

## SECTION ELEVEN

# ON THE SENATE



The construction and powers of the United States Senate were items of particular controversy during the ratification debates for the Constitution. Publius lays out a case that the Senate was to be a special body that would bring specific elements to the political system not provided by other institutions. Senators, he argued, would need to be men of more knowledge and of more stable character than might be found in the House. This was because the Senate would play a greater role in foreign policy, impeachments, and the selection of high government officials, including life-tenured judges.

To best ensure proper officeholders, the Constitution requires senators to be older and to have longer citizenship than members of the House. It also provided that state legislatures make their state's appointments to the Senate in the manner of their own choosing. While Publius argued that the state legislatures would make the best appointments and could use the appointments to protect their state's role in the political system, the Seventeenth Amendment (1913) completely changed this aspect of the Constitution by providing for the popular election of senators from all states. The amendment provides that senators be elected just like House members are—by the election of the people directly.

As Publius outlines in *Federalist* 62, the founding vision of the Senate was that it would be comprised by a specially chosen group of proven leaders. They would add stability to the political system, partly because of who they were and how they were to be chosen, but also because they would serve longer terms and their elections would be staggered. While many of us today value government action and “change” in policies, the Senate was designed as an institution to provide order and stability. What Publius calls “mutability” was something to be avoided as stable governments garnered respect at home and abroad and were able to protect the common person through stability in laws.

In language that would shock some of our contemporary readers, Publius talks of

the Senate as an institution to protect the people from their own mistakes. While the House was to be popularly elected every two years, the Senate would be insulated from public opinion and would be able to resist public demands for unwise and short-sighted actions. He uses the history of ancient Athens and the popular assembly's decision to execute the great philosopher Socrates as the best example of the public sometimes making decisions they soon come to regret.

In the final papers in this section, Publius takes on two of the particularly important responsibilities of the Senate: to ratify treaties and conduct impeachment trials. To the opponents of the Constitution who feared such important powers were given to a body unelected by the people, as the Senate was to be, Publius counters that such weighty responsibilities were proper only for such a body that would be specially selected by political leaders in the states and who would be in office long enough to gain the knowledge and wisdom necessary to make proper decisions.

Interestingly, the core Anti-Federalist arguments against the Senate and its operation mirror the Federalist arguments in important ways. Where the Federalists saw a benefit, however, the Anti-Federalists smelled danger. Where the Federalists approved of the senators being more distant from the influence of the people, the Anti-Federalists saw a potential aristocracy. Where the Federalists saw benefits in six-year terms and re-eligibility, the Anti-Federalists saw senators taking office for long stretches of time, growing ever more distant from the people. Where the Federalists thought the Senate was the right body to advise the president and work with him to make treaties, the Anti-Federalists saw a dangerous blending of legislative and executive power that could lead to an alliance against the more democratic element of the Constitution—the House of Representatives. Where the Anti-Federalists saw the Senate as an anti-democratic entity that threatened liberty, Publius countered that “liberty may be endangered by the abuse of liberty as well as by the abuses of power.”

## QUESTIONS FOR OUR TIME

1. The Seventeenth Amendment completely upturned the founding vision of the Senate, which was to be an elect body chosen by state legislatures and to represent the states as political entities. Now all senators run political campaigns and are elected by the people of their states. Though it has been in effect for more than a century, some still argue for repeal of the amendment and a return to legislative selection of senators. What do you think? Are our senators better now than before the direct popular election of senators? Have we lost anything by making both houses of the legislature subject to popular elections and the demands of popular campaigns for office?

2. Conduct this thought-experiment: Consider the two senators from your own state today. What are their backgrounds? What are their talents? What makes them “electable”? How do they conduct themselves in office? Then consider what your senators might look like and how they would act if they were not popularly elected but were appointed by your state legislature. Would they be different? Which would produce the better leaders for our country? Would you take state legislative races more seriously if you knew your representatives would also be choosing your United States senators?
3. Publius seems to value stability and order in government over dynamism and change. Modern America, on the other hand, seems often to value change more than it does stability (sometimes even equating it with “stagnation”). In your opinion, what is the proper balance that should be struck between stability and change? How are we to achieve such a balance?
4. The Anti-Federalist Cato argues that the treaty-making power is too important to be given just to the president and the Senate. What do you think? Should the House of Representatives have a bigger role in making treaties that impact the American people?
5. Regarding the judicial role of the Senate in conducting trials of impeached officials, Publius states that the Senate will be the best body to remain independent between the accusers (the House of Representatives) and the accused (impeached official). However, in American history, the impeachment votes of U.S. senators have almost always followed their own partisan affiliation. Though three presidents have been impeached, for instance, only one U.S. senator has voted to convict the president of his own party. If partisanship has undermined the independence of the Senate, how can it be restored? Is there another institution that would be more independent at conducting trials of sitting political officials?

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## FEDERALIST NO. 62

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### CONCERNING THE CONSTITUTION OF THE SENATE, WITH REGARD TO THE QUALIFICATIONS OF THE MEMBERS; THE MANNER OF APPOINTING THEM; THE EQUALITY OF REPRESENTATION; THE NUMBER OF THE SENATORS, AND THE DURATION OF THEIR APPOINTMENTS

Having examined the constitution of the house of representatives, and answered such of the objections against it as seemed to merit notice, I enter next on the examination of the senate.

The heads under which this member of the government may be considered, are, I. The qualifications 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; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merit and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.

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 favouring 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.

III. The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion. If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties, however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try, by the standard of theory, a part of the constitution which is allowed on all hands to be the result, not of theory, but “of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable.” A common government, with powers equal to its objects, is called for by the voice, and still more loudly by the political situation, of America. A government founded on principles more consonant to the wishes of the larger states, is not likely

to be obtained from the smaller states. The only option then for the former, lies between the proposed government, and a government still more objectionable. Under this alternative, the advice of prudence must be, to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.

In this spirit it may be remarked, that the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small states: since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the states into one simple republic.

Another advantage accruing from this ingredient in the constitution of the senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the states. It must be acknowledged that this complicated check on legislation may, in some instances, be injurious as well as beneficial; and that the peculiar defence which it involves in favour of the smaller states, would be more rational, if any interests common to them, and distinct from those of the other states, would otherwise be exposed to peculiar danger. But as the larger states will always be able, by their power over the supplies,

to defeat unreasonable exertions of this prerogative of the lesser states; and as the facility and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice, than it appears to many in contemplation.

IV. The number of senators, and the duration of their appointment, come next to be considered. In order to form an accurate judgment on both these points, it will be proper to inquire into the purposes which are to be answered by a senate; and, in order 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, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must 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. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark, that, as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must

be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government.

*Second.* 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. Examples on this subject might be cited without number; and from proceedings within the United States, as well as from the history of other nations. But a position that will not be contradicted, need not be proved. All that need be remarked is, that 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.

*Third.* Another defect to be supplied by a senate, lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men, called, for the most part, from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders

of our governments; and that these have proceeded from the heads, rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding, against each preceding session; so many admonitions to the people, of the value of those aids which may be expected from a well constituted senate?

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 the American governments, too little attention has been paid to the last. The federal constitution avoids this error: and what merits particular notice, it provides for the last in a mode which increases the security for the first.

*Fourth.* The mutability in the public councils, arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the states, is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But 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, and all the advantages connected with national character. An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once by all prudent people, as a speedy victim to his own unsteadiness and folly. His more friendly neighbours may pity him, but all will decline to connect their fortunes with his: and not a few will seize the opportunity of making their fortunes out of his. One nation is to another, what one individual is to another; with this melancholy distinction perhaps, that the former, with fewer of the benevolent emotions than the latter, are under fewer restraints also from taking undue advantage of the indiscretions of each other. Every nation, consequently, whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the more systematic policy of its wiser neighbours. But the best instruction on this subject is unhappily conveyed to America by the example of her own situation. She finds that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs.

The internal effects of a mutable policy are still more calamitous. It poisons the blessings 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: if they be repealed or revised before they are promulg[at]ed, or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be to-morrow. 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 monied few, over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said, with some truth, that laws are made for the *few*, not for the *many*.

In another point of view, great injury

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 labours 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.

PUBLIUS



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## FEDERALIST NO. 63

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### A FURTHER VIEW OF THE CONSTITUTION OF THE SENATE, IN REGARD TO THE DURATION OF THE APPOINTMENT OF ITS MEMBERS

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, proceeding from the causes already mentioned; 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 honourable 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. What has not America lost by her want of character with foreign nations? And how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiassed part of mankind.

Yet, however 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; or in an assembly so durably invested with public trust, that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community. The half-yearly representatives of Rhode Island, would probably have been little affected in their deliberations on the iniquitous measures of that state, by arguments drawn from

the light in which such measures would be viewed by foreign nations, or even by the sister states; whilst it can scarcely be doubted, that if the concurrence of a select and stable body had been necessary, a regard to national character alone, would have prevented the calamities under which that misguided people is now labouring.

I add, as a *sixth* defect, the want in some important cases of a due responsibility in the government to the people, arising from that frequency of elections, which in other cases produces this responsibility. The remark will, perhaps, appear not only new, but paradoxical. It must nevertheless be acknowledged, when explained, to be as undeniable as it is important.

Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party; and in order to be effectual, must relate to operations of that power, of which a ready and proper judgment can be formed by the constituents. The objects of government may be divided into two general classes: the one depending on measures, which have singly an immediate and sensible operation; the other depending on a succession of well chosen and well connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country, needs no explanation. And yet it is evident, that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more

than a steward or tenant, engaged for one year, could be justly made to answer for plans or improvements which could not be accomplished in less than half a dozen years. Nor is it possible for the people to estimate the *share* of influence, which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently 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.

Thus far I have considered the circumstances which point out the necessity of a well constructed senate, only as they relate to the representatives of the people. To a people as little blinded by prejudice, or corrupted by flattery, as those whom I address, I shall not scruple to add, that such an institution may be sometimes necessary, as a defence 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 may be suggested, that a people spread over an extensive region, cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions; or to the danger of combining in the pursuit of unjust measures. I am far from denying, that this is a distinction of peculiar importance. I have, on the contrary, endeavoured in a former paper to show, that it is one of the principal recommendations of a confederated republic. At the same time, this advantage ought not to be considered as superseding the use of auxiliary precautions. It may even be remarked, that the same extended situation, which will exempt the people of America from some of the dangers incident to lesser republics, will expose them to the inconveniency of remaining, for a longer time, under the influence of those misrepresentations which the combined industry of interested men may succeed

in distributing among them.

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. In each of the two first, there was a senate for life. The constitution of the senate in the last, is less known. Circumstantial evidence makes it probable, that it was not different in this particular from the two others. It is at least certain, that it had some quality or other, which rendered it an anchor against popular fluctuations; and that a smaller council, drawn out of the senate, was appointed not only for life, but filled up vacancies itself. These examples, though as unfit for the imitation, as they are repugnant to the genius, of America are, notwithstanding, when compared with the fugitive and turbulent existence of other ancient republics, very instructive proofs of the necessity of some institution that will blend stability with liberty. I am not unaware of the circumstances which distinguish the American from other popular governments, as well ancient as modern; and which render extreme circumspection necessary, in reasoning from the one case to the other. But after allowing due weight to this consideration, it may still be maintained, that there are many points of similitude which render these examples not unworthy of our attention. Many of the defects, as we have seen, which can only be supplied by a senatorial institution, are common to a numerous assembly frequently elected by the people, and to the people themselves. There are others peculiar

to the former, which require the control of such an institution. The people can never wilfully betray their own interests: but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater, where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act.

The difference most relied on, between the American and other republics, consists in the principle of representation, which is the pivot on which the former move, and which is supposed to have been unknown to the latter, or at least to the ancient part of them. The use which has been made of this difference, in reasonings contained in former papers, will have shown that I am disposed neither to deny its existence, nor to undervalue its importance. I feel the less restraint therefore in observing, that 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. Without entering into a disquisition which here would be misplaced, I will refer to a few known facts in support of what I advance.

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* them in their *executive* capacity.

Prior to the reform of Solon, Athens was governed by nine archons, annually *elected by the people at large*. The degree of power delegated to them, seems to be left in great obscurity. Subsequent

to that period we find an assembly, first of four, and afterwards of six hundred members, annually *elected by the people*; and *partially* representing them in their *legislative* capacity, since they were not only associated with the people in the function of making laws, but had the exclusive right of originating legislative propositions to the people. The senate of Carthage, also, whatever might be its power, or the duration of its appointment, appears to have been elective by the suffrages of the people. Similar instances might be traced in most, if not all the popular governments of antiquity.

Lastly, in Sparta we meet with the Ephori, and in Rome with the Tribunes; two bodies, small indeed in number, but annually *elected by the whole body of the people*, and considered as the *representatives* of the people, almost in their *plenipotentiary* capacity. The Cosmi of Crete were also annually *elected by the people*; and have been considered by some authors as an institution analagous to those of Sparta and Rome, with this difference only, that in the election of that representative body, the right of suffrage was communicated to a part only of the people.

From these facts, to which many others might be added, 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 favour of the United States. But to insure to this advantage its full effect, we must be careful not to separate it from the other advantage, of an extensive territory. For it cannot be believed, that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece.

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, is apparently most to be apprehended by the United States. But a more particular reply may be given.

Before such a revolution can be effected, the senate, it is to be observed, must in the first place corrupt itself; must next corrupt the state legislatures; must then corrupt the house of representatives; and must finally corrupt the people at large. It is evident, that the senate must be first corrupted, before it can attempt

an establishment of tyranny. Without corrupting the legislatures, it cannot prosecute the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corruption with equal success on the house of representatives, the opposition of that co-equal branch of the government would inevitably defeat the attempt; and without corrupting the people themselves, a succession of new representatives would speedily restore all things to their pristine order. Is there any man who can seriously persuade himself, that the proposed senate can, by any possible means within the compass of human address, arrive at the object of a lawless ambition, through all these obstructions?

If reason condemns the suspicion, the same sentence is pronounced by experience. The constitution of Maryland furnishes the most apposite example. The senate of that state is elected, as the federal senate will be, indirectly by the people; and for a term less by one year only, than the federal senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment; and, at the same time, is not under the control of any such rotation as is provided for the federal senate. There are some other lesser distinctions, which would expose the former to colourable objections, that do not lie against the latter. If the federal senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the senate of Maryland; but no such symptoms

have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the federal constitution, have been gradually extinguished by the progress of the experiment; and the Maryland constitution is daily deriving from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any state in the union.

But if any thing 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, unquestionably, ought to be seen in full display, the aristocratic usurpations and tyranny which are at some future period to be exemplified in the United States. Unfortunately, however, for the anti-federal argument, the British history informs us, that this hereditary assembly has not even been able to defend itself against the continual encroachments of the house of representatives; and that it no sooner lost the support of the monarch, than it was actually crushed by the weight of the popular branch.

As far as antiquity can instruct us on this subject, its examples support the reasoning which we have employed. In Sparta the Ephori, the annual representatives of the people, were found an overmatch for the

senate for life; continually gained on its authority, and finally drew all power into their own hands. The tribunes of Rome, who were the representatives of the people, prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it. This fact is the more remarkable, as unanimity was required in every act of the tribunes, even after their number was augmented to ten. It proves the irresistible force possessed by that branch of a free government, which has the people on its side. To these examples might be added that of Carthage, whose senate, according to the testimony of Polybius, instead of drawing all power into its vortex, had, at the commencement of the second punic war, lost almost the whole of its original portion.

Besides the conclusive evidence resulting from this assemblage of facts, that the federal senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body; we are warranted in believing, that if such a revolution should ever happen from causes which the foresight of man cannot guard against, the house of representatives, with the people on their side, will at all times be able to bring back the constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature the affections and support of the entire body of the people themselves.

PUBLIUS

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## FEDERALIST NO. 64

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### A FURTHER VIEW OF THE CONSTITUTION OF THE SENATE, IN REGARD TO THE POWER OF MAKING TREATIES

It is a just, and not a new observation, that enemies to particular persons, and opponents to particular measures, seldom confine their censures to such things only in either, as are worthy of blame. Unless on this principle, it is difficult to explain the motives of their conduct, who condemn the proposed constitution in the aggregate, and treat with severity some of the most unexceptionable articles in it.

The 2d section gives power to the president, “*by and with the advice and consent of the senate, to make treaties, PROVIDED TWO-THIRDS 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 appear to have been attentive to both these points:

they have directed the president to be chosen by select bodies of electors, to be deputed by the people for that express purpose; and they have committed the appointment of senators to the state legislatures. This mode has, in such cases, vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking advantage of the supineness, the ignorance, the hopes, and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors.

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 elections 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. If the observation be well founded, that wise kings will always be served by able ministers, it is fair to argue, that, as an assembly of select electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters; so will their appointments bear at least equal marks of discretion and discernment. 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. They who wish to commit the power under consideration to a popular assembly, composed of members constantly coming and going in quick succession,

seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures, which not only talents, but also exact information, and often much time, are necessary to concert and to execute. 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. Nor has the convention discovered less prudence in providing for the frequent elections of senators in such a way, as to obviate the inconvenience of periodically transferring those great affairs entirely to new men; for, 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 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. It is of much consequence that this correspondence and conformity be carefully maintained; and they who



assent to the truth of this position, will see and confess that it is well provided for, by making the 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. There 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; and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. 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; tides, very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay, even when hours, are precious. 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 favourable 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. The matters which in negotiations usually require the most secrecy, and the most despatch, are those preparatory and auxiliary measures, which are no otherways important in a national view, than as they tend to facilitate the attainment of the main objects. For these the president will find no difficulty to provide; and should any circumstance occur, which requires the advice and consent of the senate, he may at any time convene them. Thus we see, that the constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigation, on the one hand; and from secrecy and despatch, on the other.

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 power to do every other act of sovereignty, by which the citizens are to be bound and affected.

Others, though content that treaties should be made in the mode proposed, are averse to their being the *supreme* law of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country; but new errors, as well as new truths, often appear. These gentlemen would do well to reflect, that a treaty is only another name for a bargain; and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties, may alter or cancel them: but still let us not forget,

that treaties are made not by one only of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

However useful jealousy may be in republics, yet when, like bile in the natural, it abounds too much in the body politic, the eyes of both become very liable to be deceived, by the delusive appearances which that malady casts on surrounding objects. From this cause, probably, proceed the fears and apprehensions of some, that the president and senate may make treaties without an equal eye to the interests of all the states. Others suspect, that the two-thirds will oppress the remaining third, and ask, whether those gentlemen are made sufficiently responsible for their conduct; whether, if they act corruptly, they can be punished? and if they make disadvantageous treaties, how are we to get rid of those treaties?

As all the states are equally represented in the senate, and by men the most able and the most willing to promote the interest of their constituents, they will all have an equal degree of influence in that body, especially while they continue to be careful in appointing proper persons, and to insist on their punctual attendance. In proportion as the United States assume a national form, and a national character, so will the good of the whole be more

and more an object of attention; and the government must be a weak one indeed, if it should forget, that the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole. It will not be in the power of the president and senate to make any treaties, by which they, and their families and estates, will not be equally bound and affected with the rest of the community; and having no private interest distinct from that of the nation, they will be under no temptations to neglect the latter.

As to corruption, the case is not supposeable. He must either have been very unfortunate in his intercourse with the world, or possess a heart very susceptible of such impressions, who can think it probable, that the president and two-thirds of the senate, will ever be capable of such unworthy conduct. The idea is too gross, and too invidious to be

entertained. But if such a case should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations.

With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honour, oaths, reputation, conscience, the love of country, family affections and attachments, afford security for their fidelity. In short, as the constitution has taken the utmost care that they shall be men of talents and integrity, we have reason to be persuaded, that the treaties they make will be as advantageous as, all circumstances considered, could be made; and so far as the fear of punishment and disgrace can operate, that motive to good behaviour is amply afforded by the article on the subject of impeachments.

PUBLIUS

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## FEDERALIST NO. 65

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### A FURTHER VIEW OF THE CONSTITUTION OF THE SENATE, IN RELATION TO ITS CAPACITY, AS A COURT FOR THE TRIAL OF IMPEACHMENTS

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. As in the business of appointments, the executive will be the principal agent, the provisions relating to it will most properly 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 an object not more to be desired, than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences 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 nature which may with peculiar propriety be denominated *POLITICAL*, 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. In many cases, it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.

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, or, in other words, of preferring the impeachment, 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? The model, from which the idea of this institution has been borrowed, pointed out that course to the convention. 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. As well the latter, as the former, seem to have regarded the practice of impeachments, as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the

true light in which it ought to be regarded?

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? It is much to be doubted whether the members of that tribunal would, at all times, be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favour 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 honour 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.

These considerations seem alone sufficient to authorize a conclusion, 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 honours 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 offence, 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 any thing of human nature, will not hesitate to answer these questions in the affirmative; and will be

at no loss to perceive, 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. It may be said, that the intervention of a jury, in the second instance, would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury, acting under the auspices of judges who had predetermined his guilt?

Would it have been an improvement of the plan, to have united the supreme court with the senate, in the formation of the court of impeachments? This union would certainly have been attended with several advantages; but would they not have been overbalanced by the signal disadvantage already stated, arising from the agency of the same judges in the double prosecution to which the offender would be liable? To a certain extent, the benefits of that union will be obtained from making the chief justice of the supreme court the president of the court of impeachments, as is proposed to be done in the plan of the convention; while the inconveniences of an entire incorporation of the former into the latter, will be substantially avoided. This was perhaps the prudent mean. I forbear to remark upon the additional

pretext for clamour against the judiciary, which so considerable an augmentation of its authority would have afforded.

Would it have been desirable to have composed the court for the trial of impeachments, of persons wholly distinct from the other departments of the government? There are weighty arguments, as well against, as in favour of such a plan. To some minds, it will not appear a trivial objection, that it would tend to increase the complexity of the political machine, and to add a new spring to the government, the utility of which would at best be questionable. But an objection which will not be thought by any unworthy of attention, is this: a court formed upon such a plan, would either be attended with heavy expense, or might in practice be subject to a variety of casualties and inconveniences. It must either consist of permanent officers, stationary at the seat of government, and of course entitled to fixed and regular stipends, or of certain officers of the state governments, to be called upon whenever an impeachment was actually depending. It will not be easy to imagine any third mode materially different, which could rationally be proposed. As the court, for reasons already given, ought to be numerous; the first scheme will be reprobated by every man, who can compare the extent of the public wants with the means of supplying them; the second will be espoused with caution by those who will seriously consider the difficulty of collecting men dispersed over the whole union; the injury to the innocent, from the procrastinated determination of the charges which might be brought against them; the advantage to the guilty,

from the opportunities which delay would afford for intrigue and corruption, and in some cases the detriment to the state, from the prolonged inaction of men, whose firm and faithful execution of their duty might have exposed them to the persecution of an intemperate or designing majority in the house of representatives. Though this latter supposition may seem harsh, and might not be likely often to be verified; yet it ought not to be forgotten that the demon of faction will, at certain seasons, extend his sceptre over all numerous bodies of men.

But though one or the other of the substitutes which have been examined, or some other that might be devised, should, in this respect, be thought preferable to the plan reported by the convention, it will not follow that the constitution ought for this reason 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, and the world a desert. 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* neighbour? 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.

PUBLIUS



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## FEDERALIST NO. 66

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### THE SAME SUBJECT CONTINUED

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 unfavourable 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 and well established 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 defence 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 not 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.

It is curious to observe with what vehemence this part of the plan is assailed, on the principle here taken notice of,



by men who profess to admire, without exception, the constitution of this state; while that very 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. The proportion, in point of numbers, of the chancellor and judges to the senators, is so inconsiderable, that the 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?<sup>39</sup>

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 determining in all cases of impeachment, it will give a decided predominancy to senatorial influence. To an objection so little precise in itself, it is not easy to find a very precise answer. Where is the measure or criterion to which we can appeal, for estimating 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?

If we take this course, it will lead to a more intelligible, if not to a more certain result. The disposition of the power of making treaties, which has obtained in the plan of the convention, will then, if I mistake not, appear to be fully justified by the considerations stated in a former number, and by others which will occur under the next head of our inquiries. The expediency of the junction of the senate with the executive, in the power of appointing to offices, will, I trust, be placed in a light not less satisfactory, in the disquisitions under the same head. And I flatter myself the observations in my last paper must have gone no inconsiderable way towards proving, that it was not easy, if practicable, to find a more fit receptacle for the power of determining impeachments, than that which has been chosen. If this be truly the case, the hypothetical danger of the too great weight of the senate, ought to be discarded from our reasonings.

But this hypothesis, such as it is, has already been refuted in the remarks applied to the duration of office prescribed for the senators. It was by them shown, as well on the credit of historical examples, as from the reason of the thing, that the

39 In that of New Jersey, also, the final judiciary authority is in a branch of the legislature. In New Hampshire, Massachusetts, Pennsylvania, and South Carolina, one branch of the legislature is the court for the trial of impeachments.

most *popular* branch of every government, partaking of the republican genius, by being generally the favourite of the people, will be as generally a full match, if not an overmatch, for every other member of the government.

But, independent of this most active and operative principle; to secure the equilibrium of the national house of representatives, the plan of the convention has provided in its favour, 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 case which it cannot be doubted will sometimes, if not frequently, happen. The constant possibility of the thing, must be a fruitful source of influence to that body. The more it is contemplated, the more important will appear this ultimate, though contingent power, of deciding the competitions of the most illustrious citizens of the union, for the first office in it. It would not perhaps be rash to predict, that as a mean of influence, it 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. The principle of this 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. With equal plausibility might it be alleged in this case, that the favouritism of the latter would always be an asylum for the misbehaviour of the former. But that practice, in contradiction to this principle, proceeds upon the presumption, that the responsibility of those who appoint, for the fitness and competency of the persons on whom they bestow their choice, and the interest they have in the respectable and prosperous administration of affairs, will inspire a sufficient disposition, to dismiss from a share in it, all such who by their conduct may have proved themselves unworthy of the confidence reposed in them. Though facts may not always correspond with this presumption, yet if it be in the main just, it must destroy the supposition, that the senate, who will merely sanction the choice of the executive, should feel a bias, towards the objects of that choice, strong enough to blind them to the evidences of guilt so extraordinary, as to have induced the representatives of the nation to become its accusers.

If any further argument 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 he may have made. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favourite, 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 proofs of the want of it destroy.

A fourth objection to the senate, in the capacity of a court of impeachments, is derived from their union with the executive in the power of making treaties. This, it has been said, would constitute the senators their own judges, in every case of a corrupt or perfidious execution of that trust. After having combined with the executive in betraying the interests of the nation in a ruinous treaty, what prospect, it is asked, would there be of their being made to suffer the punishment they would deserve, when they were themselves to decide upon the accusation brought against them for the treachery of which they had been guilty?

This objection has been circulated with more earnestness, and with a greater show of reason, than any other which has

appeared against this part of the plan; and yet I am deceived if it does not rest upon an erroneous foundation.

The security essentially intended by the constitution against corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them. The JOINT AGENCY of the chief magistrate of the union, and of two-thirds of the members of a body selected by the collective wisdom of the legislatures of the several states, is designed to be the pledge for the fidelity of the national councils in this particular. The convention might with propriety have mediated the punishment of the executive, for a deviation from the instructions of the senate, or a want of integrity in the conduct of the negotiations committed to him: they might also have had in view the punishment of a few leading individuals in the senate, who should have prostituted their influence in that body, as the mercenary instruments of foreign corruption: but they could not, with more or with equal propriety, have contemplated the impeachment and punishment of two-thirds of the senate, consenting to an improper treaty, than of a majority of that or of the other branch of the national legislature, consenting to a pernicious or unconstitutional law: a principle which I believe has never been admitted into any government. How, in fact, could a majority of the house of representatives impeach themselves? Not better, it is evident, than two-thirds of the senate might try themselves. And yet what reason is there, that a majority of the house of representatives, sacrificing the interests of the society by an unjust

and tyrannical act of legislation, should escape with impunity, more than two-thirds of the senate sacrificing the same interests in an injurious treaty with a foreign power? The truth is, that in all such cases, it is essential to the freedom, and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.

So far as might concern the misbehaviour of the executive in perverting the instructions, or contravening the views of

the senate, we need not be apprehensive of the want 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.

PUBLIUS

## THE ANTI-FEDERALIST PERSPECTIVE

### BRUTUS XVI

For the *New York Journal*

The term for which the senate are to be chosen, is in my judgment too long, and no provision being made for a rotation will, I conceive, be of dangerous consequence.

It is difficult to fix the precise period for which the senate should be chosen. It is a matter of opinion, and our sentiments on the matter must be formed, by attending to certain principles. Some of the duties which are to be performed by the senate, seem evidently to point out the propriety of their term of service being extended beyond the period of that of the assembly. Besides as they are designed to represent the aristocracy of the country, it seems fit they should possess more stability, and so continue a longer period than that branch who represent the democracy. The business of making treaties and some other which it will be proper to commit to the senate, requires that they should have experience, and therefore that they should remain some time in office to acquire it. —But still it is of equal importance that they should not be so long in office as to be likely to forget the hand that formed them, or be insensible of their interests. Men long in office are very apt to feel themselves independent [and] to form and pursue interests separate from those who appointed them. And this is more likely to be the case with the senate, as they will for the most part of the time be absent from the state they represent, and associate with such company as will possess very little of the feelings of the middling class of people. For it is to be remembered that there is to be a *federal city*, and the inhabitants of it will be the great and the mighty of the earth. For these reasons I would shorten the term of their service to four years. Six years is a long period for a man to be absent from his home, it would have a tendency to wean him from his constituents.

A rotation in the senate, would also in my opinion be of great use. It is now probable that senators once chosen for a state will, as the system

now stands, continue in office for life. The office will be honorable if not lucrative. The persons who occupy it will probably wish to continue in it, and therefore use all their influence and that of their friends to continue in office. —Their friends will be numerous and powerful, for they will have it in their power to confer great favors; besides it will before long be considered as disgraceful not to be re-elected. It will therefore be considered as a matter of delicacy to the character of the senator not to return him again. —Every body acquainted with public affairs knows how difficult it is to remove from office a person who is [has?] long been in it. It is seldom done except in cases of gross misconduct. It is rare that want of competent ability procures it. To prevent this inconvenience I conceive it would be wise to determine, that a senator should not be eligible after he had served for the period assigned by the constitution for a certain number of years; perhaps three would be sufficient. A farther benefit would be derived from such an arrangement; it would give opportunity to bring forward a greater number of men to serve their country, and would return those, who had served, to their state, and afford them the advantage of becoming better acquainted with the condition and politics of their constituents. It farther appears to me proper, that the legislatures should retain the right which they now hold under the confederation, of recalling their members. It seems an evident dictate of reason, that when a person authorises another to do a piece of business for him, he should retain the power to displace him, when he does not conduct according to his pleasure. This power in the state legislatures, under confederation, has not been exercised to the injury of the government, nor do I see any danger of its being so exercised under the new system. It may operate much to the public benefit.

#### CINCINNATUS IV

*For the New York Journal*

I come now, sir, to the most exceptionable part of the Constitution the senate. In this, as in every other part, you are in the line of your profession, and on that ground assure your fellow citizens, that “perhaps there never was a charge made with less reason, than that which predicts the institution of a baneful aristocracy in the Foederal Senate.” And yet your conscience smote you, sir, at the beginning, and compelled you to prefix a perhaps to this strange assertion. The senate, you say, branches into two characters the

one legislative and the other executive. This phraseology is quaint, and the position does not state the whole truth. I am very sorry, sir, to be so often obliged to reprehend the suppression of information at the moment that you stood forth to instruct your fellow citizens, in what they were supposed not to understand. In this character, you should have abandoned your professional line, and told them, not only the truth, but the whole truth. The whole truth then is, that the same body, called the senate, is vested with legislative executive and judicial powers. The two first you acknowledge; the last is conveyed in these words, sec. 3d. The senate shall have the sole power to try all impeachments. On this point then we are to come to issue whether a senate so constituted is likely to produce a baneful aristocracy, which will swallow up the democratic rights and liberties of the nation.

To judge on this question, it is proper to examine minutely into the constitution and powers of the senate; and we shall then see with what anxious and subtle cunning it is calculated for the proposed purpose. 1st. It is removed from the people, being chosen by the legislatures and exactly in the ratio of their removal from the people, do aristocratic principles constantly infect the minds of man. 2d. They endure, two thirds for four, and one third for six years, and in proportion to the duration of power, the aristocratic exercise of it, and attempts to extend it, are invariably observed to increase. 3d. From the union of the executive with the legislative functions, they must necessarily be longer together, or rather constantly assembled; and in proportion to their continuance together, will they be able to form effectual schemes for extending their own power, and reducing that of the democratic branch. If any one would wish to see this more fully illustrated, let him turn to the history of the Decemviri in Rome. 4th. Their advice and consent being necessary to the appointment of all the great officers of state, both at home and abroad, will enable them to win over any opponents to their measures in the house of representatives, and give them the influence which, we see, accompanies this power in England; and which, from the nature of man, must follow it every where. 5th. The sole power of impeachment being vested in them, they have it in their power to controul the representative in this high democratic right; to screen from punishment, or rather from conviction, all high offenders, being their creatures, and to keep in awe all opponents to their power in high office. 6th. The union established between them and the vice president, who is made one of the corps, and will therefore be highly animated with the

aristocratic spirit of it, furnishes them a powerful shield against popular suspicion and enquiry, he being the second man in the United States who stands highest in the confidence and estimation of the people. And lastly, the right of altering or amending money bills, is a high additional power given them as a branch of the legislature, which their analogous branch, in the English parliament, could never obtain, because it has been guarded by the representatives of the people there, with the most strenuous solicitude as one of the vital principles of democratic liberty.

Is a body so vested with means to soften & seduce so armed with power to screen or to condemn so fortified against suspicion and enquiry so largely trusted with legislative powers so independent of and removed from the people so tempted to abuse and extend these powers is this a body which freemen ought ever to create, or which freemen can ever endure? Or is it not a monster in the political creation, which we ought to regard with horror? Shall we thus forge our own fetters? Shall we set up the idol, before which we shall soon be obliged, however, reluctantly to bow? Shall we consent to see a proud aristocracy erect his domineering crest in triumph over our prostrate liberties?

But we shall yet see more clearly, how highly favored this senate has been, by taking a similar view of the representative body. This body is the true representative of the democratic part of the system; the shield and defence of the people. This body should have weight from its members, and the high controul which it should alone possess. We can form no idea of the necessary number in this untried system, to give due weight to the democratic part, but from the example of England. Had it not been intended to humble this branch, it would have been fixed, at least, at their standard. We are to have one representative for every thirty thousand they have nearly one for ten thousand souls. Their number is about six millions; their representatives five hundred and fifteen. When we are six millions, we shall have only two hundred representatives. In point of number therefore and the weight derived from it, the representative proposed by the constitution is remarkably feeble. It is farther weakened by the senate being allowed not only to reject, but to alter and amend money bills. Its transcendent and incommunicable power of impeachment that high source of its dignity and controul in which alone the majesty of the people feels his sceptre, and bears aloft his fasces is rendered ineffectual, by its being triable before its rival branch, the senate, the patron and



prompter of the measures against which it is to sit in judgment. It is therefore most manifest, that from the very nature of the constitution the right of impeachment apparently given, is really rendered ineffectual. And this is contrived with so much art, that to discover it you must bring together various and distant parts of the constitution, or it will not strike the examiner, that the same body that advises the executive measures of government which are usually the subject of impeachment, are the sole judges on such impeachments. They must therefore be both party and judge, and must condemn those who have executed what they advised. Could such a monstrous absurdity have escaped men who were not determined, at all events, to vest all power in this aristocratic body? Is it not plain, that the senate is to be exalted by the humiliation of the democracy? A democracy which, thus bereft of its powers, and shorn of its strength; will stand a melancholy monument of popular impotence.

### CENTINEL I

For the *Freeman's Journal*

The senate, the great efficient body in this plan of government, is constituted on the most unequal principles. The smallest state in the union has equal weight with the great states of Virginia Massachusetts, or Pennsylvania—The Senate, besides its legislative functions, has a very considerable share in the Executive; none of the principal appointments to office can be made without its advice and consent. The term and mode of its appointment, will lead to permanency; the members are chosen for six years, the mode is under the control of Congress, and as there is no exclusion by rotation, they may be continued for life, which, from their extensive means of influence, would follow of course. The President, who would be a mere pageant of state, unless he coincides with the views of the Senate, would either become the head of the aristocratic junto in that body, or its minion, besides, their influence being the most predominant, could the best secure his re-election to office. And from his power of granting pardons, he might skreen from punishment the most treasonable attempts on liberties of the people, when instigated by the Senate.

## CATO VI

For the *New York Journal*

Complete acts of legislation, which are to become the supreme law of the land, ought to be the united act of all the branches of government; but there is one of the most important duties may be managed by the senate and executive alone, and to have all the force of the law paramount without the aid or interference of the house of representatives; that is the power of making treaties. This power is a very important one, and may be exercised in various ways, so as to affect your person and property, and even the domain of the nation. By treaties you may defalcate part of the empire; engagements may be made to raise an army, an[d] you may be transported to Europe, to fight the wars of ambitious princes; money may be contracted for, and you must pay it; and a thousand other obligations may be entered into; all which will become the supreme law of the land, and you are bound by it. If the treaties are erroneously or wickedly made who is there to punish—the executive can always cover himself with the plea, that he was advised by the senate, and the senate being a collective body are not easily made accountable for mal-administration. On this account we are in a worse situation than Great-Britain, where they have secured by a ridiculous fiction, the King from accountability, by declaring; that he can do no wrong; by which means the nation can have redress against his minister; but with us infallibility pervades every part of the system, and neither the executive nor his council, who are a collective body, and his advisers, can be brought to punishment for mal-administration.