsworth’s teacher, Joseph Bellamy, was chosen to deliver the colony’s annual election sermon. In his sermon, Bellamy advocated religious tolerance and expressly assured Anglicans that if fellow colonists “desire to declare for the Church of England, there is none to hinder them.” Four years later, the Old Light Calvinists lost control of the government in the election following the Stamp Act crisis. As part of the political maneuvering, the New Lights struck a deal with the Anglicans in which William Samuel Johnson became the first Anglican elected to the upper house of the colony’s legislature in return for Anglican support of New Light candidates. The Johnson deal and similar arrangements in other elections established a pragmatic approach to the allocation of political power within the colony. These were the rules of the game that Ellsworth learned as he climbed the ladder of political success in Connecticut’s New Light–dominated Standing Order.¹²
Ellsworth’s Early Political Career and Service in the Senate

After terminating his postgraduate religious studies, Ellsworth read law and was admitted to the bar in 1771. His first few years of practice were a financial disaster, but his prospects improved when he married into one of Connecticut’s most influential families. With this entree into the colony’s power structure, Ellsworth was almost immediately elected to the General Assembly and became a justice of the peace. During the Revolutionary War, he progressed from obscure but important administrative assignments to becoming one of the state’s most important young political leaders. By 1780, at age thirty-five, he was state’s attorney for Hartford County and a member of the upper house of the state legislature and the Council of Safety. He also was a delegate to the Continental Congress.13

Ellsworth thrived in the Continental Congress and had no qualms about the moral ambiguities of power politics. In 1779, the minister of his church evidently complained to him about the Revolutionary War’s impact upon the world’s “moral State.” Consistent with Calvinist theology, Ellsworth wrote from Philadelphia that he did not know “the design of Providence in this respect,” but he conceded that “the powers at war have very little design about [the world’s moral state] and terminate their views with wealth and empire, leaving religion pretty much out of the question.” He then concluded with a mild rebuke to his doubting minister. Restating the central theme of God’s Wisdom, Ellsworth noted, “[I]t is sufficient, dear Sir, that God governs the world, and that his purposes of Grace will be accomplished.”14

After the war, Ellsworth was appointed to the Connecticut Superior Court, the state’s highest judicial court, and served until 1789. During this service, he also represented Connecticut at the Constitutional Convention in Philadelphia and played a significant role in crafting the Constitution. In the convention’s plenary sessions, he helped shape the Constitution on comparatively minor points like enlarging Congress’s authority to define crimes and the election of senators by state legislatures rather than popular vote. More significantly, he was one of the five-person Committee of Detail that wrote the working draft of the document finally adopted by the convention.15
Ellsworth also played a significant role in brokering some of the convention’s most important compromises. He was a leading proponent of the compromise on the importation of slaves and was similarly involved in resolving the dispute over whether states would be represented in Congress on an equal footing or proportionally by population. As a small-state delegate, he was dead set against proportional representation, but he was also a skilled politician who understood the value of compromise. He clearly participated in shaping the Grand Compromise that gave the big states control of the House but provided for equal state representation in the Senate. He was the delegate who formally moved the adoption of this compromise and subsequently was selected as the only small-state delegate on the Committee of Detail.16

In later years James Madison recollected that “from the day when every doubt of the right of the smaller states to an equal vote in the senate was quieted . . . Ellsworth became one of [the general government’s] strongest pillars.” In the subsequent ratification process, Ellsworth wrote an influential series of essays entitled Letters of a Landholder, and at least one knowledgeable observer commented that “the Landholder’ will do more service . . . than the elaborate works of Publius.” At the Connecticut ratification convention, Ellsworth was the Constitution’s leading advocate and among other things endorsed the concept of judicial review. He reassured the convention, “If the general legislature should . . . make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges . . . will declare it to be void.” After ratification, Ellsworth was Connecticut’s unanimous choice to represent the state in the new federal senate.17

For seven years Ellsworth was the de facto leader of the Federalists in the Senate, and during that time he worked on more committees than any other senator. His best-known legislative work is the Judiciary Act of 1789, which he and his Calvinist friend William Paterson of New Jersey drafted. The Constitution created just the bare bones of a federal judicial system and left many significant issues to the discretion of Congress. In particular, Congress was to decide whether the new judicial system would consist of a single, relatively isolated national Supreme Court or whether there would also be a system of lower federal courts distributed throughout the nation.18
In crafting the Judiciary Act, Ellsworth had to bring to bear the full extent of his remarkable ability to broker pragmatic compromises. There was substantial practical and theoretical opposition to the creation of an extensive system of federal courts. At a theoretical level, many were concerned that the federal courts would supplant the state judiciaries. In addition, the Supreme Court’s power to review state court decisions made conflicts between the Court and state courts inevitable. These theoretical objections were directly implicated by a huge number of pre-Revolutionary War contracts between American debtors and British creditors. In the Treaty of Paris, the United States had agreed that the British creditors “shall meet with no legal impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.” Many states, however, had notoriously refused to enforce this treaty obligation and had in effect closed their courts to British creditors. When the first Congress was convened, many members—particularly southern members—were adamantly opposed to using the new federal courts to enforce this treaty obligation.19

Ellsworth’s approach to this opposition was masterful. He insisted upon a complete system of federal trial courts distributed throughout the United States and supervised by the Supreme Court. At the same time he agreed to limit the federal courts’ jurisdiction to comparatively narrow groups of cases in which the federal interest was clear and immediate. The federal trial courts were given plenary power over the enforcement of federal revenue statutes and federal criminal law. They were also given complete authority to resolve prize cases that so frequently involved foreign relations.20

Under Ellsworth’s plan, litigation that demanded immediate, day-to-day attention was entrusted to a federal district court that would be staffed by a resident federal district judge in each state. In particular, these district courts were vested with jurisdiction over admiralty cases, which included prize cases, and the enforcement of federal revenue laws. Further, he created a system of federal circuit courts that were given appellate authority over the district courts and original or trial jurisdiction over criminal prosecutions and civil cases involving aliens or citizens of different states. The expectation was that these circuit courts would be the principal federal trial courts for civil and criminal litigation other than prize and revenue cases.21
The circuit courts, which were to be located in each state, were to be staffed by the local federal district judge and circuit-riding Supreme Court justices. The theory behind this innovative arrangement was that the circuit-riding justices would provide some uniformity of decision throughout the nation, lend weight and dignity to the federal trial courts, and obviate the need for appeals to the distant capital. In practice, these objectives were largely obtained, but the justices came to hate the rigorous and onerous travel required by circuit riding.\footnote{22}

The circuit courts’ alienage jurisdiction obviously included British creditors’ claims and therefore might have been quite controversial. But Ellsworth defused this potential problem by limiting alienage and diversity jurisdiction to cases involving more than $500. As a practical matter, this amount-in-controversy requirement barred the great majority of British claims from the federal trial courts because most of the claims were for lesser amounts. In other words, Ellsworth acquiesced in the ongoing violations of the Treaty of Paris in order to obtain an extensive system of federal trial courts with complete jurisdiction over the essential categories of prize cases, revenue cases, and criminal prosecutions.\footnote{23}

Ellsworth was equally pragmatic in limiting the Supreme Court’s appellate jurisdiction over state courts’ judgments. There was substantial opposition to the Court’s power to review state courts’ determinations of facts, but Ellsworth mooted this objection by stripping the Court of this power. Undoubtedly this compromise was made easier by the existence under his plan of federal trial courts to conduct fact-finding in litigation affecting the federal government’s vital interests. In addition to eliminating the appellate review of facts, Ellsworth’s plan limited the Court’s power to review legal determinations. In cases appealed from the state courts, the Court could consider only specific issues governed by positive, written federal laws—specifically, “the constitution, treaties or laws of the United States or [a federal] commission.”\footnote{24}

These and other compromises defused most of the congressional opposition to an extensive federal judicial system. Ellsworth’s plan passed both houses of Congress by large majorities and even received a majority of southern votes in each house. As a result the judicial branch was launched with comparatively little controversy and a clear consensus of approval.\footnote{25}
Ellsworth’s Appointment and Service as Chief Justice

Ellsworth continued to serve ably in the Senate until 1796, when, as part of the Jay Treaty’s fallout, he became chief justice of the United States. The Jay Treaty was a national political watershed that enabled the Jeffersonian Republicans to focus upon their disappointments with Federalist policy and to solidify their coalition of interests into a loose organization resembling an opposition political party. Before the treaty, the Republicans more or less deferred to George Washington’s Federalist administration. The treaty, however, convinced the Republicans of the need for firm and open opposition.

In the early spring of 1794, an effective British maritime campaign against American commerce in the West Indies brought the two countries to the brink of war. While the Congress was enacting legislation to prepare for war, a small group of influential senators, including Oliver Ellsworth, decided that war could be best averted by sending an envoy to England to adjust the countries’ differences. Ellsworth went to President Washington as the group’s representative and proposed the mission. The president agreed, and in the spring of 1794 Chief Justice Jay was despatched as special envoy to Great Britain. Jay returned in the next year with a treaty and almost immediately resigned his chief justiceship to become governor of New York. President Washington then offered the position to John Rutledge of South Carolina.

Meanwhile the Jay Treaty was being considered by the Senate in secret executive session, where it met severe opposition from southern senators. Despite this opposition, the Federalists, led by Oliver Ellsworth, approved the treaty by a close vote of 20–10. When the terms of the treaty were published, the nation was furious. Britain had prevailed on virtually every issue in controversy. From the American point of view, the best that could be said was that the treaty avoided a war and established a diplomatic precedent that under certain circumstances Britain was willing to enter into a treaty with the United States. Many viewed the treaty as a national humiliation. Laborers demonstrated on the Fourth of July in Philadelphia, the nation’s capital. They burned John Jay in effigy, and overpowered a force of cavalry called out to quell the “riot.” Alexander Hamilton was stoned in New York. In the midst of these ignominious affronts to Federalist policy came a hubbub in Charleston, South Carolina. Mobs rioted for
two days in opposition to the treaty, and on the third day at a public meeting John Rutledge vehemently attacked the treaty and Jay. Unfortunately for him, a detailed account of his intemperate speech was published in newspapers throughout the nation, and his appointment was doomed. Although he served briefly under a recess appointment as the second chief justice of the United States, the Senate rejected his nomination in December of 1795.27

Rutledge was, above all else, a gentleman whom Washington trusted. After Rutledge was rejected by the Senate, the president turned to another trusted personal acquaintance—Patrick Henry—but Henry declined. The president wrote that this inability to find a new chief justice was “embarrassing in the extreme,” and perhaps in desperation he nominated William Cushing, who was the Court’s senior associate justice. But Cushing also declined. Finally Washington turned to Oliver Ellsworth as his fourth choice.28

Ellsworth was nominated on March 3, 1796, and confirmed by the Senate the next day. Almost immediately he became embroiled in another facet of the general controversy over the Jay Treaty. As a practical matter, the treaty could not be implemented without money, and opponents seized upon the appropriations process in the House of Representatives as an opportunity to reconsider the treaty’s merits. Ellsworth was keenly aware of these legislative maneuvers, and just a few days before he became chief justice he wrote his wife, “[T]here remains yet to be made one violent effort in the House of Representatives to destroy the Treaty.” He believed, however, “that the effort will be unsuccessful and that the Treaty will be carried into effect, which the honor and interest of this Country very much requires.”29

On March 7, 1796, the day before Ellsworth took his oath of office as chief justice, the House demanded that the president turn over all documents relevant to the treaty’s negotiation. Today most justices would remain aloof from this kind of controversy between the executive and legislative branches, but Ellsworth apparently saw no reason for restraint. On March 13, five days after becoming chief justice, he wrote a detailed private advisory opinion on the House’s authority to demand the documents.30

Ellsworth’s opinion is found in a nine-page letter to Connecticut Senator Jonathan Trumbull and clearly was intended to be an advisory opinion. Senator Trumbull had discussed the treaty a few days
earlier with President Washington, and after that discussion Trumbull asked Ellsworth for a legal analysis of the issues. Ellsworth’s letter contains no chitchat and no customary closing enquiry about the well-being of Trumbull’s family or mutual friends. Instead the letter is devoted exclusively to the legal questions presented by the House’s demand for documents. Ellsworth predictably concluded that the House lacked authority either to reject the treaty or to demand the documents. Although the letter was addressed to Senator Trumbull, it wound up in President Washington’s files docketed under the subject “treaty making power.” Whether Ellsworth knew that his opinion would be passed on to the president is not known to a certainty, but as a shrewd and knowledgeable politician, he must have known or anticipated this event. In any case the letter obviously was intended by the chief justice as a detailed advisory opinion on a hotly debated constitutional controversy.\(^3\)

Almost as soon as Ellsworth delivered his advisory opinion, he wrote his wife with “some pain” that he had to ride the Southern Circuit that spring and preside over the federal circuit courts in each southern state. A month later he convened the court in Savannah, Georgia, and delivered a grand jury charge that was published in at least twelve newspapers in eight states. Following the custom of the times, Ellsworth’s charge was not so much an explanation of criminal law as it was a political essay extolling the federal government’s virtue. In particular, he explained, “The national laws are the national ligatures and vehicles of life. Tho’ they pervade a country, as diversified in habits, as it is vast in extent, yet they give to the whole, harmony of interest, and unity of design.” This emphasis upon “harmony of interest, and unity of design” is a restatement of the Calvinist vision of a perfect society, and in the next sentence Ellsworth expressly affirmed that the federal government was part of God’s plan. The national laws, he said, “are the means by which it pleases heaven to make of weak and discordant parts, one great people.”\(^3\)

While Ellsworth was penning this grand jury charge, he was undoubtedly concerned about the Jay Treaty’s fate in the House of Representatives. In the charge, he applauded the wisdom of distributing legislative power to two “maturing and balancing bodies, instead of the subjection of it to momentary impulse, and the predominance of faction.” In this regard, he probably considered the Senate to be “maturing and balancing” and the House to be subject to “momentary
impulse, and . . . faction.” Notwithstanding his concern about the treaty’s fate, his private conviction was that the treaty would be funded, and on April 30 the House approved the required funds by a close vote of 51–48.33

This legislative victory confirmed Ellsworth’s Calvinist understanding of government under the relatively new Constitution. Soon after learning about the Jay Treaty’s victory in the House, he reiterated the basic principle of God’s Wisdom to his son-in-law Ezekiel Williams. “Of politicks,” he wrote Williams, “I will converse with you when I come, and am satisfied in the mean time that God governs the world, & will turn all the wrath & folly of men to good account.” At about the same time, he reassured President Washington that “the publick mind, as well Southward as elsewhere, is pretty tranquil, and much more so than it would have been had our Country[, through a failure to fund the Treaty,] been dishonored and exposed by a violation of her faith.”34

After defending the wisdom of the federal government in his charge to the Georgia grand jury, Ellsworth proceeded from Savannah to South Carolina, where he dealt with the important neutrality question of whether the Jay Treaty forbade the French to sell British prizes in American ports notwithstanding an ambiguous provision possibly to the contrary in the Treaty of Alliance with France. The British consul in Charleston initially asked the local federal district judge to rule on this issue, but the judge, who usually ruled against the British, seized upon a technicality and refused to decide the matter. As soon as Chief Justice Ellsworth arrived in town, the consul renewed his petition, and Ellsworth immediately heard the case and gave full effect to the Jay Treaty.35

Later that spring the chief justice held court in North Carolina and in Hamilton v. Eaton addressed a conflict between British creditors’ treaty rights to recover debts and a North Carolina statute designed to impede those rights. Ellsworth had not participated in the Supreme Court’s earlier decision of Ware v. Hylton that national treaties override state laws, so he used the North Carolina case to pronounce his views on the subject and to reaffirm the supremacy of federal law over state law. Among other things, he brushed aside the defendant debtor’s argument that the Treaty of Paris was an improper taking of the defendant’s private property. Ellsworth met this argument head-on and bluntly ruled, “It is justifiable and frequent, in the adjustments
of national differences, to concede for the safety of the state, the rights of individuals.”

When the chief justice arrived in Philadelphia for the Supreme Court’s August Term of 1796, he was presented with yet a third opportunity to decide a case in a manner that would support the national government. In the 1790s about 90 percent of the federal government’s revenues came from the impost, and federal admiralty courts, which did not use juries, were used to enforce the impost. In *United States v. La Vengeance*, the Court was called upon to decide whether there was an entitlement to a jury trial in cases governed by laws like the impost statute. Although traditional principles of admiralty law clearly indicated that a jury should be used in these cases, Chief Justice Ellsworth delivered a majority opinion that ignored the traditional principles and denied a right to trial by jury. Years later Justice Samuel Chase recalled that the Court was motivated by “the great danger to the revenue if such cases should be left to the caprice of juries.”

Although President Washington finally decided that summer not to seek a third term of office, Ellsworth’s faith in the federal government was not shaken. In the fall of 1796, he optimistically wrote a good friend and fellow Calvinist that “we may however yet hope that the gates of Hell will not prevail.” This reference to the Book of Matthew 16:18 was used by Connecticut Calvinists to assure themselves and others that God was looking after their institutions. Ellsworth continued in this Calvinist strain by immediately “pray[ing] especially that good men everywhere may make their Election sure.” Ellsworth was clearly writing about politics, but he could not have meant the word “Election” to refer specifically to the coming political elections because all “good men everywhere” were not running for election. Instead, he was referring to God’s election of good men for salvation. In Ellsworth’s mind, God’s elect were supporters of the federal government, and they made their personal Election sure by voting properly in the November elections. When the Fifth Congress was convened in 1797, the Federalists had a majority in both houses. Moreover, John Adams, whom Ellsworth had fully supported, continued the Federalists’ control of the presidency.

Notwithstanding these Federalist electoral triumphs, 1797 was a bad year for Ellsworth. The Supreme Court was convened in early February, but Ellsworth could not attend because he was sick. He
probably was suffering from gout and gravel. This extremely painful illness usually appears in middle age and is caused by either a hereditary metabolic disorder or excessive accumulations of lead in the body (among eighteenth-century English-speaking people, typically from drinking large quantities of port wine). The illness is not degenerative, but it afflicted him with sporadic bouts of intense pain until he died in 1807. By the middle of March he reported to his son-in-law that his health was “pretty well restoring,” and he was ready to ride the Eastern Circuit.39

While Ellsworth was recovering from his illness, he and other Federalists were deeply disturbed by a worsening of relations with France and the impact of Franco-American relations upon domestic American politics. The previous year the French had unsuccessfully attempted to bring about the election of Thomas Jefferson to the presidency. After John Adams was elected, they refused to accredit a new American minister to France and increased their maritime depredations on American commerce. These affronts caused the Federalists to believe that war with France was likely. At the same time Jeffersonian Republicans seemed to support France.40 The Republicans’ domestic support for French misconduct outraged New England Federalists. In early April, Ellsworth’s friend, Connecticut Senator Uriah Tracy, wrote, “I presume we shall see at the coming Session of Congress the humiliating spectacle of a considerable number of the members of the Government take side with France & justify all the depredations.” Tracy continued, “[I]f we must suffer the French Nation to interfere with our politics—by reason of a Geographical division of Sentiment, perversely bent on humiliating their own government to a foreign one—why then, Sir, I hesitate not a moment in saying a separation of the Union is inevitable.”41

On the same day that Senator Tracy was speculating about a “separation of the Union,” Chief Justice Ellsworth delivered an embarrassing grand jury charge in New York. The combination of his painful kidney ailment and uncertainty about the impact of relations with France upon domestic politics caused him to rail against “the baleful influence of those elements of disorganization, & tenets of impiety.” He warned the nation that there were “impassioned” and “impious” people who are “radically hostile to free government.” Even worse, this “disaffection opens a door to foreign [i.e., French] in-
fluence, that ‘destroying angel of republics.’” All in all, the charge verged upon disjointed hysteria.42

A writer in the New York Argus disliked the religious undertone of Ellsworth’s charge and wrote, “I like neither his politics nor his religion.” After reading the charge, Abigail Adams was so exasperated that she wrote her husband, “[D]id the good gentleman never write before? can it be genuine? I am Sorry it was ever published.” Perhaps during this time Ellsworth—like his friend Senator Tracy—began to have serious doubts about the viability of the new federal government. Within three years the chief justice was privately stating “that there is in a government like ours a natural antipathy to system of every kind.” These are strong words indeed for a man who idealized system and order.43

If Ellsworth was pessimistic as early as 1797 about the federal government’s basic viability, his doubts were temporarily abated by a speech that President Adams delivered to a special session of Congress in the middle of May. To counter the French depredations, Adams chose the same strategy that Ellsworth had recommended to President Washington three years earlier during the war scare with Great Britain. Adams committed the nation to attempt an “amicable negotiation” with France and simultaneously urged Congress to enact “effective measures of defense.” This strategy received immediate widespread public approval, and by the end of May, Ellsworth was feeling “triumphant” that the president’s speech had strengthened the Federalists’ “political faith.”44

The winter of 1798 brought a recurrence of Ellsworth’s painful illness. In January he was “considerably unwell.” By February he was somewhat better but reported that his “want of health requires that my movements shall be gentle & cautious.” The illness continued into March, and he determined to ride a reduced circuit comprising only the states of Vermont and New Hampshire. He asked his Calvinist friend Justice Cushing to take Massachusetts and Rhode Island and offered “to furnish a little money for [Cushing’s] expenses.” Ellsworth explained that he was offering money “as it may never be in my power to repay you in kind [i.e., by riding circuit for Cushing].” This ominous explanation indicates that as early as April 1798, Ellsworth was contemplating vacating his position by resignation or possibly death.45
There is no evidence that Ellsworth’s illness recurred in the winter of 1799, and that year he was able to preside over the Supreme Court’s February Term for the first and only time during his chief justiceship. With his health restored, he bent to the wheel of government and vigorously participated in attempts to resolve domestic and foreign policy issues arising from the ongoing dispute with France. Ellsworth had been pleased with President Adams’s decision in 1797 to attempt an “amicable negotiation” of the two nations’ differences, but the upshot of the negotiation was disastrous. When the American diplomatic mission arrived in Europe the next year, the French demanded bribes as a condition to opening formal negotiations, and the mission fell through. This failure, which became known as the XYZ Affair, exacerbated the rift in Franco-American relations. Relatively minor maritime skirmishing in the West Indies was escalated to a limited quasi war, and on the domestic front Congress enacted the Sedition Act to discourage criticism of the government. Ellsworth began 1799 by writing private and public advisory opinions calculated to establish the act’s constitutionality. He finished the year on a diplomatic mission to Europe to negotiate an end to the war.46

When the Sedition Act was initially debated in Congress, the measure’s opponents vehemently attacked the proposal as unconstitutional, and the Federalists responded that the act would be a proper use of the Constitution’s “necessary and proper” clause to protect the federal government. In addition, the Federalists had a powerful argument based upon the federal courts’ preexisting authority to try common-law crimes. This idea of common-law crimes was based upon a natural-law belief that certain activities were inherently criminal even in the absence of a statute formally declaring them to be criminal. These activities included conduct like counterfeiting, bribing a public officer, and obviously seditious libel. Because the existence of the common-law doctrine of seditious libel was not seriously controverted, the only issue was whether common-law crimes against federal interests should be tried in state courts or federal courts. The Federalists argued that common-law crimes against the federal government should be tried in federal court. Therefore the Sedition Act was constitutional because it was essentially a codification of a common-law authority that the federal courts already had.47

Because the logic of this constitutional argument was unassailable, the opponents of the Sedition Act had to attack the argument’s un-
derlying premise. The opposition could not deny the existence of common-law crimes without appearing foolish or ignorant, so they were forced to deny that the federal courts had authority to punish them. Presumably, they would have conceded that the state courts had such authority. The opposition’s arguments, however, were unavailing, and Congress passed the Sedition Act in the summer of 1798.48

In the 1790s, cabinet responsibility for supervising the U.S. attorneys’ criminal prosecutions in the various states was allocated to the secretary of state rather than the attorney general, and Secretary of State Timothy Pickering evidently had some concerns about the Sedition Act. In 1796, Pickering had noted in official correspondence that on “weighty points” of law he could consult Supreme Court justices, whom he called “our first law-characters,” and the attorney general. Moreover, that same year Pickering actually sought Chief Justice Ellsworth’s legal advice in coordinating ongoing litigation in the federal courts. Consistent with this prior practice, the secretary evidently sought the chief justice’s advice on the Sedition Act’s constitutionality. In any event, in a letter penned to Secretary Pickering in December 1798, Ellsworth opined that the act was constitutional. Like other Federalists, the chief justice believed that because the act was a codification—actually, an amelioration—of the federal courts’ preexisting authority to punish common-law seditious libel, the act’s constitutionality was not subject to serious dispute. Ellsworth evidently had no qualms about giving an advisory opinion on a statute that he might subsequently have to administer in a criminal trial.49

This remarkable advisory opinion did not end the chief justice’s ex parte defense of the Sedition Act. In early 1799, the act’s opponents unveiled a new argument. The linchpin of the constitutional argument in favor of the act’s constitutionality was the federal courts’ preexisting authority over common-law crimes. During a congressional reconsideration of the act in February of that year, Representative Wilson Cary Nicholas challenged the federal courts’ pretension to common-law jurisdiction as a dangerous arrogation of federal authority. Because the common law was “a complete system” that regulated all human relations, the federal courts’ jurisdiction must extend to all human conduct, and Congress’s legislative authority must be equally comprehensive. In other words, Nicholas argued that the constitutional implication of the Federalists’ position was to consolidate virtually all state authority into the federal government.50
Chief Justice Ellsworth almost immediately began writing another advisory opinion to counter this new argument, and in May he presented his comprehensive analysis of federal common-law crimes in a charge to a grand jury in South Carolina. The charge was published in at least eleven newspapers in eight states. Ellsworth used a traditional natural-law analysis to establish the fundamental validity of the doctrine of federal common-law crimes. Like Representative Nicholas and virtually all American lawyers, Ellsworth assumed that the common law—like the law of gravity—existed in nature independent of government. Representative Nicholas had argued that to recognize a federal common-law jurisdiction would give the federal courts complete power over all human affairs, but Ellsworth emphatically rejected this idea. Given the fact that the common law of crimes already existed in nature, the federal courts seemed to be the most appropriate forum for punishing crimes against the national government. Ellsworth advised the jury (and the nation) that the doctrine was limited to acts “manifestly subversive of the national government” and emphasized that he said “manifestly subversive, to exclude acts of doubtful tendency, and confine criminality to clearness and certainty.”

In addition to explaining the substantive limits of this unwritten criminal law, Ellsworth saw the grand jury process itself as a procedural limit to common-law prosecutions. He cautioned the grand jurors that an indictment must not “be founded on suspicion; and much less on prepossession” and reminded them that they were “a shield from oppression [and not] the instruments of it.” He concluded by emphasizing that grand jurors should not investigate “the opinions of men, but their actions, and weigh them, not in the scales of passion, or of party, but in a legal balance—a balance that is undeceptive—which vibrates not with popular opinion; and which flatters not the pride of birth, or encroachments of power.”

At the same time that the chief justice was defending the Sedition Act and the doctrine of federal common-law crimes, he was participating directly in efforts to resolve the diplomatic impasse between the United States and France. The previous fall, France had intimated to William Vans Murray, the United States minister resident to The Hague, that a new diplomatic mission to France for the resolution of the nations’ differences would be received favorably. President Adams kept this overture secret because his secretaries of state, war, and trea-
sury were High Federalists. They deferred to Alexander Hamilton, ab-
horred Adams’s moderation, and sought war with France. In Febru-
ary of 1799 Adams nominated Murray to be minister plenipotentiary
to France without prior cabinet consultation. This surprise nomina-
tion was dead on arrival. As one High Federalist wrote when the pro-
posal was made public, “Surprise, indignation, grief & disgust fol-
lowed each other in quick succession in the breasts of the true friends
of our country.” A select committee was appointed by the Senate to
consider the matter, but a private meeting between the senators and
the president degenerated into a shouting match.53

Although Chief Justice Ellsworth was quite friendly with and re-
spected by most of the High Federalists, he was not one himself. He
had been a firm supporter of President Adams from the beginning. In
addition Ellsworth was philosophically inclined to seek political com-
promises. He was in the capital when Murray’s name was submitted
to the Senate and undoubtedly was appalled by the explosive shout-
ing match between the president and the Select Committee. After this
disaster, he reportedly took it upon himself to speak privately with the
president and managed to convince Adams to appoint three ministers
instead of one. The basic idea was that the three would represent dif-
ferent interests and guarantee that peace would be negotiated on ac-
ceptable terms.54

The president decided to name Ellsworth and Patrick Henry as the
two additional nominees, and Ellsworth was in no position to refuse.
Patrick Henry, however, did refuse, and the president subsequently
had a number of conversations with Ellsworth in which either
Ellsworth or Adams mentioned Governor William Davie of North
Carolina as a possible replacement. When Ellsworth rode the South-
ern Circuit that spring, he consulted with Davie and recommended his
appointment. Following this recommendation, the president then for-
mally nominated Davie.55

Ellsworth did not really want to go to France and feared that the
voyage would bring him illness. Nevertheless, he told the president to
“disregard any supposed pains or perils that might attend me from a
voie at one season more than another.” Finally, he and Davie set sail
in early November and after a rough passage of twenty-four days
made landfall in Portugal. Unfortunately, his journey to Paris was not
even half way through. From Portugal they set sail for France, “but
were 10 days in getting out of the harbour owing to contrary winds,
and were afterward 25 days at sea in a succession of storms one of which lasted 8 days, and were after all obliged to put into a port in Spain about 900 [miles] from Paris.” Then they traveled overland in the dead of winter. After a journey of nine weeks in which their carriages broke down and they wound up on horseback, they arrived in Paris in early March.56

During this arduous trip by sea and land, Ellsworth’s painful kidney ailment recurred and continued throughout the negotiations with the French government. The personal catastrophe, however, did not keep him from playing a leading role in the negotiations, and after six months, a compromise was reached. The naval war in the West Indies was terminated, and the two countries formally agreed to suspend embarrassing Franco-American treaties dating from the Revolutionary War and the period of the Confederacy. These aspects of the compromise were all well and good, but Ellsworth and his fellow commissioners had been instructed to insist that the French government compensate the United States for almost $20 million in spoliations against American commerce. As his opinion in Hamilton v. Eaton indicates, Ellsworth was perfectly willing to override individual property rights to secure safety for the nation. To obtain peace, he agreed to drop this important claim.57

Ellsworth knew that the abandonment of the spoliation claims would outrage his High Federalist friends who were opposed even to the idea of negotiating with France, but he did not care. He had been a politician for nearly his entire adult life and was satisfied that “more could not be done without too great a sacrifice, and it was better to sign a convention than to do nothing.” Moreover, his righteous self-confidence gave him the inner strength to accept the High Federalists’ inevitable snide attacks with equanimity. “If,” he wrote, “there must be any burning on the occasion, let them take me, who am so near dead already with the gravel & gout in my kidnies, that roasting would do me but little damage.”58

Ellsworth’s Resignation

In addition to accepting full political responsibility for the treaty, Ellsworth did something quite uncharacteristic. He resigned his chief justiceship. The traditional explanation for this resignation is that
“the ministerial journey to the continent broke his health,” and undoubtedly his recurring sickness played a significant role in motivating his resignation. But his gravel and gout do not completely explain the matter.\textsuperscript{59}

Gravel and gout are very painful afflictions, but they are not degenerative. Ellsworth had already endured at least three and a half years of this recurring pain without resigning. Nor did the illness seem to have much impact after his resignation. He continued to be mentally and physically active. For example, upon returning to Connecticut, he insisted on walking a little over a mile to church each week rather than riding a carriage. The winter after his return from Europe, he invited five young men to study with him as law clerks, and in 1804 he began a regular series of essays and notes on agricultural topics in the \textit{Connecticut Courant}.\textsuperscript{60}

More significantly, his 1801 resignation was by no means a retreat from public life. He retired from the national political arena but continued to play an active role in Connecticut public life until a few months before he died. In 1802, he was elected to the upper house of the state legislature and was reelected each year for the rest of his life. As the leading member of that body, he chaired and played an active role in the 1802 attempt to resolve the Baptist Petition movement. In 1805, he led the upper house’s consideration of, and personally drafted, the resolutions rejecting two proposed amendments (one on the importation of slaves; the other on the federal courts’ jurisdiction) to the United States Constitution. That same year he served on the three-person committee charged with remodeling the state’s judiciary system.\textsuperscript{61}

In addition to his legislative services, Ellsworth’s position in the legislature automatically made him an appellate judge because in Connecticut the upper house also was the Supreme Court of Errors. Ellsworth was a dominant member of this tribunal’s considerations and personally wrote many of its opinions. Although \textit{Day’s Reports} does not tell who wrote the opinions, surviving dockets assigning opinion-writing responsibility for the court’s June terms of 1803 and 1804 indicate that only one member of the court wrote more opinions than Ellsworth.\textsuperscript{62}

Although Ellsworth’s illness clearly played a significant role in his resignation from the Supreme Court, his health was hardly broken. The illness, however, probably made him unusually susceptible to a
growing suspicion that the federal government was no longer a milestone on the direct path to a graceful national order. In 1796, he had confidently pronounced that the federal government would give “harmony of interest, and unity of design” to the country. But by 1800 he was thinking “that there is in a government like ours a natural antipathy to system of every kind.” If the federal government was not to play a direct positive role in God’s plan, Ellsworth, who knew himself to be one of God’s elect, would have found continued federal service to be galling and surely would have preferred devoting himself to his orderly and righteous state of Connecticut. At the same time, however, there was something inherently dishonorable about quitting. In early middle age, Ellsworth had described himself as a soldier in public service and affirmed that “when a soldier goes forth in publick service he must stay until he is discharged, and though the weather be stormy and his allowance small yet he must stand to his post.” This unbending noblesse oblige may have caused Ellsworth to place inordinate emphasis upon his illness as the reason for not standing to his post. Certainly a good soldier in public service could not be criticized if a serious illness beyond his control forced his discharge.63

Shortly after Ellsworth resigned, John Adams’s loss in the 1800 presidential election confirmed Ellsworth’s Calvinist pessimism about the national government. On hearing of Jefferson’s victory, Ellsworth compared the task of governing under the Constitution to the legend of Sisyphus. “So,” he wrote, “the Antifeds are now to support their own administration and take a turn at rolling stones up hill.” This legend would have been particularly appealing to a Calvinist like Ellsworth who believed generally in predestination and specifically that governments were part of God’s plan. Sisyphus was a clever ruler who tricked and betrayed the gods and who, as an exemplary punishment, was doomed by the gods to his eternal task. Like Sisyphus, Jefferson was a clever ruler, and New England Calvinists believed that he had betrayed God. By suggesting that Jefferson was as certainly doomed as Sisyphus, Ellsworth was reaffirming that the federal government with Jefferson at the helm was part of God’s plan.64

Notwithstanding this pessimism, the essential optimism of God’s Wisdom prevailed as Ellsworth regained his health. Shortly after writing about “rolling stones up hill,” he commented that
Jefferson dare not run the ship aground, nor essentially deviate from that course which has hitherto rendered her voyage so prosperous. His party also must support the Government while he administers it, and if others are consistent & do the same, the Government may even be consolidated & acquire new confidence.

Later he confided to his son-in-law that “Mr. Jefferson’s Presidency may be turned to good account if people will let their reason & not their passions, tell them how to manage.”

**Concluding Thoughts**

Twentieth-century analyses of Chief Justice Ellsworth and his fellow justices tend to be slightly out of focus because our modern understanding of what Supreme Court justices do has been shaped by two hundred years of evolution in the judicial process. Today we view the Court as a unique political institution whose power is more or less limited to the resolution of specific judicial cases and controversies. Consistent with this understanding, most modern analyses of the Court place predominant—even inordinate—emphasis upon the justices’ opinions in individual cases. This modern understanding, however, becomes anachronistic when it is transported to the late eighteenth century. The justices of the early Supreme Court simply did not view their positions the way modern justices do.

In his first grand jury charge, Chief Justice Jay had viewed separation of powers and judicial independence as a doctrine in evolution. He frankly admitted that “there continues to be great Diversity of opinions [about] how to constitute and balance [the] Executive legislative and judicial.” In his mind, the nation was embarking upon a “Tryal,” and the doctrine’s contours would have to be worked out “by Practice.” Chief Justice Jay’s approach to separation of powers was pragmatic, and Chief Justice Ellsworth continued in that tradition.

As a teenager, Ellsworth had been instructed that a good public official is a righteous ruler whose obligations and actions are ordained by God. Moreover, he understood that there was no room for discord or even disagreement in a righteous nation. While Ellsworth was studying with Joseph Bellamy, Bellamy had emphasized that in a righteous or perfect nation “there are no sects, no parties, no divi-
sion.” Likewise unrighteous nations are “all riot and confusion.” This same monolithic understanding of society and government is implicit in The Summary of Christian Doctrine and Practice written some forty years later by Ellsworth’s committee at the Connecticut Missionary Society. According to the Summary, “The design of all government is to make every one feel the relation in which he stands to the community, and to compel him to conduct as becomes that relation.” Similarly, in his first grand jury charge Ellsworth affirmed that the federal government would give “harmony of interest, and unity of design” to the nation. In contrast to this ideal of a monolithic society, the concept of separation of powers is designed for a society in conflict—one in which there is disorder and confusion. Therefore Ellsworth must have been mentally predisposed to reject separation of powers.67

As chief justice, Ellsworth probably did not view himself as much a judge as a righteous ruler who happened to be serving as a judge. He wrote judicial opinions in support of the Washington and Adams administrations, but he was equally willing to support these two presidents in a nonjudicial capacity. He wrote private advisory opinions for the president and the secretary of state. He actively defended the Sedition Act. He even went to Europe as a diplomat. Therefore his letter assuring President Washington that he had “sought the felicity and glory of your Administration” is not surprising. All of his actions were part of a seamless web of support for good government.

NOTES


3. William G. Brown, The Life of Oliver Ellsworth (New York: Macmillan, 1905), 12–21. For the Great Awakening in Connecticut, see Richard L. Bushman, From Puritan to Yankee: Character and the Social Order in Connecticut, 1690–1765 (Cambridge: Harvard University Press, 1967), ch. XII–XIV. As the century progressed, the New Light ministers who worked within Connecticut’s Standing Order elaborated a theology known as New Divinity Calvinism. This New Divinity theology was heavily influenced by Jonathan Edwards but was


11. Bushman, *From Puritan to Yankee*, ch. XV & XVI.


Ellsworth (Hartford, Conn.: American Revolution Bicentennial Commission of Connecticut, 1978), ch. II & III.


16. Lettieri, Connecticut’s Young Man, ch. V.


20. Casto, Supreme Court, 31–33.


22. Ibid., 45, 55.

23. Ibid., 46–47.

24. Ibid., 33–38.

25. Ibid., 50–51.

26. Ibid., 87–90.


38. Oliver Ellsworth to Caleb Strong, Oct. 25, 1796, Caleb Strong Papers, Forbes Library, Northampton, Massachusetts. The phrase “gates of Hell” is explained in Casto, “Oliver Ellsworth’s Calvinism,” 520 n. 74. For Ellsworth’s support of John Adams, see Oliver Wolcott, Sr., to Oliver Wolcott, Jr., Dec. 12, 1796, Wolcott Papers, Connecticut Historical Society, Hartford.


41. Uriah Tracy to Samuel Dana, April 1, 1797, Pennsylvania Historical Society, Philadelphia.


45. Frederick Wolcott to Oliver Wolcott, Jr., Jan. 23, 1798, in *Supreme Court Documentary History*, 1:857; Oliver Ellsworth to William Cushing, Feb. 4, 1798, in ibid., 1:857; Abigail Adams to Hannah Cushing, March 9, 1798, in ibid., 1:859; Oliver Ellsworth to William Cushing, April 15, 1798, in ibid., 3:251.

46. DeConde, *Quasi-War*, ch. II–III.


59. *Supreme Court Documentary History*, 1:118; Michael Kraus, “Oliver

60. Brown, Oliver Ellsworth, 332–38.


63. See notes 32 & 43 and accompanying text; Oliver Ellsworth to David Ellsworth, March 24, 1780, in Brown, Oliver Ellsworth, 74.

64. Oliver Ellsworth to Rufus King, Jan. 21, 1801, Rufus King Papers, Huntington Library, San Marino, California; Casto, “Oliver Ellsworth’s Calvinism,” 509, 520–21.

65. Oliver Ellsworth to Rufus King, Jan. 24, 1801, Rufus King Papers, Huntington Library, San Marino, California; Oliver Ellsworth to Ezekiel Williams, March 20, 1801, Connecticut Historical Society, Hartford.
