



Department of Justice

ADDRESS

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OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

FEDERAL BAR ASSOCIATION

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Philadelphia was called home by many of the Founding Fathers for all or part of their lives. Ben Franklin was a Philadelphian to the end. John Dickinson, whose writings helped explain and affirm the grievances of the colonies against Great Britain, and who later became a voice of caution in the Continental Congress, was one of Philadelphia's most prominent attorneys. Later he moved to Delaware, and represented that state at the Constitutional Convention.

While he was living and practicing law in Philadelphia, Dickinson took on a certain young man as a student-apprentice. This young man was just recently off the boat from Scotland, having determined that the new world was where he would make his name and his fortune. His name was James Wilson, and he is one of my favorites among the many unjustly neglected Founding Fathers. In the spirit of your conference topic -- "The Constitution: Past, Present and Future" -- I would like to talk to you about Wilson this afternoon, not only because he did his legal studies in this fair city, but also because the positions he took at the Constitutional Convention have a great deal to do with the existence of the federal bar as a separate entity.

James Wilson was ambitious and bright. He liked Philadelphia, with its wide waterfront streets and its cosmopolitan air. This was quite exciting for a young man like Wilson who had grown up on a farm in Fifeshire, Scotland. But he decided that he would do better as a big fish in a small pond, so

he moved first to Reading and then to Carlisle, Pennsylvania. At that time, these were still pretty much frontier towns. Today, however, Carlisle is the home of Dickinson College, which is named after Wilson's first mentor, and which has its own Center for the Study of the Constitution.

At first Wilson's law practice grew only at a painfully slow pace -- so slow, in fact, that he had both time and need to turn to journalism as well. For about five months he and a friend wrote a column for a Philadelphia newspaper. The column was signed only "The Visitant," and the two authors let their readers speculate as to who the "Visitant" might be. It was a very courtly and sophisticated column, rambling amiably about philosophy, manners, and ladies. It had a devoted following among the ladies of Philadelphia, since it treated them with a combination of traditional courtesy and intellectual respect.

But soon the "Visitant" had to stop appearing because Wilson's law practice was growing. He became a prominent lawyer, a family man, and a pamphleteer for the cause of the colonies against Great Britain. He was soon a natural choice for the Pennsylvania Assembly to send to the Continental Congress.

He emerged during the tense early months of 1776 as a leader of the moderates among the defenders of the rights of the colonies. Here is how he stated his position at that time:

That the Colonies may continue connected, as they have been, with Britain, is our second Wish: Our first is -- THAT AMERICA MAY BE FREE.

Soon Wilson came around to the view that independence was necessary. But the Pennsylvania delegation was under orders from the Pennsylvania Assembly not to support independence. Getting those orders changed was complicated by the polarization of Pennsylvania politics at that time between the Philadelphia Tories, who dominated the Assembly, and the farmers from the western part of the colony, who were radicals intent on overthrowing the Philadelphia establishment.

Trying fruitlessly to reconcile these two sides, Wilson repeatedly persuaded the Congress to delay crucial decisions on independence. This earned him a reputation as a Tory among some of the radicals. Eventually the other pro-independence members of the Pennsylvania delegation had to write a pamphlet called In Defense of Wilson, just to clear up that misunderstanding.

The Assembly, meanwhile, faced the threat that the radicals might set up a rival convention of sorts. They felt the heat, and, in the Pennsylvania Assembly in 1776, just as in legislatures all across our land today, the rule applies: when you feel the heat, you see the light. The Assembly rescinded its orders, the Pennsylvania delegation in the Congress went for independence, and the independence resolution got its required unanimous vote.

The rest may indeed be history, as they say, but it is history that we should look at, in this Bicentennial year of the Constitution. The fact is, history was not yet finished with James Wilson once the ink was dry on the Declaration of

Independence. He was also to play a leading role in the drafting of the Constitution.

The United States' first decade as an independent nation, as we all know, was not successful politically. Militarily, it was glorious, featuring the victory of our rag-tag forces over what was then the mightiest empire on earth. But politically, we were just a consortium of sovereign mini-states, with a federal congress whose powers were pretty much limited to giving advice.

James Wilson was one of a number of American statesmen who saw what the problem was, namely, the lack of a government capable of executing any national purpose for the United States. George Washington saw this: as commander of the Continental Army, he and his men had been the direct victims of Congress's inability to raise money. James Madison perceived it too, and so did that dashing war-hero from New York, Alexander Hamilton. So, when the convention met in Philadelphia in 1787 with the purpose of revising the Articles of Confederation, these men knew what really had to be done: the Articles had to be scrapped, and a new federal government had to be constituted.

But these men had their work cut out for them. It is a familiar story. Many of the delegates had little desire to part with the sovereignty of their own states. Some of them argued that a strong national government would be a tyrannical one. Indeed that argument was not to be taken lightly, and James Wilson applied his great learning and mental agility to the task of answering it.

His overall reply, as it emerges from his speeches and remarks over the whole summer that the convention took up, was to postulate a federal government separate from the states and anchored in popular sovereignty, just as the state governments were. Thus, he argued that the president should be elected directly by the people. Most of the delegates would not hear of this at first: they thought it would damage the powers of the states as such. Some preferred to have the president chosen by Congress; others suggested that the governors of the states choose him. But the method of presidential election that was eventually decided on -- the electoral college -- was a significant step in the direction of Wilson's idea.

On some points, Wilson's ideas were rejected. For instance, coming as he did from a large state, he believed that proportional representation, in which each state's congressional delegation would be in proportion to its population, was the only fair form of representation, and he wanted it for both houses of Congress. The delegates from small states, naturally, did not want to join in any federation in which they could be constantly outvoted. Remarkably enough, it was not until late in the Convention that the delegates took up the idea of arranging one house with proportional representation and the other with equal representation. Roger Sherman had proposed this early on, but it was a late-blooming idea.

On another of his ideas, Wilson was voted down by the Convention but vindicated by history. He wanted direct popular election of senators. But the delegates whose first concern was

preserving state sovereignty wanted the upper house to be chosen by the state legislatures.

It was a conflict between two plausible definitions of the federal government: is it something composed of the people and the state governments, or is it something totally separate from the state governments, over-arching them? The convention chose the first option; but in 1913 the states ratified the 17th Amendment, which established popular election of senators, thus switching the nation around to James Wilson's view.

This was why I ventured to say, at the beginning, that James Wilson was partly responsible for the existence of the federal bar. He believed -- as not all the delegates did at first -- that the federal government would have to be more than just the state governments acting together. That was why he argued for direct election of the president, and for a federal judiciary with judges appointed by the president.

This view of the federal government even lay behind his devotion to proportional representation, since he viewed the federal government as an agent of the people of the United States as such, whereas equal representation puts the emphasis back on the states. On that one point, perhaps his federalism went too far. But his great faith in popular sovereignty gave him a ready rejoinder to those who accused the Federalists of not believing in the people. As his biographer Charles Page Smith says:

Certainly, in all measures, Wilson sought to strengthen the national government by freeing it from the toils of state politics, but the fact that he was

willing to pay for a strong national government by the widest kind of political democracy set him apart from the other delegates in the convention.

As we have already seen, some of Wilson's actions back in 1776 had been misinterpreted and denounced by radical elements; the same thing happened all over again during the struggle to get the Constitution ratified. The opponents of the Constitution argued that it was not democratic enough, and tried to characterize all the Federalist leaders as aristocrats, or would-be aristocrats as the case may be. Wilson, who was rather stiff of bearing, found himself attacked by one pamphleteer for his "lordly carriage." An anonymous Federalist wrote a reply, and before he got down to weightier matters, he explained that Wilson's "lordly carriage" was the result of his continuing efforts to keep his glasses from sliding down his nose.

Well, Wilson's glasses stayed on, most of the time, and the Constitution got ratified. You might think, then, that history would at last have let him return to his beloved family and library. But that didn't happen.

As a prominent attorney, as well as a leader in the drafting of the Constitution and the fight for its ratification, Wilson was in many people's minds an obvious choice for the first Chief Justice of the United States. Even one of the bitterly anti-Constitutionalist newspapers recognized this in a way: it sarcastically urged his appointment to that office, citing what it very unfairly called his "unwearied exertions in the cause of despotism."

In the event, of course, President Washington gave John Jay the appointment as Chief Justice, but he made Wilson an Associate Justice. In practical ways the Jay Court established right from the beginning the Supreme Court's power, and the limitations on that power. For instance, it refused to accept jurisdiction over the claims of Revolutionary War pensioners, even though Congress tried to hand the Court that responsibility through legislation. The pensioners' claims were an executive matter, the Court said, and separation of powers prevented it from proceeding on such cases. It could be said that the Jay Court's handling of Congress's pension law anticipated Marbury v. Madison as an act of judicial review.

But undoubtedly the most significant case to come before the Supreme Court in its earliest days -- and also one in which Mr. Justice Wilson delivered a separate opinion -- was the 1793 case of Chisholm v. Georgia, in which the issue was whether a citizen could sue a state. On this question hung the very delicate question of whether the states were still fully sovereign.

Well, Chisholm was decided 6-1 in favor of the liability of states to be sued by citizens. Justice James Iredell, in the lone dissent, sounded a worthwhile warning about the possible degeneration of the Court's legitimate function into an unconstitutional duplication of the legislative function. In this, Iredell was quite prophetic. He was less convincing, however, in viewing the Constitution as a grant of power by the states, rather than what it is -- a grant of power by the people.

(Iredell, by the way, proved to be one of Wilson's most steadfast personal friends.)

Wilson, in his opinion on the majority side, saw clearly the enormous underlying question: "Do the United States form a nation?" He believed that they do, and that the people of Georgia, no less than the people of all the other states, had delegated certain powers to the federal government, without the state of Georgia being an intermediary in that delegation. Wilson also referred to the Contracts Clause -- which some scholars suspect him of having inserted into the Constitution during one of the Convention's late committee meetings -- to show that the supremacy of the federal government over the state governments was assumed.

Well, in spite of Wilson's airtight reasoning, there remain significant doubts about Chisholm even today, and it was highly unpopular when first issued. The ink was barely dry on it before an amendment was introduced in Congress to overturn it, and the states -- several of which were suddenly finding themselves sued -- ratified it in 1798, making it the 11th Amendment. It reverses the rule set forth in Chisholm, but it does not overturn Wilson's view that the people, not the state governments, are the source of the enumerated powers spelled out in the Constitution.

Now there was one thing about James Wilson that cast a thick pall over his later years. He was a reckless speculator in land, and, as a depression set in during the mid-1790s, his fortunes took a very grim turn. This fact alone may well be responsible for his never realizing his dream of being Chief Justice, despite

the fact that the post fell vacant twice during Wilson's time on the Court. It may also be responsible for the unjust neglect of Wilson by historians. The 19th century historians largely determined who would and who would not be given places of honor in the national memory, and they seemed to favor men who had died in respectable circumstances -- or else in swashbuckling circumstances, like Hamilton.

But alas, James Wilson's last years were such as to embarrass severely the up-and-coming lawyer and intellectual man-about-town that he had been twenty years earlier. True, he was an Associate Justice of the Supreme Court, delivering wise opinions whenever he could avoid his business affairs long enough to attend the sessions of the Court. Yet at the same time, he was struggling to satisfy creditors while his land plummeted in value. When he rode the circuits, he had to dodge creditors, and he was even imprisoned twice. You see, then as now, judges' salaries did not always cover their needs.

Throughout all this ruin and humiliation, he was sustained by his devoted wife. The first Mrs. Wilson had died, and Wilson had married a Boston girl some thirty years younger than himself. The senior ladies of Boston clucked disapprovingly, but James Wilson was sincerely smitten, and Hannah Wilson became a great emotional support for him and the whole family. She even kept a vigil at his bedside during his final illness, while he rambled incoherently about debt and prison and begged her not to leave him.

Yes, James Wilson's final years were pathetic, but it is long past time for us to appreciate his life, his thought, and his contribution to the founding of our country.

He never became Chief Justice, but he did win a sort of Founding Father's triple crown: he was present and active in the signing of the Declaration of Independence, the drafting of the Constitution, and George Washington's administration. Very few of the Founding Fathers participated in all three.

He was also one of the most learned of the Founding Fathers, and could utterly snow his opponents at the Constitutional Convention with lessons from classical history. In fact, here is what was written about him by William Pierce, a delegate from Georgia who made personal notes about all the other delegates:

Mr. Wilson ranks among the foremost in legal and political knowledge. He has joined to a fine genius all that can set him off and show him to advantage. He is well acquainted with Man, and understands all the passions that influence him. Government seems to have been his peculiar Study, all the political institutions of the World he knows in detail, and can trace the causes and effects of every revolution from the earliest stages the Grecian commonwealth down to the present time. No man is more clear, copious, and comprehensive than Mr. Wilson, yet he is no great orator. He draws the attention not by the charm of his eloquence, but by the force of his reasoning.

While serving on the Supreme Court, Wilson also became one of our nation's first law professors, giving lectures at the College of Philadelphia, which we now call the University of Pennsylvania. In his teaching he focused on the nature of law. Yet he avoided the trap of mere abstract speculation by focusing also on legal and political history, and by urging respect for the common law.

"In free countries," he said in one lecture, " -- in free countries especially, that boast the blessing of a common law, springing warm and spontaneous from the manners of the people -- Law should be studied and taught as a historical science."

As that quote demonstrates, he saw common law as an expression of popular will over time, and therefore he wished to defend it against a possibly arbitrary legislature. His belief in a strong, popularly elected president is all of a piece with these views. He might be said to have anticipated Tocqueville as a conservative defender of democracy. In any case, he was a major contributor to the Federalist tradition.

James Wilson was buried at the home of a family friend, and no epitaph was engraved on his tomb. That being the case, I would like to echo the one pronounced by his biographer, Charles Page Smith: James Wilson came to this country to make his fortune. In the end he lost his -- but made ours.

Ladies and gentlemen of the Federal Bar Association, thank you for this opportunity to help you examine "The Constitution: Past, Present and Future." I trust you'll agree that James Wilson has many lessons for us -- more than just that we should

be careful about investing in land. He has long lain buried in the past; I hope we will hear more about him and his jurisprudence in the future.

Thank you very much.