



Written by [Joe Wolverton, II, J.D.](#) on June 5, 2016

## 1787: Constitution Crafted in Secret. What Would a Similar Rule Produce at a Modern-Day Con-Con?

Two hundred and twenty-nine years ago last week, the representatives of the states who had gathered in Philadelphia from May 25 to September 17 of 1787 got down to the business of deliberating on core issues of statecraft.

As was their habit, the 50 or so men attending the convention did not meet on the Sabbath. In fact, many of them attended church together in Philadelphia, worshipping at churches of any denomination whatsoever, so long as the gospel of Jesus Christ was preached.



June 3 was one such Sunday. Although there was no business carried on at the State House, newspapers reported on the first few days of the convention, several of them highlighting a controversial control imposed on the individual members: absolute secrecy.

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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.”

Several newspapers throughout the United States carried the following dispatch sent from Philadelphia regarding the secrecy rule:

Such circumspection and secrecy mark the proceedings of the Federal Convention that the members find it difficult to acquire the habits of communication even among themselves; and are so cautious in defeating the curiosity of the public that all debate is suspended on the entrance of their own inferior officers. Though we readily admit the propriety of excluding an indiscriminate attendance on the discussion of this deliberative council, it is hoped that the privacy of this transaction will be an additional motive for despatch, as the anxiety of the people must be necessarily increased by every appearance of mystery in conducting this important business.

At least four major newspapers: the *New York Journal*, the *Boston Gazette*, the *Salem Mercury*, and the *Virginia Independent Chronicle*, published this report verbatim during the month of June 1787.

In what may seem surprising to modern readers accustomed to calls for greater transparency in the goings on in government, there was substantial support among the delegates for the imposition of this 18th century gag rule.

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



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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 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, disagreed. 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 delegate from Maryland present at the Convention, spoke in December 1787 during a meeting of the Maryland state House of Representatives regarding “the proceedings of the late convention.” Here is Martin’s criticism of the secrecy 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.

Next, in what sounds too bizarre to be believable, the convention secrecy rule almost led to a duel. What will come as no surprise, however, was that the incident involved Alexander Hamilton.

During the debates in the New York ratifying convention on June 28, 1788, John Lansing, Jr., accused Alexander Hamilton of misrepresenting his position on the sovereignty of states to the members of the ratifying convention.

In speeches made at the ratifying convention, Hamilton claimed he considered the states critical components of the proposed constitution, insisting that he always advocated for a significant state role in the federal plan under consideration.

Lansing didn’t agree with Hamilton’s characterization of his conduct in Philadelphia, and he called him out on the apparent distortion. In fact, Lansing came right out and told the men gathered at the New York ratifying convention that during the debates the previous summer in Philadelphia not only did Hamilton not stress the sovereignty of states, but he actually pushed for their dissolution as independent sovereignties and advocated for their conversion into administrative subunits of a powerful central government.

Hamilton angrily denied Lansing’s charges and he sternly rebuked his accuser for bringing up debates that were supposed to have been kept secret. When Lansing ignored Hamilton’s ire, the idea of a duel to settle the dispute was floated on the floor of the convention!



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Even the “indispensable” George Washington was not beyond being berated for his disclosure of deliberations carried on at the Convention of 1787.

In a message sent to Congress in 1796 regarding the proper interpretation of the Constitution’s treaty power, President Washington used statements made during the Constitutional Convention in defense of his position.

James Madison chastised Washington for what he considered a misuse of his memory and an unauthorized violation of the secrecy rule.

As for himself, Madison was so committed to keeping the content of convention debates secret that he wouldn’t even reveal details of the deliberations to his collaborator, neighbor, and friend, Thomas Jefferson.

In a letter written to Jefferson on July 18, 1787, Madison promised his friend, “As soon as I am at liberty, I will endeavor to make amends for my silence.”

In the era of social media and instant communication, the idea that the work of government should be carried out in secret violates the contemporary commitment to openness and accountability.

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.

While the product of the Constitutional Convention of 1787 (a convention called to suggest amendments to the then-legal constitution, the Articles of Confederation) was beyond compare and remarkable for the soundness of its structures, imagine if a secrecy rule, similar to that imposed in 1787, were placed on the debates of a contemporary “amendments convention.” What sort of radical and revolutionary changes to our Constitution would be carried out safely beyond the shroud of that secrecy?

Once again, history providing the prologue to the future.

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.



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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 and it could similarly be carried out in secret.

*Photo: Independence Hall*



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