

Federalist Paper 65

The Powers of the Senate Continued
From the New York Packet.
Friday, March 7, 1788.

HAMILTON

To the People of the State of New York:

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 offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a 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 depositary 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

1 impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is
2 not this the true light in which it ought to be regarded?

3 Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently
4 independent? What other body would be likely to feel CONFIDENCE ENOUGH IN ITS OWN SITUATION,
5 to preserve, unawed and uninfluenced, the necessary impartiality between an INDIVIDUAL accused, and the
6 REPRESENTATIVES OF THE PEOPLE, HIS ACCUSERS?

7 Could the Supreme Court have been relied upon as answering this description? It is much to be doubted,
8 whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as
9 would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would
10 possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling
11 the people to a decision that should happen to clash with an accusation brought by their immediate
12 representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public
13 tranquillity. The hazard in both these respects, could only be avoided, if at all, by rendering that tribunal more
14 numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the
15 trial of impeachments, is equally dictated by the nature of the proceeding. This can never be tied down by such
16 strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as
17 in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand
18 between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The
19 awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most
20 confidential and the most distinguished characters of the community, forbids the commitment of the trust to a
21 small number of persons.

22 These considerations seem alone sufficient to authorize a conclusion, that the Supreme Court would have
23 been an improper substitute for the Senate, as a court of impeachments. There remains a further consideration,
24 which will not a little strengthen this conclusion. It is this: The punishment which may be the consequence of
25 conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced
26 to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still
27 be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who
28 had disposed of his fame, and his most valuable rights as a citizen in one trial, should, in another trial, for the same
29 offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that
30 error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one
31 decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion
32 of another decision? Those who know anything of human nature, will not hesitate to answer these questions in the
33 affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who
34 might happen to be the objects of prosecution would, in a great measure, be deprived of the double security
35 intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in
36 its terms, imported nothing more than dismissal from a present, and disqualification for a future, office. It may
37 be said, that the intervention of a jury, in the second instance, would obviate the danger. But juries are frequently
38 influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main
39 question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a
40 jury acting under the auspices of judges who had predetermined his guilt?

41 Would it have been an improvement of the plan, to have united the Supreme Court with the Senate, in the
42 formation of the court of impeachments? This union would certainly have been attended with several advantages;
43 but would they not have been overbalanced by the signal disadvantage, already stated, arising from the agency of
44 the same judges in the double prosecution to which the offender would be liable? To a certain extent, the benefits
45 of that union will be obtained from making the chief justice of the Supreme Court the president of the court of
46 impeachments, as is proposed to be done in the plan of the convention; while the inconveniences of an entire

1 incorporation of the former into the latter will be substantially avoided. This was perhaps the prudent mean. I
2 forbear to remark upon the additional pretext for clamor against the judiciary, which so considerable an
3 augmentation of its authority would have afforded.

4 Would it have been desirable to have composed the court for the trial of impeachments, of persons wholly
5 distinct from the other departments of the government? There are weighty arguments, as well against, as in favor
6 of, such a plan. To some minds it will not appear a trivial objection, that it could tend to increase the complexity of
7 the political machine, and to add a new spring to the government, the utility of which would at best be
8 questionable. But an objection which will not be thought by any unworthy of attention, is this: a court formed
9 upon such a plan, would either be attended with a heavy expense, or might in practice be subject to a variety of
10 casualties and inconveniences. It must either consist of permanent officers, stationary at the seat of government,
11 and of course entitled to fixed and regular stipends, or of certain officers of the State governments to be called
12 upon whenever an impeachment was actually depending. It will not be easy to imagine any third mode materially
13 different, which could rationally be proposed. As the court, for reasons already given, ought to be numerous, the
14 first scheme will be reprobated by every man who can compare the extent of the public wants with the means of
15 supplying them. The second will be espoused with caution by those who will seriously consider the difficulty of
16 collecting men dispersed over the whole Union; the injury to the innocent, from the procrastinated determination
17 of the charges which might be brought against them; the advantage to the guilty, from the opportunities which
18 delay would afford to intrigue and corruption; and in some cases the detriment to the State, from the prolonged
19 inaction of men whose firm and faithful execution of their duty might have exposed them to the persecution of an
20 intemperate or designing majority in the House of Representatives. Though this latter supposition may seem harsh,
21 and might not be likely often to be verified, yet it ought not to be forgotten that the demon of faction will, at
22 certain seasons, extend his sceptre over all numerous bodies of men.

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

33 PUBLIUS.

Federalist Paper 66

Objections to the Power of the Senate To Set as a Court for Impeachments Further Considered From the New York Packet. Tuesday, March 11, 1788.

HAMILTON

To the People of the State of New York:

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

The FIRST of these objections is, that the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important 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 defense of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body, is admitted, by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive. The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches. As the concurrence of two thirds of the Senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.

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 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?¹

A SECOND objection to the Senate, as a court of impeachments, is, that it contributes to an undue accumulation of power in that body, tending to give to the government a countenance too aristocratic. The Senate, it is observed, is to have concurrent authority with the Executive in the formation of treaties and in the appointment to offices: if, say the objectors, to these prerogatives is added that of deciding in all cases of impeachment, it will give a decided predominancy to senatorial influence. 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 determining what will give the Senate too much, too little, or barely the proper degree of influence? Will it not be more safe, as well as more simple, to dismiss such vague and uncertain calculations, to examine each power by

1 itself, and to decide, on general principles, where it may be deposited with most advantage and least
2 inconvenience?

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

12 But this hypothesis, such as it is, has already been refuted in the remarks applied to the duration in office
13 prescribed for the senators. It was by them shown, as well on the credit of historical examples, as from the reason
14 of the thing, that the most POPULAR branch of every government, partaking of the republican genius, by being
15 generally the favorite of the people, will be as generally a full match, if not an overmatch, for every other member
16 of the Government.

17 But independent of this most active and operative principle, to secure the equilibrium of the national House
18 of Representatives, the plan of the convention has provided in its favor several important counterpoises to the
19 additional authorities to be conferred upon the Senate. The exclusive privilege of originating money bills will
20 belong to the House of Representatives. The same house will possess the sole right of instituting impeachments: is
21 not this a complete counterbalance to that of determining them? The same house will be the umpire in all elections
22 of the President, which do not unite the suffrages of a majority of the whole number of electors; a case which it
23 cannot be doubted will sometimes, if not frequently, happen. The constant possibility of the thing must be a
24 fruitful source of influence to that body. The more it is contemplated, the more important will appear this ultimate
25 though contingent power, of deciding the competitions of the most illustrious citizens of the Union, for the first
26 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
27 peculiar attributes of the Senate.

28 A THIRD objection to the Senate as a court of impeachments, is drawn from the agency they are to have in
29 the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men, in whose
30 official creation they had participated. The principle of this objection would condemn a practice, which is to be
31 seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of
32 rendering those who hold offices during pleasure, dependent on the pleasure of those who appoint them. With
33 equal plausibility might it be alleged in this case, that the favoritism of the latter would always be an asylum for the
34 misbehavior of the former. But that practice, in contradiction to this principle, proceeds upon the presumption,
35 that the responsibility of those who appoint, for the fitness and competency of the persons on whom they bestow
36 their choice, and the interest they will have in the respectable and prosperous administration of affairs, will inspire
37 a sufficient disposition to dismiss from a share in it all such who, by their conduct, shall have proved themselves
38 unworthy of the confidence reposed in them. Though facts may not always correspond with this presumption, yet
39 if it be, in the main, just, it must destroy the supposition that the Senate, who will merely sanction the choice of the
40 Executive, should feel a bias, towards the objects of that choice, strong enough to blind them to the evidences of
41 guilt so extraordinary, as to have induced the representatives of the nation to become its accusers.

42 If any further arguments were necessary to evince the improbability of such a bias, it might be found in the
43 nature of the agency of the Senate in the business of appointments.

1 It will be the office of the President to NOMINATE, and, with the advice and consent of the Senate, to
2 APPOINT. There will, of course, be no exertion of CHOICE on the part of the Senate. They may defeat one
3 choice of the Executive, and oblige him to make another; but they cannot themselves CHOOSE, they can only
4 ratify or reject the choice of the President. They might even entertain a preference to some other person, at the
5 very moment they were assenting to the one proposed, because there might be no positive ground of opposition to
6 him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their
7 own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could
8 hardly happen, that the majority of the Senate would feel any other complacency towards the object of an
9 appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy.

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

16 This objection has been circulated with more earnestness and with greater show of reason than any other
17 which has appeared against this part of the plan; and yet I am deceived if it does not rest upon an erroneous
18 foundation.

19 The security essentially intended by the Constitution against corruption and treachery in the formation of
20 treaties, is to be sought for in the numbers and characters of those who are to make them. The JOINT AGENCY
21 of the Chief Magistrate of the Union, and of two thirds of the members of a body selected by the collective
22 wisdom of the legislatures of the several States, is designed to be the pledge for the fidelity of the national councils
23 in this particular. The convention might with propriety have meditated the punishment of the Executive, for a
24 deviation from the instructions of the Senate, or a want of integrity in the conduct of the negotiations committed
25 to him; they might also have had in view the punishment of a few leading individuals in the Senate, who should
26 have prostituted their influence in that body as the mercenary instruments of foreign corruption: but they could
27 not, with more or with equal propriety, have contemplated the impeachment and punishment of two thirds of the
28 Senate, consenting to an improper treaty, than of a majority of that or of the other branch of the national
29 legislature, consenting to a pernicious or unconstitutional law, a principle which, I believe, has never been admitted
30 into any government. How, in fact, could a majority in the House of Representatives impeach themselves? Not
31 better, it is evident, than two thirds of the Senate might try themselves. And yet what reason is there, that a
32 majority of the House of Representatives, sacrificing the interests of the society by an unjust and tyrannical act of
33 legislation, should escape with impunity, more than two thirds of the Senate, sacrificing the same interests in an
34 injurious treaty with a foreign power? The truth is, that in all such cases it is essential to the freedom and to the
35 necessary independence of the deliberations of the body, that the members of it should be exempt from
36 punishment for acts done in a collective capacity; and the security to the society must depend on the care which is
37 taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as
38 difficult as possible for them to combine in any interest opposite to that of the public good.

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