

Question from live audience

Dave

I have a question in relation to federalist number 63 that I think may be applicable in light of how party alliance can erode the check and balance function.

If the Senate is a check and balance against the larger body what is preventing the Senate from becoming nothing more than an extension of the that body?

If the majority party of the House is also the majority party of the Senate, is there an inherent risk that will disintegrate the check on the power of the larger body and in effect put power in one hand by a combined party interest of both legislative bodies?

Did the founders feel that the difference in term for which they are elected remedied this?

There are certain laws of a democratic nature which contribute, nevertheless, to correct, in some measure, the dangerous tendencies of democracy. On entering the House of Representatives of Washington one is struck by the vulgar demeanor of that great assembly. The eye frequently does not discover a man of celebrity within its walls. Its members are almost all obscure individuals whose names present no associations to the mind: they are mostly village lawyers, men in trade, or even persons belonging to the lower classes of society. In a country in which education is very general, it is said that the representatives of the people do not always know how to write correctly.

At a few yards' distance from this spot is the door of the Senate, which contains within a small space a large proportion of the celebrated men of America. Scarcely an individual is to be perceived in it who does not recall the idea of an active and illustrious career: the Senate is composed of eloquent advocates, distinguished generals, wise magistrates, and statesmen of note, whose language would at all times do honor to the most remarkable parliamentary debates of Europe.

THE FEDERALIST #62

1. Five Issues re 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.

2.First: Qualifications

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;

3.Assuring that foreign-born senators not under foreign influence.

[P]articipating 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.

4.Appointment by legislatures.

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.

5.Equal representation for large and small states.

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...

6. Compromise based not upon any theory.

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.

7.Equal representation and residual sovereignty of the states.

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.

8.Equal representation may assist in preventing bad legislation.

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 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.

9.Fourth: number of and term for senators.

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.

10. A second house of the legislative branch creates a double security.

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.

11. Restraining the passions of the House

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.

12. A legislative body chosen for a short term will make serious errors.

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.

13.Legislative blunders and instability in the states.

[N]o 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?

14.Requirements of good government.

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.

15.The need for stability.

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.

16.Mutable government is the source of innumerable problems.

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.

17.Mutable government poisons liberty and undermines the rule of law.

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.

18. Mutability of government advantages the clever and the wealthy

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.

19.National improvements require a steady system of national policy.

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.

20.Unstable government loses respect of its own people.

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.



In Federalist 62, Publius advocates for bicameralism to prevent unwise laws from passing through Congress. As such, the different requirements and duration of the Senate seems to suggest that Publius saw the Senate as an institution for more virtuous men.

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The men who are entrusted with the direction of public affairs in the United States are frequently inferior, both in point of capacity and of morality, to those whom aristocratic institutions would raise to power. But their interest is identified and confounded with that of the majority of their fellow-citizens. They may frequently be faithless and frequently mistaken, but they will never systematically adopt a line of conduct opposed to the will of the majority; and it is impossible that they should give a dangerous or an exclusive tendency to the government.

THE FEDERALIST #63

21.The Senate and national character.

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.

22.National character not derived from numerous, changeable body.

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.

23. Assuring responsible government.

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 ...

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.

24.The Senate and long-term planning.

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, „, 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.

25.The proper remedy for mutable government.

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.

26.The Senate as a restraint on occasional errors and delusions of the people.

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.

27. The Senate as a temperate and respectable body protecting the people from error.

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.

28.Extended republic necessary, but not sufficient protection.

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.

29.Long-lasting republics had senates.

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...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.

30. Two houses necessary to protect the people.

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.

31.Importance of the extended republic, even with representation.

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.

32. Opponents argue that the senate will become a tyrannical aristocracy.

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.

33.The relative dangers of liberty versus power.

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.

34.The Senate alone cannot corrupt the government.

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... 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?

35.The House as a check on the Senate.

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.



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One of the major justifications which Madison gives for the Senate is its ability to provide a path for more direct accountability in government. If there is a large turnover in elected offices, then it will be much less clear exactly which officials were responsible for certain policy missteps.

A remedy for the lack of “due responsibility” and “a sensible degree of praise and blame of public measures” is a body which has “sufficient permanency to provide for such objects as require a continued attention...and may be justly and effectually answerable for the attainment of those objects”

However, it seems that the rise of the breadth and roles of the administrative state has lead to a loss of any sort of accountability for elected public offices. (Senatorial and otherwise). There is an increasing and perverse push to create legislation which is so vague that no defects which result from its enactment can be traced to the law itself. Do you agree with this (to what extent?) and if so what are the possible remedies?

THE FEDERALIST #65

36.Objections to the Senate as a court of impeachment.

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.

37. Impeachments excite popular passions

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.

38.The Senate as the most appropriate body to judge impeachments.

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?

...

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?

39. Not the Supreme Court.

Could the supreme court have been relied upon as answering this description? ...

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.



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The first thing I find interesting about Essay #65 is that Hamilton understands that no system of government, or procedure for impeachment for that matter, will be perfect ("A well constituted court for the trial of impeachments, is an object not more the be desired, than difficult to be obtained in wholly elected"). While Hamilton, Madison, and Jay believed that Senators should be worldly, well-educated, and more connected to the national interests of the Union than the local oriented representatives, they predicted that even within the Senate, these impeachments will "connect themselves with pre-existing factions." His comment, that a decision will be "more regulated by the comparative strength of the parties, than by the real demonstrations of innocence or guilt," seems wise as ever.

Even though Hamilton believed the Senate would be better suited for impeachment proceedings than the House or Supreme Court, the requirement of 2/3 majority in the Senate to remove a president confirms that the Founders were concerned with factions within the worldly, knowledgeable Senate as well.

THE FEDERALIST #66

40. Two objection to the Senate as a court of impeachment..

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.

...

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.

41.Third objection: connection to appointments.

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.

42.Limited role of the Senate in 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...

43.Fourth objection: connection to treaty power.

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.

...

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.



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Comment 1

I am unsure of the vitality of Hamilton's conception of the impeachment process. Not because it is flawed in theory or misapprehended in fact, but because the underlying political culture today is—as Robert Bork said—in a freefall. It is undoubtedly sound in principle to argue, as Hamilton does, that the Senate will rely on “evidence of guilt so extraordinary,” and that, consequently, the potential for mischief will be mitigated. But the underlying political culture has weaponized the process. Consider one of the articles of impeachment against former President Trump: obstructing Congress. In one sense, it is the very nature of executive power to obstruct congress. Every time a President exercises the veto, he obstructs congress. We have effectively weaponized impeachment to the point where a President may face impeachment for exercising his constitutional powers. I know both times, the Senate acquitted, but that seems more tied to party loyalty than constitutional principle.

Comment 2

I will also say, that irrespective of my criticisms of Hamilton and the system he shaped, I cannot for the life of me conceive of an institutional arrangement that would work even half as well.