

## *Introduction*

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John Jay had been married barely a fortnight when the first authoritative accounts of the British government's response to the Boston Tea Party began reaching American harbors in mid-May 1774. Arriving one after another, the raft of parliamentary measures known as the Coercive or Intolerable Acts sparked the final imperial crisis that led to the adoption of the Declaration of Independence two years later. For Jay, as for so many others, the crisis brought a quick and wholly unexpected immersion in political life. He was then twenty-eight, a graduate of the fledgling King's College (now Columbia University), and a rising member of the New York bar. Marriage to eighteen-year-old Sarah Van Brugh Livingston connected him to one of the leading political families of New York and New Jersey. William Livingston, his father-in-law, had long been one of New York's master politicians and a forceful critic of many of its royal governors. Had the Revolution not intervened, family connections and manifest ability would have qualified Jay for public office of one kind or another. Yet little in his life before May 1774 indicated that he was destined for political life. He could just as easily have remained a practicing attorney and devoted his earnings, as members of the colonial upper classes generally did, to acquiring and enlarging a landed estate.

Jay and his bride, Sally, were visiting relatives in the "northern counties" of New York when the crisis of 1774 broke. Only when they returned to New York City on 22 May did they learn that Jay had already been elected to the Committee of Fifty-one, the popular body initially charged with preparing the city's response to the Boston Port Act. As with so many other patriot leaders, especially the political moderates of the Middle Colonies of New York, New Jersey, and Pennsylvania, Jay appears to have been a most unlikely revolutionary. He was neither a firebrand nor a political malcontent. Far from chafing with resentment at the excesses of imperial rule, his attitude toward Britain was respectful and affectionate. As a descendant of the great Huguenot diaspora that followed the revocation of the tolerationist Edict of Nantes in 1685, Jay appreciated the refuge that England and its colonies had offered

his great-grandfather Pierre and his grandfather Auguste, who founded the American line of the family.

Nor is there any evidence that Jay was quietly seething with unfulfilled political ambitions. In his own mind, he fancied himself a shy and retiring type, better meant for life “in a College or village” than the public tumult into which he was now thrust. Yet once caught up in the political vortex, Jay never looked back. For the next quarter century, one office followed another, carrying Jay into the highest ranks of American political leadership. Beginning with that first election to the Committee of Fifty-one, he successively served as a delegate to the First and Second Continental Congresses, a member of the New York provincial convention, chief justice of the state’s new Supreme Court of Judicature, delegate again to Congress and soon thereafter its president, minister to Spain and member of the peace commission that negotiated the Treaty of Paris ending the War of Independence, secretary for foreign affairs, first chief justice of the Supreme Court established by the new federal Constitution, and governor of New York before finally retiring from public life in 1801. Though very much the family man—he missed the final congressional debates over independence because he remained at Sally’s side after the birth of their first child, Peter Augustus—Jay proved one of the rare revolutionaries whose record of public service consistently adhered to republican principles of civic duty.

Amid all these offices and the decisions and duties attached to them, Jay was involved in virtually every facet of Revolutionary politics and governance. As with other leading members of the Founding generation, his papers illustrate the multiple dimensions of the entire enterprise of securing independence and establishing the new institutions of government that represent the era’s most enduring legacy. For every heady discussion of the grand strategies of resistance and diplomacy or the design of republican constitutions of government, there were countless other mundane but urgent assignments relating to the recruitment, arming, and provisioning of soldiers or the monitoring and suppression of outright Loyalists and others “disaffected” from the cause.

From the entire range of Jay’s activities, however, three aspects of his quarter century in public life demand special emphasis. First, like his closest allies in the early sessions of the Continental Congress, Jay perfectly illustrates both the dilemma that confronted more moderate leaders of colonial resistance before July 1776 and the surprisingly strong commitment they forged immediately afterward, as the cause lurched closed to collapse. Second, in the diplomatic career that began with his appointment to Spain in 1779, Jay repeatedly grappled with the basic question of defining what the national in-

terests of the United States would be after the overriding original aim of independence was secured. His experience overseas and as secretary for foreign affairs made Jay a determined supporter of the movement for constitutional reform that led to the adoption of a new federal Constitution in 1787–88. That commitment in turn identifies the third significant aspect of Jay's public career. He was a solid Federalist in the two senses with which that term is used, as a supporter both of the Constitution during the struggle over its adoption and of the emerging political party which dominated the national government during the presidential administrations of George Washington and John Adams. The controversy over the treaty that he negotiated with Britain in 1794, and which bears his name primarily because it was so reviled, marked a critical development in the escalating conflict between pro-administration Federalists and their Republican opponents, led by Thomas Jefferson and James Madison. Yet if Jay was an avowed Federalist, his conduct in office was less partisan than that of many of his allies, notably including the party's leading strategist, Alexander Hamilton.

### The Moderate as Revolutionary

Historians have often found it difficult to explain or even accept the revolutionary commitments of the moderates who were so influential in the politics of the Middle Colonies of New York and Pennsylvania. They were typically men of property and affairs, far more interested in their countinghouses and landed estates than in politics or governance. They rarely displayed the rigidly ideological view of politics and the dark suspicions of British intentions that more militant leaders, like Samuel Adams or Richard Henry Lee, readily expressed. They longed for reconciliation and resisted independence as long as possible. Some, like Jay's younger political ally, Gouverneur Morris, came from Loyalist families or, like Jay, counted Loyalists among their friends. Far from being enthusiasts for the democratic impulses and reforms that the Revolution released, they remained skeptical about the political capacities of "the lower orders." They also had reservations about the republican constitutions that the states adopted with independence, precisely because these new governments lacked the mechanisms of balance that the best political science of the day associated with the British constitution. Later they supported and welcomed the federal Constitution of 1787 not as the mature fulfillment of the reformist aspirations of the Revolution but as a cautionary reaction against its excesses.

For all of these reasons, the moderates in whose ranks Jay clearly num-

bered appear to have been reluctant revolutionaries at best. Yet as Jay's career after 1774 plainly demonstrates, he (and they) were as deeply engaged in the revolutionary cause as their more radical colleagues. On the central issue in dispute between Britain and its American colonies—the authority of Parliament to enact legislation that would bind the colonists and their governments “in all cases whatsoever”—they joined the broad American consensus that denied that Parliament could rightfully exercise any jurisdiction over the colonists. When it came to supporting the military struggle against Britain, they were not trimmers. Far from it: they tended to take a more sober and realistic view of what that war would entail, and to be critical of radical colleagues whom they suspected of underestimating the cost of victory.

Yet the puzzle remains: how did someone as apolitical as Jay appear to be before 1774 get so caught up in the revolutionary vortex? What was it that made dedicated revolutionaries out of Jay and his circle of moderate leaders—men like his college friend and sometime legal partner, Robert R. Livingston; Robert Morris, the great Philadelphia merchant; Gouverneur Morris, the young New York fop; or James Wilson, the lowland Scottish immigrant and Jay's later colleague on the first Supreme Court?

The answer to this puzzle has to begin with the magnitude of the crisis that broke upon the colonies in the late spring of 1774 and that became the occasion for Jay's initial political involvement. The British government's response to the precipitating event of the Boston Tea Party took the form of a series of parliamentary acts that set out to make an example of Massachusetts in general and its capital in particular. Even if, as Jay himself thought, the Bostonians would have been better advised not to dump the East India Company's tea into their harbor, the punitive quality of the Boston Port Act seemed grossly out of proportion to the damage done. Perhaps more important, this act and the ensuing Massachusetts Government and Administration of Justice Acts marked a definitive application of the theory of unlimited parliamentary supremacy over America first asserted in the Declaratory Act of 1766.

These two conditions—the draconian punishment of Boston and the transformation of a theoretical claim into a legislative program—account for the firestorm of protest that swept across the colonies in the spring and summer of 1774. It did not take the education and legal training that Jay had gained to perceive the potential consequences. Like other moderates, he found himself in a situation that simultaneously demanded vigorous support of American rights and liberties, as the colonists had traditionally understood them, and an effective demonstration that other colonies would rally to the support of Massachusetts. At the same time, as his speeches at the First Con-

gress demonstrate, Jay wanted Americans to make some conciliatory gestures of their own, such as offering to pay for the destroyed tea. It was sentiments like this that led Patrick Henry to form “a horrid Opinion of Galloway, Jay, and the Rutledges,” as the fiery Virginia orator complained one night to John Adams. “He is very impatient to see such Fellows,” Adams added, “and not be at Liberty to describe them in their true Colours.”<sup>1</sup>

Jay’s “true Colours,” though, were very different from the sentiments of a Joseph Galloway, Benjamin Franklin’s old political ally, soon to turn Loyalist. Admittedly, Jay was no radical. By temperament as well as training, he was prudent, cautious, and reserved, with a lawyer’s knack for haggling over details and worrying about contingencies. He was inclined to explain the British government’s repressive policies toward Massachusetts (and, by implication, the other colonies) as a result of misjudgment, misinformation, and miscalculation, rather than the fruit of a deep-laid plot to strip Americans of their fundamental rights and liberties. Like his father-in-law, William Livingston, who represented New Jersey at the First Congress, he did not entirely trust delegates like Samuel and John Adams or Richard Henry Lee when they denied that they were bent on attaining American independence. Reconciliation remained his goal. But if it were to be attained, the first real concessions would have to come from Britain, not America.

The great dilemma that Jay and other moderates faced after 1774 was that Britain never offered the one conciliatory gesture they needed to arrest the drift of American sentiment in favor of independence. That dilemma worsened after war erupted in Massachusetts in April 1775. When Congress reconvened in May, Jay collaborated closely with the better-known Pennsylvania delegate John Dickinson to support dispatching a second petition to George III, even though the king and his ministers had disdained to answer Congress’s first petition of 1774. But moderates could attain this concession only by supporting the urgent military preparations that had to go forward after Congress converted the provincial forces besieging the British in Boston into a Continental Army. The New York delegation had additional reasons both to fear the consequences of an escalating conflict and to insist that these preparations go forward expeditiously, for they rightly expected that their own colony, with its easily accessible port city at the lower tip of Manhattan Island, would soon become the object of British attention.

Whatever misgivings Jay harbored about American policy were secondary to the mixture of anger and disappointment with which he viewed the British government’s intransigence. In a sense, the British inclination to view Americans as already disposed to independence was as much a personal affront as

a political challenge. Jay and other moderates knew their own minds better. They preferred reconciliation to independence, albeit a reconciliation conceding the legitimacy of American grievances. In effect, the ease with which the king and his ministers dismissed all their opponents as incurable rebels became convincing evidence that Britain's rulers were governed by a rare blend of moral obtuseness and political stupidity. At some point, the supposition that British policy rested on miscalculation and misjudgment yielded to a darker conviction that a government that could err so badly and act so malevolently was no longer one to which even a moderate of good will owed allegiance.

Had Jay remained in Congress into the summer of 1776, he would still have joined John Dickinson and Robert Morris in resisting a decision for independence. Their reservations were directed not against the colonists' *right* to throw off their old allegiance but rather against the wisdom of doing so before the new American commonwealths had formally confederated and secured foreign assistance. Back with his family, Jay now became active in New York politics. He served in the provincial convention that acted as a surrogate legislature and soon took a leading role in drafting the constitution that re-established lawful institutions of government. His friends at Congress, like Edward Rutledge and Robert Morris, urged him to return. But they had to concede, as Morris put it, that "such Men as You, in times like these, should be every where,"<sup>2</sup> and the state had as good a claim on his services as Congress.

Comments like these indicate the esteem in which Jay was held. But the "times like these" to which Morris appealed were fast becoming Thomas Paine's "times that tried men's souls"—the bitter summer and fall months immediately after independence when "the cause" reeled from one military defeat to another. It was a moment when the patriotic enthusiasm of 1774–75 seemed a distant and idealized memory, and more than a few moderates could indeed calculate whether their estates and lives might be forfeited. At the same time, the course of the war itself—this conflict that Jay believed wiser British policy might easily have avoided—had the contrary effect of deepening his attachment to the cause. To the initial shock over the outbreak of hostilities in 1775 was now added a new awareness of its cruelty, with reliable reports of the slaughter of surrendering American soldiers and the violence and rapine directed against civilians as the British pressed General Washington's dwindling force across New Jersey.

This phase of the war is so ingrained in American patriotic lore that it is easy to overlook how deep was its impact on both ordinary citizens and their leaders, converting their political disillusionment with Britain into a bitter

resentment that lasted throughout the war. Had Washington not redeemed himself with the turn-of-the-year victories at Trenton and Princeton, the American cause might have collapsed. Those two successes not only bought the opportunity to rebuild the army and another year's campaigning; they also set an example of fortitude that many political leaders, like Jay, felt duty-bound to emulate. The revolutionary commitment of these moderates arose not from any long-standing or prior political aspirations, either for themselves or for their country. It was instead primarily a product of the intense experiences of these first years of revolution.

### The Diplomatist

Jay's first direct involvement with the conduct of foreign relations occurred during his initial stint in Congress. On 29 November 1775 he was named to the five-member Committee of Secret Correspondence appointed to communicate "with our friends in Great Britain, Ireland, and other parts of the world." As a member of that committee, Jay joined the decision to send the former Connecticut delegate, Silas Deane, to Paris as the first American agent to France. But after Jay left Congress in March 1776, New York became the focus of his political activities for the next two and a half years: first he was a lawmaker and constitution writer in the provincial convention that served as a surrogate legislature prior to the adoption of the new constitution in May 1777; then he was the state's leading jurist under its restored legal government.

Jay's deeper involvement in American foreign relations began only after he returned to Congress in December 1778 and almost immediately replaced Henry Laurens as its president. That involvement can be divided into four major phases. First, his presidency of Congress (December 1778–September 1779) coincided with highly contentious debates over American peace terms as well as the composition of the diplomatic corps ("squad" might be a better term) assigned to Europe. The second phase began with Jay's appointment as the nation's first minister to Spain in late September 1779, itself one of the decisions that brought this contention to a close. For the next four and a half years, Jay served overseas, first on the thankless mission of persuading Spain to recognize American independence and then, rather more successfully, as one of the three peace commissioners who concluded the Treaty of Paris ending the war for independence. Then, after returning to New York in the summer of 1784, Jay replaced Robert R. Livingston as the secretary for foreign affairs, an executive post Congress had created in 1781. He held that position until his appointment as first chief justice of the federal Supreme

Court created by the Constitution and the nomination of Thomas Jefferson as the new secretary of state. The final and most controversial phase of Jay's diplomatic career occurred in 1794–95, when President Washington dispatched the chief justice on one last mission to London. The treaty he negotiated there was designed to resolve outstanding issues left over from the peace treaty of 1783 as well as new disputes concerning American rights of neutrality amid the general European war sparked by the French Revolution. Jay's Treaty, as it was called, provoked substantial criticism at home. Equally important, its pro-British slant pushed the United States into the diplomatic confrontation with France that escalated into the Quasi-War of the late 1790s. It was to support that conflict that the dominant Federalist Party adopted the policies and legislation (notably the Alien and Sedition Acts of 1798) that led to the decisive Republican victory in the presidential and congressional elections of 1800.

Jay did not regard diplomacy as his calling, but neither did he feel he could refuse the call when it came. If he was not an ardent enthusiast for republican government on principle, he nonetheless fully accepted the republican norm that urged citizens to subordinate private interest to public good. When he returned to Congress in December 1778, he went with a special commission to press New York's claims to Vermont and meant his stay to be brief. Instead he immediately found himself presiding over, and taking an active part in, the protracted and divisive debates over diplomatic appointments and peace terms that consumed the next nine months. So, too, Jay did not hanker for overseas service. "It is one of the last things I wish for," he wrote Alexander Hamilton only a week before he received the posting to Madrid, "not from any objections to the appointment simply considered, wh[ich] would be agreeable," but because the ongoing controversy in Congress over the behavior of Deane, Lee, and even Franklin indicated how easily one's reputation could be jeopardized. But the political storm of 1779 was nothing like the one that broke in 1795, when Jay's Treaty with Britain ignited protests across the country. That mission, too, came unexpectedly, after such other potential emissaries as Hamilton and James Madison were removed from consideration.

Far more than the original debates over independence, the major phases of Jay's involvement in foreign relations illuminate the difficulties Americans faced in framing and pursuing a coherent conception of the national interest. Independence may have been the most momentous decision Americans had to make, but in the end, Britain's unwillingness to make any conciliatory gestures also made it a relatively easy one. The same could be said of the treaty of alliance with France that Benjamin Franklin, Silas Deane, and Arthur Lee

finally concluded in the winter of 1778. Though modern writers have made much of the “brilliant improvisation” of our “virgin diplomats”—and especially of Franklin’s deft touch in dealing with the French court and Parisian society—in securing a “triumph in Paris,” in the end it was the American victory at Saratoga and the strategic calculations of the comte de Vergennes, foreign minister to Louis XVI, that produced the treaty. After 1778, however, the choices grew more difficult, and Jay’s experience suggests something of both the opportunities and the pitfalls confronting the foreign policy and diplomacy of the new republic.

The great issue in the debate over peace terms was whether the interests of particular regions should trump the collective good of the nation as a whole. Two regional interests seemed most urgent. New England delegates wanted to preserve their fishermen’s traditional access to Canadian fishing beds and their coastal drying stations. A second set of interests, concentrated in the southern states, concerned American navigation of the Mississippi River and the right to transship produce beyond New Orleans—long a French port but under the control of Spain since the close of the Seven Years’ War. By 1779, with the British directing their military operations to the soft underbelly of Georgia and South Carolina, southern delegates were willing to forgo immediate claims to the Mississippi in the cause of bringing the war to an end. New England, however, was now largely insulated from combat, and its delegates were thus intent on making access to the fisheries an “ultimatum” of any peace treaty.

Much of this debate was driven by the insistence of Conrad Alexandre Gérard, the first French minister to the United States, that Congress set its peace terms, in the unlikely event that a Spanish effort to mediate an end to the war came to fruition. Gérard decidedly opposed the New England claim and disparaged its supporters as *le parti Anglois*—the English party. As president of Congress, Jay did not take the part of a neutral or impartial delegate. Gérard counted him among the handful of members on whom he relied most to overcome the New England position. For his part, Jay abetted the French minister in his maneuvers and even colluded with him on political strategy. Without ascribing dual loyalties to Jay, Gérard saw him as an ally and assumed that Jay’s French descent counted for something in his politics. That was a serious misreading of Jay’s position. Like most other descendants of the Huguenot diaspora, Jay had a view of his ancestral French homeland that was devoid of nostalgia. His cooperation with Gérard may have drawn upon the suspicions of New England that were widely shared among New York’s political leaders. But it owed more to the cautionary strategic assessments that had shaped the moderate viewpoint since 1775. For Jay and his circle, there was no question

that the continuing American reliance on French aid and military support required accommodating the nation's new ally.

After months of bitter debate and political maneuvers, the position urged by Gérard and supported by Jay prevailed. Congress would not make access to the fisheries an ultimatum of its peace terms. By the time they reached this decision, the delegates also knew that the Spanish mediation offer had come to nothing. Spain was preparing to enter the war on the side of its ally, France, but without recognizing the United States, much less indicating any interest in an American alliance. Spain had no incentive to welcome the emergence of a new and populous power on the North American mainland that could only covet its own extensive colonial empire, including the Louisiana colony obtained from France in 1763.

The appointment of Jay as minister to Spain and John Adams as peace commissioner in waiting was part of the cluster of decisions that finally ended these embarrassing months of controversy. Adams could be expected to bargain vigorously in behalf of New England's interests, which is why French policy soon made the enlargement of the American peace commission a key objective. He and Jay knew each other well from their service in Congress before independence. Though often opposed in debate, they respected each other, and their common profession as lawyers gave them a further source of fraternity. Both men soon set sail for Europe, Jay joined by his wife, who had just become pregnant with their second child, Adams by his two older sons. Both parties were lucky to survive the crossing. Jay's vessel, the American ship *Confederacy*, lost its mast and rudder, while the French frigate carrying Adams sprang a leak two days out and wallowed eastward with its passengers manning the pumps around the clock. Diverted to Martinique, the Jays eventually landed at Cádiz, where the new minister had to wait permission to proceed to Madrid. When it arrived, they made their way by land, through La Mancha—"Don Quixote country," as their Spanish escorts called it—to the capital.

The two and a half years Jay spent in Madrid were, with one exception—a Spanish loan he extracted to cover bills of exchange Congress had imprudently drawn on Spain without its permission—a study in diplomatic futility. The first months were marred by personal tragedy when the Jays' newborn daughter suddenly sickened and died. Mourning gave way to frustration as Jay failed to make any progress with an obdurate Spanish court. Congress had instructed him to pursue several objectives. Most immediately, it wanted Spain to recognize the United States as an independent power and to support its struggle for independence with as much aid as possible. Then there was

the Mississippi River, which Jay never saw but which for years to come would never be far from his thoughts. Congress hoped to secure the great river as both a western boundary and an open channel down which the American migrants heading across the Appalachians would send their agricultural surpluses to markets in the West Indies and beyond. With its own territorial claims and control of the key port of New Orleans, Spain had no interest in fostering American political or commercial ambitions. Its primary purposes in joining the American war were to honor its obligations to France and, if possible, to retake the great peninsular fortress at Gibraltar from Britain.

Against Spanish obstinacy and self-interest, Jay had neither incentives nor threats to offer. He was therefore relieved, even delighted, when a letter from Benjamin Franklin summoned him to Paris in April 1782. A year earlier, again acting in compliance with French wishes, Congress had enlarged its peace commission beyond John Adams to include Franklin, Jay, Henry Laurens (captured at sea en route to Holland and imprisoned in the Tower of London), and Thomas Jefferson (who initially declined the appointment, then accepted it in late 1782 after the death of his wife). The Jays were happy to exchange forbidding Madrid for sociable Paris, where Sally was occasionally mistaken for Marie Antoinette and where her husband could give his negotiating skills a fair test.

His term in Madrid, however, left one legacy for Jay's diplomacy. By temperament and professional training, he was already inclined to be suspicious of the motives of others. Now the experience of futility in Madrid made him view the words and deeds of European diplomats even more sharply. That attitude had at least two significant consequences for the peace negotiations that Franklin had begun and that now grew more serious with Jay's arrival. (Adams remained in Holland.) First, his insistence that the credentials of British negotiators explicitly recognize American independence effectively delayed the start of real bargaining between the two nations while inadvertently enhancing the British position as military and naval developments outside North America turned to Britain's advantage. It is possible that the Americans might have obtained more generous boundary terms—that is, more of Canada—had Jay not attached more importance to the wording of the British credentials than it deserved.

Second, and arguably more important, Jay grew equally suspicious of the motives of America's French allies. Even before coming to Paris, he concluded that Congress had erred in requiring its peace commissioners to collaborate closely with, and even accept the guidance of, the French government. When Jay learned that Vergennes had sent a trusted aide to Britain, he feared that

the French foreign minister might be seeking to negotiate independently with Britain, in the interest of supporting the American territorial claims of France's Bourbon ally, Spain. This in turn led Jay to launch the famous initiative by which, over the reservations of Franklin but with the anticipated and active support of Adams, the Americans would ignore their congressional instructions to take counsel with France and proceed to deal directly and independently with Britain. Franklin would never have done so on his own, nor could Adams ever have persuaded Franklin to take such a course. But with Jay taking the lead and Adams eager to go along, Franklin acceded.

Jay's conduct is not beyond criticism. Having been too suspicious of Britain at the outset of negotiations, he now demonstrated that he could be too suspicious of France as well. When the commissioners' report of their negotiations reached Congress, it was read with some dismay by delegates who worried that their diplomats had cavalierly disregarded their instructions, at the risk of souring relations with the one ally on whom the American war effort had desperately depended. But Jay's initiative both illustrated and exploited two fundamental facts of early American diplomacy. One was that Jay knew too much about the lengths to which Vergennes had gone to yoke Congress to the French will to believe that those instructions deserved full and uncritical respect. The other was that no instructions given an ocean away, with all the repeated and extended delays that marred trans-Atlantic correspondence, could effectively curtail the negotiating discretion of diplomats who had to respond in real time to challenges and opportunities that Congress could neither anticipate nor answer.

Whether the United States could have obtained a more generous northern boundary had Jay not delayed the start of serious negotiations is one of those counterfactual questions that can never be conclusively answered. The fact is that the western boundaries that Britain did concede were the far more valuable prize the commissioners sought and the nation needed. The Ohio and Mississippi river valleys were the obvious and immediate objects of American expansion, not the distant prairies and woods above the Great Lakes.

When the Jays sailed home on 1 June 1784, exactly a decade had passed since their wedding and Jay's entrance into revolutionary politics. Only upon disembarking at New York City in July did Jay learn that Congress had elected him secretary for foreign affairs, to succeed his old friend Livingston. Their friendship had decidedly cooled, not least because Livingston had upbraided the peace commissioners for taking the independent course into which Jay had led them. Jay did not accept the new post immediately. Congress had become a peripatetic body, moving from Philadelphia to Princeton to Annapo-

lis, with new plans to reconvene at Trenton, and Jay hoped to reside in New York. Once an understanding to that effect was reached, and Congress itself decided to relocate to New York City, Jay willingly accepted the new office.

He held it until Thomas Jefferson accepted appointment as the first secretary of state under the Constitution. During Jay's tenure, two paramount objectives dominated American foreign policy. One was to conclude treaties of commerce giving American merchants access to European and West Indian markets. The other was to secure the free flow of American produce down the Mississippi, past New Orleans, and out into the Gulf of Mexico. The first objective was of primary importance to merchants from Philadelphia north, especially after Britain barred American ships from returning to imperial harbors. The second objective was critical to the settlers crossing the Appalachian chain to settle in what is now Kentucky, Tennessee, and southern Ohio, and to the interests of the southern states, which regarded these territories as an extension of their own regional and agricultural economies.

As secretary for foreign affairs, Jay maintained the national government's communications with its chief representatives overseas, Adams in London and Jefferson in Paris. But Jay took an equally active role in the personal conduct of diplomacy after a Spanish emissary, Don Diego de Gardoqui, arrived in New York City in June 1785 with authority to negotiate a commercial treaty with the United States. The two men knew each other from Jay's futile Spanish sojourn. Though Jay was never one to allow personal acquaintance to rise above professional or political obligation, being able to negotiate in his own home city, rather than forbidding Madrid, helped ease their talks. But however accommodating the two men might be in their own conversations, the negotiations could not surmount the great obstacle Spain had erected a year before by prohibiting the shipment of American goods and produce down the Mississippi River, past New Orleans, and on to their natural markets in the West Indies. Congress had instructed Jay to make American claims to a free navigation of the Mississippi a condition of any treaty. But Gardoqui's instructions not to yield this point were equally firm.

In May 1786, Jay went back to Congress and asked for a revision of his instructions. In the interest of gaining the immediate benefits of a commercial treaty with Spain, he proposed that the United States would abjure any claim to the free navigation of the Mississippi for twenty years. There was a calculated logic to Jay's request. At some point, Jay assumed, the inexorable flow of population westward would open the great river to American navigation. To yield that right now, when there was little immediate benefit to gain, would not impair the national interest over the long run. But this calculation ignored

or at least slighted an equally trenchant objection. What guarantee was there, southern delegates to Congress wondered, that western settlers would remain loyal to a federal union that proved unwilling or unable to protect their essential interests? The migrants might seek their own accommodation with Spain, and if they did, the generous territorial settlement that the American peace commissioners had secured from Britain in 1782–83 might be undermined.

Jay's request sparked a genuine crisis for Congress and the Confederation. Delegates representing the five states from Maryland south to Georgia adamantly opposed his request, and because the votes of nine states were required to ratify any treaty he could negotiate, their opposition suggested that his proposal was futile. But the nine-state requirement did not extend to the instructions themselves, and when Jay and his supporters in the northern delegations pressed on, Congress divided along starkly sectional lines, sharper even than the 1779 debate over peace terms had produced. In its clarity, this sectional division raised fundamental questions about the character and future of the Union itself. With independence attained, did the thirteen states still have common national interests worth identifying and pursuing? Or were there only clusters of regional interests, like the fisheries or the Mississippi, which might imply that the larger Union formed to secure independence might devolve into two or three smaller confederacies?

With Congress tottering on a nearly empty treasury, unable to project American force beyond the Appalachians, this was not empty speculation. Concern over the Mississippi issue was a key factor in the thinking of reformers like James Madison, who was coming to the conclusion that piecemeal efforts to amend the Articles of Confederation had to yield to a more ambitious program of thorough constitutional change. Inadvertently or otherwise, Jay's desire for greater flexibility in the Gardoqui negotiations thus forged a critical link in the movement that led to the Constitutional Convention of 1787. Well into 1786, proponents of a stronger federal Union, Jay among them, assumed that the task of amending the Articles of Confederation would necessarily have to proceed one step at a time, with the acceptance of one amendment easing the path for the consideration of others. The apparent impossibility of securing unanimous state approval of any of the amendments Congress had proposed since 1781 was already calling that strategy into question. Now the sectional fissure Jay had helped to open suggested that time might not favor the side of reform. When the Annapolis conference of September 1786 drew only a dozen delegates from five states, reformers like Madison and Alexander Hamilton took the risky step of proposing that a second convention meet in Philadelphia the following May. They acted less out of confidence that the

nation was ready for wholesale reform than concern that a failure to act might lead to the radical devolution of authority from a Congress of thirteen states to two or three new regional confederacies—and sooner rather than later.

## Federalist

For his part, Jay remained uncertain whether the American people were ready for the kinds of far-reaching reforms that Madison and Hamilton, among others, were beginning to contemplate. Writing to John Adams in late February 1787, he confessed, “I do not promise myself much further immediate Good” from the coming convention “than that it will tend to approximate the public Mind to the Changes which ought to take place.” So cautious an assessment came easily to Jay. Unlike Hamilton, he was not by nature a political risk taker. Unlike Madison, he had not been actively involved in the various efforts to get the Confederation ratified, amended, and respected. It would have been unseemly for Jay, as secretary for foreign affairs, to take too active a part in the politics of constitutional reform.

Yet if Jay was wary of expecting too much from the convention, he fervently hoped for its success. The political sentiments he expressed in his correspondence in the period since his return to America struck decidedly nationalist notes. Like most nationally minded leaders, he recognized that the states would necessarily continue to oversee many of the prosaic but essential aspects of daily governance, including the ordinary administration of justice under laws and customs that already had a century and more of history and practice behind them. But Jay never regarded the individual states as potential sovereign entities in the international sense of the term. No one with his experience of wartime mobilization and diplomacy could imagine that essential national interests could be secured under a regime as feeble as the Confederation. That such national interests did exist was something he never doubted. Even if his negotiations with Gardoqui had sparked a sectional crisis when he seemed to favor one region over another, Jay’s strategy rested on the assumption that population movement westward would inevitably and ultimately give Americans the decisive advantage in gaining access to the Gulf of Mexico. Unlike some other leaders from northern states, he did not fret that westward expansion would clearly favor the southern states.

Jay’s experience overseas, of course, helped him to think nationally, much the same way that prolonged service in the Continental Army made confirmed nationalists out of Washington and his closest aides, including Hamilton and Henry Knox. But the objects of constitutional reform were not re-

stricted to realigning the relative powers of the Union and its member states. They also involved thinking about the structure of the national government itself. Since at least 1776, the circle of moderate leaders who counted Jay as a charter member had been complaining about the inefficiency of Congress and its propensity for subjecting routine administrative matters to the procedures of a parliamentary body. From his own experience, Jay obviously knew how inefficient Congress could be. But it was his diplomatic experience, first overseas and then as secretary for foreign affairs, that gave him a more sophisticated understanding of the evils of vesting all constitutional authority in a single institution.

In 1779 and again in 1786, Jay had observed, joined, and even helped provoke the two most divisive disputes into which Congress had plunged since its inception in 1774. Both episodes illustrated the difficulty of framing policy through a process of collective deliberations. There were lessons to draw, too, from the ease with which France's first two ministers to the United States, Conrad Alexandre Gérard and the Chevalier de la Luzerne, had manipulated Congress to yoke American foreign policy to French influence and even direction. Jay had cooperated with the first of these efforts in 1779 because the wartime situation indicated Americans had little choice about the matter. As a peace commissioner serving overseas, however, he had formed a different opinion, and that in turn led him to doubt the wisdom of exposing the active direction of foreign policy to a body like Congress. Then, too, again, knowing that his own motives in the Gardoqui talks were not the sinister, sectionally biased ones his detractors ascribed to him, he also chafed at the supplicant role he had to play in trying to persuade Congress to revise his instructions.

Thus on the eve of the Federal Convention, Jay's assessment of the defects of the Confederation went beyond the standard litany of complaints about the relative weakness of Congress. He also thought that the basic institutional design of the national government was flawed. Whatever additional powers the convention would propose vesting in the Union should be further divided into their proper legislative, executive, and judicial departments. This concern placed Jay at the forefront of the emerging Federalist movement—even though his office precluded him from taking a visible role in the maneuvers leading to the Philadelphia convention. But once the convention adjourned on 17 September 1787 and the Constitution was published two days later, Jay was the first person to whom Alexander Hamilton turned as he sought coauthors for the ambitious project that became *The Federalist*, long and rightly regarded as the most authoritative original commentary on the proposed Constitution.

Jay was an appropriate choice to take an active role in launching the project. For one thing, he had time on his hands. Unlike Hamilton, he was not actively practicing law. With Congress rarely able to muster a quorum and no developments overseas requiring response, he also had less official business to transact. Jay was also well qualified to address the two great themes that Hamilton planned for *The Federalist*. The extended series would open with a sustained defense of the advantages of union, the case for thinking of the American states as forming a genuine nation with interests of its own, and the imperative of assuring that a union constituted to pursue those interests should have powers. Only then would “Publius”—the collective pseudonym—turn to the substance of the Constitution itself, including, of course, the schemes of separated powers and checks and balances that were consistent with Jay’s belief that the national government should look like a government in the full and normal sense of the term.

Jay initially threw himself into the project. After Hamilton’s opening essay reminded Americans that they were privileged “to decide the important question, whether societies of men are really capable or not of establishing good governments from reflection and choice,” the next four installments came from Jay. These were more rhetorical appeals to the broad advantages of union than closely reasoned assessments of the national interest, but that was the high-ground approach that most supporters of the Constitution favored until their Antifederalist opponents forced them to begin rebutting specific objections. But the most famous passage from these early essays suggests how adeptly Jay could convert the Constitution’s invocation of the sovereign authority of “We the People” into a new vision of American nationality. In deciding on the Constitution, Jay observed in *Federalist* No. 2, Americans had to recall the natural advantages of the country they were blessed to inhabit. More than that, they should reflect upon their common characteristics as “one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.”

After this quick start, however, Jay’s further contributions to *The Federalist* were limited by a serious bout of rheumatism that kept him ill for several months and weak for some time after that. Then, when he was recovering, he suffered a head wound in a riot over graverobbing that disturbed the peace of New York City in the spring. He managed only one other essay as “Publius”: a careful description in *Federalist* No. 64 of the respective roles of the president

and Senate in treaty-making. Jay did draft a separate tract of his own supporting the ratification of the Constitution. Published as an *Address to the People of the State of New York*, it did no better than *The Federalist* in reversing the dominant Antifederalist position in the state.

Jay recouped his health well enough to attend the ratification convention that came to order at the Poughkeepsie courthouse on 17 June 1788. He was the leading votegetter in the solidly Federalist slate that New York City sent upstate. Antifederalists were a decided majority of the sixty-five members in attendance, but they were not equally militant in their opposition to the Constitution. As the most prominent member of the Federalist minority, Jay set to work applying his skills as lawyer and diplomat to soften the opposition, stalking individual delegates in private conversations to encourage them to rethink their objections and the wisdom of rejecting the Constitution. For the better part of a fortnight, the opponents remained impervious to appeal. But then they were hammered by the double blow of learning that wavering New Hampshire and Virginia had become the ninth and tenth states to ratify, thereby assuring that the Constitution would replace the Articles of Confederation once elections for the new bicameral Congress and independent president were held. Now Jay's efforts to conciliate the opponents were rewarded as Melancton Smith led a bloc of a dozen moderate Antifederalists willing to ratify the Constitution under the right conditions. Jay played an active role in the negotiations that allowed the Constitution to pass, 30–27. The price of ratification was the adoption of two sets of resolutions, one proposing a set of amendments to the Constitution, the other (more resembling a bill of rights) stating “impressions” and “explanations” under which the state would formally accept the new framework of government.

With his eminent Federalist credentials and distinguished record of public service, Jay was an obvious candidate for a high office in the new government—but which one? In theory he could have stayed on as secretary for foreign affairs (or secretary of state, as the office would soon be known). But if President Washington made his former aide-de-camp, Alexander Hamilton, secretary of the Treasury—as he was widely expected to do—Jay's retention would mean having two New Yorkers in the executive cabinet. Washington instead turned to Jay as his nominee to serve as first chief justice of the Supreme Court. Although he had not practiced law for a decade, Jay's early career left little doubt of his ability. Eighteenth-century American legal culture did not yet glorify judges as exalted decisionmakers, much less the ultimate arbiters of constitutional meaning. In American courts, juries typically played a more influential role than judges, and the idea of carrying

appeals from trial-level courts to higher courts was, if not a novelty, nothing like the routine practice it has since become. A solid grounding in the law and a reputation for probity would more than qualify someone with Jay's record of public service for the court. Moreover, Jay could bring to the bench a personal expertise that many Federalists expected the Supreme Court to require: a knowledge of the law of nations and a commitment to establishing the new government's reputation for abiding by international agreements. How to enforce national treaties against the conflicting laws of the states had been a critical issue of the mid-1780s, with states enacting legislation obstructing key provisions of the peace treaty. This was a key element in the Federalist program, and Jay was uniquely qualified to pursue it.

There was another sense in which Jay's appointment as first chief justice embodied Federalist objectives. In the eighteenth century, it was the judiciary that presented the public face of government, rather than a bureaucracy that barely existed. Jay and his five brethren on the first Supreme Court did not have the modern luxury of sitting contentedly in their chambers, waiting for appeals to wend their way up the judicial ladder while deploying squads of hard-working clerks to review the petitions, read the briefs, and even write their opinions. Under the landmark Judiciary Act of 1789, the justices also were responsible for the physically onerous task of riding circuit, that is, hearing cases on panels upon which they served with trial-level federal district judges. In this capacity, they in effect carried the workings of the federal government directly to the people. In doing so, they also seized the opportunity to present lessons in federal citizenship, typically in the form of addresses to federal grand juries that were as much statements of sound political principles as instructions regarding the legal duties at hand. The members of the early Supreme Court acted, as one scholar has observed, as a "republican schoolmaster." There was thus a political dimension to the work of the judicial department over which Jay presided. The mission of the federal judiciary was not only to decide the "cases in controversy" that came before it, but to assist and even represent the new government as it tried to consolidate its still shaky hold over the affections and interests of the American people.

But American politics in the 1790s soon became intensely partisan in a way that no one even a few years earlier could have imagined. As it did, the federal courts came to be seen less as the public face of the Constitution and more as an extension of the proadministration Federalist Party. Here again Jay played a critical, albeit largely inadvertent, role in the swirling partisan passions—not, however, as a jurist, but in a dramatic curtain call as a diplomat. In January 1793, the newly proclaimed French revolutionary republic

declared war on Britain. At the end of the year, the British government authorized its navy to seize neutral American merchantmen trading with French ports in the West Indies—a surprise operation the Royal Navy pulled off with great aplomb. The ensuing crisis led President Washington to launch a diplomatic mission to London designed to consider not only the immediate issue of the rights of American ships under the laws of neutrality, but an array of other questions left over from the Treaty of Paris that Jay had negotiated. At first the president considered asking Secretary of the Treasury Hamilton or even Congressman James Madison to undertake the role. But Hamilton was too partisan a figure, and Madison, as leader of the administration's congressional opposition, would not be acceptable to Federalists more generally. The president then turned to the chief justice. Along with former secretary of state Thomas Jefferson and Vice President John Adams, Jay remained one of the nation's most experienced diplomats—and now he was its least controversial one. The constitutional prohibition on plural officeholding covers only members of Congress serving under the executive. Though Jay had no desire to revisit Europe, crossing the Atlantic was a little less onerous than riding circuit; in any case, he could hardly say no to the president, whom he profoundly admired.

In accepting this mission, Jay was serving his party as well as his nation. Maintaining good relations with Britain was essential to the working of the Hamiltonian financial program, which needed an uninterrupted flow of British imports to sustain the flow of customs duties into the federal treasury. Hamilton was closely involved in drafting Jay's negotiating instructions, and the two men, who had known each other for nearly two decades, actively discussed the mission. The immediate objective, they agreed, was to gain adequate compensation for the recent British seizures in the West Indies. But the broader purpose was to ground Anglo-American relations on a broad and lasting foundation. Among other things, that would require securing Britain's withdrawal from the frontier posts at Detroit, Niagara, and Oswego that it was obliged to surrender under the Treaty of Paris, and assuring Britain that American courts would be open to suits for the recovery of prewar private debts.

Hamilton was much more the architect of this strategy than Jay, but by experience and temperament Jay was probably the best agent the administration could send abroad. His dealings with Gardoqui and the wrangling with Congress over his instructions inclined Jay to think that diplomacy worked best when negotiators had room to work with each other. The treaty he negotiated in the summer of 1794 was in many ways a model of enlightened diplomacy. Among other things, it took the innovative and progressive step

of establishing bilateral arbitration commissions to decide such issues as the boundary between the United States and Canada, the compensation due to American merchants for the ship seizures, and the payments owing to British creditors holding pre-Revolutionary debts. Then, too, if the chief goal of the negotiations was to improve and stabilize the Anglo-American relationship, Jay could take reasonable credit for bringing the nation back from the brink of confrontation. The treaty could be faulted for not doing more to secure American positions on the rights of neutral powers to trade in wartime. But here two major mitigating factors could be cited in Jay's behalf. One was that Britain's assessment of its own needs and its ability to enforce its policies were largely resistant to any pressure either Jay or the nation he represented could bring to bear. The other was that no one in 1794 could plausibly anticipate that the rights of neutrality would remain a live and contentious issue for the better part of the next two decades, or that the American stake in securing those rights would increase with both the profits to be derived from this trade and the escalating scope of the conflict between revolutionary and then Napoleonic France and its European enemies.

Independently of its details, Jay's Treaty was destined to accelerate the process of partisan mobilization that was already so well advanced. Public opinion in the United States was already sharply divided into "Angloman" (pro-British) and "Galloman" (pro-French) segments. Any treaty premised on the priority of restoring relatively harmonious relations with monarchical Britain rather than seeking common cause with republican France would draw opposition from the vitriolic Republican press and the party leaders for whom it spoke. Indeed, the opposition to Jay's negotiations predated the arrival of the text of the treaty and could only be compounded by the Federalists' insistence that its contents remain secret even after the Senate approved it by the bare two-thirds majority the Constitution required and Washington, with a few misgivings, completed the ratification by formally signing the treaty. In this charged and rancorous atmosphere, a Republican senator felt free to ignore the Senate majority's injunction to keep the treaty secret and leaked it to the press. The ensuing public controversy was predictably impassioned. Jay's alleged willingness to toady to the British monarchy made him the direct object of venomous attack. As he was fond of quipping, he could make his way across the entire country by the light of his burning effigies.

Beyond advancing the emergence of the first political party system of proadministration Federalists and opposition Republicans, Jay's Treaty had one other major consequence. Its ratification and implementation were enough to persuade France that American neutrality had a decidedly pro-

British tilt. The French response, in the months and years to come, was to treat the new republic whose independence it had done so much to secure as a potential enemy, and more immediately, to subject American shipping to the same regime of capture and confiscation that Britain had experimented with in 1794 — and which both nations intermittently deployed over the next decade and a half. The Quasi-War with France was the first great result of this conflict, and while that crisis initially enabled the Federalists to consolidate their hold on all three branches of the national government, the perception that the ruling party had abused its power led to the sweeping Republican victory in the presidential and congressional elections of 1800.

Well before the political and international consequences of his treaty became clear, Jay had abandoned national politics for the quieter final phase of his political career. Back in 1792, Jay had allowed his name to be put forward as the Federalist candidate for the governorship of New York. That election was narrowly carried by the popular figure who had dominated state politics for a decade and a half, George Clinton. When Jay sailed for England in 1794, he knew his name would be advanced again. Though New York politics was intensely partisan, and likely candidates could be consulted by their supporters, it was still deemed improper to campaign actively for elective office (which is why the distinction between *standing* for office and *running* for it remains a helpful one). The votes were already being tallied when Jay returned to America in late May 1795, and as soon as they revealed his victory, he notified President Washington of his intention to resign from the Supreme Court. He was reelected in 1798 and then happily retired from politics in 1801 — refusing a second nomination to be chief justice that his former diplomatic colleague, President John Adams, had tendered as part of the Federalist “midnight” strategy to entrench his party’s power in the judiciary. After a quarter century of continuous public service, Jay was looking forward to retirement and to the opportunity to build a new family homestead in the relative isolation of Bedford, New York. His hopes for domestic bliss were shattered when, barely a year after his retirement as governor, Sarah Livingston Jay died at age forty-five. He outlived her by twenty-seven years, dying on 17 May 1829. Give or take a few days, it was the forty-fifth anniversary of his wedding and the unexpected plunge into politics that followed.

## Notes

1. Adams, *Diary*, 2: 126, 128–29; *LDC*, 1: 133, 144–45, 173.
2. *JJUP*, 1: 317.