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JAMES MADISON AND THE PINCKNEY PLAN

S. SIDNEY ULMER*

The fact that the nature and significance of Charles Pinckney's contributions to the Federal Constitution have been obscured by the controversies revolving around the Pinckney Plan of government led the writer to do the research which furnishes the basis of this paper. The scope of the paper is limited to an analysis of James Madison's criticisms and comments on the alleged copy of the plan drawn up by Pinckney in 1818 in an effort to determine the value of Madison's criticism *in toto*. This approach to the problem is considered appropriate because of the fact that all subsequent critics of the 1818 paper have used Madison's work as the basis of their own speculations and conclusions.

THE PINCKNEY DRAFT

Charles Pinckney was the youngest of the South Carolina delegates appointed to represent his state in the Federal Convention of 1787. His youth, however, did not keep him from taking an active part in Convention affairs. Indeed his willingness to take the initiative, his aggressiveness at such a youthful age, when surrounded by older and more experienced sages, made him somewhat less than popular. It is known that both Madison and Washington, among others, considered him indiscreet and presumptuous.¹

Pinckney Draft Presented to the Convention

Pinckney's introduction of a plan of government in the early days of the Convention was perhaps considered presumptuous by some of the older and more distinguished delegates. At any rate it is in connection with this plan that Pinckney has attracted a host of critics. The list is long, but also distinguished, extending from James Madison to Max Farrand. To be placed in an unfavorable light by one who stands in the position to the Constitutional Convention occu-

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1. See the letters from Madison to Washington dated October 14, 1787 and from Washington to Madison under date of October 22, 1787. 3 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*. 123, 131 (1937) (hereinafter cited as Farrand).

pied by Mr. Madison is a serious matter indeed. Madison's notes of the proceedings are the most copious taken and for that he deserves our gratitude but one should not be led into thinking these notes represent a stenographic or verbatim report. All that Madison could and did record was what he believed to be the speaker's meaning. He has described how he worked:

In pursuance of the task I had assumed I chose a seat in front of the presiding member with the other members, on my right & left hand. In this favorable position for hearing all that passed, I noted in terms legible & in abbreviations and marks intelligible to myself what was read from the Chair or spoken by the members; and losing not a moment unnecessarily between the adjournment and reassembling of the Convention I was enabled to write out my daily notes during the session or within a few finishing days after its close in the extent and form preserved in my own hand on my files.

In the labor and correctness of this I was not a little aided by practice, and by a familiarity with the style and train of observation and reasoning which characterized the principal speakers. It happened, also, that I was not absent a single day, nor more than a casual fraction of an hour in any one day, so that I could not have lost a single speech, unless a very short one.²

Thus Madison's published journal was written out "during the session, or within a few finishing days after its close . . ." And while he was absent only fractions of hours he did not specify the days on which these absences occurred. They can only be inferred.³

In Madison's "written out" notes one finds the following entry for May 29, 1787:

Mr. Charles Pinckney laid before the house the draught of a federal Government which he had prepared to be

2. *Id.* at 550. Madison told Governor Coles that the work involved in writing out his notes in addition to the confinement of attending the Convention almost killed him but he was determined to accomplish it.

3. E. G. Madison's report of the debate on the executive power omits the remarks of Madison and Dickinson given in the notes of Pierce. Madison does not report the remarks of Hamilton given in the notes of McHenery for May 29. The remarks of King and Charles Pinckney at the end of the session of August 25 are omitted by Madison but reported by McHenery. Madison omits remarks of Charles Pinckney on June 25 as given by Yates.

agreed upon between the free and independent States of America. Mr. P. plan ordered that the same be referred to the Committee of the whole to consider the State of the American Union.⁴

But Yates, in his Secret Proceedings, related the introduction of the Pinckney draft in a different manner. "Mr. C. Pinckney, a member from South-Carolina, then added, that he had reduced his ideas of a new government to a system, *which he read*, and confessed that it was grounded on the same principle as of the above resolutions."⁵ (Randolph resolutions) (*italics furnished*).

Did Pinckney read his draft or did he, as Madison reports, simply lay it before the house? It was a Convention rule that "A writing, which contains any matter brought on to be considered, shall be read once throughout for information." Madison admitted that he was absent for "a fraction of an hour" on some days. Perhaps he was absent when the Pinckney draft was read. If the original draft was of no greater length than the alleged copy prepared by Pinckney in 1818, it could have been read aloud easily in fifteen minutes or a "fraction of an hour."

But if Madison was absent when the draft was read, where did he get his entry for May 29th? In the official journal kept by the Convention secretary one finds that on that date "Mr. Charles Pinckney, one of the Deputies of South Carolina, laid before the House for their consideration, the draught of a federal government to be agreed upon between the free and independent States of America.

Ordered that said draught be referred to the Committee of the whole House appointed to consider of the state of the american Union."⁶ Even a superficial comparison of this entry with that of Mr. Madison will indicate that he copied his entry almost verbatim from the journal. Indeed it appears that all of his records for May 29th subsequent to the speech, resolutions and comments of Mr. Randolph were copied from the journal.⁷ The inference is that Madison was absent during the latter part of this session and therefore

4. 1 FARRAND 23. The Farrand edition of Madison's notes is used throughout the remainder of this paper.

5. *Id.* at 24. The Farrand edition of Yates notes is used throughout this paper.

6. *Id.* at 16.

7. *Id.* at 23, where Farrand says: "The remainder of Madison's records for this day were copied from Journal."

could not have heard Mr. Pinckney "read" his plan. This view is substantiated by the fact that Madison nowhere claimed to have known what the plan contained. He never testified as a witness to the contents of the plan. He never said: "I read the plan and know its contents" or "I heard it read and know its contents." As will be shown, this is a crucial point in assessing the role of Madison as a critic of Pinckney.

John Quincy Adams and the Pinckney Draft

On the date of its introduction Pinckney's draft was referred to the Committee of the Whole. On July 26 it went, along with the twenty-three resolutions of the Convention and the Paterson resolutions, to the Committee of Detail.⁸ At adjournment the records and papers of the Convention were relinquished by Major William Jackson, the secretary,⁹ placed under seal, and secrecy was imposed upon the Convention members. Over thirty years later, upon breaking the seal, the draft of Pinckney was not found. John Quincy Adams, at the time Secretary of State, was engaged in publishing the official copy of the Convention journal and related papers.

8. 2 FARRAND 128.

9. Charles Cotesworth Pinckney, cousin of Charles, was a close friend of the secretary of the Convention, Major William Jackson. Jackson was born in England but migrated to Charleston, South Carolina, where he received a commission in the first regiment of South Carolina 1775. The Colonel of this regiment was Christopher Gadsden. In 1778 Jackson served under Howe with Charles Cotesworth Pinckney. During this period an enduring friendship developed between Colonel and the young Lieutenant Jackson. When General Lincoln took command of the Southern Department of the Continental Army Jackson was made an aide-de-camp on the recommendation of Charles Cotesworth Pinckney. Littell, *Major William Jackson*, PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY, 353-369 (1878). Jackson received \$866.60 for his four months work as secretary of the Convention. It has been suggested that he was over-paid. Farrand, *If Madison Had Had a Sense of Humor*, LXII PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY, 130-131 (1938). Jared Sparks told Madison that the "secretary of the Convention was a very stupid secretary, not to take care of . . . [Convention papers] better, and to make a better journal than the dry bones which now go by that name." 3 FARRAND 514. It does not appear that Jackson was quite so stupid. In 1818 Jackson told John Quincy Adams that he "had taken extensive minutes of the debates in the Convention, but, at the request of President Washington, had promised they should never be published during his own life, which he supposed had been a loss to him of many thousand dollars." 4 MEMOIRS OF JOHN QUINCY ADAMS 174, 175 (Charles F. Adams ed. 1874-77). The verity of this claim is substantiated by a letter from Timothy Pickering to Jackson in 1827 in which Pickering said: "Permit me also to urge your preparing those speeches in the General Convention which formed the Constitution of the U. States, of which you took abbreviated notes, and which yourself alone can write out at full length." 3 FARRAND 476. It appears that Jackson remained faithful to the pledge he gave Washington.

Adams' resort to Madison for a copy of the draft proving fruitless, he wrote to Pinckney asking if Pinckney had a "copy of the draught proposed" by him in the Convention and requested "a copy of it."¹⁰ Pinckney replied under date of December 30, 1818:

I have already informed you I have several rough draughts of the Constitution I proposed & that they are all substantially the same differing only in words & the arrangement of the Articles—at the distance of nearly thirty two Years it is impossible for me now to say which of the 4 or 5 draughts I have was the one but enclosed I send you the one I believe was it—I repeat however that they are substantially the same differing only in form & unessentials—It may be necessary to remark that very soon after the Convention met I changed & avowed candidly the change of my opinion on giving power to Congress to revise the State Laws in certain cases & in giving the exclusive Power to the Senate to declare War thinking it safer to refuse the first altogether & to vest the latter in Congress.¹¹

The paper Pinckney submitted was subsequently published with the official journal in 1819.¹² It is in connection with this paper that Pinckney has received considerable criticism. Thus several facts concerning the paper should be noted at this point. In the first place, the draft submitted by Pinckney in 1818 was not *the* identical draft read to the Convention in 1787. This point is summed up rather well by Gaillard Hunt. Speaking of the two letters¹³ from Pinckney to Adams and the draft submitted in 1818 he says:

The penmanship of all three papers is contemporaneous, and the letter of December 30 and the draft were written with the same pen and ink. This may possibly admit of a difference of opinion, because the draft is in a somewhat larger chirography than the letter, having been,

10. See 3 FARRAND 431, also see the letter from Madison to J. Q. Adams, November 2, 1818. In response to Adams' inquiry Madison declared that he found no copy of the Pinckney plan in his papers. *Id.* at 426.

11. A copy of this manuscript is in possession of the writer. The letter is printed in 3 THE WRITINGS OF JAMES MADISON 24, 25 (G. Hunt ed. 19).

12. A copy of this paper is in possession of the writer; the original is in the National Archives.

13. Pinckney wrote to Adams on December 12, 1818 on the same subject.

as befitted its importance, written more carefully. But the letter and the draft are written upon the same paper, and this paper was not made when the convention sat in 1787. There are several sheets of the draft and one of the letter, and all bear the same watermark—"Russel & Co. 1797." The draft cannot, therefore, claim to be the original Pinckney plan¹⁴

But Pinckney never claimed that the draft submitted in 1818 was the "original Pinckney plan." When the question is one of interpretation it is only proper that words be interpreted in the light most favorable to the writer or speaker. When Pinckney's letter accompanying the draft is read in conjunction with Adams' letter of request, the liberal interpretation is that he sent, in fact, just what the Secretary had requested—to wit: "a copy" of the "copy of the draught proposed by you" to the Convention. Viewed in this manner the fact that the paper upon which the two letters and the draft were written bore a 1797 watermark causes no astonishment.

Pinckney related in his own words that he retained neither the original nor the copy of the original draft. In a letter to Mathew Carey dated August 10, 1788, less than a year after adjournment of the Convention, he wrote: "I would with pleasure send you a copy of my system . . . but I have not one—the original being laid before the Convention, and the copy I gave to a gentleman to the Northward."¹⁵ Pinckney did not disclose the name of the "gentleman to the Northward" but apparently it was George Read. In a letter to John Dickinson, of date May 21, 1787,¹⁶ Read wrote: "I am in possession of a copied draft of a Federal system intended to be proposed, if something nearly similar shall not precede it."¹⁷ He then outlined some of its principal features. These features were from the Pinckney plan. It is possible that Pinckney gave Read the copy in an attempt to get his support for the plan prior to the convening of the Convention.

But if Pinckney retained neither the original nor the copy of the original draft how was he able to tell Adams by letter of December 12, 1818, that "from an inspection of my papers

14. 3 THE WRITINGS OF JAMES MADISON XVII G. Hunt ed. (19).

15. A copy of this letter is in possession of the writer; the original is in the Library of Congress.

16. Both Read and Pinckney were in Philadelphia prior to this date; Pinckney as early as May 17 and Read as early as May 19.

17. 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 25FF (1937).

not long ago, I know it was then easily in my power to have complied with your request" for a copy of the draft submitted to the framers?¹⁸ How was he able to say in his letter of December 30 that he had four or five rough drafts "of the Constitution I proposed to the Convention" and that they are "all substantially the same"? The assertions in the December letters seem to contradict the statements made to Carey in 1788. But again a liberal interpretation would be that, while he definitely did not have the original draft, he later discovered the rough drafts which he considered so "substantially" the same as the original that he permitted publication in 1819 of the "one I believe was it."

A second point to note about the 1818 paper is that most printed copies are erroneous in one respect.¹⁹ These copies head up the divisions of the plan: "Article I," "Article II," "Article III," etc. Pinckney, however, headed only the first division "Article I." For the remainder he simply used 2, 3, 4, 5, etc.

James Madison and the 1818 Draft

One cannot determine with facility the point in time at which the legitimacy of the 1818 draft was first questioned. It does not appear to have been questioned before Pinckney's death in 1824. When it was published in 1819 there were sixteen members of the Convention still living including two of the original South Carolina delegates, Pierce Butler and Charles C. Pinckney. Between 1819 and 1824 no one came forward with the suggestion that the paper was not what it was purported to be. In fact James Madison appears to have been the only member of the Convention ever to question the document sent to Adams in 1818.²⁰ The draft was published by Adams with the journal without comment. The cover letter was not published until 1895.²¹

In 1823 John Taylor of Caroline published his *New Views of the Constitution of the United States*.²² Taylor related the

18. A copy of this letter is in possession of the writer; the original is in the National Archives.

19. This error is made by A. J. Bethea, Hannis Taylor, Elliot in his reprint of the official journal and others.

20. The position of Rufus King is reserved for later comment.

21. By Mr. Worthington C. Ford, *The Nation* LX (May 23, 1895), 397-98. The letter is not printed in the *Documentary History* as G. Hunt says in 3 THE WRITINGS OF JAMES MADISON 25 n. (G. Hunt ed. 19).

22. Washington, 1923.

features of the Pinckney plan on page 19 of this work accepting the journal copy of the plan as authentic.

Madison's earliest recorded question about the 1818 draft is found in an entry in Jared Sparks's journal dated April 19, 1830. The draft, wrote Sparks—

is remarkable for containing several important features in exact accordance with the Constitution as it was passed. This is the more strange, as some of these very points grew out of the long debates which followed the presentation of the draft.

Mr. Madison seems a good deal perplexed on the subject. He says Charles Pinckney presented a draft at the beginning of the session, that it went to a committee with other papers, and was no more heard of during the convention How it happened that it should contain such particulars as it does, Mr. Madison cannot tell; but he is perfectly confident that they could not have been contained in the original draft as presented by Mr. Pinckney, because some of them were results of subsequent discussions. Mr. Madison supposes that Mr. Pinckney must at the time have added certain points as the convention proceeded, particularly such as he approved, and as he thought would make his draft more perfect, and that this altered draft had lain by him till he had forgotten what parts were changed or improved; and thus he copied the whole. But however this may be explained, says Mr. Madison, it certainly is not the draft originally presented to the convention by Mr. Pinckney. It is obvious that Mr. Madison feels some embarrassment on the subject, because in his papers on the convention he has probably ascribed several of these particulars to the Virginia delegates, from whom they originated; and when his papers shall be made public, there will be found a discrepancy between them and Pinckney's draft. After the draft was printed, he intended to write to Mr. Pinckney asking, and even requiring, an explanation; but Mr. Pinckney died, and the opportunity was lost.²³

The primary significance of this long entry lies in the fact that it represents the first recorded suggestion that the draft published in 1819 was not as represented by Pinckney. It

23. I ADAMS, LIFE AND WRITINGS OF JARED SPARKS 560-564 (1893); *Id.* at vol. II 35-36, 3 FARRAND 479, 480.

records the first criticism of the draft by James Madison; the first of a number of such criticisms which continued intermittently until his death in 1836.²⁴ Indeed, he even left posthumous criticisms of the draft.

It is not clear from this entry in Sparks' journal whether Sparks or Madison first raised the issue but a close reading of Madison's writings on the subject leaves one with the impression that Madison was the leader in the matter and Sparks and others the followers.

One cannot pinpoint the exact moment when Madison began to question the 1818 draft in his own mind. It is known that he began to prepare his notes for publication in 1821²⁵ but it is not likely that he began to question the paper much before 1830. Madison, from the close of the Convention until his death, was in the habit of testifying as to the proceedings of the Convention. And he missed few opportunities to correct those who had fallen into error because of inferior knowledge on the subject.²⁶ It is improbable that Madison would have missed the opportunity of correcting John Taylor of Caroline who accepted the 1818 draft as authentic. Indeed the chance would have been more welcome in light of Taylor's critical treatment of Madison's work in the Convention.²⁷

Madison's attempt to explain his delay in questioning the 1818 draft has a strange ring. It would seem that had Madison noticed the alleged discrepancies in the published paper in 1819 he could have found an opportunity to bring the matter to Mr. Pinckney's attention prior to Pinckney's death five years later. That he did not do so coupled with the fact that

24. His last letter on this point was written to Duer in 1835; printed in 3 FARRAND 534, 537.

25. See the letter from Madison to Thomas Ritchie, Sept. 15, 1821. *Id.* at 447.

26. See the following from Madison to: George Washington, Thomas Jefferson in 1787; J. Q. Adams (two letters), Robert Walsh in 1819; President Monroe, J. Q. Adams in 1820; Joseph Gales, Thomas Ritchie, J. G. Jackson in 1821; George Hay in 1823; Andrew Stevenson, Thomas Cooper in 1826; Edward Everett in 1827; Martin Van Buren in 1828; J. C. Cabell (two letters) in 1829; M. L. Hurlbert, James Hillhouse, Andrew Stevenson in 1830; Theodore Sedgwick, Jr., James Robertson, Jared Sparks, J. K. Paulding (three letters each to Paulding and Sparks) N. P. Trist in 1831; Professor Davis in 1832; W. C. Rives, John Tyler (not sent), in 1833; Thomas S. Grimke in 1834; W. A. Duer in 1835. 3 FARRAND *Passim*.

27. In a letter to N. P. Trist, December 1831, Madison wrote: "On recurring to the writings of Col. Taylot, it will be seen that he founds his imputation agst. myself and Govr. Randolph, of favoring a Consolidated National Govern on the Resolutions introduced into the Convention by the latter" 3 FARRAND 517.

evidence to substantiate his claim is completely lacking leads to a contrary inference. It seems highly improbable, in view of Madison's voluminous correspondence between 1819 and 1830, in which he commented on, discussed and in some cases corrected virtually every publication concerning the 1787 Convention, that he would have neglected to mention the alleged discrepancies in the printed Pinckney paper. Madison did not fail to note that the *Secret Debates* of Yates contained "egregious errors"²⁸ or that Yates' attention was "warped . . . to an unfavorable understanding of what was said in opposition to the prejudices felt."²⁹ Madison's intense interest in disproving the validity of the 1818 Pinckney draft, as evidenced in his writings on the subject subsequent to 1830, does not lead one to believe he could have had these misgivings from 1819 to 1830 and yet kept them locked in his bosom.

Madison's personal interest in the matter of the Pinckney plan, which underlies the embarrassment to which Sparks referred, can be readily explained in terms of Madison's relation to the Virginia delegation and the Virginia resolutions. It is not surprising that Madison had a developed appreciation of the role of Virginia in instigating the Convention and in making important contributions to the final outcome. It is in connection with the Virginia resolutions that Madison betrays, behind the detached facade which rarely deserted him, the fact that he was a man after all and perhaps subject to some of the common human pretensions. In the "Preface to the Debates in the Convention of 1787" the following sentences occur:

As a sketch the earliest perhaps on paper, of a Constitutional Govt. for the Union (organized into regular Departments with physical means operating on individuals) to be sanctioned by *the people of the States*, acting in their original & sovereign character, was contained in a letter of Apl. 8, 1787 from J. M. to Govr. Randolph. . . .³⁰

Other ideas of Madison on government occur in letters to George Washington of date April 16, 1787, and Thomas Jefferson of date March 19, 1787. The Virginia resolutions contain the features of Madison's ideas of government delineated in his letters to Washington and Jefferson. And it appears

28. See Madison's letters cited in note 26.

29. *Ibid.*

30. Printed in 3 FARRAND 549.

that Madison was primarily, if not solely, the author of these resolutions. At any rate he emphasized again and again that the so-called Randolph resolutions were not the work of Randolph. In the "Preface" and other places he makes this point but perhaps nowhere does one find it in clearer terms than in a letter to Tyler in 1833:

In your speech of February 6th. 1833 you say 'He (Edmund Randolph) proposed (in the Federal Convention of 1787) a Supreme National Government, with a Supreme Executive, a Supreme Legislature, and a Supreme Judiciary, and a power in Congress to veto State laws. Mr. Madison I believe, Sir, was also an advocate of this plan of govt. If I run into error on this point, I can easily be put right. The design of this plan, it is obvious, was to render the States nothing more than the provinces of a great government to rear upon the ruins of the old Confederacy a consolidated Government, one and indivisible!

I readily do you the justice to believe that it was far from your intention to do injustice to the Virginia Deputies to the Convention of 1787. But it is not the less certain that it has been done to all of them, and particularly to Mr. Edmund Randolph.

The Resolutions proposed by him, were the result of a Consultation among the Deputies, the whole number, seven being present . . . Mr. Randolph was made the organ [for introducing the resolutions] on the occasion, being then the Governor of the State, of distinguished talents, and in the habit of public speaking.³¹

According to Rives, Madison had for some time prior to this consultation been preparing for the labors of the Federal Convention. Indeed he had, "from the moment of his leaving Congress at the close of the Revolution, turned his thoughts most anxiously to an improved political organization."³² In this connection he had gone so far as to compile papers on "Ancient and Modern Confederacies" and "Vices of [the] Political System of [the] United States."³³

Substantiation for the belief that Madison saw a competitive relationship between the Virginia resolutions and the

31. *Id.* at 524, 525.

32. 2 RIVES, HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 209 (1866).

33. *Id.* at 208.

Pinckney plan is found in a letter to Thomas S. Grimke, of date January 6, 1834. Commenting on the Virginia resolutions Madison wrote:

The Journal shows that they were in fact the basis of the deliberations & proceedings of the Convention. And I am persuaded that altho' not in a developed & organized form, they sufficiently contemplated it; and moreover that they embraced a fuller outline of an adequate System, than the plan [Pinckney] laid before the Convention, variant as that, ascertainably, must have been from the Draft now in print.³⁴

Thus it should be kept in mind in assessing Madison's criticism of Charles Pinckney's 1818 draft of a system of government that Madison had a *personal interest* in the matter. This interest stemmed from two basic facts: (1) the failure of the Madison notes to show the importance of the original Pinckney draft as a contribution to the Constitution and (2) the participation of Madison in drawing up the Virginia resolutions, which he interpreted as the basis of the Constitution. It should be noted in the above quotation that Madison referred to the original Pinckney plan as variant to the draft now in print but he did not testify as a witness to that variance. He was careful to say "variant" as it "must have been." Madison here and elsewhere consistently refused to testify from personal knowledge as to the contents of the original Pinckney plan.

In Madison's first recorded criticism of the 1818 draft it does not appear that he specified the faults he detected in the paper. His comments were general in nature. While he was certain that it was not the same as the original draft and that it was not *the* original draft presented to the Convention in 1787, he did not speak in terms of articles and provisions. That was to come later. It seems that Madison's early criticism was based on the belief that Pinckney represented the 1818 paper to be an identical copy of the original draft. His explanation that Pinckney had interlined his original plan as the Convention proceeded and then copied the whole indicates a belief that Pinckney retained the original draft. But this one knows from the Pinckney letter to Carey not to have been the case. It does not appear that Madison was aware of the existence of the letter which accompanied the draft sent to

34. 3 FARRAND 532.

Adams until after June 16, 1831.³⁵ After the letter was called to his attention, his criticism continued unabated taking the line that the 1818 draft was not a "substantial" copy of the original paper.

But while Madison's crusade against the 1818 paper continued unabated, his criticisms were in every case guarded and cautious. In two letters to J. K. Paulding in 1831 Madison asked his aid in locating a pamphlet published by Pinckney in 1787 supposedly containing his ideas on government and on the "Plan" he presented to the Convention in that year.³⁶ A third letter in 1831 thanked Paulding for sending the pamphlet, a copy of which had been located in the Historical Society of New York.³⁷ In the same year Madison corresponded with Sparks on the subject.³⁸ Sparks, on the 16th of June, 1831, was prepared to give up the inquiry after reading the letter covering the draft sent to Adams in 1818. Sparks wrote Madison:

I have procured from the Department of State a copy of the letter from Mr. Charles Pinckney to Mr. Adams, when he sent his draught for publication. This letter is so conclusive on the subject that I do not think it necessary to make any further inquiry. It is evident, that the draught, which he forwarded, was a compilation made at the time from loose sketches and notes. The letter should have been printed in connexion with the draught. I imagine Mr. Pinckney expected it. He does not pretend that this draught was absolutely the one he handed into the convention. He only 'believes' it was the one, but is not certain.³⁹

35. See the letter to Sparks dated June 27, 1831, in which he says: "The letter to Mr. Adams was new to me." *Id.* at 502.

36. *Id.* at 501.

37. *Id.* at 503.

38. See Sparks' letter to Madison May 24, 1831; Madison's letter to Sparks June 21, 1831; Sparks' letter to Madison May 5, 1830 in 3 *FARRAND Passim*.

39. Quoted in NOTT, *THE MYSTERY OF THE PINCKNEY DRAUGHT* 147 (1908). This represents the second explanation of the differences between the 1818 paper and the original draft. An additional explanation is the following, attributed to Madison by Adams through Sparks: "He conjectured that Mr. Pinckney's memory had failed him, and that, instead of a copy of the paper which he did present, he found a copy of the plan reported by the committee with interlined amendments, perhaps proposed by him, and, at a dis- of more than thirty years, had imagined it was his own plan." 8 *MEMOIRS OF JOHN QUINCY ADAMS* 224-225 (Charles F. Adams ed. 1874-1877). Jameson, *Studies in the History of the Federal Convention of 1787*, *ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1902* 89 FF (1903), states that

It is evident from this letter that Sparks, who had been conversing with Madison on the matter, thought the question involved was whether the 1818 draft was an *exact* copy of the lost original. Pinckney's letter made it clear that such was not the case. But in his reply of June 27 Madison said:

Abundant evidence I find exists of material variance between the two drafts, and I am sorry that the letter of Mr. Pinckney is far from explaining them. It does not appear, as you inferred, that the draft sent to Mr. Adams was compiled from his notes and papers; but that it was one of the several drafts found amongst them, and the very one, he believed, that he had presented to the Convention, all the drafts, however, being substantially the same.⁴⁰

Madison at this time began to get more specific in his charges. He called to Sparks' attention the fact that in the early days of the Convention Pinckney had proposed to take the election of the House of Representatives from the people and give it to the legislatures of the states. This, Madison urged, is a "violent presumption that the latter, not the former, was the mode contained in his draft."⁴¹ The 1818 paper, however, provided for election by the people. This particular discrepancy became Madison's most repeated criticism of the 1818 draft. One finds it repeated at least five times in his writings.⁴² This discrepancy in conjunction with other evidence constitutes the most damaging evidence adduced to show that the 1818 draft contained important features not in the original plan.

In the June 27 letter Madison flatly stated his reluctance to testify as to the "errors" made by Pinckney in the 1818 paper. He did not wish to be drawn into the matter. He would have been required to produce proof of his allegations and to testify from personal knowledge concerning the orig-

this was Madison's original conjecture. But Sparks, as has been noted, reported the matter differently in his journal. Adams apparently misunderstood Sparks' account or else suffered a memory lapse before committing the matter to writing. There would have been no need for Pinckney to have had a MS copy of the committee's report. Each member had a printed copy. If the printed copy were interlined Pinckney could not have thought it was his original draft or a copy of it.

40. 2 ADAMS, LIFE & WRITINGS OF JARED SPARKS 227-229 (1893); 3 FARRAND 502.

41. *Ibid.*

42. In his "Note" on the Pinckney plan; in his editorial note; in letters to Sparks Nov. 25, 1831, to Grimke Jan. 6, 1834, to Duer June 5, 1835. 3 FARRAND 505, 514, 531, 534.

inal Pinckney draft introduced in the Convention. He preferred instead the role of an advocate. "I should not," he wrote, "be a party to an exposure of the strange incongruities into which he [Pinckney] has fallen, without a fuller view of the proofs, and the obligation not to withhold them, than the present occasion would permit."⁴³

Madison's reluctance, however, did not prevent him from getting the idea across in his correspondence that there was something wrong with the 1818 plan. In at least four instances he referred to the "delicate" nature of the question.⁴⁴ And in his last letter on the subject in 1835, he wrote: "In my present condition, enfeebled by age and crippled by disease, I may well be excused for wishing not to be in any way brought to public view on subjects involving considerations of a delicate nature."⁴⁵

But, indeed, while no member of the Convention except Madison was alive at this time, it seems that there were papers extant which could have thrown light on the subject. Pinckney's grandson, W. S. Elliot, in an 1866 article implied that most of Pinckney's papers were destroyed in the Charleston fire of 1861.⁴⁶ In his letter to Grimke in 1834, Madison wrote: "I knew Mr. P. well, and was always on a footing of friendship with him. But this consideration ought not to weigh against justice to others, as well as against truth on a subject like that of the Constitution of the U. S."⁴⁷ Had this consideration for "justice to others" been extended to Mr. Pinckney, Mr. Madison would, perhaps, have been led to publicly raise the issue of the draft. An investigation by friends of Pinckney might have turned up enough new evidence to clarify the matter. It is unfortunate for the historian that Madison did not see his way clear to bring the matter to public attention.

By the fourteenth of November, 1831, Sparks' mind had got "into a new perplexity about Pinckney's Draught." After comparing the 1818 draft to the report of the Committee of Detail brought in on August 6, 1787, Sparks wrote to Madison:

43. 2 ADAMS, *op. cit. supra* note 40, at 227, 229; 3 FARRAND 503.

44. Letters to Sparks Nov. 25, 1831; to Grimke Jan. 6, 1834; to Duer June 5, 1833; to Paulding April, 1831. 3 FARRAND 514, 531, 534, 500.

45. 4 TO DUER, LETTERS AND OTHER WRITINGS OF JAMES MADISON, 381 (1884).

46. See I JAMESON, *op. cit. supra* note 39 at 131.

47. 3 FARRAND 532.

It is impossible to resist the conviction, that they proceeded from one and the same source.

This being established, the only question is, whether it originated with the committee, or with Mr. Pinckney, and I confess that judging only from the face of the thing my impressions incline to the latter. Here are my reasons.

1. All the papers referred to the committee were Randolph's Resolutions as amended, and Patterson's Resolutions and Pinckney's Draught without having been altered or considered. The committee had them in hand nine days. Their Report bears no resemblance in form to either of the sets of resolutions, and contains several important provisions not found in either of them. Is it probable that they would have deserted these, particularly the former, which had been examined seriatim in the convention, and struck out an entirely new scheme (in its form) of which no hints had been given in the debates?

2. The language and arrangement of the Report are an improvement upon Pinckney's Draught. Negligent expressions are corrected, words changed and sentences broken for the better. In short, I think any person examining the two for the first time, without a knowledge of circumstances, or of the bearing of the question, would pronounce the Committee's Report to be a copy of the Draught, with amendments in style, and a few unimportant additions.

3. If this conclusion be not sound, it will follow that Mr. Pinckney sketched his draught from the Committee's Report, and in so artful a manner as to make it seem the original, a suspicion I suppose not to be admitted against a member of the Convention for forming the Constitution of the United States.

Will you have the goodness to let me know your opinion?⁴⁸

When Madison answered Sparks on November 25 he outlined all his charges against the 1818 paper but ignored Sparks' question as to the validity of his reasoning on the relationship of the Committee draft to the Pinckney draft.

48. Printed in NOTT, *op. cit. supra* note 39, at 149. Farrand, strangely, prints excerpts from this letter but omits this part of the letter. 3 FARRAND 513, 514. See 2 ADAMS, *op. cit. supra* note 40 at 230, 231.

Madison did admit, however, that the Committee might have paid "a passing respect for Mr. Pinckney's plan by adopting, in some cases, his arrangement; in others, his language."⁴⁹

No comment was forthcoming from Sparks until January 17, 1832, and then only after Madison had dispatched another letter on January 7. Sparks reluctantly assented that this letter seemed to him conclusive, but, he immediately adds, "I am still a good deal at a loss about the first draught of the Committee."⁵⁰

Madison repeated his allegations against the 1818 paper again in 1834 in writing to T. S. Grimke and in an 1835 letter to W. A. Duer. Finally he left among his papers, at death, a note to the Pinckney plan which sets forth the specific instances where the alleged error had crept into the 1818 draft. In this note Madison gave his final explanation of the differences between the original and the later Pinckney draft. The error, he said, is due to the loss of the original and by—

a consequent resort for a copy to the rough draught, in which erasures and interlineations following what passed in the Convention, might be confounded in part at least with the original text, and after a lapse of more than thirty years, confounded also in the memory of the Author.⁵¹

It will be noted here that this explanation corresponds with the original Madison explanation, as reported by Sparks in 1830, except for one modification. In his first recorded explanation, Madison evidently thought Pinckney had with him and used a copy of the original draft of his "system" of government in the Convention. After having read Pinckney's letter of December 30, 1818, Madison knew that Pinckney was not able to resort to a copy of the original. Pinckney had used four or five drafts, sending Adams the one he thought most similar to the original plan. Madison, in light of this information, modified his explanation by reasoning that Pinckney had followed Convention proceedings with a rough draft before him, changing it as the proceedings progressed. This is a remarkable explanation. It is a clear admission or suggestion that Pinckney's rough draft (made before the Convention) was so similar to the conclusions reached in convention after

49. 3 FARRAND 515.

50. Quoted by NOTT, *op. cit. supra* note 39, at 155.

51. The Note is printed in 3 FARRAND 504 FF.

"critical discussion" that the deviation of the Convention from the draft could be absorbed by erasures and interlineations. If this be so, it would bear out Pinckney's assertion that all of the four or five drafts were substantially the same. Certainly Pinckney did not "interline and erase" in all four or five drafts. If he was able to absorb the Convention deviations from his draft, such deviations must have been minor indeed and therefore would not have impaired the "substantial similarity" of the four or five drafts. Unfortunately this explanation cannot account for all of the alleged errors noted by Madison. There is a definite limit to the amount of material that can be absorbed in this manner. Some of the discrepancies suggested by Madison could not have been absorbed in this way.⁵²

Madison also left, in his own hand, an editorial note to be appended to his "Note on the Pinckney Plan." This editorial note was written so as to give the impression that it is a comment by the editor (Madison assumed his editor would be Mrs. Madison) and contains criticisms of the 1818 draft based on a comparison of the draft to the plan described by Pinckney in a pamphlet published in 1787 shortly after the close of the Convention.⁵³ This pamphlet contains a speech never delivered in convention and does not constitute conclusive evidence as to the contents of the original Pinckney draft.

The Sum and Substance of Madison's Charges

The *gravamina* of Madison's criticisms can be stated as follows: (1) the 1818 paper contains details, expressions and definitions which resulted from critical discussion in the Convention; (2) the draft contains propositions which Pinckney definitely opposed in the Convention; (3) Pinckney published a pamphlet in 1787 describing the plan he introduced in Convention—his description does not fit the 1818 draft.

As to the first category, the only example Madison cited here was Article VIII of the 1818 paper. This objection is disposed of simply by observing that not a single provision of Pinckney's Article VIII resulted from debate in the Convention. Every provision in the Article was brought before the

52. See: NORT, *op. cit. supra* note 39 at ch. 7.

53. Entitled "Observations on the Plan of Government Submitted to the Federal Convention, in Philadelphia, on the 28th of May, 1787" hereinafter referred to as "Observations." Printed in 3 FARRAND 106-123.

Convention by the report of the Committee of Detail on August 6th. The Committee had Pinckney's draft before it when framing the report.⁵⁴

The second charge is an accurate statement of the facts. It is certain that Pinckney opposed propositions in convention which are contained in the 1818 paper. The question here is the significance of the facts. While the original Pinckney plan does not appear to be extant, it seems that Otto, the French Charge d'Affairs, was in possession of a copy in June 1787. On June 10, 1787 Otto wrote a letter to the French Secretary of Foreign Affairs commenting on the Constitutional Convention and explaining the plans of reform projected in the Convention.⁵⁵ The plans of reform, he said, have been communicated to me. He then described, undoubtedly, some provisions from Pinckney's plan of government.

This conclusion is derived from several facts. Otto used the term "President" in describing the executive, a term which was used in the Convention for the first time in the report of the Committee of Detail brought in on August 6th. Otto reported in his letter that the second legislative chamber was to be called "*le Senat*." The executive Otto described was a single President elected for six years, and he referred to a "*Conseil compose des differens Ministres d'Etats*." By June 10th, when Otto was writing, there had only been two sets of propositions submitted to the Convention; the general resolutions of Randolph and the detailed plan in articles and sections submitted by Charles Pinckney. Both of these sets of propositions were presented on May 29th. It is ascertainable from other sources that the original Pinckney plan provided for a single "President"⁵⁶ while Randolph's seventh resolution spoke of a "National Executive"⁵⁷ and Randolph had in mind a plural executive.⁵⁸ It is known too that Pinckney's plan established a "Senate"⁵⁹ while the fifth of Randolph's resolutions refers only to the "second branch."⁶⁰ Only Pinckney's plan referred to a presidential council of revision composed of the heads of the executive departments.⁶¹ It appears, therefore, highly probable that Otto's comments on the struc-

54. See NOTT, *op. cit. supra* note 39, at 79.

55. The letter is printed in 3 FARRAND 39-45.

56. 2 FARRAND 135, 158.

57. 1 FARRAND 21.

58. *Id.* at 66, 88, 97.

59. 2 FARRAND 135, 158.

60. 1 FARRAND 20.

61. 2 FARRAND 135.

ture of the legislative branch and the type of executive, referred to parallel provisions in the original Pinckney plan. Otto's comments on these points do not contradict any known provisions in Pinckney's original system of government. On the contrary he described provisions which could have come from no other source than the Pinckney plan. If the foregoing conclusion be justified, it would seem, from Otto, that Pinckney's original plan provided for election of the first branch of the National Legislature by the people. The 1818 draft contains a similar provision.

But, as Madison was quick to point out, Pinckney in early June moved in convention to deprive the people of such a power. The weight of the evidence here seems to be on Madison's side when he charges that Pinckney favored election of the lower house of Congress by the state legislatures. Madison attempted to clinch this point in his "Editorial Note" in which he wrote:

But what conclusively proves that the choice of the H. of Reps. *by the people* could not have been the choice in the lost paper is a letter from Mr. Pinckney to J. M. of March 28, 1789, now on his files, in which he emphatically [shows] adherence to a choice by the *State Legres*.⁶²

This letter is printed in the *Documentary History of the Constitution* and contains the following sentences:

Are you not, to use a full expression, abundantly convinced that the theoretical nonsense of an election of the members of Congress by the people in the first instance, is clearly and practically wrong.—that it will in the end be the means of bringing our councils into contempt & that the legislature are the only proper judges of who ought to be elected?⁶³

An even earlier corroboration of Pinckney's views on this matter is contained in a letter to Rufus King dated January 26, 1789, in which Pinckney said:

You know I always preferred the election by the legislature, to that of the people, & I will now venture to pronounce that the mode which you & Madison & some others so thoroughly contended for & ultimately carried is the greatest blot in the constitution.⁶⁴

62. 3 FARRAND 505.

63. V, 168-169; 3 FARRAND 355.

64. 1 *The Life and Correspondence of Rufus King* 359 (C. R. King ed. 1900); 3 FARRAND 355.

It will be noted that in the letter to King, Pinckney used the phrase "I always preferred" This would seem to indicate that he never held any other view on this point and that his opposition to election of the lower federal house by the people, as voiced in the Convention on June 6, did not represent a change of mind on his part. The official journal, Madison's notes and Yates' Debates all record Pinckney's opposition of June 6. In addition, the copy of the Pinckney plan in the possession of George Read on May 21, 1787, provided for the house of delegates to "be chosen by the Legislature of each State."⁶⁵ C. C. Nott's suggestion that in view of the solidarity of the South Carolina delegation and the debate on May 31, the youngest member of the delegation changed his mind between May 29 and June 6 is not supported by the weighty evidence characterizing the contrary position.

The remainder of Madison's criticism falling in category two has considerably less weight. Madison called attention, for instance, to an error of omission. Article VIII of Pinckney's 1818 draft provides for a President, but, said Madison, "no provision is contained in the paper for the election of such an officer . . . notwithstanding the evident purpose of the Author to provide an *entire* plan of a Federal Government."⁶⁶ This charge must be read in light of the fact that Article VIII actually states that the President "shall be elected for . . . Years and shall be reeligible."⁶⁷ It is known from Pinckney's proposals in convention that he favored election of the executive by a majority of the National Legislature⁶⁸ and that he objected to election by the people in the Convention.⁶⁹

For another instance where the 1818 paper is at variance with the ideas of Pinckney expressed in the Convention, Madison cited Article VIII of the paper providing for impeachment of the President. On July 20, he pointed out, Pinckney "was opposed to any impeachability of the Executive Magistrate."⁷⁰ According to the records for that date, as reported by Madison, Pinckney did not see the necessity for impeach-

65. This letter is printed in Jameson, *op. cit. supra* note 39 at 119, 120; 3 FARRAND 25.

66. "Note to the Pinckney Plan", 3 FARRAND 504.

67. 3 FARRAND 599; TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION* 565 (1911).

68. 2 FARRAND 30, 403.

69. *Ibid.*

70. "Note to the Pinckney Plan", 3 FARRAND 505.

ment; he did not think that the President should be impeached while in office; and he was against impeachment by the Legislature. Failure to see the necessity of impeachment is somewhat weaker in meaning than "opposed to any impeachability." But that the President should not be impeachable while in office would seem to indicate opposition to "any impeachment" since a man out of office cannot be impeached, without a broader interpretation of the term than is usually given.

Article III of the 1818 draft requires that all money bills originate in the first branch of the Legislature. Pinckney, declared Madison, "strenuously opposed" this on August 8 and again on August 11th. These two dates are only a few days after the Committee of Detail reported its draft on August 6th. Debate then followed on the provisions of the draft and it was during this debate that Pinckney on August 8 favored equality between House and Senate in respect to the power to originate money bills. On August 11 he only opposed *reconsideration* of the section. The section in the Committee draft on this point is so like that of Article III that if the original Pinckney draft contained the provisions of Article III, Pinckney, by opposing the section in the Committee draft was in opposition to a provision of his original plan. But one must look further on this point. Pinckney's reasons for opposition to this section of the Committee draft were given on June 13. "Mr. Pinckney thinks the question premature. If the Senate shd. be formed on the *same* proportional representation as it stands at present, they sd have equal power; otherwise if a different principle sd. be introduced."⁷¹

As of June 13 the Senate was to be formed on the basis of proportional population. But in Pinckney's plan the Senate was to be based on proportional size—thus a "different principle" was introduced and the necessity for equal power vitiated. Furthermore, Otto reported to the French Foreign Secretary that "*les bills concernant les finances ne pourroient etre proposes que dans*" the lower house of the Legislature.⁷² Otto undoubtedly got this provision from the Pinckney plan. Otto was writing on June 10; the point was not brought up in the Convention before June 13⁷³ and the Randolph resolutions contained no such provision.

71. 1 FARRAND 234.

72. 3 FARRAND 40.

73. By Gerry, 1 FARRAND 233.

Article V of the 1818 paper makes members of each house ineligible to, as well as incapable of holding any office under the Union. Madison claimed that this disqualification was "highly disapproved and opposed by him [Pinckney] Aug: 14."⁷⁴ Again the question is whether Pinckney's statement of August 14 can be construed as high disapproval and opposition. Actually Pinckney moved to postpone Article VI, section 9, of the Committee draft in order to take up the proposition that "the members of each House shall be incapable of holding any office under the U. S. for which they or any of others for their benefit receive any salary, fees, or emoluments of any kind—and the acceptance of such office shall vacate their seats respectively."⁷⁵ He moved the same proposition on September 3, stating that he wished to restrain the incompatibility of members to hold United States' office to a *mere* incompatibility. The Convention accepted the clause on the same date after amending the absolute prohibition in the direction indicated by Pinckney but on motion of Williamson of North Carolina.⁷⁶

If Pinckney used a rough draft for his 1818 paper as he claimed, it is possible that the rough draft contained the prohibition on office holding for legislators but did not contain the qualification he later added to the draft put before the Convention. Madison's remarks on this alleged discrepancy are far from conclusive.

Madison's criticisms of the 1818 paper which fall in category three have the least value of all. This is due to the position occupied by the "Observations." The speech contained in this pamphlet was never given in the Convention. Indeed, several paragraphs of the speech were taken verbatim from Pinckney's oration before the New Jersey Legislature in 1786.⁷⁷ The pamphlet, published after adjournment of the

74. "Note on the Pinckney Plan", 3 FARRAND 505.

75. 2 FARRAND 284.

76. Madison reported it this way: "The last clause, rendering a seat in the Legislature & an office incompatible was agreed to *nem con*:" 2 FARRAND 492. It is notable that Pinckney's first motion on this point was lost by the vote of South Carolina and that South Carolina voted "no" on his second motion and on Williamson's motion. The inference is that the South Carolina delegation split three-one on all three votes. It indicates, perhaps, that Charles Pinckney did not always carry the delegation and *vice versa*. This has significance for Nott's suggestion that Pinckney changed his mind on election of the lower federal house after hearing the views of the South Carolina delegation.

77. Carey, *Account of a deputation from Congress to the assembly of New Jersey*, 22 THE AMERICAN MUSEUM 155 (1787). (August, 1787) 155.

Convention, describes some of the provisions of Pinckney's original plan and can be used to corroborate evidence gained from other sources. But it is in no way conclusive evidence of the contents of Pinckney's original paper.

What can be concluded about Madison's criticisms of the 1818 draft? It is clear that every one of the criticisms is based on a particular inference. Madison does not produce absolute proof of his charges; he does not produce conclusive documentary evidence or the direct evidence of a witness to the facts. The entire edifice of speculative charges is based on inference. It is imperative therefore, that one know the factual circumstances from which these inferences were drawn in order to assess their value. An analysis of these facts indicates that: (1) in some instances Madison did not adequately assess the facts; (2) in some instances he did not take into consideration *all* the facts; (3) in most cases the inferences drawn from the factual circumstances do not seem to be justified. In respect to this point it can be said that most of the discrepancies between provisions of the 1818 draft and Pinckney's views in convention can be explained by a change of opinion on the part of Pinckney.

The expectation that there would be frequent changes of opinion, in fact, prompted changes in the rules reported by the rules committee on May 28.⁷⁸ Benjamin Franklin is reported to have written Thomas Jefferson: "I have often found I was mistaken in my most favorite ideas. I have upon the present occasion given up, upon mature reflection, many points which, at the beginning, I thought myself immoveably & decidedly in favor of."⁷⁹ Madison himself noted that there were—

Few who did not change in the progress of discussions the opinions on important points which they carried into the Convention Few who, at the close of the Convention, were not ready to admit this change as the enlightening effect of the discussions . . . And how few, whose opinions at the close of the Convention, have not undergone changes on some points, under the more enlightening influence of experience.⁸⁰

78. See the statements by Mason and King on that date. 1 FARRAND 10.

79. Letter to Jefferson, Oct. 11, 1787; printed in 3 FARRAND 105.

80. "Genl. Remarks On the Convention", 3 FARRAND 455.

Should the right exercised by Franklin and so many others be denied Pinckney? Can one say that of all the members of the Convention only Charles Pinckney did not change his mind? It is remarkable that Madison cited only four instances of conflict between Pinckney's ideas as expressed in convention and Pinckney's ideas contained in the 1818 draft. These four instances are not as clear cut as Madison imagined. But if they were all valid Mr. Pinckney would have to be classed as rather resolute in his opinions for he would have changed his mind only four times in four and one half months of debate and discussion.

It can be concluded that there is a possibility that in some respects the 1818 paper differs from the original Pinckney plan. At least this seems justified in respect to the provision for election of the lower federal house. But even here one cannot be sure of Pinckney's position in the original plan. It is known for instance that Pinckney based his plan, to a large extent, on various state constitutions. In the 1788 ratification convention in South Carolina, Pinckney specifically referred to provisions in the constitutions of Pennsylvania, Georgia, Maryland, Massachusetts, New York and "all other states." The New York constitution he thought the 'best in the Union.'⁸¹ Under the first state constitutions every state with a bi-cameral system provided for election of the lower house by the people; this included New York, the state with the "best" constitution. In Rhode Island and Connecticut where the colonial charters were retained popular election was the mode as it was in the unicameral legislatures of Pennsylvania and Georgia.⁸² It is possible that in utilizing the state constitutions for the preparation of his draft, Pinckney temporarily followed their provisions for popular elections. This remains, however, the most questionable provision of the 1818 paper. If this provision represents error, the explanation for it has not been furnished. Madison's explanation becomes plausible only if restricted to this one provision or if considerably less error is alleged. The mass of alleged error noted by Madison cannot be explained as he attempted to do. Article VIII of the 1818 paper is too extensive to have been absorbed by interlineation. The net positive value of Madison's effort is that he does raise certain questions. But he furnishes no answers

81. JERVEY, ROBERT Y. HAYNE AND HIS TIMES, 24 (1909).

82. See: Morey, *The First State Constitutions*, 4 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 201-232 (1893).

if one discounts what amounts to imaginative speculation. The net negative aspect of Madison's questions and speculations, and this is more important, is that most subsequent commentators have assumed the speculations to represent conclusive proof.

APPENDIX

MR. CHARLES PINCKNEY'S DRAFT OF A FEDERAL GOVERNMENT

We the people of the States of New Hampshire Massachusetts Rhode Island & Providence Plantations - Connecticut New York New Jersey Pennsylvania Delaware Maryland Virginia North Caroline South Carolina & Georgia do ordain declare & establish the following Constitution for the Government of Ourselves and Posterity.

Article 1:

The Stile of This Government shall be The United States of America & The Government shall consist of supreme legislative Executive and judicial Powers —

2

The Legislative Power shall be vested in a Congress To consist of Two separate Houses — One to be called The House of Delegates & the other the Senate who shall meet on the day of in every Year

3

The members of the House of Delegates shall be chosen every Year by the people of the several States & the qualification of the electors shall be the same as those of the Electors in the several States for their legislatures — each member shall have been a citizen of the United States for Years — shall be of Yea of age & a resident of the State he is chosen for — until a census of the people shall be taken in the manner herein after mentioned the House of Delegates shall consist of to be chosen from the different states in the following proportions — for New Hampshire. for Massachusetts for Rhode Island for Connecticut. for New York for New Jersey. for Pennsylvania. for Delaware for Maryld for Virginie. for North Caroline for South Carolina. for Georgia. & the Legislature shall hereafter regulate the number of delegates by the number of inhabitants according to the Provisions hereinafter made, at the rate of one for every thousand— all money bills of every kind shall originate in the house of Delegates & shall not be altered by the Senate — The House of Delegates shall exclusively possess the power of impeachment & shall choose its own Officers & Vacancies therein shall be supplied by the Executive authority of the State in the representation from which they shall happen —

4

The Senate shall be elected & chosen by the House of Delegates which House immediately after their meeting shall choose by ballot Senators from among the Citizens & residents of New Hampshire. from among those of Massachusetts. from among those of Rhode Island. from among those of Connecticut. from among those of New York, from among those of New Jersey from among those of Pennsylvania from among those of Delaware — from among those of Maryland. from among those of Virginia from among those of North Caroline from among those of South Caroline & from among those of Georgia —

The Senators chosen from New Hampshire Massachusetts Rhode Island & Connecticut shall form one class — those from New York. New Jersey Pennsylvania & Delaware one class — & those from Maryland Virginia North Carolina South Carolina & Georgia one class —

The House of Delegates shall number these Classes one two three & fix the times of their service by Lot — the first Class shall serve for Years — the second for Years & the third for

Years — as their Times of service expire the House of Delegates shall fill them up by Elections for Years & they shall fill all Vacancies that arise from death or resignation for the Time of service remaining of the members so dying or resigning —

Each Senator shall be years of age at leest — shall have been a Citizen of the United States at 4 Years before his Election & shall be a resident of the state he is chosen from —

The Senate shall choose its own Officers

5

Each State shall prescribe the time & manner of holding Elections by the People for the house of Delegates & the House of Delegates shall be the judges of the Elections returns & Qualifications of their members

In each house a Majority shall constitute a Quorum to do business — Freedom of Speech & Debate in the legislature shall not be impeached or Questioned in any place out of it & the Members of both Houses shall in all cases except for Treason Felony or breach of the Peace be free from arrest during their attendance at Congress & in going to & returning from it — both houses shall keep journals of their Proceedings & publish them except on secret occasions & the yeas and nays may be entered thereon at the desire of one of the members present.

Neither house without the consent of the other shall adjourn for more than days nor to any Place but where they are sitting.

The members of each house shall not be eligible to or capable of holding any office under the Union during the time for which they have been respectively elected nor the members of the Senate for one Year after —

The members of each house shall be paid for their services by the State's which they represent —

Every bill which shall have passed the Legislature shall be presented to the President of the United States for his revision — if he approves it he shall sign it — but if he does not approve it he shall return it with his objections to the house it originated in, which house if two thirds of the members present, notwithstanding the Presidents objections agree to pass it, shall send it to the other house with the Presidents Objections, where if two thirds of the members present also agree to pass it, the same shall become a law — & all bills sent to the President & not returned by him within days shall be laws unless the Legislature by their adjournment prevent their return in which case they shall not be laws.

6th

The Legislature of the United States shall have the power to lay & collect Taxes, Duties, Imposts & Excises

To regulate Commerce with all nations & among the several states —

To borrow money & emit bills of Credit

To establish Post Offices

To raise armies

To build & equip Fleets

To pass laws for arming organising & disciplining the Militia of the United States —

To subdue a rebellion in any state on application of its legislature

To coin money & regulate the Value of all coins & fix the Standard of weights & measures

To provide such Dock Yards & arsenals & erect such fortifications as may be necessary for the United States, & to exercise exclusive Jurisdiction therein

To appoint a Treasurer by ballott
 To constitute Tribunals inferior to the Supreme Court
 To establish Post & military roads
 To establish and provide for a national University at the Seat of the Government of the United States —
 To establish uniform rules of Naturalization
 To provide for the establishment of a Seat of Government for the United States not exceeding _____ miles square in which they shall have exclusive jurisdiction
 To make rules concerning Captures from an Enemy
 To declare the law & Punishment of piracies & felonies at sea & of counterfeiting Coin & of all offences against the Laws of Nations
 To call forth the aid of the Militia to execute the laws of the Union
 enforce treaties suppress insurrections & repel invasions
 And to make all laws for carrying the foregoing powers into execution.—

The Legislature of the United States shall have the Power to declare the Punishment of Treason which shall consist only in levying War against the United States or any of them or in adhering to their Enemies.—No person shall be convicted of Treason but by the Testimony of two Witnesses.—

The proportions of direct Taxation shall be regulated by the whole number of inhabitants of every description which number shall within

_____ Years after the first meeting of the Legislature & within the term of every _____ Years after be taken in the manner to be prescribed by the legislature

No tax shall be laid on articles exported from the States — nor capitation tax but in proportion to the Census before directed

All laws regulating Commerce shall require the assent of two thirds of the members present in each house —

The United States shall not grant any title of Nobility —

The Legislature of the United States shall pass no Law on the subject of Religion, nor touching or abridging the Liberty of the Press nor shall the Privilege of the Writ of Habeas Corpus ever be suspended except in case of Rebellion or Invasion

All acts made by the Legislature of the United States pursuant to this Constitution & all Treaties made under the authority of the United States shall be the Supreme Law of the Land & all Judges shall be bound to consider them as such in their decisions

7

The Senate shall have the sole and exclusive power to declare war & to make treaties & to appoint Ambassadors & other Ministers to Foreign nations & Judges of the Supreme Court

They shall have the exclusive power to regulate the manner of deciding all disputes & Controversies now subsisting or which may arise between the States respecting Jurisdiction or Territory

8

The Executive Power of the United States shall be vested in a President of the United States of America which shall be his stile & his title shall be His Excellency — He shall be elected for _____ Years & shall be reeligible.

He shall from time give information to the Legislature of the state of the Union & recommend to their consideration the measures he may think necessary — he shall take care that the laws of the United States be duly executed: he shall commission all the Officers of the United States & except as to Ambassadors other ministers & Judges of the Supreme Court he shall nominate & with the consent of the Senate appoint all other Officers of the United States — He shall receive public Ministers from foreign nations & may correspond with the Executives of the different states—He shall have power to grant pardons and reprieves except in impeachments — He shall be commander in chief of the army & navy of the United States & of the Militia of the several

states, & shall receive a compensation which shall not be increased or diminished during his continuance in office — At Entering on the Duties of his office he shall take an Oath to faithfully execute the duties of a President of the United States — He shall be removed from his office on impeachment by the house of Delegates & Conviction in the supreme Court of Treason bribery or Corruption — In case of his removal death resignation or disability The President of the Senate shall exercise the duties of his office until another President be chosen — & in case of the death of the President of the Senate the Speaker of the House of Delegates shall do so —

9

The Legislature of the United States shall have the Power & it shall be their duty to establish such Courts of Law Equity & Admiralty as shall be necessary — the Judges of these Courts shall hold their Offices during good behavior & receive a compensation which shall not be increased or diminished during their continuance in office — One of these Courts shall be termed the Supreme Court whose Jurisdiction shall extend to all cases arising under the laws of the United States or affecting ambassadors other public Ministers & Consuls — To the trial of impeachments of Officers of the United States — To all cases of Admiralty & maritime jurisdiction — In cases of impeachment affecting Ambassadors and other public Ministers the Jurisdiction shall be original & in all the other cases appellate —

All Criminal offences (except in cases of impeachment) shall be tried in the state where they shall be committed — the trial shall be open & public & be by Jury —

10

Immediately after the first census of the people of United States the House of Delegates shall apportion the Senate by electing for each State out of the Citizens resident therein one Senator for every members such state shall have in the house of Delegates — Each State however shall be entitled to have at least one member in the Senate —

11

No State shall grant letters of marque & reprisal or enter into treaty or alliance or confederation nor grant any title of nobility nor without the Consent of the Legislature of the United States lay any impost on imports — nor keep Troops or Ships of War in Time of peace — nor enter into compacts with other states or foreign powers or emit bills of Credit or make anything but Gold Silver or Copper a Tender in payment of debts nor engage in War except for self defence when actually invaded or the danger of invasion is so great as not to admit of delay until the Government of the United States can be informed thereof — & to render these prohibitions effectual the Legislature of the United States shall have the power to revise the laws of the several states that may be supposed to infringe the Powers exclusively delegated by the Constitution to Congress & to negative & annul such as do

12

The Citizens of each state shall be entitled to all privileges & immunities of Citizens in the several states —

Any person charged with Crimes in any State fleeing from Justice in another shall on demand of the Executive of the State from which he fled be delivered up & removed to the State having jurisdiction of the Offence —

13

Full faith shall be given in each State to the acts of the Legislature & to the records & judicial Proceedings of the Courts & Magistrates of every State

14

The Legislature shall have power to admit new States into the Union on the same terms with the original States provided two thirds of the members present in both houses agree

15

On the application of the legislature of a State the United States shall protect it against domestic insurrections

16

If Two Thirds of the Legislatures of the States apply for the same The Legislature of the United States shall call a Convention for the purpose of amending the Constitution — Or should Congress with the Consent of Two Thirds of each house propose to the States amendments to the same — the agreement of Two Thirds of the Legislatures of the States shall be sufficient to make the said amendments Parts of the Constitution

The Ratifications of the Conventions of States shall be sufficient for organizing this Constitution. —