

**OPINION OF THE ATTORNEY GENERAL  
CONCERNING THE JUDICIAL  
AUTHORITY OF THE COMMISSIONER  
OR MINISTER OF CONSULS OF THE  
UNITED STATES IN CHINA AND TURKEY**

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Opinion of the Attorney general concerning the judicial authority of the commissioner or minister of consuls of the United States in China and Turkey by C. Cushing

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**C. CUSHING**

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IN

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## OPINION OF THE ATTORNEY GENERAL

CONCERNING

THE JUDICIAL POWERS OF THE COMMISSIONER OR MINISTER AND OF CONSULS  
OF THE UNITED STATES IN TURKEY AND CHINA.

DEPARTMENT OF STATE,

*October 8, 1855.*

The following opinion of the Attorney General, on the judicial authority of the commissioner or minister and of consuls of the United States in China and Turkey, is published for their instruction:

ATTORNEY GENERAL'S OFFICE,

*September 19, 1855.*

SIR: Your communication of the 13th of June calls for my opinion as to certain points in the judicial jurisdiction of the commissioner and consuls of the United States in China. My reply has been delayed for the purpose of conference with Mr. McLane, the late, and Mr. Parker, the present, commissioner. I now proceed to state the conclusions to which reflection has brought me.

That jurisdiction, so far as regards the forms and the manner of its exercise, is regulated by the act of August 11, 1848, which purports to have for its object to carry into effect certain provisions, in this relation, contained in the respective treaties between the United States and China, and the United States and the Ottoman Porte. (ix Stat. at Large, p. 276.)

This act, consisting of twenty-four sections, is, of course, to be considered as a whole; and anything

obscure in one part of it is to be elucidated by reference to other parts.

It is, avowedly, based on the two treaties in question, and especially that with China, and is to be construed in subordination to that, and to the constitution.

In substance, it accepts and gives actual form to those stipulations of treaty, which confer on all citizens of the United States the rights of exterritoriality in China and Turkey.

The legal rationale of the treaty stipulations as to China, with which we are now chiefly concerned, and their relation to the legislative authority of the United States, are explained in the following despatch of the minister who negotiated the treaty :

“ I entered China with the formed *general* conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations,—in a word, a Christian state.

“ The states of Christendom are bound together by treaties, which confer mutual rights and prescribe reciprocal obligations. They acknowledge the authority of certain maxims and usages, received among them by common consent, and called the law of nations ; but which, not being fully acknowledged and observed by the Mohammedan or Pagan states, which occupy the greater part of the globe, is, *in fact*, only the international law of Christendom. Above all, the states of Christendom have a common origin, a common religion, a common intellectuality ; associated by which common ties, each permits to the subjects of the other, in time of peace, ample means of access to its dominions for the purpose of trade, full right to reside therein, to transmit letters by its mails, to travel in its interior at pleasure, using the highways, canals, stagecoaches, steam-

boats, and railroads of the country as freely as the native inhabitants. And they hold a regular and systematic intercourse as governments, by means of diplomatic agents of each, residing in the courts of the others, respectively. All these facts impart to the states of Christendom many of the qualities of one confederated republic.

“How different is the condition of things out of the limits of Christendom! From the greater part of Asia and Africa, individual Christians are utterly excluded, either by the sanguinary barbarism of the inhabitants, or by their phrensied bigotry, or by the narrow-minded policy of their governments. To their courts, the ministers of Christian governments have no means of access except by force, and at the head of fleets and armies. As between them and us, there is no community of ideas, no common law of nations, no interchange of good offices; and it is only during the present generation, that treaties, most of them imposed by force of arms or by terror, have begun to bring down the great Mohammedan and Pagan governments into a state of inchoate peaceful association with Christendom.

“To none of the governments of this character, as it seemed to me, was it safe to commit the lives and liberties of citizens of the United States.

“In our treaties with the Barbary states, with Turkey, and with Muscat, I had the precedent of the assertion, on our part, of more or less of exclusion of the local jurisdiction, in conformity with the usage, as it is expressed in one of them, observed in regard to the subjects of other Christian states.

“Mr. Urquhart thinks these concessions have not been wise on the part of the Mohammedan states. It may be so for them; but it will be time enough for them to obtain jurisdiction over Christian foreigners, when these last can visit Mecca, Damascus, or Fez, as safely and freely as they do Rome and Paris, and when submission to the local jurisdiction becomes reciprocal.

“Owing to the close association of the nations of Christ-



endom, and the right their people mutually enjoy and exercise, of free entry into each other's country, there is reciprocity in the recognition of the local jurisdiction. Not so in the case of the great Moslem or Pagan states of Asia and Africa, whose subjects do not generally frequent Europe and America, either for trade, instruction, or friendship.

"In China, I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the empire; while the Portuguese attained the same object through their own local jurisdiction at Macao. \* \*

"I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption on behalf of citizens of the United States. This exemption is agreed to in terms by the letter of the treaty of Wang-Hiya. And it was fully admitted by the Chinese, in the correspondence, which occurred contemporaneously with the negotiation of the treaty, on occasion of the death of Sha Aman.

"By that treaty, thus construed, the laws of the Union follow its citizens, and its banner protects them, even within the domain of the Chinese empire.

"The treaties of the United States with the Barbary powers, and with Muscat, confer judicial functions on our consuls in those countries, and the treaty with Turkey places the same authority in the hands of the minister or consul, as the substitute for the local jurisdiction, which, in each case of controversy, would control it if it arose in Europe or America. These treaties are in this respect accordant with general usage, and with what I conceive to be the principles of the law of nations in relation to the non-christian powers.

"In extending these principles to our intercourse with China, seeing that I have obtained the concession of absolute and unqualified exterritoriality, I considered it well to use in the treaty terms of such generality, in describing the substitute-jurisdiction, as, while they hold unimpaired the customary or law-of-nations-jurisdiction, do also leave to Congress the full and complete direction to define, if it

please to do so, what officers, with what powers, and in what form of law, shall be the instruments for the protection and regulation of the citizens of the United States.

“And it only remains, in case the treaty shall be ratified, to adopt such legislative provisions as the wisdom of the President and of Congress may desire or approve, to give effect to the concessions, which the Chinese government has made in this matter, and which seem to me so important in principle, and so material to the honor and interests of the United States.” (Mr. Cushing to Mr. Calhoun, September 29, 1844. MS., State Dept.)

This anticipated dependence of the act on the treaty is plainly expressed by it, in so far as regards the *civil* jurisdiction of the commissioner and consuls, when it says: “Which jurisdiction shall embrace all controversies between citizens of the United States or others provided for by said treaty.” (Sec. 3d.) And in the text of the act, as well as its title, it purports “to carry into effect” or into “full effect” the provisions of the treaty.

The *criminal* jurisdiction conferred by the act is general in terms, without, however, as we shall see hereafter, overstepping the treaty. Whether the civil jurisdiction is *broader* than that of the treaty, is to be decided by its enactments. I do not perceive any provision of the act, in this respect, which goes beyond the treaty. Any provision, to have such effect, must be affirmative and reasonably explicit; because the tribunals, constituted by the act as well as the treaty, are special ones, having limited jurisdiction, namely, that which is conferred by treaty or statute. I repeat, that nothing appears, in the course of the act, capable of imparting jurisdiction beyond the persons and predicaments provided for by the treaty stipulations.

Hence, incontestably, in exploring the intent of the statute, we must be careful at no time to lose sight of the provisions of the treaty, at least in the questions of jurisdiction.

Let us now trace, through the treaty and statute, the persons who are to exercise this jurisdiction, the forms of its exercise, the laws it is to administer, and the persons and the conditions of its application.

“For the superintendence and regulation of the concerns of the citizens of the United States doing business at the said five ports” (of China), says the treaty, “the government of the United States may appoint consuls, or other officers, at the same, who shall be duly recognised as such by the officers of the Chinese government.” (Art. iv.)

After which it proceeds :

“All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction, and regulated by *the authorities*, of their own government. And all controversies occurring in China between citizens of the United States and the subjects of any other government, shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China.” (Art. xxv.)

“And if controversies arise between citizens of the United States and subjects of China, which cannot be amicably settled otherwise, the same shall be examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction.” (Art. xxiv.)

Finally, in regard to crimes, it is agreed that—

“Citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary of the United States, thereto authorized according to the laws of the United States.” (Art. xxi.—See viii Stat. at Large, pp. 592, 597.)