

VI. August 1787

The continuing relationship among members of the Committee of Detail once debate resumed in the Convention as a whole bears close examination. Gorham's reduced participation in convention proceedings suggests the possibility that he played a relatively minor role in having drafted the Constitution. His spoken contributions as tabulated based on Madison's records actually declined by a third compared to his contributions during the equivalent period immediately preceding the Committee of Detail. Likewise, Randolph fell into hostile disputes with his fellow members of the Committee at least five times over the next fourteen sessions, suggesting his dissatisfaction with the shared perspective of the rest of the committee.

Meanwhile, the verbal participation of both Rutledge and Ellsworth increased dramatically on the floor of the Convention.

Rutledge's contributions doubled and Ellsworth's increased by two-thirds. In absolute numbers, Ellsworth's total of 53 spoken contributions from August 6 to August 23, when he left the Convention, exceeded Wilson's (49) and was surpassed only by Gouverneur Morris's (59) and Madison's (55). The tally of contributions of other delegates trailed at a distance: Mason (39), Sherman (36), Pinckney (34), Randolph (30), Rutledge (25), Mercer (23), Williamson (22), Gorham (20), King (18), Butler and Dickinson (16 apiece), etc.

Silent during his first three weeks in attendance, Ellsworth became a major presence while debating the merits of the Constitution's wording. It may be conceded that most of his contributions were of minor importance, but their frequency and specificity suggest an intense proprietary concern in promoting the Committee of Detail's final draft of the Constitution he had a hand in composing. Whenever the wording of particular contexts was taken into consideration, he seems to have felt obligated to help explain the Committee's intentions.

The style of debate also radically shifted once the Committee of Detail submitted to the Convention its preliminary draft of the Constitution. This draft necessarily replaced the Virginia Plan as the Convention's

working agenda, and rhetoric was minimized as delegates concentrated their attention on the wording of specific amendments, swiftly turning from one to another as support by the convention as a whole was determined. During this period, the five members of the Committee of Detail were outspoken in their discussion of amendments and frequently lapsed into exchanges among themselves as if they were seeking improved clarification of their shared objectives. Thirty-four exchanges may be counted in which they spoke in clusters of two, three, or four. Others joined in, of course, but there seems to have been sustained “inside” dialogue among members of the Committee of Detail.

Throughout August the group also continued to hold independent sessions of their own, though none of these are recorded. Usually, Wilson, Ellsworth, and Rutledge presented their arguments in unison, and sometimes with Gorham’s participation. On the other hand, the occasional hostility of Randolph’s contributions anticipated his later refusal to sign the Constitution and his attack on the federal judiciary at the 1788 Virginia ratifying convention.

The two occasions when the veto power over state and federal laws was introduced in early August, the interaction among the Committee of Detail suggests that Wilson might have forgotten himself and broken

a prior understanding to avoid debate on the issue. On August 15, for example, John Mercer (a friend of Martin and fellow delegate from Maryland) specifically attacked judicial review as a usurpation of legislative power:

He disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable (2 Farrand, 298).

Dickinson expressed his agreement, but confessed he “was at a loss what expedient to substitute.” Sherman warned against judges “meddling in politics” in their capacity as members of the Council of Revision, after which Gorham pointedly suggested abandoning the issue. Wilson, however, could not refrain from launching into a speech advocating the prevention of legislative tyranny by granting “sufficient self-defensive power *either* to the Executive *or* Judiciary department” [italics added]. Immediately, Rutledge complained of the tediousness of the proceedings, and Ellsworth joined in by declaring, “We grow more & more skeptical as we proceed. If we do not decide soon, we shall be unable to come to any decision.” Obviously they wanted to terminate Wilson’s abortive effort. Here Wilson seems to have strayed

into arguments, which touched upon judicial review, whereupon Rutledge and Ellsworth interceded to keep the issue out of discussion. Just five months later at their respective ratifying conventions, both Wilson and Ellsworth ringingly declared the necessity and inevitability of judicial review as the bulwark of constitutional government.

On August 23, a comparable exchange occurred when Charles Pinckney of South Carolina introduced for the last time Madison's notion of congressional review over state laws (2 Farrand, 390). Madison remarked that he had always supported the principle, but "thought the modification might be made better." There is no indication what he meant by "the modification," but it seems more than likely that he was referring to the substitution of judicial review at a later time. When Sherman, Mason, and Williamson repeated their longstanding objections to congressional review, Wilson once again seems to have forgotten himself, this time by using the issue of congressional review to emphasize "the keystone wanted to compleat the wide arch of government, we are raising."

Once again Rutledge and Ellsworth came to the rescue in response to his tactic. Rutledge chastised Wilson with the ominous warning, "If nothing else, this alone would damn and ought to damn the Constitution.

Will any state ever agree to be bound hand & foot in this manner?" Rutledge neglected to mention how judicial review might be used as an alternative, but as later became obvious, one of its most useful benefits would be its imposition of federal sovereignty on a more limited basis. Then Ellsworth added his important but usually overlooked explanation that there would also be serious technical difficulties in implementing congressional review, since all state laws would need to be reviewed either by Congress or by its appointed agents (by implication inclusive of federal judges). Ellsworth also left unspoken judicial review's primary advantage already mentioned by Jefferson in his June 20 letter to Madison, that it would eliminate this problem, since the only laws reviewed by the Supreme Court would be those appealed from inferior courts.

Soon the vote was taken on the floor of the Convention, and once again congressional review was defeated as opposed to judicial review, which remained free and clear of having been rejected at the Convention.

For business reasons Ellsworth departed from the Convention by August 24, but both Sherman and Johnson took his place in floor proceedings. The day after Ellsworth's departure, Sherman spoke up five times, and on August 27 Johnson

dropped his modest bombshell with his carefully worded amendment that granted the Supreme Court the authority to interpret the Constitution. It can be speculated that as usual Sherman, Ellsworth, and Johnson were acting as a team, and that Johnson's amendment could have been proposed by any of the three, or, for that matter, by Rutledge or Wilson. Except for Wilson, all of these delegates had held their silence when Gerry and Martin raised the issue of judicial review on June 4 and July 21.

Twice again subsequent to the Committee of Detail's meetings, on August 15 and 23, the issue surfaced, but both times they succeeded in preventing its discussion. Then, when amendments upon the judiciary came under discussion on August 23 and 27, Rutledge and Johnson put through their two quick and easily overlooked amendments which made the necessary modifications to facilitate the later adoption of judicial review, and which did this without specifically referring to judicial review. On both occasions debate was minimal, so these amendments could be adopted almost as quickly as they were introduced.

A third amendment, proposed by Wilson, would then have incorporated judicial review into the Constitution itself, but, again, it would have done this without

having specifically referred to it by name or by the powers it granted. As earlier indicated, Wilson's amendment was quickly withdrawn without debate.

Strategy Considerations

Considered in retrospect, the three amendments of Rutledge, Johnson, and Wilson suggest a major advance in strategy. In the Constitution's original draft submitted by the Committee of Detail, there was no explicit provision for judicial review and the possibility of vertical integration between state and federal courts was indicated only by omission. It was with Rutledge's August 23 amendment that Martin's supremacy clause was expanded to establish loyalty to the Constitution itself as a primary responsibility of all state justices. Indeed, Rutledge's careful sequence in his wording of the amendment gave the Constitution first priority among federal laws, statutes, and treaties to be granted supremacy by state judges, thus guaranteeing the role of state justices as officers of the court primarily responsible to the Constitution:

This Constitution & the laws of the U.S. made in pursuance thereof, and all Treaties made under the authority of the U.S. shall be the supreme law

of the several States . . . (2 Farrand, 389; italics added).

This emphasis on loyalty to the Constitution itself had already been featured in Article 14 of the Virginia Plan (“bound by oath to support the articles of Union”), but it had been excluded in both the New Jersey Plan and Martin’s amendment later identified as the Supremacy Clause. With his amendment Rutledge resurrected this portion of the Virginia Plan, but his purpose at this stage in the Convention was probably doubled, first to secure the loyalty of state officials to the federal government as Madison had first intended, but also to validate by this means the role of the state judiciary in the enforcement of the Constitution. Rutledge likewise eliminated Martin’s anti-nationalist escape clause by including state constitutions in the “contrary notwithstanding” phrase that specified the state documents to be subordinated to the federal Constitution:

And the Judges in the several States shall be bound thereby in their decisions, any thing in *the Constitutions or laws* of the several States, to the contrary notwithstanding (*ibid.*; italics added).

Rutledge thus inverted the small-state strategy of Martin’s July 17 amendment by

giving the federal Constitution final authority over all state laws, state constitutions included, but with state courts granted their authority in defending the Constitution. State justices would have the opportunity to veto both state laws and those portions of state constitutions they found in conflict with the federal Constitution. Once Rutledge's amendment was unanimously accepted, the only ingredients needed to impose judicial review by the federal Supreme Court were the vertical integration of state and federal courts and an appeals process granting the Supreme Court its final authority.

Just as Rutledge laid the groundwork for the judicial review of state law with his August 23 amendment, Johnson did the same for the judicial review of both state and federal law by his August 27 amendment four days later. Johnson very likely proposed his amendment in response to the adoption of Rutledge's amendment, since the two amendments respectively held state courts and the Supreme Court itself primarily responsible to the federal Constitution.

Madison had set the stage for Johnson's amendment on July 18, when he resolved a relatively minor issue by proposing "that the jurisdiction [of the Supreme Court] shall extend to all cases arising under the national laws" (2 Farrand, 46). The proposition

“under” had been used in the supremacy clause, so its addition to Article III could be justified for having provided symmetry between Articles III and VI pertaining to the adjudication of national laws in both state and federal courts.

When Madison and Gouverneur Morris likewise sought on August 27 to extend the Supreme Court’s judicial power to all controversies “to which the US shall be a party,” Johnson quickly responded by adding the Constitution itself as yet another subject of its judicial power. This modification might have seemed harmless enough, since it provided comparable symmetry between Articles III and VI by expanding Madison’s “arising under” clause to feature the Supreme Court’s authority relevant to the Constitution as well as treaties and national laws:

The Judicial Power shall extend to all cases both in law and equity *arising under this Constitution* and the laws of the United States, and treaties made . . . under their authority . . .”
(2 Farrand, 430, 576; italics added).

Now the Supreme Court would exercise two presumably independent functions, of judging all federal law and of remaining loyal to the Constitution itself.

Once these two functions were combined however, the Supreme Court would necessarily be able to determine the validity of federal law based on its agreement with the Constitution. Granted, this power was not specifically declared until the 1803 *Marbury v. Madison* decision, but wording that established the defense of the Constitution as the primary obligation of the Supreme Court left the possibility open to later interpretation.

Another important effect of Johnson's amendment, often overlooked, was that it gave identical status to the Constitution in both the federal Supreme Court and state courts, permitting an appeals arrangement between the two once state courts were granted original jurisdiction. Since both state courts and the Supreme Court were obliged to defend the supremacy of the Constitution, the state courts' judicial review of state laws possibly in conflict with the Constitution could be appealed for final dispensation by the Supreme Court. Exactly the same principles obtained at both levels, so the Supreme Court could review the decision of lower courts on a comparable basis.

Rutledge's amendment thus established the basis for judicial review of state laws as later guaranteed by the Judiciary Act, and Johnson's amendment, established

the basis for judicial review of both state and federal laws in conflict with the federal Constitution, in the latter case as confirmed by the 1803 *Marbury v. Madison* decision.

Madison quickly recognized the implication of Johnson's wording that any federal law could be judged and rejected by the Supreme Court based on its constitutionality. Opposed to such an arrangement, he expressed his concern that judicial review might have been intended and suggested the Convention was "going too far" if this were the case. He argued that the power of the Supreme Court should be properly limited to "cases of a Judiciary Nature," *i.e.*, those cases submitted by adversary parties for judicial determination (Berger, 216). He elaborated his objection that "the right of expounding the Constitution in cases not of this nature ought not to be given to that Department [the Supreme Court]." Others at the Convention whose identities remain undisclosed assured him that there was no threat of judicial review, since the Supreme Court's jurisdiction would of course be "*constructively* limited to cases of a Judiciary Nature" (italics added).

By "cases of a judiciary nature," these delegates probably meant cases in which the law was applied, as opposed to cases in which the law itself could be vetoed. Swayed by the momentum of proceedings, Madison

reluctantly joined in the unanimous vote supporting Johnson's amendment. However, as he warned, the combination of his and Johnson's amendments, both of which passed unanimously, did establish the basis for *Marbury v. Madison*, giving the Supreme Court the power to judge the constitutionality of federal laws.

Perhaps because he was rattled by debate, Madison neglected to mention in his *Notes* the next major amendment under consideration once two minor revisions proposed by Rutledge were unanimously accepted. As summarized by the official *Journal*, but not by Madison himself, this overlooked but crucially important amendment offered by Wilson finally gave the Convention the opportunity to vote on an appeals system that integrated state and federal courts as proposed on June 5, July 18, and in the New Jersey plan.

Law and Fact Language

Delegates had voted against the New Jersey plan in its entirety; now they would be able to vote specifically on the vertical integration of state and federal courts, and in an arrangement whereby both laws and factual evidence adjudicated by state courts could be appealed to the Supreme Court. The official *Journal* mentioned this abortive amendment without disclosing its

source, and, as already indicated, Madison altogether neglected to mention it, so constitutional historians have overlooked its importance. However, the amendment as described in the Journal can be conflated with its discussion by Morris and Wilson as reported by Madison, an exchange that otherwise seems disconnected with earlier proceedings, thus suggesting Wilson's authorship as well as the full significance of his proposal:

Journal:

It was moved and seconded to agree to the following amendment. In all the other cases before-mentioned original jurisdiction shall be in the Courts of the several States but with appeal both as to Law and fact to the courts of the United States, with such exceptions and under such regulations, as the Legislatures shall make (2 Farrand, 424).

Madison's Notes:

Mr. Govr. Morris wished to know what was meant by the words "In all the cases before mentioned it (jurisdiction) shall be appellate with such exceptions &c." whether it extended to matters of fact as well as

law and to cases of Common law as well as Civil law.

Mr. Wilson. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed (2 Farrand, 431).

Journal:

The last motion being withdrawn . . . (2 Farrand, 424).

Here, at last, was the keystone that would have imbedded judicial review in the Constitution without further effort. It was far more significant than earlier proposals for integrating state and federal courts, since it specifically permitted state court decisions to be appealed to the Supreme Court and since its phrase “both as to law and fact” could be construed to permit the review of state laws based on their compatibility with the Constitution as guaranteed by the Rutledge and Johnson amendments that had just been accepted. Also significant was the probable authorship by Wilson since it was Wilson who responded to Morris’s question about the “law and fact” clause” by explaining the intent of the amendment.

The “law and fact” clause had not been mentioned in previous convention debate

upon the judiciary, so Morris appropriately asked what it meant in the context of the amendment, and it was Wilson who responded by trying to reconstruct its intended meaning. Who else but the delegate who presents an amendment with entirely new wording could be expected to clarify this wording to such an assembly?

In his response to Morris, Wilson also disclosed that the wording, “both as to law and fact,” and thus probably the entire amendment, was chosen by the Committee of Detail, which he simply described as “the Committee.” As explained earlier, those among the Committee who could support this amendment would have included Wilson, Rutledge, and Ellsworth, with Gorham having played a peripheral role and with Randolph opposed to such an addition to the Constitution. Perhaps disingenuously, Wilson argued that the wording seemed appropriate to the Committee because of its earlier use by the federal Court of Appeals, suggesting that it granted no broader powers than already exercised under the Articles of Confederation for judging the use of law as applied to facts.

Nevertheless, a more threatening interpretation would have been possible if the “law and fact” clause could also have been interpreted to permit judgments upon law itself independent of fact, or as

illustrated by fact, to be appealed from state to federal courts. With fact-granted priority, appeals would primarily involve jury trials, but with law-given priority, law itself could be appealed, and this would have entailed judicial review. Not surprisingly, the “law and fact” clause was familiar to both Ellsworth and Wilson, since Ellsworth had acted as a justice on the Court of Appeals, and Wilson as a lawyer who had appeared before it in the celebrated Olmstead case. Wilson had likewise used the words “law and fact” as the title of one of his early fragments in the Committee of Detail (2 Farrand, 157). It therefore seems likely that Wilson himself, serving as the Committee’s amanuensis, had drafted the amendment as a contingency whose controversial importance was fully recognized by Ellsworth and himself, and at least to an extent by others on the Committee.

That Wilson proposed such an amendment might have been surprising to some delegates, since he had been one of the two authors of the June 6 Madison compromise whose purpose was to avoid the use of the state judiciary for original jurisdiction. Now, however, it was obvious that he completely reversed himself, apparently because he felt that with the Convention’s rejection of congressional

review, nationalism would best be served by switching his allegiance to judicial review.

Just as Rutledge, once a small-state advocate, based his July 23 amendment on the Virginia Plan featured by the nationalists, Wilson, once opposed to small-state objectives, was trying to resurrect a portion of the New Jersey Plan featured by the small-state faction. By earlier standards, the two might have seemed to be rather dramatically switching roles, but their reversal was fully justified if they shared a new goal at this point in deliberations, the eventual imposition of judicial review as the principal guarantee of federal sovereignty.

With the addition of Wilson's amendment, combined with the Rutledge and Johnson amendments, the principle of judicial review would have been fully written into the Constitution, though in a piecemeal arrangement that postponed its justification until later interpretation by the Supreme Court. As indicated in the *Journal*, Wilson's amendment was withdrawn after brief discussion without being voted upon. Why? Probably because it was considered too controversial. Everything would be lost if it were rejected by the Convention, or, worse yet, if it were incorporated into the Constitution, but only to rally an effective opposition at state ratifying conventions. As drafted by the Committee of Detail, Article III

compounded by the Rutledge and Johnson amendments already gave Congress the implicit power to impose judicial review at a later time. Why let redundant explicitness jeopardize something already in the works?

It seems probable that Wilson spontaneously decided on August 27, perhaps without consulting the others, that the time was ripe to submit the amendment to the Convention for a final showdown in giving state courts original jurisdiction and thus permitting judicial review. Rutledge and Johnson's amendments had just laid the basis for judicial review by featuring the primary authority of the Constitution in both state courts and the federal Supreme Court. Now, despite Madison's admonitions, the keystone could be added, letting judicial review by state courts be appealed to the Supreme Court. However, as already indicated, Wilson withdrew his amendment from consideration. It may be speculated that Wilson took it upon himself to present the amendment, but that Rutledge once again exerted a restraining influence, as he had on August 15 and 23, and convinced Wilson to withdraw it for a later time.

Another possibility would be that Wilson did indeed act as a spokesman for others on the Committee of Detail, Rutledge included, but that other delegates, either friendly or hostile—perhaps Dickinson or

Morris—prevailed upon them to defer to Congress any final judgment in the matter. In either case, it seems likely that Wilson himself withdrew his amendment. Just as explicit reference to the vertical integration of state and federal courts had been excluded from earlier motions and amendments, Wilson was apparently convinced to carry on the strategy of omission even now, at the final stage of the Convention. As it turned out, Section 25 of the Judiciary Act would later serve this purpose, and with better and more specific guidelines for determining the scope and procedures of judicial review.

In response to Wilson's remarks, Dickinson took the opportunity to propose a relatively narrow substitute amendment permitting appeals based on both "law and fact" without specifying whether state courts would be granted original jurisdiction. Once again, the full significance of Dickinson's amendment following that of Wilson is best clarified by collating the *Journal* and Madison's *Notes*, in this instance once Wilson withdrew his amendment as indicated in the *Journal*:

Madison's Notes:

Mr. Dickinson moved to add after the word "appellate" the words "both as to law & fact which was agreed to nem: con: (2 Farrand, 431).

Journal:

It was moved and seconded to amend the clause to read “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 In all the other cases before mentioned it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make” which passed in the affirmative (2 Farrand, 425).

Here Dickinson seems to have tried to salvage as much of Wilson’s amendment as possible based on Wilson’s definition of the “law and fact” clause for later establishing judicial review pertinent to law alone. Dickinson’s substitute amendment was unanimously accepted as what might have seemed a harmless component of the withdrawn amendment. His wording was probably found suitable in guaranteeing the full appellate authority of the Supreme Court regardless of who would be granted original jurisdiction. Whether state and federal courts were integrated, the principle would insure an effective appeals process, fact linked with the law, and if and when

judicial review itself were imposed, with the law emphasized rather than fact, the wording of Dickinson's amendment would help to justify it. Meanwhile, those opposed to judicial review could support Dickinson's amendment as a technicality for improving the appeals process without mandating either judicial review or the fixed integration of state and federal courts.

Apparently, it did not occur any of the delegates that anti-nationalists would later challenge the Constitution because of a relatively superficial consideration, the possibility that jury trial verdicts as opposed to state and local laws could be reversed by the Supreme Court based on the law and fact clause, thus imposing an extra burden on litigants to make their case again at a different location. However, everybody present at the Convention was hurrying to complete its business and eager to dispense with specific issues without exploring them too much in depth. The timing was perfect both to lay the foundation for judicial review and to postpone its implementation until Congress established inferior federal courts.

Style Matters

Given the intricacy of the strategy to postpone the implementation of judicial review, it should be no surprise that in the final draft of the Constitution, as in all earlier drafts, Articles III and VI were

kept brief and deliberately void of direct reference to judicial review. These two articles turned out to be what might have seemed the briefest and vaguest part of the Constitution, yet they were phrased with such precision that Gouverneur Morris, who was principally responsible for the wording in the final draft, later complained that here alone, in the description of the judiciary, he was prevented by fellow delegates from making the stylistic modifications he felt were needed:

That instrument [the Constitution] was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; *excepting, nevertheless, a part of what relates to the judiciary.* On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their self-love, and to the best of my recollection, this was the only part which passed without cavil (3 Farrand, 420; italics added).

Morris did not identify the delegates who interfered with his effort to improve the wording upon the judiciary, but these probably included Madison and Johnson,

also members of the Committee of Style (Johnson as its chairman), as well as Wilson, who was not a member, but a fellow Pennsylvania delegate permitted to inspect and revise Morris's final version because he had shared in authoring the initial version by the Committee of Detail.

Both Johnson and Wilson would have been motivated to defend the original wording of these amendments from stylistic modifications, since the later imposition of judicial review depended on a precise choice of words in order to convey the intentionally broad implications of the exceptions and regulations clause, the ambiguous designation of inferior federal courts, and the primary role given to the Constitution in both Article III and the supremacy clause. To meddle too much with the style of Articles III and VI could well have thwarted their purpose—to be unclear in the specifics, but absolutely precise in granting Congress the power to take advantage of these specifics when it created inferior courts as mandated by Article III.

The rest of the Constitution was straightforward and could therefore be revised with relative latitude for stylistic purposes, but the wording upon the judiciary was fraught with intricate legal implications crucial to the establishment of the federal judiciary two years later, when judicial review could finally be imposed.