

Wilson as a Justice

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ABSTRACT

James Wilson, a founding father of great intellect and promise, never fulfilled his potential as a Justice. This paper explores his experience on the Supreme Court and the reasons that led to his failure to achieve the distinction that was expected of him.

James Wilson very much wanted to be the first Chief Justice.¹ But when George Washington denied him that honor and nominated him to be an Associate Justice, he accepted and threw himself into the work with characteristic industry.² Other than a title and \$500 more in annual salary³ (Wilson probably wanted this more than anything else), Wilson lost little. Life as an Associate Justice would be no different from life as the Chief. A Justice occupied one of the most exalted positions in the new government and was paid more than any other federal employee, except the President and the Vice-President.⁴ Nominations were the subject of fierce competition.⁵ But in 1789 no one knew exactly what that job would entail.

This paper gives the reader some idea of what a Justice, and specifically James Wilson, did in the 1790s.⁶ Wilson spent more of his time on the bench of circuit courts than he did on the Supreme Court bench; thus, this paper will focus significantly on his circuit court activities.⁷ And Wilson performed his circuit court

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1. Letter from James Wilson to George Washington (April 21, 1789), in 1 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800*, at 612-13 (Maeva Marcus, ed., 8 vols.) (1985-2007) [hereafter DHSC].

2. *Id.* at 49-51.

3. Act for allowing certain compensation to the Judges of the Supreme and other Courts, and to the Attorney General of the United States, ch. 18, § 1, 1 Stat. 72 (1789).

4. Act for allowing a Compensation to the President and Vice President of the United States, ch. 19, 1 Stat. 72 (1789).

5. Various letters, Jan. 1789-Sept. 1789, in 1 DHSC, *supra* note 1, at 604-64.

6. One thing I will not discuss is Wilson's speculation in land, as that will be covered by John Mikhail. See John Mikhail, *Wilson as a Land Speculator*, 17 *GEO. J. L. & PUB. POL'Y* 79 (2018).

7. Unfortunately, little is known about the dockets of all the circuit courts upon which Wilson sat, so I cannot discuss most of the decisions Wilson made as a circuit court judge. Until thorough studies of all the circuit courts that existed in the 1790s are undertaken, we will not know what happened in those courts. Only two such studies exist: MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816* (1978) and KURT GRAHAM, *TO BRING LAW HOME: THE FEDERAL JUDICIARY IN EARLY NATIONAL RHODE ISLAND* (2010).

duties with the diligence and seriousness that they deserved. But even a man as intelligent and well-educated as James Wilson did not embark upon his service with a vision of implanting his view of jurisprudence on the American republic. Although Wilson had prepared and presented his law lectures at the very beginning of his tenure as a Justice and had that material uppermost in his mind, he soon encountered the reality of practical politics and had to deal with real cases and controversies—not necessarily amenable to his theoretical views of the law. John Jay, the new Chief Justice, insightfully described his approach to achieving a workable government, which he hoped would govern not only his colleagues but also all who were associated with the functioning of the new courts. “[W]ise and virtuous Men,” he declared,

have thought and reasoned very differently respecting Government, but in this they have at Length very unanimously agreed . . . That its Powers should be divided into three, distinct, independent Departments—the Executive legislative and judicial. But how to constitute and ballance them in such a Manner as best to guard against Abuse and Fluctuation, & preserve the Constitution from Encroachments, are Points on which there continues to be a great Diversity of opinions, and on which we have all as yet much to learn.⁸

It would be Wilson and his brethren who would be first to try to figure out how to do this.

He and his fellow Justices, immersed in the politics of the Constitution’s framing and ratification, could not help but be aware of the kinds of questions they would be facing. The Constitution was merely a blueprint. It did not spell out how a functioning government was to be established. While the clauses in Article III appeared to be straightforward, they raised a number of issues: Was the full extent of jurisdiction granted in Clause One mandatory or could Congress limit the jurisdiction of the federal courts within the guidelines contained in this Clause? When a state was mentioned as a party, did it mean that the state could be a defendant as well as a plaintiff? When a case was brought into federal court under its diversity jurisdiction and the issue concerned matters ordinarily dealt with by state courts and state law, what law should the federal court apply? Was the enumeration of cases that would be within the Supreme Court’s original jurisdiction meant to be the sum total of that jurisdiction or was it only a minimum that Congress could expand upon? These, and other questions, remained for future adjudication.

Together, the Constitution and the Judiciary Act of 1789 became the framework under which the new Justices would work. The founders, recognizing the need for a national court to implement national interests in a system where powers were divided between a central government and the states, created in

8. John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (April 12, 1790), in 2 DHSC, *supra* note 1, at 26–27.

Article III the most novel institution of the American government: the Supreme Court. Having vested the judicial power in this Court and having spelled out its jurisdictional limits, the Constitution made only one further provision for this Court, although it was not explicit. By stating that the Chief Justice shall preside at presidential impeachment trials,⁹ the position of Chief Justice was implicitly established. Article III also set out the life tenure of federal judges and protection for their compensation. Congress, however, had to decide in the first instance whether lower courts were necessary. The number of Justices and judges, where and when the courts would meet, and how much the judges would be paid, had to be provided by statute. And this the First Congress hurried to do.

The Judiciary Act of 1789 provided that the Supreme Court would consist of a Chief Justice and five Associate Justices. It would convene at the capital (then New York and a year later Philadelphia) on the first Monday in February and the first Monday in August, to hold two annual sessions.¹⁰ Congress created two levels of lower courts below the Supreme Court. For each of the states, the Judiciary Act created a federal district court that would have its own presiding judge who lived in the district and would exercise jurisdiction over admiralty and maritime causes and minor federal crimes.¹¹ At a higher level would be circuit courts, which, unlike today's Circuit Courts of Appeal, were to be primarily courts of original jurisdiction—trial courts—for major federal crimes and civil cases of higher monetary value. Appeals from the district courts made up a minor portion of their dockets. Each state would have one circuit court, and the states were grouped into three circuits: the eastern, the middle, and the southern. The Judiciary Act provided that no judges would be appointed to the circuit courts. Instead, twice a year, two Supreme Court Justices would attend the circuit court in each state, with the district judge from that state as the third member of the bench. The act set the number of Justices at six, so that two could be assigned to each circuit in the spring and in the fall.¹² A few years later, Congress amended the 1789 Act to require only one Justice to attend each circuit court.¹³

Congress also decided that it could regulate the jurisdiction of all federal courts, and in the Judiciary Act of 1789 it established with great particularity a limited jurisdiction for the district and circuit courts,¹⁴ gave the Supreme Court the original jurisdiction provided for in the Constitution, and granted the Supreme Court appellate jurisdiction in cases from the federal circuit courts and from state courts where those courts' rulings had rejected federal claims.¹⁵ The

9. U.S. CONST. art. I, § 3.

10. Act to establish the Judicial Courts of the United States, ch. 20, §§ 1, 5, 1 Stat. 73, 75 (1789) [hereinafter Judiciary Act of 1789].

11. §§ 3, 9.

12. §§ 4, 11.

13. Act in addition to the Act, entitled, "An Act to establish the Judicial Courts of the United States," ch. 22, § 1, 1 Stat. 333, 334 (1793).

14. Judiciary Act of 1789 §§ 9, 11.

15. §§ 13, 25.

decision to grant federal courts a jurisdiction more restrictive than that allowed by the Constitution represented a recognition by the first Congress that the people of the United States would not find a full-blown federal court system palatable at that time.¹⁶

With an acute consciousness of the fragility of the new government and keeping in mind President George Washington's admonition that the work of the Justices would be in large part responsible for the "stability and success of the National Government,"¹⁷ Wilson and his brethren determined to do all in their power to strengthen the new government at home and abroad. But the occasions for doing that were few, and what the Justices encountered for more days of the year than they would have liked was the arduous task of circuit riding.

The new Justices soon learned to detest circuit riding. They were away from home for six months each year; they traveled on rough and rutted roads and trails or by water; they slept in public houses in crowded and uncomfortable conditions. A comment by Justice Iredell to his wife gave a hint of how bad things could be when he noted happily that "[w]e are very well accomodated, tho' Mr. Wilson & myself have only one room between us."¹⁸ Justice William Cushing once slept with twelve fellow lodgers in the room, and James Iredell met with "a bed fellow of the wrong sort"¹⁹—and they paid for the privilege out of their own salaries. Despite the hardships of riding circuit, the Justices took their obligations seriously and did everything possible to attend the circuit courts. They learned to deal with Congress's inconvenient scheduling of dates for court meetings by trading courts with each other, going to places more convenient for them than the circuit to which they had been assigned.²⁰ Wilson fared better than other Justices because he lived in Philadelphia and, after the first year, did not have to travel to the capital for Supreme Court sessions as well as ride circuit. It is hardly surprising that the Justices complained frequently to Congress but to little avail. By not requiring a separate set of judges for the circuit courts, Congress limited the costs of the federal judiciary, about which many states had shown concern during the ratification process. But Congress also claimed to have had more positive reasons

16. For a discussion of the origins of the Judiciary Act of 1789, see Maeva Marcus and Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in *ORIGINS OF THE FEDERAL JUDICIARY* 13–39 (Maeva Marcus ed.) (1992).

17. On the eve of their undertaking their first judicial duties, Washington had written to the Justices, "I have always been persuaded that the stability and success of the National Government, and consequently the happiness of the People of the United States, would depend in a considerable degree on the Interpretation and Execution of its Laws, _In my opinion, therefore, it is important that the Judiciary System should not only be independent in its operations, but as perfect as possible in its formation." Letter from George Washington to the Justices of the Supreme Court (April 3, 1790), in 2 *DHSC*, *supra* note 1, at 21.

18. Letter from James Iredell to Hannah Iredell (Sept. 25, 1792), in 2 *DHSC*, *supra* note 1, at 298.

19. Diary of William Cushing (Nov. 20, 1793), *PHILADELPHIA ALMANAC* (1793), in 2 *DHSC*, *supra* note 1, at 433; Letter from James Iredell to Hannah Iredell (October 2, 1791), in 2 *DHSC*, *supra* note 1, at 212.

20. See, e.g., Letter from James Wilson to William Cushing (May 7, 1793), in 2 *DHSC*, *supra* note 1, at 372; Letter from James Iredell to James Wilson (August 5, 1794), in 2 *DHSC*, *supra* note 1, at 477–78.

for the circuit-riding arrangement: sending Supreme Court Justices to all the states would be good for the new government and for all the citizens. As Senator (later Justice) William Paterson declared, circuit courts would benefit the populace by carrying “Law to their Homes, Courts to their Doors.”²¹

As the year 1790 began, the Justices embarked upon their business in a spirit of discovery: each action they took would be a test of the blueprint for governing outlined by the Constitution and the First Congress. Conscious of the significance of every decision they made, the Justices invested much thought in even the smallest administrative detail, and, in the first year, administrative detail is all that the Supreme Court and most of the circuit courts had to occupy their time. The judges appointed criers and clerks, ordered official seals, decided how to dress, where to reside, and established rules governing grand and petit jury selection and for admission to the bars of their respective courts. One of the rules set down by the Supreme Court for admission to its bar required attorneys to provide a certificate of membership in the bar of their highest state court for three years because Chief Justice Jay did not want the Justices to vouch for the abilities of the lawyers applying.

While the courts did not conduct a huge amount of business in their first year, many actions were commenced, and an occasional trial was held.²² The Justices took advantage of the dearth of legal business by giving long grand jury charges that were general expositions on the nature of government and the new nation (rather than lectures on specific crimes) that were meant to impress everyone in the courtroom and beyond, as newspapers frequently published these charges. Wilson proved himself a master of the art. His charge to the grand jury of the Circuit Court for the District of Pennsylvania is a perfect example.²³

To begin his charge, Wilson noted that the lack of business gave him an opportunity to advise the grand jury on the “utility, the power, and the duty of Juries.”²⁴ He pointed to the power of the people as the animating force of the new government and repeated that sentiment when he concluded the section on juries: “We now see the circle of government, beautiful and complete. By the people, its springs are put in motion originally: By the people, its administration is consummated: At first; at last; their power is predominant and supreme.”²⁵ After spending time on the task of a grand jury, to be pursued with “Mature deliberation, sound judgment, and strict impartiality,”²⁶ Wilson turned to the work of petit juries and included a discussion of a question that would appear time and again in

21. Notes of William Paterson (June 23, 1789), in 4 DHSC, *supra* note 1, at 416.

22. 2 DHSC, *supra* note 1, at 8.

23. This was not the first charge that Wilson gave. Before presiding in Pennsylvania, Wilson sat in New Jersey, on April 2, 1790, where he delivered “a suitable charge” to a “respectable Grand Jury,” PENNSYLVANIA MERCURY, April 15, 1790, but there is no record of the content of the charge.

24. James Wilson’s Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania, (April 12, 1790), in 2 DHSC, *supra* note 1, at 33.

25. *Id.* at 40.

26. *Id.* at 37.

the work of the federal courts in the first decade: What are the “relative powers of courts and juries?”²⁷ Although he understood that the distinction between judges, who decide questions of law, and juries, who decide questions of fact, had been long recognized, Wilson noted that there were many occasions on which the jury must decide on the law and the facts, and he approved of that. He admitted that juries could make mistakes, sometimes bad ones, but he concluded that “their errors and mistakes can never grow into a dangerous system,”²⁸ and that confirmed his faith in the people. Wilson ended his charge by reminding the grand jurors of the few crimes already stipulated in federal law (treason in the Constitution²⁹ and crimes like perjury and smuggling connected to the various revenue collection and coastal trade acts³⁰) and of the importance of these laws to the health of the nation.³¹

It did not take long for business to pick up in the federal courts. By the August 1791 Term, the Supreme Court had heard a case and issued an opinion that reflected its belief that the Court’s rulings carried weight beyond the immediate question being considered. The first case with which the Court dealt, *West v. Barnes*,³² perfectly illustrates the Justices’ concerns, but from the report in Dallas it would seem that only a point of procedure was involved. Can a writ of error seeking to remove a case from a circuit court to the Supreme Court issue from the lower court? The case had been decided on the merits by Chief Justice Jay, Justice William Cushing, and District Judge Henry Marchant in the Rhode Island Circuit Court under its diversity of citizenship jurisdiction. West, unhappy with the judgment, took out a writ of error to pursue the case in the Supreme Court. But when the case was brought before the Court, Barnes, who represented himself, objected to the writ: it “could not be regarded as a good Writ of Error” because it had been signed and sealed by the clerk of the circuit court. The Rhode Island Court could not order itself to remove the proceedings to a higher court for review. A proper writ of error to an inferior federal court had to have the signature

27. *Id.* at 38.

28. *Id.* at 38–40.

29. U.S. CONST. art. III, § 3.

30. Act to regulate the Collection of Duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandises imported into the United States, ch. 5, 1 Stat. 29 (1789); Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes, ch. 22, 1 Stat. 94 (1781); Act for the Punishment of certain Crimes against the United States, ch. 9, 1 Stat. 112 (1790) [hereafter Crimes Act of 1790], had not been passed at the time of Wilson’s charge.

31. Wilson delivered this charge, sometimes with passages cut out, to the circuit courts of Delaware, Maryland, and Virginia within the first two years of circuit riding, and even gave it in Rhode Island in 1792, 2 DHSC, *supra* note 1, at 33. He wrote a variant of this charge for a special session of the Circuit Court for the District of Pennsylvania that the Supreme Court had ordered to try two men being held on suspicion of murder and piracy. The charge covered the duties of grand and traverse juries and also discussed at length the crimes of treason, murder, manslaughter, robbery, and piracy and their punishments stipulated in the Crimes Act of 1790. In all of Wilson’s charges, passages similar to those in his law lectures appear. James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (February 21, 1791), in 2 DHSC, *supra* note 1, at 142–52.

32. *West v. Barnes*, 2 U.S. (2 Dall.) 401 (1791). See generally 6 DHSC, *supra* note 1, at 7–26 (discussing *West v. Barnes*).

of the clerk and the seal of the Supreme Court. But if this was the case, the judgment below could not be stayed because Section 23 of the Judiciary Act of 1789 required that the writ be served on the adverse party by being filed in the lower court within ten days of that court's decision.³³ The Judiciary Act did not specifically say, however, out of what court the writ was to issue. The Justices were faced with a dilemma: Should they construe the procedural provisions of Section 23 of the Judiciary Act literally—producing inequitable results for litigants who lived in states distant from the nation's capital—or should they effectively rewrite the statute to avoid this inequitable result? Although the Justices realized that their decision would create problems for writ-seeking litigants who lived far from Philadelphia, they believed that correction could come only from the legislature; Congress had to provide the remedy, not the Court.³⁴

The Justices gave their opinions orally and seriatim; the junior Justice spoke first, and the others proceeded by seniority. All showed concern for the effect of their decision on litigants, but only James Wilson suggested a practical remedy. He indicated that Section 14 of the Judiciary Act solved the question: It gave all federal courts the power to issue writs “not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”³⁵ West had called upon the Supreme Court to exercise jurisdiction in his case; therefore, it was that Court, by the terms of Section 14, that had the power to issue the necessary writ. And the principles and usages of law, as he had shown earlier, pointed to authority flowing from a superior to an inferior court. Wilson admitted that interpreting Section 23 in this way would cause great inconvenience, and only the legislature could change the statute. But he suggested a way to mitigate the inconvenience. He thought that the language of the writ itself, “We command you, that, *if judgment be given*, then you send the record,” pointed to a solution.³⁶ Purchase a writ before the lower court issued a decision. The expense might be superfluous but not a great hardship. He emphasized, however, that this was just a suggestion, not a ground of his opinion. His opinion was, “that the proceedings of the Circuit Court for the district of Rhode-Island are not *judicially* before us; and that, for this reason, the motion of the counsel for the plaintiff cannot be sustained.”³⁷ Eventually,

33. Judiciary Act of 1789, ch. 20, § 23, 1 Stat. 85 (1789).

34. *West v. Barnes*, FED. GAZETTE (Philadelphia) Aug., 2–3, 1791, reprinted in 6 DHSC, *supra* note 1, at 18–26.

35. Judiciary Act of 1789 § 14.

36. *West v. Barnes*, FED. GAZETTE (Philadelphia) Aug. 2–3, 1791, reprinted in 6 DHSC, *supra* note 1, at 18–26.

37. *Id.* at 25. Justice Iredell declared, “It is of infinite moment that Courts of Justice should keep within their proper bounds, and *construe*, not *amend*, acts of Legislation.” *Id.* at 22. He fully expected Congress to change the law immediately. When it did not, he continued all cases in his circuit where section 23 was implicated and sent a letter to President Washington explaining his action and requesting the President urge Congress to act. See Letter from James Iredell to George Washington (Feb. 23, 1792), in 2 DHSC, *supra* note 1, at 24–41.

Congress did make different provisions for writs of error.³⁸

Wilson revealed another concern—not for the proper division of power among the three branches, but for individual rights—when he presided at a special session of the Circuit Court for the District of Pennsylvania held on August 15, 1791. Eleanor MacDonald was accused of larceny on the high seas (stealing ten or eleven doubloons from the master of a ship in the Delaware River within the jurisdiction of the United States), a federal crime under the Crimes Act of 1790. This may seem like a trivial offense, but it produced a grand jury charge from Wilson that is instructive. He began the charge by asking whether it was necessary to inconvenience so many people (judges, grand jurors, petit jurors, court personnel, witnesses) by holding a special session of the court out of concern for one individual. His answer was an emphatic affirmative: “it is for the Honour of Government, that, even on such an Occasion, that all this should be done. No public Offence against the Laws is too minute for their Vigilance and Reprehension: no Citizen is too insignificant to become an object for their Protection or their Energy.”³⁹ Wilson identified the rights of individuals as related to “Their person Security,” “Their Reputation,” and “Their Property” but spent the remainder of his prolix charge discussing property because Eleanor MacDonald was accused of theft.⁴⁰ He lectured the jurors on the history of communal and private property, citing sources as diverse as the *Works* of Sir Francis Bacon and William Stith, who wrote an account of the first settlement of Virginia, published in 1747, and urged them to be vigilant in rooting out violations of the law of property.⁴¹ On August 16, the jury acquitted MacDonald.

These early grand jury charges and the opinion in *West v. Barnes* highlight the tension that Justice Wilson must have felt between a keen desire to demonstrate his considerable knowledge of the law and its historical underpinnings and the necessity of simply solving a practical problem that arose from a poorly written statute. To his credit, he got to the point in his Supreme Court opinion and offered a workable solution, but in his charge to the MacDonald grand jury, he indulged his penchant for displaying his erudition. The duel between theory and practice would continue throughout Wilson’s tenure as a Justice.

Another clash between theory and the administrative necessities of setting up a new government occurred in 1792, dividing the Justices. A month before the next

38. See Act for regulating Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses, ch. 36, § 9, 1 Stat. 278 (1792). The new procedure required the clerk of the Supreme Court to send forms of the writ of error, approved by two Justices, to the circuit court clerks, who could issue the writ under the seal of the circuit court and return it to the Supreme Court, following the same process as the Supreme Court clerk, when he issued a writ.

39. James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (Aug. 15, 1791), in 2 DHSC, *supra* note 1, at 198–99. The Supreme Court ordered the special session of the circuit court.

40. *Id.*

41. See James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (Aug. 15, 1791), in 2 DHSC, *supra* note 1, at 197–204.

round of circuit riding commenced, Congress enacted a law that became known as the Invalid Pensions Act.⁴² The passage of this Act gave the federal courts their first opportunity to review the constitutionality of an act of Congress,⁴³ something they were not eager to do. The words, “judicial review,” of course, are not explicitly mentioned in the Constitution, and this has cast doubt on the legitimacy of the practice. But from the very beginning of the republic, federal judges assumed that they had this power. Congress, in the first decade, acted as if there were no doubt that the courts could exercise judicial review.⁴⁴ In a charge to a grand jury while on circuit—the first ever given under the new Judiciary Act—John Jay put his finger on what would become the subject of recurrent controversy: “A judicial Controul, general & final, was indispensable. The Manner of establishing it, with Powers neither too extensive, nor too limited; rendering it properly independent, and yet properly amenable, involved Questions of no little Intricacy.”⁴⁵

Statements about the role of the judiciary in the American polity evidence a belief in judicial review, but the real test occurred when the judges actually declared an act of Congress unconstitutional. This unprecedented action, known as *Hayburn’s Case*, took place in April 1792 in the United States Circuit Court for the District of Pennsylvania rather than in the Supreme Court; it therefore has not received as much attention as it deserves. But at the time it created quite a stir.

The Invalid Pensions Act required Congress to compensate injured veterans of the Revolutionary War. As there was no bureaucratic apparatus in place to hear these claims, Congress designated the judges of the United States Circuit Courts for this task. The Act charged the judges with the duty of determining whether the petitioner’s disability was indeed a result of his military service. If they found that it was, the petitioner’s name and a recommendation for the amount of his pension was submitted to the Secretary of War, who was to check his records to ensure that the petitioner had actually served in the military. If the Secretary found any indication of fraud, he was authorized to withhold the petitioner’s name from the United States pension list and to report his action to Congress for its final determination of the matter.⁴⁶ Thus, the Secretary of War, and after him,

42. See Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the claims to Invalid Pensions, ch. 11, 1 Stat. 243 (1792).

43. A circuit court had found a state law unconstitutional the previous year. In the April 1791 meeting of the Connecticut circuit court, Justices Jay, Cushing, and Judge Richard Law struck down a statute that allowed state courts to deduct interest on British debts accrued during the Revolutionary War. See Spring and Fall Circuits 1791, in 2 DHSC, *supra* note 1, at 123 n.6.

44. See Maeva Marcus, *Judicial Review in the Early Republic*, in LAUNCHING THE “EXTENDED REPUBLIC”: THE FEDERALIST ERA 25, 25–53 (Ronald Hoffman & Peter J. Albert eds., 1997).

45. John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (Apr. 12, 1790), in 2 DHSC, *supra* note 1, at 27.

46. See Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the claims to Invalid Pensions, ch. 11, 1 Stat. 243 (1792).

Congress, effectively had the power to reverse a factual determination of a circuit court and to deny a claim that the judges had found to be valid.

Within weeks of the Act's passage, William Hayburn appeared before the Circuit Court for the District of Pennsylvania claiming eligibility for a pension. On April 12, the court, composed of Supreme Court Justices James Wilson and John Blair, and District Judge Richard Peters, refused to hear Hayburn's petition.⁴⁷ The records of the court give no indication of the reasons for the judges' refusal to proceed, but the following day, Representative Elias Boudinot, on the floor of the House, gave a full report of the judges' statements from the bench.⁴⁸ And soon after, the judges themselves wrote a letter to President Washington explaining their position in the case.⁴⁹

Boudinot reported that the circuit court judges thought that the law that imposed on the court the duty of examining invalids was unconstitutional because it allowed the Secretary of War and Congress to revise a decision of the court. Under the Constitution the judiciary is independent, and neither the executive nor the legislature has "revisionary authority over the judicial proceedings of the courts of Justice."⁵⁰

In their letter to the President, the judges made clear that they had indeed declared the Invalid Pensions Act of 1792 unconstitutional. After a careful exposition of their reasons for finding that the Act did not meet the requirements of the Constitution, they explained that their conduct, though necessary, "was far from being pleasant. To be obliged to act contrary either to the obvious directions of Congress or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again."⁵¹ Wilson was the presiding judge and undoubtedly took a large part in announcing the court's action (after consultation with the other judges) and writing the letter, though there is no specific proof of this.

The judges of two other circuit courts, although they did not have actual cases before them, wrote letters to President Washington informing him of their belief that the Invalid Pensions Act of 1792 was unconstitutional. In its letter, however, the Circuit Court for the District of New York introduced a novel interpretation of the statute that allowed that court to hear the claims of invalid petitioners. Chief Justice John Jay and his brethren wrote that because "the objects of this act are exceedingly benevolent," they would assume that what Congress really wanted them to do was to serve as commissioners to hear the veterans' claims,

47. See Ruling of the United States Circuit Court for the District of Pennsylvania (Apr. 11, 1792), in 6 DHSC, *supra* note 1, at 46–48.

48. *Proceedings of the United States House of Representatives*, GEN. ADVERTISER (Philadelphia), Apr. 13, 1792, reprinted in 6 DHSC, *supra* note 1, at 48–49.

49. Letter from James Wilson, John Blair, and Richard Peters to George Washington (Apr. 18, 1792), in 6 DHSC, *supra* note 1, at 53–54.

50. See *Proceedings of the United States House of Representatives*, GEN. ADVERTISER (Philadelphia), Apr. 13, 1792, reprinted in 6 DHSC, *supra* note 1, at 48.

51. Letter from James Wilson, John Blair & Richard Peters to George Washington (Apr. 18, 1792), in 6 DHSC, *supra* note 1, at 54.

rather than as Article III judges. Thus, not only Justices Jay and Cushing, but also Justice Iredell, who agreed to go along with this interpretation of the statute when he later sat on the Circuit Court for the District of Connecticut, heard the petitions of invalids after the adjournment of each day's session of the circuit court and made recommendations to the Secretary of War. Wilson, who was the Justice assigned to sit with Iredell in Connecticut, refused to hear the claims.⁵²

At the first day of the August 1792 term of the Supreme Court, Attorney General Edmund Randolph told the Court that he would move for a mandamus to order the Circuit Court of Pennsylvania to hear Hayburn's petition to be put on the pension list. But before he could discuss the merits of the Invalid Pensions Act, a member of the Court informed him that the Court doubted the Attorney General's authority to move for a *mandamus ex officio*, and Randolph had to spend two days explaining why he had that power. Apparently, the specific question that concerned the Court was whether the Attorney General could seek a mandamus without the authorization of the President.⁵³ The Court divided evenly, with Justices Blair, Iredell, and Thomas Johnson⁵⁴ in favor of the Attorney General's proceeding on his own authority and Chief Justice Jay, and Justices Cushing and Wilson opposed.⁵⁵

Failing in this effort, Randolph decided to represent Hayburn personally in seeking relief from the Supreme Court. After argument, the Supreme Court postponed a decision. Everyone understood that this meant that the Justices hoped that Congress would correct the Invalid Pensions Act so that the Court would not have to embarrass the legislature by declaring the Act unconstitutional. And that is exactly what happened. During the six months before the next term of the Supreme Court in February 1793, Congress became convinced that the judges' doubts about the constitutionality of the Act were well-founded, and a new law was passed stipulating a different procedure for examining the claims of Revolutionary War veterans. *Hayburn's Case* became moot.⁵⁶

Congress recognized another legal problem, however, and, in the new Invalid Pensions Act of 1793, provided for its adjudication. If the 1792 Act was unconstitutional, were the pensions received by the veterans who had been examined by

52. In a letter to his wife, James Iredell wrote, "We have had a great deal of business to do here, particularly as I have reconciled myself to the propriety of doing the Invalid-business out of Court. Judge Wilson altogether declines it." Letter from James Iredell to Hannah Iredell (Sept. 30, 1792), in 2 DHSC, *supra* note 1, at 301 (emphasis added). In this instance, Wilson stuck to his belief in the theory of judicial review and made no attempt to find a way to carry out the "benevolent" objects of the Invalid Pensions Act.

53. Dallas, in his report on *Hayburn's Case*, misses this point. See 2 U.S. (2 Dall.) 409, 409 (1792). For a full discussion of this point, see Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 3 WIS. L. REV. 527, 527-46 (1988).

54. Johnson had been appointed by President Washington in August 1791, to replace John Rutledge, who had resigned the previous March. See Letter from John Rutledge to George Washington (Mar. 5, 1791), in 1 DHSC, *supra* note 1, at 23; see also Letter from Thomas Johnson to George Washington (Aug. 13, 1791), in 1 DHSC, *supra* note 1, at 76.

55. See *Hayburn's Case*, in 6 DHSC, *supra* note 1, at 37-38.

56. See *id.* at 38-40.

the judges of the circuit courts acting as commissioners illegally obtained? In *United States v. Yale Todd*, Todd, an invalid pensioner, was ordered to return to the United States the money he had received and to renew his application under the Act of 1793.⁵⁷

Yale Todd, then, would appear to represent the first instance of the Supreme Court itself declaring an act of Congress unconstitutional. The problem is that the Supreme Court provided no rationale for its decision, at least not one that has been recorded anywhere. There are two grounds upon which the Court could have relied: one, that the Invalid Pensions Act of 1792 was void because it conflicted with the constitutional separation of powers; or two, that Yale Todd's pension was invalid because the statute had wrongly been interpreted to allow the judges to act as commissioners and hear pension claims. The weight of the evidence indicates that the Court relied on this second, narrower ground,⁵⁸ and political prudence likely favored this side as well, so the Supreme Court did not strike down an act of Congress in 1794. What is important, however, is that a federal circuit court in 1792 found a congressional statute unconstitutional. Although no written opinion to this effect exists—written opinions were not required in the 1790s—a member of Congress had heard Justice Wilson announce that the Invalid Pensions Act was not constitutional, and the Court would not proceed under it.⁵⁹ It is interesting to speculate as to what position Wilson took in *Yale Todd*.⁶⁰

The Court faced another highly sensitive case in the August 1792 term when Alexander Chisholm brought suit against the state of Georgia. Because Justice Iredell had ruled in the Circuit Court for the District of Georgia that it had no jurisdiction in an action against a state, and because Chisholm was determined to receive payment on a contract dating from the Revolutionary War, the Supreme

57. See *id.* at 40, 42–43.

58. See *id.* at 43–45.

59. See *Proceedings of the United States House of Representatives*, GEN. ADVERTISER (Philadelphia), Apr. 13, 1792, reprinted in 6 DHSC, *supra* note 1, at 48–49. Also, in a letter from Edmund Randolph to George Washington written a few days before the Pennsylvania Circuit Court was to meet, the attorney general informed the president that he had met Justice Wilson on the street, and Wilson had told him that Blair and he “meant to refuse to execute the act” and made a “strong remark against its constitutionality.” Letter from Edmund Randolph to George Washington (Apr. 5, 1792), in 6 DHSC, *supra* note 1, at 45–46.

60. The minutes of the Supreme Court merely note that the Court “are of opinion that Judgment be entered for the plaintiff [United States].” No mention is made of any dissent or any rationale for that ruling. See Extract from the Minutes of the Supreme Court (Feb. 17, 1794), in 6 DHSC, *supra* note 1, at 380, 381. Another interesting point about the *Yale Todd* case, which is not reported by Dallas, is that it came to the Court as an original matter. The 1793 statute required the Attorney General and the Secretary of War to bring a case before the Supreme Court to determine the legitimacy of the pensions of the veterans who received them by virtue of decisions made by judges acting as commissioners. This type of case is not included in the original jurisdiction given to the Court by the Constitution. No evidence exists that the Justices took issue with the jurisdictional stance of *Yale Todd*. Five other cases in the first decade were acted on by the Court on original jurisdiction not specified in the Constitution. None of these could have been considered after the decision in *Marbury*. We will never know what Wilson thought about that. See *Hayburn's Case*, in 6 DHSC, *supra* note 1, at 33, 40.

Court ordered Georgia to appear on the first day of August 1792 to answer Chisholm's plea. When no one showed up, Attorney General Randolph moved to compel Georgia to appear or have a default judgment entered for the plaintiff. Alexander Dallas, who was representing Georgia in another case before the Court, asked the Justices not to consider Randolph's motion until the next term, giving the state time to decide whether to submit to the jurisdiction. The Court agreed, postponing its confrontation with Georgia until the February 1793 Term.⁶¹

While *Chisholm v. Georgia*,⁶² the case that decided the question of whether a state can be sued by a citizen of another state, may be the most well-known and most studied case from the first decade of the Court's life, it won that fame mainly because the judgment led to the Eleventh Amendment. For present purposes, it is James Wilson's part in this story that is of interest.⁶³

Before the Court issued its decision in *Chisholm*, it had time to think about the question of state suability. Several other suits against states had been germinating over the previous two years, namely *Van Staphorst v. Maryland*,⁶⁴ *Oswald v. New York*,⁶⁵ and *Hollingsworth v. Virginia*,⁶⁶ which involved James Wilson personally.⁶⁷ And the act of riding circuit put the Justices in touch with the political opinion of the day. They surely knew that an opinion in favor of state suability would not be popular. Yet this did not stop them from declaring that the Supreme Court had jurisdiction in the case. And Wilson did not shy away from setting down, in his usual fashion, that allowing suits against states in the highest federal court was a cornerstone of the system of government established by the Constitution. Wilson looked at the problem from three different perspectives: (1) "the principles of general jurisprudence," (2) "the laws and practice of particular States and Kingdoms," and (3) "the Constitution of the United States."⁶⁸ Using legal analysis, Wilson argued that state sovereign immunity was inconsistent with the Constitution. The most telling statement in Wilson's opinion came when he revealed where his heart and mind lay:

With regard to one of the terms State this Authority is declared: With regard to the other Sovereignty the Authority is implied only: But it is equally strong, for, in an Instrument well drawn, as in a Poem well composed, Silence is sometimes most expressive. To the Constitution of the United States the Term Sovereign is totally unknown. There is but one Place where it could

61. See *Chisholm v. Georgia*, in 5 DHSC, *supra* note 1, at 127, 131–32.

62. See generally *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

63. For the whole story, see *Chisholm v. Georgia*, in 5 DHSC, *supra* note 1, at 127.

64. See generally *Van Staphorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791); see also *Van Staphorst v. Maryland*, in 5 DHSC, *supra* note 1, at 7–56.

65. See generally *Oswald v. New York*, 2 U.S. (2 Dall.) 401, 401–02 (1792); see also *Oswald v. New York*, in 5 DHSC, *supra* note 1, at 57.

66. See generally *Hollingsworth v. Virginia*, in 5 DHSC, *supra* note 1, at 274.

67. His name was inked out of a bill in equity filed with the Supreme Court. *Id.* at 300 n.4.

68. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793).

have been used with Propriety: But even in that Place it would not perhaps have comported with the Delicacy of those who ordained and established that Constitution. They might have announced themselves as The “Sovereign” People of the United States: But serenely conscious of the Fact they avoided the ostentatious Declaration. They expressed themselves with Dignity: But in Dignity, unaffected Simplicity is always included.⁶⁹

The Justices maintained their belief in citizens of states being able to sue a different state in the Supreme Court until President Adams declared the Eleventh Amendment ratified in 1798. Between that time and the *Chisholm* ruling on jurisdiction, the state of Georgia decided to settle the case by paying its debt.⁷⁰ In another case, *Oswald v. New York*, the Supreme Court held a jury trial to determine whether the state of New York owed Oswald, a citizen of Pennsylvania, money and, if so, how much. James Wilson presided at this trial, because Chief Justice Jay was in England and the next most senior Justice, William Cushing, was ill. Wilson delivered a charge to the petit jury, the exact content of which remains unknown, but the legal underpinnings of which can be imagined.⁷¹ The jury returned a verdict for the plaintiff, and the state of New York paid its debt. In Virginia, which had been mulling over what steps it should take to defend itself in the *Hollingsworth* suit, the state named Charles Lee and John Marshall as counsel and left to these attorneys the question of whether to appear before the Supreme Court. In short, the country had accepted *Chisholm* as the law of the land until the Supreme Court removed suits against states from its docket when the Eleventh Amendment was ratified.⁷²

69. *Chisholm v. Georgia*, in 5 DHSC, *supra* note 1, at 127, 196 (punctuation in original). I have used the DHSC version of Wilson’s opinion, because it is a manuscript in his hand and differs somewhat from the opinion in Dallas. Opinions were announced orally in the 1790s. If a manuscript exists (and there are very few), and it is undated, it could have been written before the oral announcement, or after it. Dallas often asked the Justices for written opinions, but even if he received them, he often made his own editorial changes. In the quotation above, e.g., the last line is omitted in Dallas. See *Chisholm*, 2 U.S. at 454. When Dallas had no manuscript to print, he used his own notes of arguments or other attorneys’ notes. His version of Supreme Court opinions is hardly authoritative.

I take issue with John Witt’s statement that the case “demanded a politically astute performance by the still-young Supreme Court . . . not a lengthy exercise in overwrought erudition.” See JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 74 (2007). I may agree with his comment on style, but I believe the *Chisholm* decision was correct, legally and politically. There are as many statements agreeing with the opinions as there are against it, and the Eleventh Amendment, in my view, attempts to calm the waters, which were not as stormy as some would have you believe, in the narrowest way. The Federalists knew that there were other paths to making states obey the law in federal court, so they fashioned the amendment to their liking. I agree with Randy Barnett that the Eleventh Amendment did not repudiate the theory of sovereignty contained in the *Chisholm* ruling. See Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729 (2007).

70. See *Chisholm v. Georgia*, in 5 DHSC, *supra* note 1, at 136–37.

71. For background to this case, see *Oswald v. New York*, in 5 DHSC, *supra* note 1, at 57. The jury verdict came four years after the suit was initiated—four years of legal and political maneuvering in New York state.

72. See February 1798 Term, in 1 DHSC, *supra* note 1, at 298, 305.

After the momentous February 1793 Supreme Court Term, Wilson deserved a break, and he got one. When on circuit in Massachusetts, he fell madly in love with a woman thirty years his junior and became the subject of much amusement among Bostonians. John Quincy Adams instantly wrote to his brother in Philadelphia:

The most extraordinary intelligence, which I have to convey is that the wise and learned Judge & Professor Wilson, has fallen most lamentably in love with a young Lady in this town, under twenty, by the name of Gray. He came, he saw, and was overcome. The gentle Caledon [Scot], was smitten at meeting with a first sight love—unable to contain his amorous pain, he breathed his sighs about the Streets; and even when seated on the bench of Justice, he seemed as if teeming with some woful ballad to his mistress.⁷³

Adams revealed further that Wilson had proposed marriage at his second meeting with Hannah Gray and might receive a favorable response, aided by the fact that he had come to Boston in a “very handsome chariot and four.” And Adams told his brother that he should soon expect to “behold in the persons of those well assorted lovers a new edition of January and May.” His brother in Philadelphia would soon see Hannah Gray, “the happy consort of the happy judge.”⁷⁴ Indeed, Wilson and Hannah did marry on September 19, 1793.⁷⁵

The “chariot and four” received attention for reasons other than the Wilson romance. The *Federal Gazette* of Boston reported that the circuit court had opened and that Judge Wilson had delivered a grand jury charge “replete with the happiness of equal government.”⁷⁶ “This idea comes with ill grace from a man, who parades our streets with a coach and four horses, when it is known his exorbitant salary enables him to make this *flashy parade*, and the money is taken from the pockets of the industrious part of the community,” the *Gazette* commented.⁷⁷

But before Wilson knew the outcome of his proposal to Hannah, he was plunged into another controversial case unfolding at a special session of the Circuit Court for the District of Pennsylvania in July 1793. The facts of the case are straightforward: In early May, Gideon Henfield, an American citizen who was serving aboard the French-commissioned privateer, *Citizen Genet*, had

73. Letter from John Quincy Adams to Thomas Boylston Adams (June 23, 1793), in 2 DHSC, *supra* note 1, at 408, 408–09.

74. *Id.* at 410.

75. James Wilson to Hannah Gray (June 20, 1793), in 2 DHSC, *supra* note 1, at 408, 408 n.2. Wilson’s first wife, the mother of his six children had died six years earlier. James Wilson: Appointment as Associate Justice in 1789, in 1 DHSC, *supra* note 1, at 44, 48. Contrary to the expectations of those who thought she had married for money, Hannah Gray remained a devoted wife through the five years of their marriage, steadfastly by his side as he fled south the last year of his life.

76. FED. GAZETTE (Boston), June 10, 1793, reprinted in 2 DHSC, *supra* note 1, at 406, 406. The *Gazette* appeared to be quoting the *COLUMBIAN CENTINEL* (Boston), June 8, 1793, which had described the charge as “replete with the purest principles of our equal Government.”

77. *Id.*

participated in the capture of the *William*, a British ship.⁷⁸ Henfield, the prize master, had brought the ship into Philadelphia and was promptly charged with breaching the neutrality and disturbing the peace of the United States.⁷⁹ The previous April, President Washington, with Congress not in session, had issued a neutrality proclamation that forbade Americans to aid or abet hostilities against the nations at war.⁸⁰ Once Henfield was charged, the special session of the circuit court was ordered to be held in Philadelphia on July 22, with Wilson presiding, assisted by Justice Iredell and District Judge Richard Peters.⁸¹

Wilson charged the grand jury in his usual manner, speaking at length about natural law, the law of nations, the common law of Britain, and war.⁸² But at last he reached the matter at hand and made his opinion known: The Constitution gives Congress alone the power to declare war, and it had not done so. The President had proclaimed a state of neutrality, and a citizen had taken part in hostile acts against a belligerent power with whom the United States was at peace.⁸³ Along the way, Wilson gave his interpretation of Article 22 of the Treaty of Amity and Commerce (1778), which France believed made the French an exception to the neutrality rules.⁸⁴ The United States could not allow the acts of a single citizen to put the whole country at risk of war.⁸⁵ Wilson convinced the grand jury, which indicted Henfield, but after a short trial, the petit jury acquitted him.⁸⁶

A few weeks before the special session of the circuit court, the Justices became involved in another drama over neutrality when President Washington requested that the Supreme Court give an advisory opinion on questions dealing with neutrality and the treaty with France. With the arrival on American soil in April 1793 of the recently appointed French minister to the United States, Edmond Charles Genet, the Washington administration became preoccupied with provocations by Genet against the neutrality of the United States and sought further support for its policies.⁸⁷ One of its earliest actions was to ask the Justices who were already in Philadelphia for the August Term of the Supreme Court to answer questions

78. 2 DHSC, *supra* note 1, at 340 (citing FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49–89 (Philadelphia, Carey and Hart 1849)).

79. *Id.*

80. 2 DHSC, *supra* note 1, at 340 (citing 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 140 (Washington, Gales & Seaton 1833)).

81. Order for a Special Session of the Circuit Court for the District of Pennsylvania (May 29, 1793), in 2 DHSC, *supra* note 1, at 393, 393–94.

82. James Wilson, Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (July 22, 1793), in 2 DHSC, *supra* note 1, at 414, 415–20.

83. *Id.* at 420.

84. *Id.* (citing 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 19–20 (Hunter Miller ed., 1931)).

85. *Id.* Notably, Wilson did not specifically state that no congressional statute prohibited the acts of which Henfield was accused. James Wilson's Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania, July 22, 1793, in 2 DHSC *supra* note 1, at 414, 414–23.

86. 2 DHSC, *supra* note 1, at 341 (citing WHARTON, *supra* note 79, at 49–89).

87. Glass v. Scoop Betsey, in 6 DHSC, *supra* note 1, at 296, 296–300.

concerning the President's neutrality proclamation, the law of nations, and America's treaty obligations to help the executive figure out what to do.⁸⁸ On July 17, Chief Justice Jay visited President Washington before the other Justices had gathered in Philadelphia and apparently raised the question of whether it was appropriate for the Court to give an extra-judicial opinion.⁸⁹ On July 18, Thomas Jefferson, the Secretary of State, sent a letter to the Justices setting forth the issues on which the administration sought advice, including the question of "[w]hether the public may, with propriety, be availed of their advice."⁹⁰ And on July 19, Jefferson reported that he had just met with Jay and Wilson, who wanted to know when an answer would be needed. They said they thought they could do it in a few days.⁹¹ But on July 20, the Justices wrote to Washington that they did not want to answer the questions without the participation of two Justices who had not yet arrived in Philadelphia.⁹² The Court's final answer was not given until August 8, when the Justices wrote that the Constitution's separation of powers among the three branches argued "against the Propriety of our extrajudicially deciding the questions alluded to."⁹³

The Washington Administration seemed to know, however, well before August 8, what the reply would contain. Without any formal notice from the Court, the President and his cabinet had prepared, by the end of July, new neutrality rules that answered many of the questions intended for the Justices.⁹⁴ The President also turned his attention to Congress, having decided that a neutrality act should be promulgated, although he did not convene Congress early to obtain it.⁹⁵ It is very likely, although no specific documentary evidence exists to prove it, that either Jay or Wilson (or both) informally told the President or Jefferson that the Justices were reluctant, as a court, to issue advice extrajudicially, but that they could speak as individuals.⁹⁶ They may have informed Washington that there were cases in the lower federal courts that would provide the opportunity for the Justices to address the neutrality issues raised.⁹⁷ Furthermore, it would be good

88. *Id.* at 298–99.

89. Letter from George Washington to Thomas Jefferson (July 18, 1793), in 2 DHSC, *supra* note 1, at 745, 745.

90. Letter from Thomas Jefferson to the Justices of the Supreme Court (July 18, 1793), in 6 DHSC, *supra* note 1, at 747.

91. Letter from Thomas Jefferson to George Washington (July 19, 1793), in 6 DHSC, *supra* note 1, at 751.

92. Cushing and Blair were the missing Justices. Letter from the Justices of the Supreme Court to George Washington (July 20, 1793), in 6 DHSC, *supra* note 1, at 752, 753 n.2.

93. Letter from the Justices of the Supreme Court to George Washington (Aug. 8, 1793), in 6 DHSC, *supra* note 1, at 755, 755. It was signed by only five Justices, because Cushing missed the August term of Court. *Id.* at 757 n.2 (citing 1 DHSC, *supra* note 1, at 217 n.143).

94. 6 DHSC, *supra* note 1, at 300.

95. *Id.* at 300, 300 n.17. A neutrality measure did not become law until June 5, 1794. Neutrality Act of 1794, ch. 50, 1 Stat. 381.

96. 6 DHSC, *supra* note 1, at 300.

97. *Id.*

for Congress to pass a neutrality act; if all three branches individually espoused similar views on neutrality, it would make the nation appear stronger.⁹⁸

Wilson attended every term of the Supreme Court and most of the circuit courts assigned to him through February 1797, after which his creditors caught up with him, and he had to stay out of Pennsylvania and go south. Because he had resided in Philadelphia where the Supreme Court sat, Wilson had perhaps assumed more of the administrative duties of a Justice than his brethren did. He sat on all special sessions of the circuit court. Once the capital moved to Philadelphia in 1791, he signed lots of official court documents, like writs and citations, that were necessary in the ordinary course of business. Wilson also certified the necessity for the use of the militia to deal with the Whiskey Rebellion.⁹⁹ And it fell to Wilson to reorganize the assignment of circuit courts after Chief Justice Jay had been appointed Envoy Extraordinary to Great Britain in April 1794.¹⁰⁰ All the Justices had extra circuit duty for the next few years because of Jay's absence, and it came at a time when the Supreme Court docket grew heavier and included a number of important cases.¹⁰¹

When Wilson's opinions are analyzed, it is difficult to trace any jurisprudential development for several reasons. One, there are very few of them. Two, the subjects of the cases in which a Wilson opinion exists differ greatly. Three, during his tenure, there are a good number of opinions for the Court, styled "by the Court." Most are unanimous; occasionally a dissent is noted, but the Justice is unidentified. In the two most significant cases to be decided after *Chisholm, Hylton v. the United States*¹⁰² and *Ware v. Hylton*,¹⁰³ Wilson delivered uncharacteristically short opinions. In *Hylton*, the case on the constitutionality of the Carriage Tax Act,¹⁰⁴ he pointed out that there had been only four Justices including himself

98. On July 22, 1793, Wilson, in his grand jury charge, had answered a number of questions regarding neutrality and Article 22 of the Treaty of Amity and Commerce with France. See James Wilson, Charge to the Grand Jury, *supra* note 83 and accompanying text. Already, however, in late June, the ship that would lead to a major Supreme Court decision on neutrality and prize cases had been captured. The Court's ruling in *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794), was announced in February of the following year. For a discussion of the case, see 6 DHSC, *supra* note 1, at 296–355.

99. The Militia Act of 1792 required that a federal judge certify the inability of civil authorities to execute the law before the militia could be called up. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795). Wilson was asked to do this in response to the Whiskey Rebellion in Pennsylvania. Letter from James Wilson to George Washington (Aug. 4, 1794), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 85 (Washington, Gales & Seaton 1834).

Wilson, who presided over the Supreme Court because Jay was in England and Cushing was ill, also announced its decision in February 1795 to not allow special sessions of the circuit court to try the Whiskey rebels. 2 DHSC, *supra* note 1, at 517 n.18 (citing 1 DHSC, *supra* note 1, at 231 n.160, 232 n.164). Though disposed to authorize such courts, the Justices declared they could not do so because of "insurmountable" difficulties in scheduling. *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795).

100. See, e.g., Letter from James Wilson to William Cushing (April 27, 1794), in 2 DHSC, *supra* note 1, at 450.

101. Supreme Court Docket, in 1 DHSC, *supra* note 1, at 483–515.

102. 3 U.S. (3 Dall.) 171 (1796).

103. 3 U.S. (3 Dall.) 199 (1796).

104. Act of June 5, 1794, ch. 45, 1 Stat. 373 (repealed 1796).

on the bench for the argument (four was the number needed to form a quorum).¹⁰⁵ Because of that, Wilson had determined that even though he had sat on the circuit court and given his opinion on the carriage tax, he would participate in the Supreme Court decision, if necessary.¹⁰⁶ But the Justices were unanimous in upholding the law, so Wilson could be counted for quorum purposes but did not need to vote.¹⁰⁷ Just so everyone knew where he stood, however, he added, “that my sentiments, in favor of the constitutionality of the tax in question, have not been changed.”¹⁰⁸ In *Ware*, he was similarly brief, but for a different reason. The Justices who preceded him in announcing their opinions, Samuel Chase, William Paterson, and James Iredell, had gone on at length, so Wilson declared that he would be “concise” because he based his decision on two “plain principles,” one grounded on the law of nations and the other on the treaty of peace.¹⁰⁹ Virginia’s Confiscation Act, passed during the Revolutionary War, was not consonant with the law of nations, which did not condone confiscation, and after independence, the states “were bound to receive the law of nations.”¹¹⁰ Second, the treaty “annuls the confiscation,” because it is the “will of a nation.”¹¹¹ No historical exegesis or quotes from his law lectures adorned this opinion.

A large part of the Supreme Court docket in the 1790s consisted of prize cases, which came to the Supreme Court under its admiralty jurisdiction. A persistent question in these cases concerned the proper method by which to bring the cases before the Supreme Court: appeal or writ of error.¹¹² As a practical matter, an appeal gave the Justices much more work to do because they could review both law and fact and had to see all the supporting evidence the record could provide. A case brought by writ of error meant review on the law only, and the record could consist of a statement of facts agreed upon by the parties or their counsel, or one drawn up by the judge in support of the lower court’s decree.¹¹³

Two sections of the Judiciary Act of 1789 gave rise to conflicting interpretations of which procedure to use to bring an admiralty or equity case to the Supreme Court.¹¹⁴ The Justices disagreed on the method to follow and did not announce a rule until the August 1796 term, during the argument in *Wiscart v.*

105. *Hylton*, 3 U.S. at 183.

106. No law prevented a Supreme Court Justice who had heard a case in the circuit court from voting on a decision in the higher court, but the Justices had decided among themselves that it did not seem right to participate. District judges, by statute, were not permitted to vote in circuit court cases where they had ruled in the court below. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

107. *Hylton*, 3 U.S. at 184.

108. *Id.*

109. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796).

110. *Id.*

111. *Id.*

112. For more information on the subject of appeals and writs of error in admiralty cases, see Robert Feikema Karachuk, *Error or Appeal? Navigating Review Under the Supreme Court’s Admiralty Jurisdiction, 1789–1800*, 27 J. SUP. CT. HIST. 93 (2002).

113. Judiciary Act of 1789, ch. 20, § 19, 1 Stat. 73, 83.

114. §§ 21–22.

Dauchy.¹¹⁵ Wilson delivered a dissent because he felt so strongly that appeal was the proper procedure.¹¹⁶ He observed that this decision would affect not only the jurisprudence of the courts, but also “the rights and pretensions of foreign nations,” who would be parties in admiralty cases.¹¹⁷ Appeal was “expressly sanctioned by the Constitution,” Wilson stated, and therefore should be “considered as the most regular process.”¹¹⁸ Nothing in the Judiciary Act restricted the use of appeal, but even if it did, Wilson averred, it would be “superseded by the superior authority of the constitutional provision.”¹¹⁹

Wilson viewed the Constitution as self-executing, but his brethren did not agree with him. History supported Wilson in his championing of appeal. He lost on the question of the need for congressional action, however.¹²⁰

Wilson’s tenure as a Justice ended with his untimely death.¹²¹ Hardly recognizable as the man whose early life held so much promise, Wilson’s last years on the Court displayed a distracted mind. His constant preoccupation with his financial affairs, his need to stay out of Philadelphia to escape his creditors, a short stay in the Burlington, New Jersey jail,¹²² talk of impeachment¹²³—all conduced to keep him from his official duties. What can be said of Wilson’s short tenure on the bench, with relatively little in the way of work product to analyze, is that as a Justice, he never lost faith in the Constitution and the national government. That may be his most substantial judicial legacy.

115. *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321 (1796), was an equity case, but the rule announced was applicable to admiralty cases as well.

116. *Id.* at 324–27. It was not known that Justice Paterson had joined Wilson until Paterson admitted it in a later case, *Jennings v. the Brig Perseverance*, 3 U.S. (3 Dall.) 336, 337 (1797).

117. *Wiscart*, 3 U.S. at 324.

118. *Id.* at 325.

119. *Id.* Wilson then interpreted the statutory provisions in line with his view, as in his mind they did not conflict with the Constitution but were ambiguous.

120. After Wilson’s death, the Supreme Court made its rule final in the case of *Blaine v. Ship Charles Carter*, 4 U.S. (4 Dall.) 22 (1800), announcing that all suits, of whatever origin, must be removed from circuit courts to the Supreme Court by writ of error. A year later, Congress reversed this and required review of equity, admiralty, and prize cases by appeal. Judiciary Act of 1801, § 33, ch. 4, 2 Stat. 89, 98–99. This act, however, was repealed the following year by the new Republican Congress. Act of Mar. 8, 1802, § 1, ch. 8, 2 Stat. 132, 132. Congress reestablished appeal as the proper procedure for Supreme Court review in equity, admiralty, and prize cases. Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244, 244.

121. Wilson died on August 21, 1798, at age fifty-five. 1 DHSC, *supra* note 1, at 48.

122. See Letter from James Wilson to Bird Wilson (Sept. 6, 1797), in 3 DHSC, *supra* note 1, at 223.

123. See Letter from Samuel Johnston to James Iredell (July 28, 1798), in 1 DHSC, *supra* note 1, at 859.