

## V. The Committee of Detail

The Committee of Detail wrote the first draft of the Constitution over a period of ten days, between July 26 and August 6, during which the Convention as a whole took a vacation from proceedings.

Participation on the Committee of Detail was limited to five members elected by the Convention—Wilson, Rutledge, Ellsworth, Randolph, and Gorham—three of whom belonged to the *de facto* coalition that later supported judicial review. Rutledge and Ellsworth were probably chosen to represent the southern and northern factions of the small-state coalition, while Randolph, Wilson, and Gorham represented three of the four large states, respectively Virginia, Pennsylvania, and Massachusetts. New York, the fourth large state, became unrepresented at the Convention once Yates and Lansing left in protest on July 10, eleven days after Hamilton's departure.

## Multiple Roles

All five of the delegates on the Committee of Detail had played constructive but supportive roles in their state delegations. Wilson had been overshadowed in floor discussions by Gouverneur Morris, Ellsworth by Sherman, and Rutledge by the often-superfluous enthusiasm of Charles Pinckney. Gorham was probably chosen to split the difference between Gerry and Rufus King on the Massachusetts delegation, and Randolph to split the difference between Mason and Madison on the Virginia delegation.

Gorham, a wealthy Boston merchant, had briefly served as president of the Continental Congress, and currently served as chairman of the committee of the whole at the Constitutional Convention. Gorham replaced Washington on the few occasions when he stepped down from the chair, for example to rally support for slavery. Randolph had served as both Attorney General and Governor of Virginia, as a member of the legislative committee that had drawn up Virginia's constitution and bill of rights, and as the delegate honored with presenting the Virginia Plan to the Convention on May 29. Each member of the Committee of Detail except Gorham had benefitted from extensive legal experience, each shared the central assumptions of

the group he represented, and they had all proven capable of effective compromise.

When the Committee of Detail was elected, three of its members—Wilson, Randolph, and Gorham—could be counted on to support the thrust of the Virginia Plan for imposing federal sovereignty with more effectiveness than would have been possible through exclusive dependence on judicial review by state courts as specified by Martin's initial version of the supremacy clause.

Wilson had expressed his views to this effect on June 5 and July 21, and Randolph and Gorham on July 18. These three delegates also continued to advocate congressional review, as indicated by Wilson's remarks to the Convention on August 23 and by Randolph's list of five "Suggestions for Conciliating the Small States," a compromise proposal dated on July 10 which included as an option that the rejection of state law by Congress could be appealed to the Supreme Court for a final determination (3 Farrand, 56). Randolph's suggestion combined congressional and judicial review in what might have amounted to a major revision of the Virginia Plan, but there is no evidence that anybody, Randolph included, followed up on such a possibility.

Meanwhile, Ellsworth, as a small-state participant on the Committee of Detail, supported both the Council of Revision and judicial review by state courts, while Rutledge, like Sherman and Martin, apparently supported an exclusive reliance on judicial review by state courts more or less as entailed by the supremacy clause and other portions of the New Jersey Plan. What seems to have happened during the Committee of Detail's sessions over the next ten days, as may be adduced from the subsequent record, is that Wilson, Rutledge and Ellsworth joined forces in working toward an entirely new alternative—the more inclusive use of judicial review through a vertical integration of state and federal courts. Seen in retrospect, their shared process of discovery was in fact a momentous inspiration that state supreme court decisions upon the constitutionality of state laws could be appealed to the federal Supreme Court for a final dispensation.

Just as Proposition 5 of the New Jersey Plan permitted other verdicts to be appealed from state to federal courts, the judicial review of state laws by state courts could be appealed, and this appeals process could effectively substitute for the principle of congressional review advocated by Madison. Such an arrangement would have been too new, too intricate, and too controversial to

impose at the Convention, but the description of the judiciary in the Constitution could be kept as open as possible and tailored to permit and justify later modifications that imposed judicial review.

The Committee of Detail kept no records of deliberations, so there is no clear evidence that this strategy was in the works before the August 23 and 27 amendments of Rutledge, Johnson, and Wilson. However, the pains taken by this committee to grant Congress full power in creating an appellate judiciary but little if any power in curtailing its authority once it was created suggest the likelihood that it began to take root within the Committee of Detail.

The committee's modifications favorable to judicial review were subtle, yet persistent and ultimately successful. For example, preceding the Connecticut Compromise, small-state delegates had wanted to grant state courts original jurisdiction of cases to be settled by the Supreme Court, while large-state delegates had favored a compromise guaranteeing the later creation of federal appeals courts with at least temporary status. Now, in the Committee of Detail, the emphasis on temporary measures shifted to postponement, since Congress could only make its temporary assignments following the acceptance of the Constitution by all of the state ratifying conventions. This

modification permitted a fusion of large and small-state goals, both the later creation of a federal court system and the use of state courts for original jurisdiction.

In retrospect, it seems obvious that this arrangement was intended for permitting Congress to bring state and federal courts into a vertical hierarchy, and it also seems probable that this hierarchy was intended for imposing judicial review to reinforce federal sovereignty. Such a possibility becomes apparent in light of Wilson's abortive August 27 amendment and Section 25 of the 1789 Judiciary Act, probably written by Ellsworth, both of which linked judicial review with the use of state courts for original jurisdiction. Since Wilson and Ellsworth were knowledgeable in the law—more knowledgeable, in fact, than most other delegates at the Convention—it seems likely that they realized while serving on the Committee of Detail how the postponed integration of state and federal judiciaries would benefit their subsequent effort to impose judicial review.

### **Drafting the Constitution**

During the proceedings of the Committee of Detail, two full-scale preliminary drafts of the Constitution were composed in the handwriting of Randolph and Wilson, but often with marginal notes

by Rutledge, the Committee of Detail's elected chairman. Randolph's draft (often described as the Randolph-Rutledge draft) seems the earliest, since it was roughly sketched out and significantly differed from the Committee of Detail's final draft submitted to the Convention as a whole on August 6. Wilson's draft (often described as the Wilson-Rutledge draft) was much closer to the final draft in its content. It seems likely that Wilson and perhaps Randolph were chosen as amanuenses to transcribe the wording found acceptable by the group as a whole during these final sessions.

Wilson and Randolph are usually credited with having dominated committee proceedings because they authored these two drafts and because the Committee of Detail's final draft was exclusively in Wilson's handwriting. However, this was not necessarily the case, any more than the role of executive secretaries in transcribing the verbal instructions of their superiors while they strive to explain their ideas.

It is significant that Randolph later refused to sign the Constitution, and in light of debate on the floor once the Convention as a whole reconvened, it seems likely that Rutledge and Ellsworth's contributions were more or less as important as those of Wilson. What seems most likely that Randolph's authorship was as a secretary,

while Wilson's role was as a final editor. What was actually said among the group as a whole is anybody's guess. Vigorous group participation can be adduced from Ellsworth's casual remarks as reported by his son to the historian, George Bancroft, several decades later:

One day, upon my reading a paper to him (in his illness), containing an eulogium upon the late Gen. Washington, which among other things ascribed to him the founding of the American Government, . . . he (Judge E.) objected, saying that President Washington's influence while in the convention was not very great; at least not much as to the forming of the present Constitution of the United States in 1787. Judge E. said that he himself was one of the five who drew up that Constitution (Brown, 169-70).

According to Farrand's version of Ellsworth's conversation (3, 396-97), there were six authors altogether, including all members of the Committee of Detail except Randolph. Instead, both Madison and Hamilton were included, Hamilton's name probably having been confused with Randolph's, though Hamilton's advocacy of judicial review in *The Federalist Papers* might have been taken into account.

Ellsworth was supposedly feeble and approaching death when he made his remark, so such a mistake seems at least a possibility. If this were the case, Ellsworth merely conceded Madison's ubiquitous role at the Convention and emphasized the shared participation of the Committee as a whole without specifying the relative importance of its particular members except as might be implied from his mistake about Randolph's name.

By far the most important of the Committee of Detail's modifications was the enlargement of Congress's mandate to create inferior federal courts as guaranteed by the June 5 Madison compromise. Both the Virginia Plan and Madison compromise had granted Congress simply the power to set these inferior courts in motion. In contrast, the Committee of Detail's three drafts gave Congress comparatively broad powers in the creation of the judiciary.

The first of these, the Randolph-Rutledge draft, granted Congress the power to increase the Supreme Court's jurisdiction "to such other cases, as the national legislature may assign":

But this supreme jurisdiction shall be appellate only, except in <Cases of Impeachmt. & (in)> those instances, in which the legislature shall make it original. And the legislature shall

organize it . . . The whole or a part of the jurisdiction aforesaid according to the discretion of the legislature may be *assigned* to the inferior tribunals, as original tribunals (2 Farrand, 147; italics added).

The Wilson-Rutledge draft somewhat curtailed this freedom by specifically designating the Supreme Court's areas of appellate and original jurisdiction. But in compensation it granted Congress the power to impose exceptions and regulations whenever these seemed necessary:

In all the other Cases before-mentioned, it [the jurisdiction of the Supreme Court] shall be appellate, *with such Exceptions and under such Regulations as the Legislature shall make.* The Legislature may assign any part of this Jurisdiction above mentd., except the Trial of the Executive, in the Manner and under the Limitations which it shall think proper to such inferior Courts as it shall constitute from Time to Time (2 Farrand, 173; italics added).

As it stood, the exceptions and regulations clause, indicated by italics, was incorporated word for word into the Committee of Detail's final preliminary draft.

The wording of this clause was possibly borrowed from the abortive Hamilton plan, which had used exceptions to refer to guidelines imposed by the Constitution and regulations to refer to the power of Congress to impose later modifications: “. . . subject to such *exceptions* as are herein contained and to such *regulations* as the Legislature shall provide” (3 Farrand, 626; italics added). However, the Committee of Detail revised this distinction by combining exceptions and regulations to augment the power of Congress when it later created the judiciary. Even with a comma added in the Constitution’s final draft to separate the two phrases (“with such exceptions, and under such regulations”), the intent remained plain for giving Congress full responsibility in this task. And of course the primary responsibility of Congress would remain its choice whether to use state or federal courts, or both, for the original jurisdiction of federal cases. This choice had been twice debated at the Convention, but was yet to be resolved. Now Congress, and Congress alone, was empowered to make it once the Constitution was ratified.

The Committee of Detail’s final draft of the Constitution also discouraged the use of federal appeals courts by emphatically stressing their temporary status: “. . . and in such inferior Courts as shall, *when necessary, from time to time*, be constituted

by the Legislature of the United States” (2 Farrand, 186; italics added). This limitation was justified by the passage of Rutledge’s June 5 motion against permanent inferior federal courts, and Rutledge and Ellsworth might well have insisted upon its being stressed in the Constitution. To emphasize this point, the words “when necessary” were added to the final draft of the Committee of Detail. The Committee of Style later deleted them, but without diminishing the importance of the phrase, “from time to time,” which was retained.

What is absolutely important to recognize is that this emphasis on the use of temporary appeals courts encouraged the use of state courts for this purpose, since the temporary courts already appointed under the Articles of Confederation employed state justices who could just as easily fulfill their responsibility in state courts. The use of state courts as appeals courts could be temporary, but these courts would retain a permanent role in state government, permitting the appeal of cases from these permanent lower courts to a permanent Supreme Court.

Why appoint temporary federal appeals courts to perform a temporary function when permanent courts could do the same thing on a continuing basis? Nobody can be quoted as having advocating the vertical

integration of state courts and the federal Supreme Court because of their shared permanence, but the wording of the passage hardly discouraged such an interpretation.

The use of state courts for original jurisdiction was also encouraged by the vague reference to inferior courts and by the manner in which the Supreme Court's original and appellate jurisdictions were specified. In contrast to Article 9 of the Virginia Plan, there was no effort to identify the inferior tribunals to be granted original jurisdiction. Instead, in Article XI, Section I, of the Committee of Detail's final draft (equivalent to Article III, Section I, in the final draft of the Constitution), the wording specified "*such* inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States" (2 Farrand, 186; italics added). Section 3 (Section 2 of the final draft) listed specific areas of jurisdiction, but there was no indication what courts would be assigned original jurisdiction.

Moreover, the jurisdiction of inferior courts could only be deduced by the process of subtraction. First the full jurisdiction (both original and appellate) of the Supreme Court was listed:

The Jurisdiction of the Supreme Court shall extend to all cases

arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects (2 Farrand, 186).

Next the Supreme Court's original jurisdictions were listed: "In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original."

Finally, the Supreme Court's appellate jurisdictions (*i.e.*, the original jurisdictions of inferior courts) were subtracted from this total:

*In all the other cases before-mentioned, it [the jurisdiction of the Supreme Court] shall be appellate, with such exceptions and under such regulations as the Legislature shall make (2 Farrand, 186; italics added).*

Only by subtracting the second list from the first—eight items minus four—could readers determine that the original jurisdiction of inferior courts would include,

- Cases arising under laws passed by Congress,
- Controversies between citizens of different states,
- Controversies between citizens and foreign states, and
- Controversies between citizens and foreign subjects.

As earlier indicated, state justices were already involved in deciding these cases under the Articles of Confederation, so here too the participation of state courts would have seemed entirely appropriate. Remarkably, the wording in all other cases likewise compelled the establishment of inferior courts as soon as possible and implied by omission the possibility that these could be state courts. There was no wording to suggest otherwise.

The extent to which the Committee of detail wanted to stress the full authority of Congress to incorporate state courts within the federal judiciary was also indicated by the so-called assignment clause that followed the list of jurisdictions in the final draft of the Committee of Detail:

The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time (2 Farrand, 186).

The Randolph-Rutledge draft had used the word “assign” in describing the power of Congress to increase or diminish the Supreme Court’s original jurisdiction (2 Farrand, 147). Later, in the Wilson-Rutledge draft, the word “assign” was used in a more emphatic construction that provided the basis for its use in Wilson’s final preliminary draft (2 Farrand, 173). However, the clause became entirely redundant once the role of Congress in creating inferior courts was stressed in the exceptions and regulations clause.

Moreover, once the Supreme Court’s full original and appellate jurisdictions were specified in the Constitution itself, the mandate of Congress to organize the judicial system was automatically tied to the “assignment” of establishing inferior federal courts, exactly the issue at stake in the New Jersey plan and June 5 and July 18 debates. Consequently, the assignment clause could be deleted, as it was by a unanimous vote on August 27, three weeks

after the Committee of Detail submitted its preliminary draft of the Constitution to the Convention as a whole (2 Farrand, 431). Nevertheless, the use of this clause in the Committee of Detail's final preliminary draft indicates the importance attached to it by at least a majority of this committee.

### **Deliberate Compromise**

It should be emphasized that the deliberate use of omission and indirect reference in the Committee of Detail's final draft of the Constitution was probably intended in the spirit of compromise. The June 5 and July 18 amendments had not mentioned state courts, and the New Jersey Plan, which did, had been rejected in its entirety by the Convention. Moreover, there had been no second effort to submit to a vote the vertical integration of state and federal courts, such as Martin had made for the supremacy clause. Since the Official Proceedings of the Convention that were provided to the Committee of Detail specified neither a mixed nor an exclusively federal judicial system, the Committee properly kept both possibilities viable. The choice could later be resolved, either during the Convention or when Congress fulfilled its mandate in appointing inferior courts.

Randolph could accept this compromise as a holding action that deferred debate until others could join in resisting an integrated

judicial system, and Gorham was possibly unaware of the full implications of what was transpiring. However, Wilson, Rutledge and Ellsworth must have taken full satisfaction with the wording of the final draft, since its postponement of a final decision could also be interpreted as having empowered Congress to integrate state and federal courts. And of course it was Ellsworth who subsequently took advantage of this wording once elected to the U.S. Senate by drafting the Judiciary Act to give the Supreme Court its power of judicial review over state laws, if on a permanent—not temporary—basis.