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## Criminal Practice, and Politics and the Constitution in the History of the United States

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## BOOK REVIEWS

CRIMINAL PRACTICE. By John C. Lowe, Charlottesville, Va.: The Michie Company, 1984. 852 pages, \$140.00

*Reviewed by Ronald J. Bacigal\**

When John Lowe asked me to review his book, I confess that I was surprised. Having just authored two books on Virginia Criminal Procedure,<sup>1</sup> I considered John and myself to be competitors. However, after examining his book I now understand that our books serve different purposes and in fact complement each other.

Evaluating Mr. Lowe's book requires some familiarity with the Michie Company's series of publications known as the *Law Practice System*. As the Michie Company explains:

A law practice system is a documented, logical method of handling a specific area of law practice. In convenient, looseleaf format, each System combines forms, data collection sheets and detailed written instructions which lead the attorney and the law office staff through the various steps necessary to accomplish a given legal task. . . . The systems approach enables the practitioner to conserve professional time, maximize productivity, and improve accuracy and reliability. It organizes each step of a given legal task so that more work can be done by the legal staff, thus saving the attorney's valuable time.<sup>2</sup>

It is important to keep the above purpose in mind, for as Mr. Lowe notes, his book "is not intended to be a criminal law textbook" nor "a treatise on Virginia criminal law."<sup>3</sup> While Mr. Lowe's

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1. (Editor's Note) Professor Bacigal's publications—R. BACIGAL, *VIRGINIA CRIMINAL PROCEDURE* (1983) and R. BACIGAL, *VIRGINIA CRIMINAL PROCEDURE FORMS* (1984)—are reviewed in 17 U. RICH. L. REV. 881 (1983).

2. Michie Company, advertising circular (1984).

3. J. LOWE, *CRIMINAL PRACTICE* § 5006 (Michie 1984).

book cannot be used as a source of statutory or case law, the book does a first rate job of fulfilling its primary purpose: "to provide a primer on forms practice in Virginia for young lawyers, paralegals and legal secretaries, and others . . . who do not have many years of experience upon which to draw for the creation of forms to use in criminal cases."<sup>4</sup> The excellent index and cross-references make it easy for the young practitioner to flip to the appropriate section and review a variety of forms which might be used at each stage of the criminal proceeding. There are also forms which cover areas outside the mainstream of criminal practice, such as petitions for restoration of civil rights and claims under the victim's compensation act. The novice practitioner will benefit greatly from assistance in such neglected areas.

Another significant benefit of the book is the many forms which assist young practitioners in making a record to protect themselves. Claims of ineffective representation of defense counsel and attacks on the competency and the integrity of prosecutors are mounting rapidly. Inadequate records maintained by attorneys often make it difficult to counter such claims. The book suggests detailed procedures for establishing the attorney's actions and making a record of the client's input. These practical considerations are often not addressed in treatises on substantive or procedural law, and ignorance of these procedures can present dangerous pitfalls for the unwary novice.

The book, however, is more than a primer for young lawyers. Mr. Lowe is one of the most successful criminal defense attorneys in the state and has quite a national reputation as well. Given the sophisticated nature of Mr. Lowe's practice, it is not surprising to find a number of complex and sophisticated forms which will assist even the experienced practitioner. Some of these creative and innovative forms reflect frontier legal issues and thus may not be readily accepted by Virginia trial courts. But the benefit of these forms cannot be denigrated merely because they require counsel to muster strong arguments for their acceptance.

While anyone can benefit from an examination of this book, its major focus is upon assisting the novice practitioner. A young attorney entering an established law firm would expect to be placed under the protective tutelage of an experienced lawyer. Through his book, Mr. Lowe acts as a surrogate tutor for the practitioner

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4. *Id.*

who does not have the luxury of walking down the hall to obtain a quick answer from a senior partner. Mr. Lowe takes the novice under his wing, opens his complete files, and offers the guidance gleaned from years of successful practice. If I were a young criminal lawyer about to start out as a sole practitioner and needing guidance on how to run a law office, Mr. Lowe's book would be my first purchase.



## CROSSKEY VERSUS MADISON: JAMES MADISON AND THE UNITED STATES CONSTITUTION

POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES. By W. W. Crosskey. Chicago, Illinois: University of Chicago Press, 1953-80. 3 vol. series.

*Reviewed by Donald O. Dewey\**

The one piece of information regarding James Madison that is common knowledge is that he was the "Father of the Constitution." If we are to err regarding Madison's impact, it is most likely to underemphasize his role; it can hardly be overemphasized.

Madison initiated the convening of and participated actively in the Annapolis Convention, which recommended the Federal Convention of 1787. He made the motion in the Virginia House of Delegates which was the next step toward calling the Convention. In the interim he assiduously studied ancient confederacies and thus came to Philadelphia as the best prepared delegate. Delegate William Pierce declared that "every Person seems to acknowledge his greatness" and described him as "the best informed Man of any point in debate."<sup>1</sup> Almost certainly he was the author of the Virginia Plan of Union, which guided the Convention and provided a nationalistic framework for the Constitution. In the Convention he was one of its most active and creative participants. Recognizing the historical importance of the Convention, and the inadequacy of its secretary, Madison took voluminous notes of the debates, in "abbreviations and marks legible to me,"<sup>2</sup> and then he spent his evenings transcribing them while other delegates patronized the inns. The validity of these notes is the principal issue of this paper.

After the Convention, Madison played a vital role in the ratifica-

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\* Dean, School of Natural & Social Sciences, Professor of History, California State University; B.A., 1952, University of Oregon; M.S. History, 1954, University of Utah; Ph.D. History, 1960, University of Chicago. The author's doctoral thesis, entitled "The Sage of Montpelier, The Political and Constitutional Ideas—1816-1836," discusses the history and works of James Madison during the last twenty years of his life.

1. 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 94 (1921) [hereinafter cited as *RECORDS*].

2. I. BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800*, at 23-26 (1950).

tion of the Constitution in the crucial state of Virginia, the largest state in both area and population. The legendary debates between James Madison and Patrick Henry were among those rare moments when reason prevailed over oratory. Madison also wrote about one-third of *The Federalist*, which helped to win ratification in New York. Finally, he was the leading member of the first House of Representatives under the Constitution, where he "fathered"—or at least "midwived"—the Bill of Rights as well.

Madison was so conscious of the political significance of his Notes of the Debates that he did not want them published until all members of the Convention were dead.<sup>3</sup> As if to assure this commitment, he outlived the next-to-last member to die by seven years. Madison died in 1836 and his Notes were first published in 1840. Thus many crucial decisions regarding the Constitution (e.g. the Marshall decision and the nullification crises) occurred with limited knowledge concerning the Federal Convention. Unfortunately, the delay also permitted the development of a fanciful theory about what Madison did to the Notes in the interim.

William W. Crosskey's massive *Politics and the Constitution*<sup>4</sup> is intended mainly to prove that the federal government has not done the job it was intended to do. Crosskey contends that Congress's powers were intended to be virtually unlimited and that the Supreme Court has wrongly asserted the authority to rule upon the constitutionality of federal legislation. Crosskey's greatest concern is Congress's failure to control commerce, which to him means virtually every gainful activity of American citizens; he is convinced that the distinction between interstate and intrastate commerce is a fraud perpetrated by Jeffersonian interpreters of the Constitution. Because general knowledge of the writings of the Constitution did not accord with Crosskey's preconceptions, he had to impeach the key witness regarding the Federal Convention, namely James Madison.<sup>5</sup>

To Crosskey, Madison bastardized the Constitution rather than being its legitimate father. Crosskey accuses Madison of distorting

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3. *Id.* at 19-22; RECORDS, *supra* note 1, at 147, 475.

4. W. W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953). Crosskey was responsible for two volumes of the work; a third was written by William Jeffrey, Jr.

5. One is reminded of Charles A. Beard's need, forty years earlier, to put the Supreme Court in its place by arguing that the authors of the Constitution were inspired by economic, rather than patriotic, motives.

his Notes of the Debates of the Federal Convention in order to distort the United States Constitution for political purposes. Madison is accused of inventing speeches in the Federal Convention as well as falsifying several other sections.

Here is a summary of the indictment presented in *Politics and the Constitution*. Writers have placed undue reliance on the papers of one man, James Madison, "the Chief—and, in many cases, the sole—source on which our constitutional histories rely,"<sup>6</sup> whom Crosskey contends does not deserve our trust. In the 1820's Madison supposedly doctored the Notes of the Debates for political purposes, inventing speeches, debate, and issues, and suppressing other issues. All the "fighting issues"<sup>7</sup> of the Jeffersonians are "supported or suggested"<sup>8</sup> in the notes. While errors would be expected in the work of an amateur reporter, Madison's distortions were said to be deviously intended for "petty, personal, and political"<sup>9</sup> purposes, as well as for patriotic purposes, as Madison understood patriotism. The distorting impact of Madisonian sources and Jeffersonian ideas helped to make our government the "queer, crippled thing which it is."<sup>10</sup> Crosskey contends that Madison's notes were greeted with skepticism "in certain quarters"<sup>11</sup> when finally published in 1840. Then he cites as authority, in a footnote hidden at the back of Volume II, the fact that Alexander Hamilton's son questioned the accuracy of the Notes.<sup>12</sup> This is rather like asking Julie Nixon Eisenhower the public view of John Dean's veracity.

But Crosskey does not stop there; many other Madisonian manuscripts must be discredited, including Madison's notes on the Continental Congress, *The Federalist*, and even Madison's personal correspondence. To Crosskey, *The Federalist* was characterized by "sophistry, innuendo, and near-falsehood,"<sup>13</sup> especially when Madison was writing in Publius. Indeed, Madison's contributions came "perilously close to falsehood."<sup>14</sup> *The Federalist* was

6. 1 W.W. CROSSKEY, *supra* note 4, at 7.

7. *Id.* at 11.

8. *Id.*

9. *Id.* at 13.

10. *Id.* at 7. *See also id.* at 11-13.

11. *Id.* at 7.

12. *Id.* at 8. *See also 2 id.* at 1255.

13. 1 *id.* at 10.

14. *Id.* at 9.

considered "locally ridiculous"<sup>15</sup> in the few areas where it was read and its "sophistries, its inconsistencies, distractions, and other tricks are obvious today."<sup>16</sup> Anyway, it was merely intended to fill space in the "federal" newspapers and thus justify presenting only one side of the issue.<sup>17</sup> Even personal letters to and from Madison are suspect. Crosskey concedes that most of "the many letters to and from Madison among the Madison papers . . . are genuine,"<sup>18</sup> but the gaps in his correspondence are "significant,"<sup>19</sup> and what remains must be used cautiously. The authenticity of a few unnamed letters "is at least questionable."<sup>20</sup> All constitutional references in Madison's preserved correspondence must be examined "with utmost caution."<sup>21</sup> The letters of Madison in the papers of "Washington and other men who are beyond suspicion"<sup>22</sup> should be used as the standard in judging his other letters.<sup>23</sup> Presumably only Federalists are beyond suspicion.

That is the Crosskey thesis on Madison as of 1953 when his 1400-page work was published. It was offered as unsubstantiated declarations, with the promise that the thesis would be backed up in due course by facts. We are still awaiting those facts on Madison's notes after over thirty years. Volume III of *Politics and the Constitution* has been edited from Crosskey's drafts by his former student William Jeffrey and published in 1980, twelve years after Crosskey's death. The authors of Volume III speak of a fourth and final volume that will finally get to the Federal Convention and presumably Madison's Notes,<sup>24</sup> though this now seems unlikely since both authors are now deceased.

It is significant that the motto of Crosskey's third volume is Patrick Henry's explanation for refusing to participate in the Convention of 1787, "I smell a rat," since a footnote in this volume hints quite broadly that Madison was the rodent in question.<sup>25</sup> One chapter heading particularly epitomizes the subtlety of the Cross-

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15. *Id.* at 10.

16. *Id.*

17. *Id.* at 9-11.

18. *Id.* at 8.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 9.

23. *Id.* at 8.

24. 3 *id.* at 400-01, 409.

25. *Id.* at 350.

key style: "James Madison's memorandum on the Proceedings in Congress on February 21, 1787: Herein of the First Clear Instance of Madisonian Falsification."<sup>26</sup> In explaining his vote in Congress on a New York proposal regarding the Constitutional Convention, Madison expressed a view which Crosskey insists he could not have held in 1787. Furthermore, Madison's record of William Samuel Johnson's vote on the same issue differs from that shown in the official journal. This is enough to convince Crosskey that the Madison memorandum "can only be regarded as a document systematically rewritten at a later date to obscure and obfuscate what had gone on in Congress."<sup>27</sup> Crosskey's reasoning on the matter demonstrates his prosecutorial style. To present the argument in full would be tedious and time-consuming, as is much of Crosskey's rhetoric; instead, key phrases will be highlighted to show how it develops:

[T]he reader will find it extremely difficult to believe Madison was not fully aware that the greatest difficulty was certain to be encountered in obtaining such a government through any submission to the people. The consequence is that a vote by James Madison on February 21, 1787, for a true constituent convention is not an improbable, but a highly probable, act. . . .

*If James Madison deliberately voted on February 21, 1787 for a true constituent convention, the certainty is that, in his memorandum, he must also deliberately have misstated the reason for his vote for the New York motion. A little reflection will likewise show the reader that, if such was the fact about Madison's vote, the general impression his memorandum seeks to convey of that day's whole doings in Congress must, in various other respects, have been deliberately untruthful as well. For example, if the New York motion was an actual attempt to obtain a true constituent convention, there must certainly have been some statement and discussion of its purpose on the floor of Congress. If such was the purpose of the New York motion, it was a purpose that could not possibly have been accomplished slyly . . . . If, therefore, the New York motion did have the purpose we have suggested . . . , Madison's memorandum can only be regarded as a document systematically rewritten at a later date to obscure and obfuscate what had gone on in Congress. . . .*<sup>28</sup>

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26. *Id.*

27. *Id.*

28. *Id.* at 398 (emphasis in original).

This is one of a number of instances where Crosskey marches relentlessly from possibilities to probabilities to certainties.

Having satisfied himself that he has caught Madison in the falsification of a document, Crosskey next takes the quantum leap to conclude that this likewise demonstrates the falseness of Madison's Notes on the Federal Convention. The following allegation is totally unencumbered with documentation:

Shortly after the publication of the Convention's journal and the notes taken by William Yates<sup>29</sup> . . . Madison undertook to prepare for posthumous publication the memoranda he had made of the proceedings of the Continental Congress and of the debates in the Federal Convention. Considering the circumstances in which Madison did this work, and the sensitiveness which he constantly showed to criticism, the fact is scarcely surprising that the documents . . . show plain evidence of the kind of extensive alteration of which we have mentioned some instances . . . . There are many instances of what appear to be small, but are nonetheless important, alterations to the same general end; there are some plain cases of affirmative interpolation; and, most important of all, there are certain cases of egregious wholesale omission of comment upon matters with respect to which Madison changed sides.<sup>30</sup>

Crosskey also promises to present

a multiplicity of instances in Madison's notes on the Federal Convention, in each of which the probability of falsification is about what it is with respect to his memorandum on the proceedings in Congress . . . . [T]he separate instances are transformed into a single compound probability which amounts to a virtual certainty.<sup>31</sup>

He concludes that

the fact of falsification by Madison appears so palpably in case after case as to amount in the aggregate to certainty. That being [t]rue, any history based upon an implicit, uncritical acceptance of Madison's notes, including his memorandum of what went on in Congress on February 21, 1787, cannot fail to be in many very important respects false history.<sup>32</sup>

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29. This means 1821 or later.

30. 3 W. W. CROSSKEY, *supra* note 4, at 404.

31. *Id.* at 400.

32. *Id.*; see also *id.* at 409.

Crosskey also published a promise of things to come in a 1968 article in *The Chicago Law Review*. "The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison"<sup>33</sup> is a seven-page fragment which was to be included in Volume IV of *Politics and the Constitution*. Because Madison's Notes use the term "ex-post-facto" in a manner different from how Crosskey contends it *should* have been used, Crosskey senses "a later Madisonian fabrication."<sup>34</sup> Madison's failure also to record a motion regarding the insertion of the word "previously" in the Contract Clause was described as a "deception."<sup>35</sup> Crosskey neglected to mention that Madison himself had admitted that he did not attend every single moment of the Convention.<sup>36</sup> Even the Father of the Constitution presumably had biological needs.

Volume III finally reveals the reasons for Madison's "apostasy"<sup>37</sup> from Hamiltonian nationalism—Crosskey would call it American constitutional nationalism. In addition to the selfish motives which Crosskey insisted prompted Madison's every move, he was especially influenced by the slave rebellion in San Dominique, which began in August, 1791. Crosskey describes the slave rebellion at length, without relating it in any way to Madison personally. Yet Crosskey is convinced that fear of similar uprisings in Virginia were the cause of Madison's retreat from nationalism in 1791, rather than the less exotic fact that the Hamiltonian program came to fruition in 1790-1791.<sup>38</sup> Crosskey neglects to point out that Madison's opposition to the assumption of state debts and to the national bank occurred long before Toussaint L'Ouverture had even been heard of in North America.

Since the burden of proof should be on the innovator who introduces a startling doctrine that rejects the accumulated knowledge of the past, it might seem that this unsubstantiated thesis does not merit a response. Yet despite his lack of evidence, Crosskey has been given a surprising degree of credence. For example, when Lyman Butterfield, editor of *The Adams Family Papers* visited *The Papers of James Madison* in the early 1960's at the Uni-

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33. 35 U. CHI. L. REV. 248 (1968).

34. *Id.* at 252.

35. *Id.* at 254.

36. 3 RECORDS, *supra* note 1, at 550.

37. 3 W. W. CROSSKEY, *supra* note 4, at 405.

38. *Id.* at 405-08.

versity of Chicago, his first comment upon entering the Madison shop was, "Do you have the goods on Madison yet?" It was humor, but it demonstrates that Crosskey's thesis had not been banned in Boston.<sup>39</sup> There was a similar comment from Harold Syrett, editor of *The Papers of Alexander Hamilton*, which was probably more seriously intended. In the introduction to a recent book on Madison, the current editor of *The Papers of James Madison*, Robert A. Rutland, even remarked that Madison's "tinkering caused doubts as to what was changed in 1787 for the sake of accuracy and what might have been altered much later as an outright distortion." When questioned regarding this, Rutland confirmed that he only meant that Madison's methods of handling his notes left himself open to such charges.<sup>40</sup>

Given Crosskey's inaccuracies regarding Madison, one must look with a jaundiced eye toward his other assertions; the attack on Madison is at the heart of Crosskey's treatise. Yet Crosskey's work has been referred to as "monumental" by some courts,<sup>41</sup> and has been cited numerous times by the United States Supreme Court.<sup>42</sup>

Crosskey has gained an audience for his allegations, especially in law schools. While not many people have plowed through all 1400 pages of the first two volumes, *too many* have read the explosive Introduction, especially pages seven to twelve, where the indictment of Madison occurs. When I questioned Crosskey's thesis in a lecture at the University of San Diego Law School, a law professor asked if it was necessary to disregard the remainder of the book simply because Crosskey was wrong on Madison. I replied that the attack on Madison was at the heart of the book, but that he should use the rest of it as he saw fit, so long as he questioned Crosskey's

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39. The author of this article was then Associate Editor of *THE PAPERS OF JAMES MADISON* at the University of Chicago Press.

40. M. D. PETERSON, *JAMES MADISON: A BIOGRAPHY IN HIS OWN WORDS* 8 (1974).

41. See, e.g., *National Can Corp. v. Whittaker, Corp.*, 505 F. Supp. 147, 148-49 n.2 (E.D. Ill. 1981); *Ryan v. Mooney*, 499 F. Supp. 1112, 1114 (E.D. Ill. 1980); *United States v. Manning*, 215 F. Supp. 272, 278 n.12 (W.D. La. 1963) (stating: "Crosskey's construction of the Tenth Amendment and the documentation of his views have value in themselves, without the necessity of one's accepting his general conclusion that the constitution created a national, not a federal, government.").

42. See, e.g., *Department of Revenue of Wash. v. Association of Wash. Stovedoring Co.*, 435 U.S. 734, 760 n.26 (1978) (differing with Crosskey's interpretation of the Framers' intent with regard to art. I, § 8, cl. 1 of the Constitution); *Michelin Tire Corp. v. Wages, Tax Comm'r*, 423 U.S. 276, 290-91 (1976) (citing Crosskey with approval); *Flast v. Cohen*, 392 U.S. 83, 129 n.18 (1968) (Harlan, J., dissenting) (disagreeing with Crosskey's characterization of the ninth and tenth amendments); *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 476 n.6 (1967) (Harlan, J., dissenting) (citing Crosskey with approval).

assertions as suspiciously as I was checking them on the Madison episode.

Crosskey's allegations are so easily answered by the very documents to which he refers that it is surprising that he has been taken seriously. The paper, the ink, the handwriting of the Notes all testify against Crosskey. Madison used paper with six different watermarks in the sizeable manuscript which comprises his Notes. All but one of the six watermarks appear also in correspondence which he wrote around the time of the Federal Convention. That sixth watermark was used almost entirely on two days in September, by which time the major issues in the Convention were largely settled.<sup>43</sup> Except for obvious insertions of a much later date, the ink appears to be consistent throughout the Notes of the Debates. Finally, and most important, the Notes are in the handwriting of his young manhood, rather than the tiny, arthritic, rheumatic hand of the 1820's and 1830's. There is a significant difference between Madison's youthful and aged handwriting.

For Madison to have committed the enormities of which he is accused, we have to assume that he planned from the beginning to perpetrate a fraud (Crosskey would readily concur). Then Madison had to set aside ample paper to age along with that on which he was recording his Notes. He also must have set aside an ample supply of ink and prevented it from evaporating. Finally, trickiest of all, we must assume that for years Madison cleverly feigned arthritis and rheumatism to disguise the fact that he was really able, as an old man, to rewrite the Notes in the same hand he had used four decades earlier. Thus he must have feigned a crabbed and painful scrawl for *all* other handwriting of his old age. He was even so devious that in the feigned arthritic hand and in different ink he inserted corrections between the lines of the Notes of the Debates, as another trap to gull lesser men than W. W. Crosskey. Ironically, a number of these corrections are not corrections at all. When the official journal was published, Madison changed his own Notes to bring them into line. The later discovery of other fragmentary journals indicates that Madison's original notes were more accurate than several of his "corrections." If Madison did indeed maintain two distinctly different writing styles for two decades without faltering, he was even more talented than those who have taken

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43. I. BRANT, *COMMANDER IN CHIEF, 1812-1836* 435, 571 (1961) (provides a thorough study of the paper used in Madison's notes and includes, opposite page 385, an illustration showing two of the watermarks).

him at his word all along have contended.

Crosskey could escape parts of this quandary if he proclaimed the *entire* Notes of the Debates a fraud, not just selected parts. This would lessen the problem of the ink and the watermarked paper in the Notes, if we can be convinced that Madison instead invented false letters, dated 1787, in which he used the same paper. However, the handwriting problem would be lessened only marginally if the document was concocted entirely in the 1820's.

This solution is offered with tongue in cheek, for Crosskey is unwilling to surrender those sections of the Notes which coincide with his thesis. There is a wealth of nationalism in the Notes—much of it as embarrassing to Madison and his party as it is comforting to Crosskey and his disciples—and Crosskey would never sacrifice that. Most notable is the highly nationalistic Virginia Plan of Union, which was probably written by Madison himself, although Crosskey argues that it was the inspiration of Henry Knox of Massachusetts.<sup>44</sup> To claim the entire work to be fraudulent, not just those sections that he dislikes, would call into question some of the language upon which Crosskey's very thesis relies, and which he quotes with approval. When Madison makes a nationalist statement, Crosskey finds a credible witness. Discarding the Notes in entirety would be throwing the baby out with the bath. No, Madison's Notes are Crosskey's great ally, as well as his great antagonist.

While Crosskey was living, the staff of *The Papers of James Madison* shared results of their extensive search for Madison documents with Crosskey, who was operating just across the Midway. However, we never found documents contributing to his unique thesis. The few cases where it can be demonstrated that Madison attempted to revise letters demonstrate his humanity, his desire not to hurt others unnecessarily (with the notable exception of John Adams!), and his personal vanity, but in no way do they fit the grand conspiracy envisioned by Crosskey. Vanity provided the background of all of these minor tamperings with history. Late in the 1820's when Madison regained the letters that he had written to Jefferson, Madison compassionately doctored one ciphered letter to make Lafayette appear less vain than he had been described in 1784, and he vindictively altered another to make John Adams appear even more vain—if that is possible—than he had been de-

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44. 3 W.W. CROSSKEY, *supra* note 4, at 418.

scribed in 1783.<sup>45</sup>

The most spectacular example of falsification is the ciphered correspondence in which Madison informed Jefferson, who had been playing cupid, of Madison's disrupted courtship of Congressman William Floyd's sixteen-year-old daughter. Again in the 1820's, Madison blotted out the ciphered paragraph in which he had confirmed the romance and marked in the margin that it could not be deciphered—he certainly wanted it to be undecipherable to Dolley Madison. Ironically, in this romantic misadventure, Madison was not the masterful undercover agent portrayed by Crosskey. He failed to save ink for this bit of deception and, decades later, the original showed in brown through the markings. Madison's great biographer, Irving Brant, was able to decipher the letter and learn that Madison did not really spend all of his waking hours in Congress. Madison's cipher was not at hand four months later when he wrote to report that Kitty Floyd had abandoned him, so he wrote a letter so prolix that no one but Jefferson and prying historians who had deciphered the earlier letter could detect that Madison had wooed and lost. Even that obfuscation is marked out so thoroughly that it is possible to get only a hint of "several dilatory circumstances on which I had not calculated."<sup>46</sup> It is significant that this correspondence survived even in mutilated form, rather than being destroyed. These painful letters were retained, after attempted censorship of the segment which Madison considered to be a strictly personal affair and therefore no part of history, because elsewhere in the letter there were references to events in Congress. The schemer described by Crosskey would have burned these letters.

The best example of Madison's regard for history—and to him that meant the story of statecraft not the tittle-tattle of the personal lives of great men—occurred when he declined in 1827 to correct his speeches in the Virginia ratifying convention which would appear in Elliot's *Debates*. He insisted that

it might not be safe, nor deemed fair, after a lapse of 40 years, lacking a few months, and without having in the meantime ever revised them, to undertake to make them what it might be believed they

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45. See 6 THE PAPERS OF JAMES MADISON 220-22 (W.T. Hutchinson ed. 1960); 7 *id.* at 119-22.

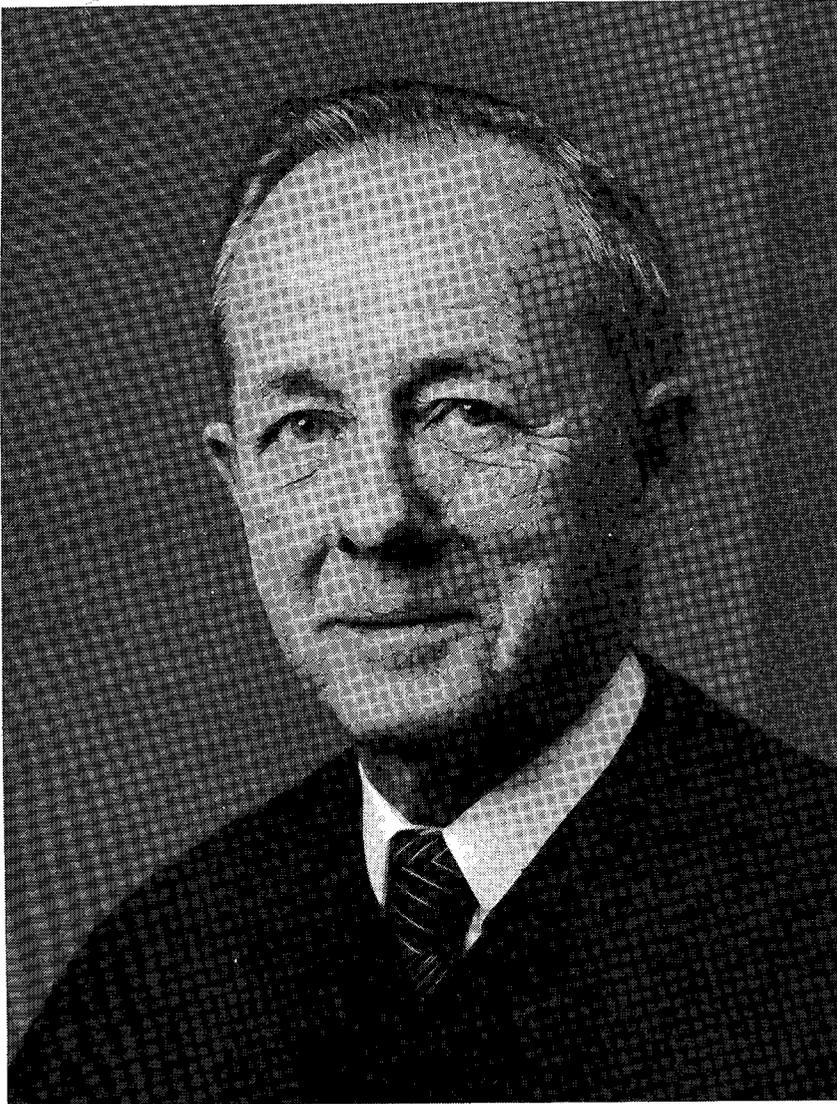
46. 6 *id.* at 481-83, 7 *id.* at 268-70. See also I. BRANT, JAMES MADISON THE NATIONALIST 283-87 (1948) (opposite page 286 is a photocopy of the unciphered letter).

ought to be. If I did not confound subsequent ideas, and varied expressions, with the real ones, I might be supposed to do so.<sup>47</sup>

That shows the spirit of James Madison the historian and constitutional reporter infinitely better than does the unsubstantiated theory of W. W. Crosskey.

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47. 9 THE WRITINGS OF JAMES MADISON 292 (G. Hunt ed. 1900-10).



**E. BALLARD BAKER**  
1918-1985

