

Early Drafts of the U.S. Constitution

THE HISTORICAL SOCIETY OF PENNSYLVANIA possesses the richest collection of documents relating to the drafting of the U.S. Constitution, the engrossed text of the Constitution and James Madison's *Notes* of the 1787 convention aside.¹ This collection is contained in volume 1 of the Historical Society's James Wilson Papers. Wilson was a member of the Pennsylvania delegation; the most important of his papers from 1787 relate to his role on the Committee of Detail, tasked by the convention to produce the first working draft of the Constitution. Indeed, almost every surviving document from that committee is found in the Wilson Papers at the Historical Society. (The chief exception is a sketch of the Constitution in the hand of Edmund Randolph, now located in the George Mason papers at the Library of Congress.)

To explain the importance of these documents and of the Committee of Detail, it will be helpful to begin by recalling the basic chronology of the Constitutional Convention. The delegates commenced their work in earnest on May 29, 1787, when Edmund Randolph presented to the convention the "Virginia Plan." There followed two weeks of somewhat tentative discussion about the Randolph proposals and about the nature of the federal government. The chief point of disagreement centered on the question of representation in the upper chamber of the legislature. The Virginia Plan had envisioned representation in proportion to population; the smaller states, in contrast, favored the system of the Articles of Confederation, in which each state was represented equally. On June 15,

¹ This introductory essay is based on a series of articles in the *University of Pennsylvania Journal of Constitutional Law*. The two most relevant are "James Wilson and the Drafting of the Constitution," 10 (2008): 901–1009, and "The Constitutional Moment of James Wilson (Part 2): The Committee of Detail" (to appear in vol. 14 (Dec. 2011)), both by William Ewald. Full references to the scholarly literature can be found there. James Madison's notes were published as *The Papers of James Madison: Purchased by Order of the Congress, Being His Correspondence and Reports of Debates during the Congress of the Confederation, and His Reports of Debates in the Federal Convention . . .* (Washington, DC, 1840).

William Paterson submitted the rival “New Jersey Plan.” For the next month, the delegates argued bitterly about the question of representation, and the convention nearly dissolved itself over the issue. Finally, on July 16, it was decided in a dramatic vote that the upper house would be organized on the principle of equal state representation, but that all revenue bills would be required to originate in the lower house. This resolution (often called the “Connecticut Compromise,” though Madison and Wilson and other proponents of the large-state position regarded it as a defeat) ended the argument and allowed the convention to proceed to a successful conclusion. From that point onwards, there was never again a time at which the convention appeared likely to fail.

A further nine days of discussion followed this climactic vote, treating such matters as the presidency and the federal judiciary. The exhausted delegates then decided to take a break. On Thursday, July 26 the convention adjourned for ten days. In the interim, a committee of five members—the “Committee of Detail”—was charged with working up the convention’s various resolutions into a structured draft of a Constitution. Although the convention’s records contain no discussions revealing why the five were chosen, from their geographical diversity it is apparent that the committee was chosen with a careful view to geographical balance. Its members were Nathaniel Gorham (Massachusetts), Oliver Ellsworth (Connecticut), James Wilson (Pennsylvania), Edmund Randolph (Virginia), and John Rutledge (South Carolina). Rutledge reported the committee’s draft to the convention and appears to have served as the chairman. It should be noted that James Madison did not serve on this committee. In terms of parliamentary procedure, the committee’s assignment was to revise the Virginia Plan. Since that plan had been submitted to the convention by Randolph (who was then the governor of Virginia), and since Madison’s role may not have been known to the other delegates, Randolph would have seemed the appropriate choice to represent Virginia.

The committee had at its disposal, in addition to the convention resolutions, the texts of the Virginia Plan, the New Jersey Plan, and the “Pinckney Plan” (submitted by Charles Pinckney of South Carolina immediately after the Virginia Plan and promptly tabled). They also referred to the texts of the various state constitutions and of the Articles of Confederation, from which many provisions were borrowed in the final report. After the committee had finished its work, its report was printed

and distributed to the assembled delegates on Monday, August 6. It provided the structure for the convention's deliberations during the final six weeks of the summer, including the near-final draft of the Constitution as reported by the Committee of Style on September 10. The engrossed copy of the Constitution was signed on September 17, at which point the convention formally adjourned.

In the decades following the Constitutional Convention, its proceedings were treated as a closely held secret, and the delegates had little to say in private—and essentially nothing in public—about the events of 1787. Although the official *Journal* was published in 1819, it was not deeply informative and contained little more than a record of the formal votes. Not until the publication of Madison's *Notes* in 1840, fully half a century after the convention had completed its business, did the public obtain a detailed record of the debates. But in 1840 the nation was focused on the looming sectional crisis. Madison's *Notes* were dragged into the ongoing debates, invoked either to support the abolitionist claim that the Constitution represented a "Covenant with Hell," or else invoked to demonstrate the right of secession. The times were not favorable for a dispassionate examination of the historical record.

Only after the Civil War did the scholarly study of the convention properly commence. In 1882 George Bancroft published the two volumes of his *History of the Formation of the Constitution of the United States of America*. Bancroft was by a considerable distance the most influential American historian of the day. His books, the capstone to his ten-volume *History of the United States* (whose first volume had appeared nearly fifty years earlier) were rooted in deep archival research and on the examination of many documents still held in private hands. Bancroft, a passionate defender of the Union, told the story of the convention as a dramatic struggle between the states, pitting the Virginia Plan against the New Jersey Plan. The convention (and, by extension, the nation) almost tore itself apart until, in a very American gesture of reconciliation, a compromise was reached—which Bancroft was the first to call the "Connecticut Compromise." Bancroft's account swept the field; it brilliantly provided both a way of organizing the events of the convention and of fitting them into a much larger narrative of American national destiny.

Bancroft's treatment of the Committee of Detail was by comparison cursory. The entire focus of his narrative was on the dramatic struggle

leading to the Connecticut Compromise, and he showed little interest in close analysis of the technical contributions of the Committee of Detail. In part this emphasis was a matter of the available documentation. Madison's *Notes*—for Bancroft, as for all subsequent historians, the primary source of information—recorded the appointment of the committee and reproduced its final printed report. But Madison, absent from the committee, gave no account of its internal functioning. Oddly, although Bancroft had expended great effort in tracking down private papers, he appears not to have been aware of Wilson's papers (the most important of which had already been deposited at the Historical Society of Pennsylvania). And in any case their significance was still unknown.

On Wilson's death in 1798 his papers passed to his son, Bird Wilson, who used them to prepare an edition of his father's speeches and other writings. There is no sign that Bird knew that his father's papers contained early drafts of the Constitution, and in view of the delegates' pledge of secrecy, it is unlikely that his father ever discussed the convention with him. On Bird's death in 1859 the papers passed to his niece (and Wilson's granddaughter), Emily Hollingsworth. Emily—in June 1876 and January 1877—made two gifts of these papers to the Historical Society. The papers relating to the Committee of Detail were contained in these donations; but from her correspondence with the director of the Historical Society it is clear that she did not know what the manuscripts contained, and she is even less likely than Bird to have understood the importance of the Committee of Detail. (She is most concerned to point out the existence of a routine letter from George Washington, and in the end remarks, "Do not feel obliged to retain any of the Papers you deem inadmissible to the repositories of your Society.") Emily gave only a portion of her grandfather's papers to the Historical Society. Other papers were distributed after her death to the three executors of her estate. Of those residual papers, a number went to the executor, Israel W. Morris, who made a further large donation to the Historical Society in 1903. Other papers passed into the possession of the Montgomery family; some of those papers were eventually donated to the Historical Society and others to the Free Library of Philadelphia. (For a detailed discussion of the physical disposition of Wilson's papers, see Lorianne Updike Toler's "Addendum" at the end of this issue.)

The Wilson Papers at the Historical Society of Pennsylvania appear to have been ignored for more than two decades. Then, in 1899, William M.

Meigs published a facsimile of a document in the hand of Edmund Randolph, found among the papers of George Mason, which he identified as belonging to the work of the Committee of Detail. Meigs mentioned the existence of “one other draft”—in the singular—among the Wilson Papers at the Historical Society.² Soon thereafter, J. Franklin Jameson identified among the Historical Society papers not only Wilson’s successive drafts (in the plural) of the Constitution, but also a copy in his handwriting of the convention resolutions, and, most surprisingly, a set of extracts from the New Jersey Plan and the Pinckney Plan, also in Wilson’s handwriting. This last discovery was of special importance to Jameson. Pinckney in his later years had claimed to have been the principal author of the Constitution; but the original copy of his plan had disappeared, and the version he promulgated in 1818 had clearly been produced later. Shortly after Jameson, Andrew C. McLaughlin identified in the Historical Society papers a *second* and much longer set of extracts in Wilson’s handwriting from the Pinckney Plan. In view of the considerable controversy that then existed, the reconstruction of the original version of Pinckney’s plan—a remarkable piece of archival detective work—attracted the bulk of Jameson’s attention.³

In the meantime, considerable scholarly effort had been expended to locate and transcribe the surviving documentary records relating to the convention. This work culminated in the 1911 publication by Max Farrand of his three-volume *The Records of the Federal Convention of 1787*. In that work, Farrand did three things that previously had been done only partially or imperfectly. First, he provided a carefully edited text of all the available documents relating to the work of the Constitutional Convention. Secondly, taking Madison’s *Notes* as his base text, he assembled around it all the other contemporary journals of the convention, collating them day-by-day and thereby providing scholars with the ability to easily compare the various versions of each day’s events. Thirdly, he undertook a comprehensive project of archival research, assembling and transcribing diary entries, personal correspondence, speeches, reminiscences, newspaper articles, and other documents that might shed light on

² William Montgomery Meigs, *The Growth of the Constitution in the Federal Convention of 1787* (Philadelphia, 1900), 317–24.

³ Jameson’s various textual studies are collected in J. Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, first published in the *Annual Report for the American Historical Association for the Year 1902* (Washington, DC, 1903), 1:87–167. McLaughlin’s contribution on the Pinckney Plan appeared as an unsigned note, “Sketch of Pinckney’s Plan for a Constitution, 1787,” *American Historical Review* 9 (1904): 735–41.

the convention. This material made up the third volume of the 1911 *Records*; by 1937 he had uncovered enough additional material to fill a fourth volume.⁴ Farrand's work is a landmark and has provided the foundation for all subsequent study of the convention. In particular, he was the first to gather together all the surviving records of the Committee of Detail and to arrange them into a chronological sequence, which fills forty-six pages of the *Records*.

Curiously, although there was plenty to comment on, and although he was more thorough in transcribing the documents than any previous scholar, Farrand chose not to develop the historical narrative regarding the Committee of Detail. His accompanying monograph, *The Framing of the Constitution of the United States* (1913), devotes a short chapter to the committee, but in the main follows the lines laid down by Bancroft and concentrates its attention on the events leading to the Connecticut Compromise.

Only one aspect of the work of the Committee of Detail has attracted widespread attention from later scholars: the provisions protecting slavery and inhibiting the enactment by Congress of navigation acts. These "deep South" provisions were introduced into the committee drafts, almost certainly at the instigation of Rutledge and Randolph, without having been previously discussed by the convention; they caused considerable turmoil before they were finally rejected by the convention in August, and those slavery debates in the convention have been the focus in recent decades of much scholarly writing. But the more technical aspects of the committee's work have not received sustained attention. The standard historiography, following in the footsteps of Bancroft and Farrand, agrees in seeing the vote of July 16 as the defining moment of the convention and the work of the Committee of Detail as an episode of secondary importance.

Two considerations suggest that both these emphases—the low ranking of the committee, and the high ranking of the vote of July 16—may be misplaced. The first is a straightforward numerical observation. The Virginia Plan introduced by Randolph at the start of the convention fills three pages in Farrand's edition. The convention resolutions, as supplied to the Committee of Detail after nearly two full months of debate, fill six

⁴ Max Farrand, ed., *The Records of the Federal Convention of 1787*, 3 vols. (New Haven, CT, 1911). Farrand's work was reissued in 1937 in four volumes. In 1987, James H. Hutson produced his *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (New Haven, CT, 1987). Farrand's first three volumes were reissued at that time, and the material from his fourth volume was incorporated into the Hutson *Supplement*.

printed pages. That is, the convention had managed (roughly speaking) to add three pages to Madison's plan. The report of the Committee of Detail, produced in little over a week, fills twelve pages—twice as much as what the committee had been given. The final Constitution, as it emerged after a further six weeks of effort, fills fifteen pages. These facts are not, of course, conclusive. But (as lawyers are well aware) the power to shape a document lies to a considerable extent with the drafter. In this case, one knows already from the “deep South” provisions that the committee did not simply follow instructions; and the numerical facts should provoke a closer look at precisely what was contributed by the committee.

The second consideration is subtler and comes from the direction of comparative constitutional law. The compromise vote of July 16, whatever its merits, has rarely been imitated by other constitutions and is rarely treated in the scholarly literature as a major distinguishing feature of American constitutional governance. It is true that Madison and Wilson both viewed the “Connecticut Compromise” as a major flaw, and many political scientists have criticized it for its violation of the democratic principle of “one-person-one-vote.” But whether one views it as a flaw or as a virtue, it is hard, two centuries after the event, to see it as a *major* flaw or a *major* virtue. It has given rise to no substantive litigation; votes in the Senate virtually never pit large states (as such) against small states (as such); and if it were replaced by a more Madisonian principle of representation, the American system of governance would still be recognizably the same. Like the Electoral College or the vice presidency, it is more of a quirk of the system than a central and defining feature.

The same is not true for other aspects of the American constitutional scheme. The system of overlapping federal and state legislative powers; the dual system of federal and state courts; the tripartite structure of the national government (with a president rather than a prime minister); the system of judicial review, grounded in the supremacy of the Constitution—these structural features, remarkable innovations at the time, remain distinctive. They have given rise to large amounts of litigation and indeed (together with the Bill of Rights and the Fourteenth Amendment) are at the very heart of American constitutional law. Unlike the compromise of July 16, they could not be removed or altered without radically altering the entire constitutional landscape.

The crucial point linking these two observations is this: of the distinguishing features central to the American system of constitutional gover-

nance, many of the most fundamental make their first appearance in the drafts of the Committee of Detail. The first attempt at delineating an explicit enumeration of congressional powers (rather than accepting the amended Virginia Plan's allowance that Congress "legislate in all cases for the general interests of the Union"); the necessary and proper clause; and much of the structure of the federal judicial power—these central elements were introduced in the committee and *not* in the convention. In other words, it is necessary to draw a distinction. The vote of July 16 is indeed fundamental to the history of the *convention*: otherwise the proceedings might have collapsed. But it is not equally important to the history of the *Constitution*. If our interest is in understanding what the convention accomplished—what it contributed within the broad sweep of Western constitutional history—then the work of the Committee of Detail is of fundamental importance.

This new point of view has three immediate consequences. First, it imposes a different chronology on the events of the convention. Instead of a tale revolving around the clashes over proportional representation and slavery, the proceedings now divide naturally into three acts, with the committee serving as the middle of a three-act drama, equal in importance to what went before and to what went after. Secondly, it entails a shift away from the colorful personalities and events delineated in Bancroft and towards a close examination of the more technically legal aspects of the convention. Those are the aspects that loom large in the work of the committee and that are central to the modern field of constitutional law; the central task then becomes to situate the convention within the broader historical tradition of Western public law. Thirdly, this new point of view makes it necessary to reconsider the tangled question of the relationship between Wilson and Madison. So long as the emphasis is on the maneuverings leading up to the vote of July 16, it makes sense to think of Wilson as chiefly an ally of Madison. But when the focus shifts to the Committee of Detail, that familiar understanding of their relationship is no longer tenable: Madison was not in the room.

These observations naturally raise the question of how the committee approached its task: and here it is important to emphasize that there is much we do not know. Virtually all our information about the internal workings of the committee comes from the documents reproduced below; and they leave many questions unanswered. We do not know how often the committee met, or where; we do not know for certain whether Wilson

wrote his drafts in response to dictation, or with other members present, or alone in his study after hours; we do not know how the committee took its votes, or how it dealt with dissents.

It follows that to reconstruct the internal workings of the Committee of Detail—to the limited extent that this can be done—requires a careful piecing together of the evidence. It is necessary first to assemble whatever can be gleaned from Madison's *Notes* about the specific positions taken by the individual committee members in their speeches to the convention; to bring into play what is known about their political views more generally; to collate this material with the various documents on which the committee drew, and then to try to piece together, clause by clause, in the succession of drafts, what was contributed at each stage, and who is likely to have been responsible for which contributions.

Who was the principal author of the committee report? Wilson, both as a lawyer and as a political thinker, was the strongest intellect on the committee, and the surviving manuscripts are almost all in his handwriting. It is tempting to infer (in the words of Irving Brant) that "On the straight drafting job, this might be called a committee of Wilson and four others."⁵ But that common inference turns out to be too rapid. A careful examination shows that on many important questions—especially the provisions concerning slavery, but on others as well—Wilson was outvoted by his colleagues.

Broadly speaking, the changes the committee introduced can be divided into three categories:

- (1) At one extreme are changes that were either routine or mere matters of terminology. The choice to call the chief executive a "President" rather than a "Governor," or to call the lower house of Congress the "House of Representatives" rather than the "House of Burgesses," are instances. Likewise, certain basic powers already contained in the Articles of Confederation were simply inserted by the committee into its report—e.g. the power to raise an army and navy, or the power to regulate weights and measures. These matters were uncontroversial and occasioned no debate when they were submitted to the full convention.

⁵ Irving Brant, *James Madison*, vol. 3, *Father of the Constitution, 1787–1800* (Indianapolis, 1950), 111.

- (2) At the opposite extreme are several insertions that had not previously been discussed in convention and that caused considerable controversy. The most obvious are the “deep South” provisions. On many of these matters, far from having been the dominant member of the committee, Wilson was certainly outvoted and may well have found himself in a minority of one.
- (3) Finally, there are a large number of contributions that fall between these two extremes—important additions that were neither a matter of routine bookkeeping nor bitterly controversial. It is important to emphasize that little in the work of the committee was entirely without precedent. There are exceptions, but almost every clause of the committee report has antecedents, either in the Articles of Confederation, or in the state constitutions, or in one of the three plans—Virginia, New Jersey, and Pinckney—that the convention consigned to committee. So here it was a matter, not of creating entirely from scratch, but of selecting, of choosing what to include from the mass of available materials, of filling in details, of formulating appropriate language, and of organizing the whole into a coherent text. It is here that Wilson’s role is likely to have been the greatest. His skill as a drafter of legislation; his attention to fine shades of language; the existence among his papers of his own careful transcriptions of the Pinckney and New Jersey plans, all point to the centrality of his contribution. But these are hints rather than decisive proofs; and in the end, everything that emanated from the committee had to secure the support of a majority of its members.

If this argument is correct, then the work of the Committee of Detail requires more careful scrutiny than it has customarily received. The transcription of the committee documents provided by Farrand turns out on inspection to contain numerous inaccuracies. None is of great consequence; but because so much turns on the interpretation of handwritten documents, because Farrand’s transcription rendered the original jumble of handwritten marginalia, interlineations, and deleted texts in-line and difficult to decipher, because these manuscripts have never been fully reproduced, because editorial judgments for documents of this import should be transparent, and because certain markings, letters, and the placement of some punctuation remain in doubt, we provide facsimiles of the original manuscripts, along with new transcriptions.

Editorial Conventions

In our editorial conventions, we were guided by two principles: (1) keeping the text as true to the original as possible, and (2) transparency. Accordingly, we did not correct spellings, nor did we mask guesswork for hard-to-decipher words and phrases, especially where words were crossed out. The only silent guesswork relates to punctuation: we were often unsure if marks were periods, commas, or merely stray marks. With the lone exception of text wrapping, we attempted to approximate the placement of text on the page. Finally, Farrand's ordering and numeration were followed in sequencing the documents. We added descriptive titles and avoided arbitrary judgments in calling a document a draft or a document.

The transcriptions contained herein should be viewed as a guide to the originals. Judgment calls were made, but the reader is encouraged to compare the text with that of the black-and-white manuscript reproductions published here and the color images made available on www.ConSource.org and through the Historical Society of Pennsylvania's digital library at digitallibrary.hsp.org (record numbers 1663, 2766, 2767, and 3785). This issue can also be accessed on line at www.jstor.org.

Our editorial conventions are as follows:

- 1) Wilson's and Randolph's handwriting are represented by ACaslon font and Rutledge's by Arial font. The few words in what is probably Bird Wilson's hand in Document I are represented by Courier font.
- 2) *Deletions* are represented by strikethroughs. If the underlying text is legible, it is reproduced thus:

~~National~~.

If the text has been struck out more than once, we render it thus:

~~National~~

If the underlying text is illegible or obliterated, we render the likely number of characters thus:

[~~xxxx~~].

When one or more letters has been written over another, the

stricken letter is represented first, and then the letter(s) to which they were changed as follows:

ıI

- 3) *Editorial conjectures* are given in brackets. If the word or phrase is questionable, it is simply given in brackets with a question mark thus:

[National ?].

An alternative reading is given thus:

State/States.

If a word is illegible, we try to indicate its approximate length thus:

[xxxx].

In many cases it is unclear whether Wilson, Randolph, or Rutledge intended a mark to be a comma, or a semicolon, or a colon, or whether the manuscript simply contains a stray mark. In such cases we have made our best guess without indicating the possible variants.

- 4) *Misspellings*. As can be seen from the facsimiles, a number of words have been shortened or mutilated by a letter or two when the edge of the page was subsequently trimmed. In addition, the removal of the 1877 binding tape has, in rare instances, rendered words spelled incorrectly by removing letters. In both cases, instead of burdening the text with excessive annotation, we have left the text as is, exactly corresponding to the manuscripts in their current format. (In the case of Randolph's sketch, we cross-checked the current facsimile to that made in 1899 by Meigs.)

- 5) *Interlineations*. Interlineations or text added later by the same author are represented in eight-point font.

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