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The Attorney General's First Separation of Powers Opinion.

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THE ATTORNEY GENERAL'S FIRST SEPARATION OF POWERS OPINION*

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The prominence of judicial review in the history of constitutional interpretation in this republic often overshadows the essential and ongoing role of other institutions in the interpretation of the Constitution of the United States. The finality of Supreme Court decisions (barring reversal by the Court or by amendment) plays a major—and appropriate—role in focusing our attention on the courts' decisions, but other factors also shape our perceptions. It is, at least superficially,[1] easy to trace the course of Constitutional interpretation in the reported cases, and there is an abundance of secondary literature. The history of congressional and presidential interpretation, in contrast, is much less well-known.[2] It is, furthermore, intrinsically more difficult to grasp. Non-judicial interpretations of the Constitution are often implicit rather than overt, embedded in political decisions that may include no express discussion of constitutional issues at all. The collective nature of congressional action and the often-confidential character of executive branch deliberations add to the difficulties of working out the history of non-judicial interpretation.[3]

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1. Even with respect to the courts, the easily accesible case reports are a partial and potentially misleading basis on which to rest historical scholarship. Professor William Casto's important new book on the Supreme Court's first decade reveals an active and important institution that a lawyer confined to the pages of the United States Reports would be unable to perceive. See William R. Casto, *The Supreme Court in the Early Republic* (U. of South Carolina Press, 1995).

2. The important history of constitutional interpretation by other institutions and actors—lower executive branch officials, states, juries, non-governmental organizations, and so on—is still more obscure.

3. The recent work of Professor David Currie on constitutional interpretation in the First Congress is an important example of how much can be learned from a close examination of congressional debate and action. See David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L.

At times, however, the problem is even more basic: the original materials necessary for understanding the development of executive or congressional interpretation may simply be generally unavailable. A significant number of early opinions of the Attorneys General, for example, never were collected in the official Opinions of the Attorneys General, the first volume of which was published in 1852,[4] and remain in manuscript or printed only in out of print and inaccurate nineteenth-century books on other subjects. This is true of what was, to our knowledge, the most important opinion written by an Attorney General during the 1790s on an issue of separation of powers. What follows, after a brief introduction to the context of that opinion, is a modern edition of that opinion, written by Attorney General William Bradford in 1794.[5]

I. INTRODUCTION

From the beginning of the Union, one of the most important modes of interaction between the President and Congress has been the executive's submission of information for legislative consideration. Article II of the Constitution requires that the President "from time to time give to the Congress Information of the State of the Union,"[6] and the early Presidents evidently did not regard that duty as satisfied by the ritual performance of an annual address.[7] However, "Congress began almost immediately to call for information not voluntarily submitted,"[8] and in short order the question arose of whether the President has some degree of discretion in responding to such requests. The general propriety of legislative requests for information and documents was never in doubt: in April 1792, George Washington's cabinet

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Sch. Roundtable 161 (1995); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress 1789-1791*, 61 U. Chi. L. Rev. 775 (1994). On the other hand, the self-evidently labor-intensive nature of Currie's scholarship may well be a deterrent to others!

4. Volume 1 of the official Opinions of the Attorneys General collects opinions from the first Attorney General, Edmund Randolph, on, but has significant gaps in its coverage.

5. The only previous publication of Bradford's opinion was a defective edition in John C. Hamilton, ed., 4 *Works of Alexander Hamilton* 494-95 (J.F. Trow, 1851).

6. Art. II, sec. 3, cl. 1.

7. See, e.g., Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* 77-78 (Ballinger Publishing Company, 1976) (discussing President Washington's practice of sending "material to keep Congress informed of important developments, including matters that could have led to military actions"); id. at 176-77 (noting that President Jefferson's practice was similar to that of his predecessors). Our outline of the context of Attorney General Bradford's opinion is dependent on the discussion in Sofaer's invaluable book.

8. Id. at 78.

unanimously advised him that the House of Representatives was entitled to request the transmission of documents in the executive's possession in order to carry out its functions.[9] At the same time, however, the cabinet was agreed that the President had the duty and the authority not to transmit any documents, "the disclosure of which would injure the public" in his opinion.[10]

It is unclear whether, and to what extent, the cabinet's conclusion that the President could refuse to disclose information in order to protect the public interest was communicated to the House. Although Washington and his advisors did not think that the public interest required withholding any of the requested documents, no response was made until the House limited the request to documents "of a public nature," at which point the President complied.[11] Two years later, however, Washington expressly exercised the authority to limit the disclosure of information to a house of Congress in the public interest.

On January 24, 1794, the Senate passed a resolution requesting the President "to lay before the Senate the correspondences which have been had between the Minister of the United States at the Republic of France and said Republic, and between said Minister and the office of Secretary of State."[12] The minister in question was the flamboyant Gouverneur Morris, whose patent dislike of the Revolutionary regime in France had enraged that government as well as its American sympathizers; some of the

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9. The request arose out of congressional concern over the Wabash Nation's stunning defeat of the Army in November 1791 and initially was made by a special investigatory committee of the House and addressed to Secretary of War Henry Knox. Although the cabinet members advised Washington that such requests properly should be addressed to the President rather than to a subordinate officer, they did not draw any distinction between the committee and the House as a whole. As Secretary of State Thomas Jefferson wrote:

> We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion.

Jefferson, *The Anas*, in Andrew A. Lipscomb, ed., 1 *The Writings of Thomas Jefferson* 303-04 (Thomas Jefferson Memorial Association, 1903).

10. Id. at 304.

11. In addition to being a resolution of the House itself rather than the committee, the second request for documents was addressed to the President rather than to Secretary Knox. Sofaer concludes from this fact and the insertion of the "public nature" limitation that the substance of the cabinet's advice to Washington had been communicated to the House. Sofaer, *Constitutional Power* at 82 (cited in note 7). However, he notes an ambiguity in the limiting language, which could be read either to recognize a public-interest qualification along the lines of the cabinet opinion or simply to exclude the papers of private persons from the request. Id. at 82-83 (concluding that the House probably intended the public-interest construction of its language).

12. Id. at 83.

resolution's supporters no doubt saw the request as a means of embarrassing the Federalist administration in the person of one of its most partisan officers. After reviewing his files, Secretary of State Edmund Randolph informed Washington that Morris's correspondence did contain passages that it would be impolitic to disclose for various reasons.[13]

As in 1792, Washington asked the advice of his cabinet on the proper response to the Senate resolution. At a meeting of the three secretaries on January 28, they agreed to advise the President that he was not obligated to comply with the letter of the resolution, although they disagreed over the extent of the discretion he could or should exercise in withholding material.[14] Secretary of War Henry Knox and Secretary of the Treasury Alexander Hamilton opined that the President should transmit "no part of the correspondences," although Hamilton conceded that "the principle [presumably, of discretion to withhold diplomatic correspondence] is safe, by excepting such parts as the President may choose to withold."[15] Secretary Randolph believed that the President should deliver "all the correspondence, proper from its nature to be communicated to the Senate . . ., but that what the President thinks improper, should not be sent."[16] The differences within the cabinet that the opinion reveals are interesting, although their importance should not be exaggerated: it was common ground that the President was not bound by the fact that the Senate had expressed no public-interest (or indeed, any other) limitation on the documents it requested and that the decision of how to comply with the resolution, if at all, was the President's. The high officers of the Washington administration remained committed to the position that, at least with respect to requests by a single house, the President enjoys significant discretion to control the disclosure of information.

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13. While Randolph thought that Morris's letters included "little of what is exceptionable," he did recommend that Washington withhold certain passages:

> (1) what related to Mr. G[enê]t [the controversial French minister to the United States]; (2) some harsh expressions of the conduct of the rulers of France, which if returned to that country, might expose him [Morris] to danger; (3) the authors of some interesting information, who, if known would be infallibly denounced.

Randolph to Washington (Jan. 26, 1794), in Sofaer, *Constitutional Power* at 83 n.* (cited in note 7).

14. The cabinet members jointly signed an opinion that expressed each individual member's view. See Opinion on Communicating to the Senate the Dispatches of Gouverneur Morris (Jan. 28, 1794), in Harold C. Syrett, ed., 15 *Papers of Alexander Hamilton* 666-67 (Columbia U. Press, 1969).

15. Id. at 667.

16. Id.

President Washington's practice of obtaining formal, written opinions from the heads of departments on difficult questions of law and policy did not prevent him from seeking the legal views of his Attorney General as well.[17] At the time the Senate passed the Morris resolution, there was, in fact, no Attorney General, but the day before the cabinet met and formulated its opinion, President Washington appointed William Bradford to the vacant office.[18] Bradford had served in the Continental Army, and was then appointed attorney general of Pennsylvania in 1780. Despite his youth and inexperience,[19] Bradford served with distinction for more than a decade and was elevated to the state supreme court in 1791. His greatest accomplishment was his successful attempt to curtail the use of capital punishment: he is credited with wielding decisive influence on the Pennsylvania legislature's decision in 1794 to eliminate the death penalty for all crimes except first degree murder.

The proper response to the Senate resolution calling for the Morris correspondence was the first question Washington put to

17. It should be noted that Washington played a crucial role in shaping the concept of the heads of the departments as a presidential "cabinet." The original constitutional text nowhere refers to the heads of the executive departments as a cabinet, although it empowers the President to require from any of them "the Opinion, in writing . . . upon any Subject relating to the Duties of their respective Offices." U.S. Const., Art. II, sec. 2, cl. 1. However, Washington's own wartime experiences (and British example) led him to treat the three original secretaries as, individually and collectively, a council of advisors on whatever matters he deemed appropriate. See Glenn A. Phelps, *George Washington and American Constitutionalism* 162-63 (U. Press of Kansas, 1993). The Attorney General, not being the head of a department before 1870, was not subject to Article II's Opinion Clause, but the provision of the Judiciary Act of 1789 that established the office required the Attorney General to advise the President on legal matters. See Act of Sept. 24, 1789, 1 Stat. 73, 92-93. Washington's Attorneys General often participated in cabinet deliberations. See, e.g., Jefferson, *Anas* at 303 (cited in note 9).

18. The first Attorney General (Randolph) had become Secretary of State at the beginning of January. It is surprisingly difficult to determine on precisely which day Bradford assumed the office of Attorney General: many sources state that he was appointed on January 28, although President Washington's journal of his official acts records that he "[s]igned a Commission for William Bradford, being appointed Attorney General for the US." on Jan. 27, 1794. Dorothy Twohig, ed., *Papers of George Washington: The Journal of the Proceedings of the President 1793-1797* at 280 (U. Press of Virginia, 1981).

19. Bradford was born in 1755 and graduated from Princeton in 1772. His legal studies were interrupted by the outbreak of the war, in the course of which he rose from private to colonel before health problems compelled him to resign from the Continental Army in 1779. After a brief additional period of legal study, Bradford was admitted to the bar the same year. He thus was 25 and a member of the bar for only a year when he became state attorney general. Bradford's early advancement may not have been entirely a recognition of his personal abilities: his father, the printer William Bradford, was a great figure in the Patriot movement of the 1770s. For this information, we have relied on the brief essays on Bradford in Arthur Robb, *Biographical Sketches of the Attorneys General: Edmund Randolph to Tom C. Clark* (2d ed. 1946), and in Allen Johnson, ed., *Dictionary of American Biography* 566 (Charles Scribner's Sons, 1964).

Attorney General Bradford. His opinion is undated, but the reference in the opinion to the resolution shows that he wrote it before the end of January. Bradford came to the same practical judgment that the cabinet members had reached: the President had the authority to transmit to the Senate only those parts of the Morris correspondence that he deemed proper to disclose. Unlike the conclusory advice of the three secretaries, however, his opinion is a succinct, and even elegant, statement of his reasoning. Bradford grounded the President's authority over the disclosure of diplomatic information—he termed it a "duty"—on both constitutional principle and the nature of diplomacy.[20] "[T]he rights of the executive and the nature of foreign correspondences require" that documents that "in the judgment of the Executive shall be deemed unsafe and improper to be disclosed" should be withheld.[21]

At the same time that Bradford apparently asserted presidential authority to disregard the terms of the Senate resolution, he argued that the President appropriately might interpret the resolution as not requiring of him action contrary to "the rights of the Executive."[22] The Senate's resolution, Bradford reasoned, ought to be construed on the presumption that the Senate had acted with respect both for the necessity of confidentiality and for the President's responsibilities. "[I]t could scarcely be supposed even if the words were stronger that the Senate intended to include any Letters the disclosure of which might endanger national honour or individual safety."[23] The fact that the letter of the resolution seemed to call for the Morris correspondence in its entirety, therefore, did not "exclude, in the construction of it" the exercise of executive discretion to withhold material that "any circumstances may render improper to be communicated."[24]

President Washington ultimately acted in accordance with the advice of his cabinet and of Attorney General Bradford and on February 26, 1794, transmitted to the Senate a redacted set of the requested documents. As the President's cover letter to the Senate explained: "After an examination of [the Morris correspondence], I directed copies and translations to be made; except in those particulars which, in my judgment, for public considera-

20. Attorney General Bradford's Opinion, Washington Papers (on file with the Library of Congress).

21. Id.

22. Id.

23. Id.

24. Id.

tions, ought not to be communicated."[25] The Senate did not protest Washington's mode of compliance with its request, and, indeed, Secretary of State Randolph informed the President that his action "appears to have given general satisfaction," and, in particular, that Congressman James Madison had agreed in conversation that "the discretion of the President was always to be the guide" in such matters.[26]

The 1794 Senate resolution was not President Washington's last encounter with the relationship between the President's control over sensitive information and congressional document requests, although Bradford's death the following year prevented him from further involvement in the issue.[27] The most famous incident involved the demand by the House of Representatives in March 1796 for all documents relating to the negotiation of the controversial Jay Treaty with Great Britain.[28] On that occasion, Washington flatly refused to comply with the House's resolution, in part because he viewed the resolution as an unconstitutional intrusion into the treaty power shared by the President and the Senate.[29] However, Washington also invoked the argument from the nature and necessities of diplomacy that his second Attorney General had presented two years before.

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25. Sofaer, *Constitutional Power* at 84 (cited in note 7).

26. See id. at 85 n.*.

27. Bradford died on August 23, 1795. Johnson, ed., *Dictionary of American Biography* at 566 (cited in note 19).

28. For a collection of the most important documents, with commentary, see H. Jefferson Powell, *Languages of Power* 104-13 (Carolina Academic Press, 1991).

29. In his recent book on Washington's constitutional thought and practice, Glenn Phelps states that Washington's 1796 refusal "was based not on a general claim of executive prerogative, but rather on a constitutional interpretation that narrowed the House's role in foreign affairs." Phelps, *George Washington* at 177 (cited in note 17). Although we admire Phelps's important work, this assertion seems to overstate the extent to which Washington presented only one argument for his position. In any event, Phelps does not question Washington's acceptance in principle of the sort of arguments Bradford made in 1794. See id. at 172-78.

II. ATTORNEY GENERAL BRADFORD'S OPINION[30]

The Attorney General has the honour to report,
That having considered the Resolve of the Senate of the 24th instant whereby the President of the United States is requested to lay before that body the correspondence which has been had between the minister of the ~~French~~ ~~R~~ United States at the French Republic and the said Republic and between said Minister and the office of Secretary of State ---

He is of opinion that it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed. He also conceives that the general terms of the resolve do not exclude, in the construction of it, those just exceptions which the rights of the executive and the nature of foreign correspondences require. Every call of this nature, where the correspondence is secret and no specific object pointed at, must

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be presumed to proceed upon the idea that the papers requested are proper to be communicated[;] & it could scarcely be supposed, even if the words were stronger[,] that the Senate intended to include any Letters[,] the disclosure of which might endanger national honour or individual safety.

The Attorney General is therefore of opinion,
That it will be advisable for the President to communicate to the Senate such parts of the said Correspondence as upon examination he shall deem safe & proper to dislose: withholding all such, as any circumstances may render improper to be communicated.

Wm Bradford

The President of the United States

30. The following transcription reproduces Randolph's handwritten text, which is preserved in the Washington Papers in the Library of Congress. The layout attempts to replicate the appearance of the originals.