A Democratic Federalist, *Pennsylvania Herald,* 17 October 1787

The arguments of the Honorable Mr. [James] Wilson, expressed in the speech he made at the State House on the Saturday preceding the general election (as stated in the *Pennsylvania Herald*), although extremely *ingenious* and the best that could be adduced in support of so bad a cause, are yet extremely *futile* and will not stand the test of investigation.

In the first place, Mr. Wilson pretends to point out a leading discrimination between the state constitutions and the Constitution of the United States. In the former, he says, every power which is not *reserved* is *given*, and in the latter, every power which is not *given* is *reserved*. And this may furnish an answer, he adds, to those who object that a bill of rights has not been introduced in the proposed Federal Constitution. If this doctrine is true, and since it is the only security that we are to have for our natural rights, it ought at least to have been clearly expressed in the plan of government. The 2d section of the present Articles of Confederation says: "*Each State retains its sovereignty, freedom and independence, and* EVERY POWER, JURISDICTION AND RIGHT WHICH IS NOT BY THIS CONFEDERATION EXPRESSLY, DELEGATED TO THE UNITED STATES IN CONGRESS ASSEMBLED." This declaration (for what purpose I know not) is entirely omitted in the proposed Constitution. And yet there is a material difference between this Constitution and the present Confederation, for Congress in the latter are merely an executive body; it has no power to raise money, it has no *judicial jurisdiction*. In the other, on the contrary, the federal rulers are vested with each of the three essential powers of government—their laws are to be *paramount* to the laws of the different states. What then will there be to oppose to their encroachments? Should they ever pretend to tyrannize over the people, their *standing army* will silence every popular effort; it will be theirs to explain the powers which have been granted to them. Mr. Wilson's distinction will be forgot, denied or explained away, and the liberty of the people will be no more.

It is said in the 2d section of the 3d Article of the federal plan: "The judicial power shall extend to ALL CASES, in *law* and *equity*, arising under this constitution." It is very clear that under this clause, the tribunal of the United States may claim a right to the cognizance of all offenses against the *general government*, and *libels* will not probably be excluded. Nay, those offenses may be by them construed, or by law declared *misprision of treason*, an offense which comes literally under their express jurisdiction. Where is then the safety of our boasted liberty of the press? And in case of a *conflict of jurisdiction* between the courts of the United States and those of the several commonwealths is it not easy to foresee which of the two will obtain the advantage?

Under the enormous power of the new confederation, which extends to the *individuals* as well as to the *states* of America, a thousand means may be devised to destroy effectually the liberty of the press. There is no knowing what corrupt and wicked judges may do in process of time when they are not restrained by express laws. The case of *John Peter Zenger* of New York ought still to be present to our minds to convince us how displeasing the liberty of the press is to men in high power. At any rate, I lay it down as a general rule that wherever the powers of a

government extend to the lives, the persons, and properties of the subject, all their rights ought to be clearly and expressly defined, otherwise they have but a poor security for their liberties.

The second and most important objection to the federal plan, which Mr. Wilson pretends to be made *in a disingenuous form*, is the entire *abolition of the trial by jury in civil cases*. It seems to me that Mr. Wilson's pretended answer is much more *disingenuous* than the objection itself, which I maintain to be strictly founded in fact. He says "that the cases open to trial by jury differing in the different states, it was therefore impracticable to have made a general rule." This answer is extremely futile, because a reference might easily have been made to the *common law of England*, which obtains through every state, and cases in the maritime and civil law courts would of course have been excepted. I must also directly contradict Mr. Wilson when he asserts that there is no trial by jury in the courts of chancery. It cannot be unknown to a man of his high professional learning that whenever a difference arises about a matter of fact in the courts of equity in America or England, the fact is sent down to the courts of common law to be tried by a jury, and it is what the lawyers call a *feigned issue*. This method will be impracticable under the proposed form of judicial jurisdiction for the United States.

But setting aside the equivocal answers of Mr. Wilson, I have it in my power to prove that under the proposed Federal Constitution *the trial of facts in civil cases by a jury of the vicinage* is entirely and effectually abolished and will be absolutely impracticable. I wish the learned gentleman had explained to us what is meant by the *appellate* jurisdiction as to law and *fact* which is vested in the superior court of the United States? As he has not thought proper to do it, I shall endeavor to explain it to my fellow citizens, regretting at the same time that it has not been done by a man whose abilities are so much superior to mine. The word *appeal*, if I understand it right in its proper legal signification includes the *fact* as well as the *law*, and precludes every idea of a trial by jury. It is a word of *foreign growth* and is only known in England and America in those courts which are governed by the civil or ecclesiastical law of the *Romans*. Those courts have always been considered in England as a grievance and have all been established by the usurpations of the *ecclesiastical* over the *civil* power. It is well-known that the courts of chancery in England were formerly entirely in the hands of *ecclesiastics*, who took advantage of the strict forms of the common law to introduce a foreign mode of jurisprudence under the specious name of *Equity*. Pennsylvania, the freest of the American states has wisely rejected this establishment and knows not even the name of a court of chancery. And in fact, there cannot be anything more absurd than a distinction between LAW and EQUITY. It might perhaps have suited those barbarous times when the law of England, like almost every other science, was perplexed with quibbles and *Aristotelian* distinctions, but it would be shameful to keep it up in these more enlightened days. At any rate, it seems to me that there is much more *equity* in a trial by jury, than in an appellate jurisdiction from the fact.

An *appeal*, therefore, is a thing unknown to the common law. Instead of an appeal from facts, it admits of a second, or even third trial by different juries, and mistakes in points of *law* are rectified by superior courts in the form of a *writ of error*—and to a mere common lawyer, unskilled in the forms of the *civil law* courts, the words *appeal from law and fact* are mere nonsense and unintelligible absurdity.

But even supposing that the superior court of the United States had the authority to try facts by *juries of the vicinage*, it would be impossible for them to carry it into execution. It is well-known that the supreme courts of the different states, at stated times in every year, go round the different counties of their respective states to try issues of fact, which is called *riding the circuits*. Now, how is it possible that the supreme continental court, which we will suppose to consist at most of five or six judges, can travel at least twice in every year, through the different counties of America, from New Hampshire to Kentucky, and from Kentucky to Georgia, to try facts by juries of the vicinage. Common sense will not admit of such a supposition. I am therefore right in my assertion, that *trial by jury in civil cases is, by the proposed Constitution, entirely done away and effectually abolished*.

Let us now attend to the consequences of this enormous innovation and daring encroachment on the liberties of the citizens. Setting aside the oppression, injustice, and partiality that may take place in the trial of questions of property between man and man, we will attend to one single case, which is well worth our consideration. Let us remember that all cases arising under the new Constitution, and all matters between *citizens of different states*, are to be submitted to the new jurisdiction. Suppose, therefore, that the military officers of Congress, by a wanton abuse of power, imprison the free citizens of America, suppose the excise or revenue officers (as we find in Clayton's *Reports*, page 44 Ward's case that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift),3 suppose, I say, that they commit similar or greater indignities; in such cases a trial by jury would be our safest resource. Heavy damages would at once punish the offender and deter others from committing the same. But what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen, and who will perhaps sit at the distance of many hundred miles from the place where the outrage was committed? What refuge shall we then have to shelter us from the iron hand of arbitrary power? O! my fellow citizens, think of this while it is yet time and never consent to part with the glorious privilege of trial by jury, but with your lives.

But Mr. Wilson has not stopped here. He has told us that a STANDING ARMY, that *great support of tyrants*, not only was not dangerous, but that it was *absolutely necessary*. O! my much respected fellow citizens! and are you then reduced to such a degree of insensibility, that assertions like these will not rouse your warmest resentment and indignation? Are we then, after the experience of past ages, and the result of the inquiries of the best and most celebrated patriots have taught us to dread a standing army above all earthly evils, are we then to go over all the threadbare commonplace arguments that have been used without success by the advocates of tyranny, and which have been for a long time past so gloriously refuted! Read the excellent Burgh in his political disquisitions4 on this hackneyed subject, and then say, whether you think that a standing army is necessary in a free country? Even Mr. Hume, an *aristocratical* writer, has candidly confessed that *an army is a mortal distemper in a government, of which it must at last inevitably perish* (2d Burgh, 349); and the Earl of Oxford (Oxford, the friend of France and the *pretender*, the attainted Oxford) said in the British Parliament, in a speech on the mutiny bill, that "while he had breath, he would speak for the liberties of his country, and against courts martial and a standing army in peace as dangerous to

the constitution." Such were the speeches even of the enemies to liberty, when Britain had yet a right to be called free. But, says Mr. Wilson, "It is necessary to maintain the appearance of strength even in times of the most profound tranquility." And what is this more than a threadbare hackneyed argument, which has been answered over and over in different ages and does not deserve even the smallest consideration? Had we a standing army when the British invaded our peaceful shores? Was it a standing army that gained the battle of Lexington and Bunker's Hill, and took the ill-fated [John] Burgoyne? Is not a well-regulated militia sufficient for every purpose of internal defense? And which of you, my fellow citizens, is afraid of any invasion from foreign powers, that our brave militia would not be able immediately to repel?

Mr. Wilson says that *he does not know of any nation in the world which has not found it necessary to maintain the appearance of strength in a season of the most profound tranquility*. If by this *equivocal* assertion, he has meant to say that there is no nation in the world without *a standing army in time of peace*, he has been mistaken. I need only adduce the example of Switzerland, which, like us, is a *republic* whose *thirteen* cantons, like our thirteen states, are under a *federal government*, and which besides is surrounded by the most powerful nations in Europe, all jealous of its liberty and prosperity. And yet that nation has preserved its freedom for many ages, with the sole help of a militia, and has never been known to have a standing army except when in actual war. Why should we not follow so glorious an example, and are we less able to defend our liberty without an army than that brave but small nation, which with its militia alone has hitherto defied all Europe?

It is said likewise, that *a standing army is not a new thing in America. Congress even at this moment have a standing army on foot*. I answer, that *precedent* is not *principle*. Congress have no right to keep up a standing army in time of peace. If they do, it is an infringement of the liberties of the people—*wrong* can never be justified by *wrong*—but it is well-known that the assertion is groundless. The few troops that are on the banks of the Ohio were sent for the express purpose of repelling the invasion of the savages and protecting the inhabitants of the frontiers. It is our misfortune that we are never at peace with those inhuman butchers of their species, and while they remain in our neighborhood, we are always, with respect to them, in a state of war. As soon as the danger is over, there is no doubt but Congress will disband their handful of soldiers. It is therefore not true that Congress keep up a standing army in a time of peace and profound security.

The objection to the enormous powers of the President and Senate is not the least important of all, but it requires a full discussion and ample investigation. I shall take another opportunity of laying before the public my observations upon this subject, as well as upon every other part of the new Constitution. At present I shall only observe that it is an established principle in America, which pervades every one of our state constitutions, that *the legislative and executive powers ought to be kept forever separate and distinct from each other*, and yet in this new Constitution we find there are TWO EXECUTIVE BRANCHES, each of which has *more or less control over the proceedings of the legislature*. This is an innovation of the most dangerous kind upon every known principle of government, and it will be easy for me to convince my fellow

citizens that it will, in the first place, create a *Venetian* aristocracy and, in the end, produce an *absolute monarchy*.

Thus I have endeavored to answer to the best of my abilities, the principal arguments of Mr. Wilson. I have written this in haste, in a short interval of leisure from my usual avocations. I have only traced the outlines of the subject, and I hope some abler hand will second my honest endeavors.

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