

**Fromm Institute/Carcieri/Federalist Papers, Pt. 2/Session Five/The Senate
Essays 62-66**

Essays 62-63 – Madison or Hamilton (we're not sure which) does two things: 1) justifies particular provisions in Article I related to the Senate like qualifications for office, mode of appointment, the size of the body, and the duration of the office; 2) presents the general advantages of having a body like the Senate as designed in the proposed Constitution.

Essay 64 – John Jay defends the treaty power as established in the proposed Constitution.

Essays 65-66 – Hamilton defends the limited judicial character that the proposed Constitution gives the Senate, i.e., as a court for the trial of impeachments.

Federalist No. 62/ Hamilton or Madison

HAVING examined the constitution of the House of Representatives, ... I (now turn to) the Senate. The heads into which this member of the government may be considered are: I. The qualification of senators; II. The appointment of them by the State legislatures; III. The equality of representation in the Senate; IV. The number of senators, and the term for which they are to be elected; V. The powers vested in the Senate.

I. The qualifications proposed for senators, as distinguished from those of representatives, consist in a more advanced age and a longer period of citizenship. A senator must be thirty years of age at least; as a representative must be twenty-five. And the former must have been a citizen nine years; as seven years are required for the latter. The propriety of these distinctions is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages

II. It is equally unnecessary to dilate on the appointment of senators by the State legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems....

IV. The number of senators, and the duration of their appointment, come next to be considered.... (T)o form an accurate judgment (here, we must) inquire into the purposes which are to be answered by a senate; and ... to ascertain these, it will be necessary to review the inconveniences which a republic must suffer from the want of such an institution.

First. It is a misfortune incident to republican government, ... that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust. (A) senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must therefore be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient.... The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.... (A) body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration....

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities; most governments are deficient in the first. I scruple not to assert, that in American governments too little attention has been paid to the last. The federal Constitution avoids this error

Fourthly. The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, (shows) the necessity of some stable institution in the government.... (A) continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.

To trace the mischievous effects of a mutable government would fill a volume. I will hint a few only, each of which will be perceived to be a source of innumerable others.

In the first place, it forfeits the respect and confidence of other nations

The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; ... Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed? ... Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people....

(G)reat injury (thus) results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.

But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability

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A FIFTH desideratum, illustrating the utility of a senate, is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, ... but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.

An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.... (H)owever requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small that a sensible degree of the praise and blame of public measures may be the portion of each individual

I add, as a SIXTH defect ... (that it is) difficult to preserve a personal responsibility in the members of a NUMEROUS body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents. The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects....

(A) well-constructed Senate ... may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next....

It adds no small weight to all these considerations, to recollect that history informs us of no long-lived republic which had not a senate. Sparta, Rome, and Carthage are, in fact, the only states to whom that character can be applied.... These examples, though as unfit for the imitation, as they are repugnant to the genius, of America, are, notwithstanding, ... very instructive proofs of the necessity of some institution that will blend stability with liberty....

The difference most relied on, between the American and other republics, consists in the principle of representation; ... which is supposed to have been unknown to the latter, or at least to the ancient part of them.... (However,) the position concerning the ignorance of the ancient governments on the subject of representation, is by no means precisely true in the latitude commonly given to it.... In the most pure democracies of Greece, many of the executive functions were performed, not by the people themselves, but by officers elected by the people, and REPRESENTING the people in their EXECUTIVE capacity....

From these facts, ... it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American governments, lies IN THE TOTAL EXCLUSION OF THE PEOPLE, IN THEIR COLLECTIVE CAPACITY, from any share in the LATTER, and not in the TOTAL EXCLUSION OF THE REPRESENTATIVES OF THE PEOPLE from the administration of the FORMER. The distinction, however, thus qualified, must be admitted to leave a most advantageous superiority in favor of the United States....

In answer to all these arguments, suggested by reason, illustrated by examples, and enforced by our own experience, the jealous adversary of the Constitution will probably content himself with repeating, that a senate appointed not immediately by the people, and for the term of six years, must gradually acquire a dangerous pre-eminence in the government, and finally transform it into a tyrannical aristocracy.

To this general answer, the general reply ought to be sufficient, that liberty may be endangered by the abuses of liberty as well as by the abuses of power; that there are numerous instances of the former as well as of the latter; and that the former, rather than the latter, are apparently most to be apprehended by the United States....

But if anything could silence the jealousies on this subject, it ought to be the British example. The Senate there instead of being elected for a term of six years, and of being unconfined to particular families or fortunes, is an hereditary assembly of opulent nobles. The House of Representatives, instead of being elected for two years, and by the whole body of the people, is elected for seven years, and, in very great proportion, by a very small proportion of the people. Here (we see) in full display the aristocratic usurpations and tyranny which are at some future period to be exemplified in the United States....

Federalist No. 64/Jay

(Article II of the proposed Constitution) gives power to the President, "by and with the advice and consent of the Senate, to make treaties, provided 2/3 of the Senators present concur"

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good. The convention appears to have been attentive to both these points

As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object. By excluding men under thirty-five from the first office, and those under thirty from the second, it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle....

The inference which naturally results from these considerations is this, that the President and senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several States or to foreign nations, who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence. With such men the power of making treaties may be safely lodged.

Although the absolute necessity of system, in the conduct of any business, is universally known and acknowledged, yet the high importance of it in national affairs has not yet become sufficiently impressed on the public mind.... It was wise, therefore, in the convention to provide, not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them. The duration prescribed is such as will give them an opportunity of greatly extending their political information, and of rendering their accumulating experience more and more beneficial to their country.... (As for) the inconvenience of periodically transferring those great affairs entirely to new men, ... by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information will be preserved.

There are a few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it.... (T)his correspondence and conformity (must) be carefully maintained, (and) it is well provided for by making concurrence of the Senate necessary both to treaties and to laws.

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect **SECRECY** and immediate **DESPATCH** are sometimes requisite. These are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; ... The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

They who have turned their attention to the affairs of men, must have perceived that there are tides in them; ... The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and despatch, that the Constitution would have been inexcusably defective, if no attention had been paid to those objects....

But to this plan, as to most others that have ever appeared, objections are contrived and urged. Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is, that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them the power to do every other act of sovereignty by which the citizens are to be bound and affected....

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THE remaining powers which the plan of the convention allots to the Senate, in a distinct capacity, are comprised in their participation with the executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments.... (T)he provisions relating to (the executive) will ... be discussed in the examination of that department. We will, therefore, conclude this head with a view of the judicial character of the Senate.

A well-constituted court for the trial of impeachments is (crucial).... The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a (political) nature ... , as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused.... The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves. The difficulty of placing it rightly, in a government resting entirely on the basis of periodical elections, will as readily be perceived, when it is considered that the most conspicuous characters in it will, from that circumstance, be too often the leaders or the tools of the most cunning or the most numerous faction, and on this account, can hardly be expected to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny.

The convention, it appears, thought the Senate the most fit depository of this important trust. Those who can best discern the intrinsic difficulty of the thing, will be least hasty in condemning that opinion, and will be most inclined to allow due weight to the arguments which may be supposed to have produced it. What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry ... ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to a share of the inquiry? ... In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the example....

Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in its own situation, to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers? Could the Supreme Court have been relied upon as answering this description? ...

The necessity of a numerous court for the trial of impeachments, is ... dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons. (I thus conclude) that the Supreme Court would have been an improper substitute for the Senate, as a court of impeachments.

There remains a further consideration, which will not a little strengthen this conclusion. It is this: The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature, will not hesitate to answer these questions in the affirmative; ... (they can see) that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismissal from a present, and disqualification for a future, office....

But though one or the other of the substitutes which have been examined, or some other that might be devised, should be thought preferable to the plan in this respect, reported by the convention, it will not follow that the Constitution ought ... to be rejected. If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy Where is the standard of perfection to be found? Who will undertake to unite the discordant opinions of a whole community, in the same judgment of it; and to prevail upon one conceited projector to renounce his infallible criterion for the fallible criterion of his more conceited neighbor? To answer the purpose of the adversaries of the Constitution, they ought to prove, not merely that particular provisions in it are not the best which might have been imagined, but that the plan upon the whole is bad and pernicious.

Federalist No. 66/Hamilton

A REVIEW of the principal objections that have appeared against the proposed court for the trial of impeachments, will not improbably eradicate the remains of any unfavorable impressions which may still exist in regard to this matter.

The FIRST of these objections is, that the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important . . . maxim which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place, and has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body, is admitted, by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive. The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches. As the concurrence of two thirds of the Senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.

... (T)his part of the plan is assailed, on the principle here taken notice of, by men who profess to admire, without exception, the constitution of New York; while that constitution makes the Senate, together with the chancellor and judges of the Supreme Court, not only a court of impeachments, but the highest judicatory in the State, in all causes, civil and criminal.... (T)he judiciary authority of New York, in the last resort, may, with truth, be said to reside in its Senate. If the plan of the convention be, in this respect, chargeable with a departure from the celebrated maxim which has been so often mentioned, and seems to be so little understood, how much more culpable must be the constitution of New York?

A SECOND objection to the Senate, as a court of impeachments, is, that it contributes to an undue accumulation of power in that body, tending to give to the government a countenance too aristocratic. The Senate, it is observed, is to have concurrent authority with the Executive in the formation of treaties and in the appointment to offices: if, say the objectors, to these prerogatives is added that of deciding in all cases of impeachment, it will give a decided predominancy to senatorial influence....

Where is the measure or criterion to which we can appeal, for determining what will give the Senate too much, too little, or barely the proper degree of influence? Will it not be more safe, as well as more simple, to dismiss such vague and uncertain calculations, to examine each power by itself, and to decide, on general principles, where it may be deposited with most advantage and least inconvenience?...

(T)he plan of the convention has provided ... several important counterpoises to the additional authorities to be conferred upon the Senate. The exclusive privilege of originating money bills will belong to the House of Representatives. The same house will possess the sole right of instituting impeachments: is not this a complete counterbalance to that of determining them? The same house will be the umpire in all elections of the President, which do not unite the suffrages of a majority of the whole number of electors; ... (A)s a mean of influence (this power) will be found to outweigh all the peculiar attributes of the Senate.

A THIRD objection to the Senate as a court of impeachments, is drawn from the agency they are to have in the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men, in whose official creation they had participated.... (T)his objection would condemn a practice which is to be seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of rendering those who hold offices during pleasure, dependent on the pleasure of those who appoint them....

If any further arguments were necessary to evince the improbability of such a bias, it might be found in the nature of the agency of the Senate in the business of appointments. It will be the office of the President to NOMINATE, and, with the advice and consent of the Senate, to APPOINT. There will, of course, be no exertion of CHOICE on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves CHOOSE, they can only ratify or reject the choice of the President.... (T)hey could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy....

So far as might concern the misbehavior of the Executive in perverting the instructions or contravening the views of the Senate, we need not (fear the lack) of a disposition in that body to punish the abuse of their confidence or to vindicate their own authority. We may thus far count upon their pride, if not upon their virtue. And so far even as might concern the corruption of leading members, by whose arts and influence the majority may have been inveigled into measures odious to the community, if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding that there would be commonly no defect of inclination in the body to divert the public resentment from themselves by a ready sacrifice of the authors of their mismanagement and disgrace.