Written by **Joe Wolverton, II, J.D.** on May 28, 2014

1787 Constitutional Convention: Why the Secrecy Rule?

Two hundred and twenty-seven years ago this week, the important "business of May," as James Madison once described it, began in Philadelphia. Delegates from 12 of the 13 states gathered in the iconic building where other representatives boldly declared independence from the British empire a scant — though eventful — 11 years earlier.

The "grand experiment" undertaken by our Founding Fathers was to see if they, unlike so many similar would-be lawgivers of the past, could construct a constitution that would avoid contracting the various diseases that destroyed those historic bodies politic. Like the legendary Lycurgus of Sparta, so would James Madison, Alexander Hamilton, James Wilson, and the other 50 or so delegates each carefully study the forms of government of the ancient and modern confederacies, borrowing and adapting the best aspects of them and rejecting the worst.

Finally, on Tuesday, May 29, 1787, with the arrival of John Dickinson of Delaware and Elbridge Gerry of Massachusetts, there was the necessary seven-state quorum in the State House and the real work of revising the Articles of Confederation could begin.

First, however, the body was called upon to consider the secrecy rule proposed prior to the arrival of Dickinson and Gerry.

The secrecy provision mandated "That no copy be taken of any entry on the journal during the sitting of the House, without leave of the House. That nothing spoken in the House be printed, or otherwise published or communicated without leave."

In what may seem surprising to modern readers accustomed to calls for greater transparency in the goings on in government, there was near universal acknowledgment among the delegates of the need for the secrecy.

Two days before the rule was adopted, George Mason of Virginia wrote his son, saying:

> It is expected our doors will be shut, and communications upon the business of the Convention be forbidden during its sitting. This, I think, myself, a proper precaution to prevent mistakes and misrepresentation until the business shall have been completed, when the whole may have a very different complexion from that in which the several crude and indigested parts might, in their first shape, appear if submitted to the public eye.

James Madison, the young, slight, sickly, and superbly prepared delegate from Virginia, sounded a very similar tone in a letter to his friend and neighbor — Thomas Jefferson. After voting in favor of the

Secrecy Rule, Madison wrote, "It was thought expedient, in order to secure unbiased discussion within doors and to prevent misconceptions and misconstructions without, to establish some rules of caution, which will for no short time restrain even a confidential communication of our proceeding."

Jefferson, living in Paris, was not among those approving of the suppression of information, however. In a letter to John Adams in London, Jefferson decried the rule, saying, "I am sorry they began their deliberations by so abominable a precedent as that of tying of the tongues of their members. Nothing can justify this example but the innocence of their intentions and ignorance of the value of public discussions."

Luther Martin, a representative from Maryland, believed that the mandate of silence violated the terms of the commission granted him by the state legislature. In a letter to that body, Martin criticized the rule:

> So far did this rule extend that we were thoroughly prevented from corresponding with gentlemen in the different states upon the subjects under our discussion — a circumstance, sir, which I confess I greatly regretted. I had no idea that all the wisdom, integrity and virtue of this State or of others, were centered in the Convention. I wished to have corresponded freely and confidentially with eminent characters in my own and other states — not implicitly to be dictated by them, but to give their sentiments due weight and consideration. So extremely solicitous were they that their proceedings should not transpire, that the members were prohibited even from taking copies of resolutions on which the Convention were deliberating, or extracts of any kind from the Journals, without formally moving for and obtain permission, by a vote of the Convention for that purpose.

There is something so contrary to our contemporary understanding of how the work of government should be carried out, particularly something as significant as the consideration of amendments to the Constitution, that Martin's description of the strength of the seal of silence sounds unnecessary, unwise, and unacceptable.

Perhaps the true reason for the imposition of the secrecy rule was revealed in a story told years later by Jared Sparks, reporting on a conversation he had with Madison in 1830. Sparks claims Madison told him:

> Opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. Meantime, the minds of the members were changing and much was to be gained by a yielding and accommodating spirit. Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to retain their ground, whereas by secret discussion, no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth and was open to argument.
>
> Mr. Madison thinks no Constitution would ever have been adopted by the Convention if the debates had been public.

There's the rub. You see, on the same day that the secrecy rule was approved by the convention, a much more radical proposal was introduced by one of the leading delegates from one of the most populous states, a proposal that would forever change the proceedings of the convention and the history of the United States.

Thirty-three years old and already governor of the Old Dominion, standing nearly six feet tall and possessed of a magnetic air of aristocracy and erudition, Virginia's Edmund Randolph rose and, in the words of James Madison, "opened the main business."

After spending the previous day hammering out the rules that would govern the convention ("this was an age of formal manners," observed Catherine Drinker Bowen), the delegates were ready to hit the ground running, revising — they thought — the Articles of Confederation.

Randolph and his Virginia colleagues had another idea, however. In consultations at the Indian Queen pub held prior to the opening of the "main business," Randolph and his fellow Virginia delegates received from James Madison a draft of a plan of a federal government (the Virginia Plan) that scrapped the Articles altogether, replacing it with Madison's vision.

Within the 15 resolutions of the Virginia Plan, a new national government was proposed. A government of three branches — legislative, executive, and judicial — was laid out.

When the Constitutional Convention (not a term any of the 55 or so delegates who attended that meeting would have used to describe it, by the way) began in 1787, the document known as the Articles of Confederation was the constitution of the United States. Article XIII of that constitution mandated that, regarding the changing of the Articles: "Nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."

When the proceedings got underway in May 1787, that legally binding constitutional requirement was completely ignored. From the moment Edmund Randolph stood and proposed what was known as the "Virginia Plan," the Constitutional Convention of 1787 became a "runaway convention."

Furthermore, there was yet another provision of the Articles of Confederation requiring unanimity in any amendment or change made to that document. Again, in Philadelphia, that provision was not only disregarded, but was completely replaced, eventually, by Article VII of the Constitution created at the convention.

Article VII of our current Constitution reads, "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."

That's quite a bit different. With the approval of that new provision, the unanimity rule and the constitution were replaced. What began with a bang ended with a whimper. This is thanks, in no small part, to the secrecy rule.

It is impossible to know what final form the Constitution would have taken — if any — had the press and the public been given access or information. History is not typically kind to secrets, particularly those that throw out constitutions and create from whole cloth new governments.

We were undoubtedly lucky (blessed by God) in the outcome of the runaway convention of 1787. The million-dollar question we face now is: Would we be so lucky again?

Not likely. As I've indicated in other articles, there are scores of socialist organizations slavering at the thought of getting their hands on the Constitution and making it over into something we wouldn't recognize. These groups have adopted Article V as the means to that end — an Article V convention of the states.

There is nothing in Article V limiting the power of a convention called under its authority. Think of the ramifications of a convention called to change the Constitution — a convention without legal limits on its power.

Of course, proponents of this second constitutional convention claim that the gathering they support would not create a new constitution.

That's not the point. The point is that an Article V convention *could* create a new constitution, just as the constitutional convention in Philadelphia did in 1787.

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