THE SENATE AND HYPER-PARTISANSHIP: WOULD THE CONSTITUTION LOOK DIFFERENT IF THE FRAMERS HAD KNOWN THAT SENATORS WOULD BE ELECTED IN PARTISAN ELECTIONS?

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Part of the Symposium "Hyperpartisanship and the Law," sponsored by the Georgetown Journal of Law and Public Policy

George Mason University Law and Economics Research Paper Series

12-38

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Abstract:

This article is a contribution to the symposium "Hyperpartisanship and the Law," sponsored by the *Georgetown Journal of Law and Public Policy*. The article considers the implications of direct election of United States Senators via partisan elections for the Constitution. As originally designed, the Senate was elected by state legislatures and the Framers anticipated (naïvely perhaps) that the Senate would be comprised of men chosen on the basis of distinction and ability rather than partisan allegiances. That system was changed in 1913 with the enactment of the Seventeenth Amendment, which adopted direct election of Senators. This article asks whether the Constitution would look different if the Framers had anticipated that Senators eventually would be elected by direct election as opposed to indirect election.

In particular, I focus on the distinctive powers given to the Senate within the federal constitutional structure and the reasons articulated for why those powers were given to the Senate: the power to try impeachments, to confirm nominees, and to ratify treaties, as well as the role of the Senate in the system of bicameralism and federalism. Although it is impossible to know for sure what the Framers would have done had they anticipated direct election in partisan elections I argue that it is likely that they would not have given the power to try impeachments to the Senate in the form that they did, it is reasonable that they might have changed the system of nomination and confirmation, and is likely that they would have retained the Senate's major role in treaty confirmation. Although direct election dramatically diluted the value of bicameralism, it is likely that they would have retained a bicameral structure for most matters anyway. Finally, it is extremely likely that had they anticipated that Senators would be directly elected they would have built in additional explicit constitutional safeguards for the protection of federalism.

The Senate and Hyper-Partisanship: Would the Constitution Look Different if the Framers Had Known that Senators Would be Elected in Partisan Elections?

TODD ZYWICKI*

In considering hyperpartisanship and the law, I want to discuss ways in which the Constitution might—or might not—look different had the Framers anticipated the United States Senators eventually being elected by partisan elections directly by the people. As originally composed the United States Senate was elected by state legislatures. In 1913 that was changed by the Seventeenth Amendment so we have the system we have now which is direct election of Senators in partisan elections on a state-wide basis. I am going to focus on a couple of the key powers that the Senate has under the Constitution and speculate on whether or not if the Framers had been able to foresee that eventually what we would have is Senators directly elected in partisan elections things would have looked different.

If you look at the Senate it basically has two basic functions under the Constitution. First is an institutional function which provides an important role in both bicameralism and federalism and the idea was that Senators would be representatives to the states to the national government

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and vice-versa. To perform this function it was important for Senators to be elected by state legislatures in order to protect federalism and to create a diversity of constituencies between the House and Senate in order to further the purposes of bicameralism in reducing the influence of interest-group faction on the national government.[1]

But the Senate was also intended to have a second function, to be a sort of American version of the House of Lords, standing above politics and serve as a repository of wisdom and prudence in governmental policy-making.[2] Historian Gordon Wood observes that the Senate was expected to function "with more coolness, with more system, and with more wisdom than the popular branch."[3] To further this function it was less important that Senators be elected by state legislatures than it was for Senators be elected by an indirect electoral process for longer terms distinct from the hurly-burly of the House's democratic processes (much as the indirect election of the President through the Electoral College was intended to have a similar "sifting" effect for Presidential selection). In addition, the minimum age for eligibility for election to the Senate (30 years old) was higher than for the House (25 years), further instantiating

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[1] *See* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007 (1994).

[2] *See* C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT (1995); *see also* Todd J. Zywicki, Book Review, *C.H. Hoebeke, The Road to Mass Democracy: Original Intent and the Seventeenth Amendment*, 1 INDEPENDENT REVIEW 439 (1997).

[3] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 553 (1969).

the notion that those who served in the Senate should be imbued with greater wisdom and worldly accomplishment than their colleagues in the lower house. Through this process of indirect election it was thought that the Senate would bring to itself men of wisdom and worldly accomplishment in politics, commerce, law, and military affairs, whose distinction would be universally acknowledged but whose dignity would prevent them from undergoing the indignities of the scramble of democratic vote-pandering that House members would undergo.

Tocqueville, for example, was highly impressed with the quality of man who served in the Senate in the early years of the republic, especially in contrast to the members of the House of Representatives, and attributes it to the nature of their election. The Senate, he observed, contained "a large proportion of the famous men of America. There is scarcely a man to be seen there whose name does not recall some recent claim to fame. They are eloquent advocates, distinguished generals, wise magistrates and noted statesmen."[4] He attributed this superiority of character to the indirect method of their election, "I can see only one fact to explain it: The election which produces the House of Representatives is direct, whereas the Senate is subject to election in two stages. All citizens together appoint the legislature of each state, and then the federal

[4] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 200-01 (J. Mayer ed., 1966).

Constitution turns each of these legislatures into electoral bodies that return the members of the Senate."[5]

Today, we generally reject the notion that we can compare the "quality" of Senators between the early and latter days of our Republic. And there is little doubt that then, as now, the Senate like all political bodies, was a mixed bag of quality. Leaving aside the questions of whether the Senate actually produced higher quality men and greater wisdom than the house, however, what is more important is that in examining the Constitution it is clear that the Framers believed that this would be the case—that indirect election of Senators was important to produce a body independent of democratic political pressures and factionalism and which could function in a moderated and deliberative fashion.

In particular, I want to focus on the question of given the fact that the Founders believed that Senators would be indirectly elected, would the Constitution look different if the Framers had contemplated that Senators eventually would be elected democratically in partisan electoral contests? This is not to say that the Framers were correct in believing that partisan politics could be held at bay—the early rise of the party system and the demise of the Electoral College demonstrating that the Framers aspirations

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[5] *Id.* at 201.

on this score were naïve, as well as the late Nineteenth-century rise of quasi-democratic means of Senate election, such as party primaries.[6]

Regardless of whether their views were realistic, however, it is clear that those assumptions were instrumental in the design of the Constitution. In particular, the indirect nature of the election of Senators was an important consideration for the several functions uniquely allocated to the Senate under the Constitution outside of the bicameral process: to try articles of impeachment; confirmation of judges, ambassadors, and other senior government officials; and to ratify treaties. With respect to each of these duties uniquely allocated to the Senate, I will argue that the decision to provide those responsibilities to the Senate rested at least in part on its indirectly-elected character and that for at least some of them (most notably the power to try impeachments), it is likely that the Framers would *not* have provided those duties to the Senate if it had been anticipated that Senators would be elected democratically. Finally, I will briefly address the link between indirect election of Senators and structural protections such as federalism and bicameralism. I have treated this issue at length elsewhere and thus the discussion will be brief here, but merits mention.[7]

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[6] *See* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals*, 45 CLEVELAND STATE L. REV.165 (1997).

[7] *Id.*

Impeachment

The Constitution establishes a two-step process for impeachment. The House serves as sort of a grand jury to determine whether it should indict an officer through the power to "impeach." The Senate then sits a sort of petit jury deciding whether to convict on the House's impeachment. Under Article I, Section 2, the House of Representatives is given the "sole Power of Impeachment." And Article I, Section 3 provides, "The Senate shall have the sole Power to try all Impeachments." Moreover, it further provides that when sitting for that purpose, the Senate shall be under Oath, much like a jury trial and that two-thirds vote of those present is necessary for the Senate to convict.

The procedure established by the Constitution for impeachment may be the most obvious way in which it seems likely that the Framers would have designed the Constitution differently if they had anticipated that Senators eventually would be elected by partisan direct election, as it is today. It is plausible to envision an indirectly-elected non-partisan Senate sitting as a sort of trial jury to weigh the evidence of an impeachment trial. On the other hand, it is equally implausible to envision a partisan-elected Senate doing the same, especially in our current era of hyper-partisanship. Simply recalling the farcical Clinton impeachment proceedings a decade ago is probably sufficient to make the point that partisan politics and dispassionate fact-finding are antithetical to one

another. And, indeed, we can see that the Framers understood that the structure of the Senate was essential to this arrangement.

Impeachment is the focus of *Federalist* 65 and 66. And what is evident there is that the Framers recognized the threat that impeachment could be used as a political tool and that the role of the Senate was to temper the political passions that could lead to rash impeachment proceedings. Hamilton notes in *Federalist* 65, for instance, that the impetus impeachment proceedings will often arise from preexisting factional arrangements in society "more or less friendly or inimical to the accused."[8] As such, the movement 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."[9] Hamilton cautions that "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."[10]

Trusting the impeachment process to the democratically-elected House, therefore, would tend to exacerbate the tendency of impeachment to be used for political purposes as they will tend to inflame public passions against the accused "and on this account can hardly be expected

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[8] *The Federalist* No. 65, at 396 (Clinton Rossiter ed. 1961).

[9] *Id.*

[10] *Id.* at 396-97.

to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny."[11]

The remedy for this fear was to make the Senate the "depositary of this important trust" to stand in between the representatives of the people on one hand and the accused on the other.[12] In so doing, the Framers were adopting the model of the British House of Lords, which held a similar power to decide questions of impeachment (and, as with the United States Constitution, the House of Commons had the power to "prefer the impeachment"). The Senate, Hamilton argues, is the only body that will have the right balance of stature, independence, and political accountability to serve in the role of passing on impeachments. "Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent?"[13] He asks further, "What other body would be likely to feel *confidence enough it its own situation* to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused and the *representatives of the people, his accusers?*"[14]

Having thus rejected the House as too subject to democratic pressures to try impeachment Hamilton also rejected the Supreme Court as the proper body to try impeachments for the opposite reason—its

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[11] *Id.* at 397.

[12] *Id.*

[13] *Id.* at 398.

[14] *Id.* at 398.

insufficient political accountability would make its judgments illegitimate among the public. Moreover, he argues that impeachment proceedings differ in their scope and procedures from an ordinary trial, and that judges may not be best-suited to execute the less rule-bound procedures of an impeachment trial. Finally, he notes that it would be improper for the courts to sit in judgment both in an impeachment trial to determine whether the accused should be removed from office and then again in a subsequent prosecution of the underlying acts. Hamilton argues that in such circumstance the impeachment trial would appear to prejudge the outcome of a subsequent trial underlying misbehavior that gave rise to the impeachment proceedings. Better to keep the judicial function separate from the political entanglements of impeachment.

Would the impeachment process look different if the Framers had known that the Senate would be directly elected? It is clear that the notion of indirect election was a crucial element of allocation of this power to the Senate. And as the Clinton impeachment showed, the vices of political control over impeachment are manifest. To the extent that the Framers would have left the trial of impeachment in the hands of the Senate, therefore, it is reasonable to conclude that they would have done so only because they were unable to conjure up a different approach. Given that the current system tends to exacerbate rather than moderate the political nature of the House's role in impeachment proceedings, however, it is likely that the Framers would have seen the evil and acted against it.

Nominations

It seems clear that the Framers would have reconsidered the process of impeachment had they known that the Senate would be directly elected. With respect to nominations, especially judicial nominations, I think it is less clear, but again I think it is possible that the Framers would have designed the "advice and consent" role of the Senate differently had they anticipated political election Senators. Article II, Section 2, provides that the President "shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for…."

In part my uncertainty here rests in the observation that the role of the Senate in the confirmation process has evolved to be so much more political than the Framers apparently originally believed it would be.[15] In *Federalist* 76 Hamilton describes the convention's reasons for shared authority between the President and the Senate for passing on nominations of judges, ambassadors, and senior governmental officials. In light of contemporary debates, I will focus on judicial nominations, which have provided much controversy in recent years.

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[15] Again, it may be that the Framers were naïve in believing that appointments would be non-political. And as others on this panel at the conference explained, the politicization of judicial and other nominations emerged quite early—and perhaps predictably—in the nation's history. My observations here are based on what I understand the Framers to have *anticipated* how nominations would take place rather than how history actually evolved.

The primary concern of the Framers—contrary to current debates which revolve around judicial ideology—was to uphold the integrity and independence of the judiciary as a co-equal branch of the federal government and to protect it from becoming an arm of either of the political branches. The focus of the nomination and confirmation process, therefore, was intended to be on the qualifications and character of the nominated person. Thus, they rejected the vesting of the nomination power in the legislature because it would be too prone to political log-rolling and vote-trading. Yet they rejected unilateral appointment by the President because they feared that this would enable him to appoint unqualified cronies. As Hamilton asks, "To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general a silent operation."[16] He continues, "It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." As a result of this threat of rejected, the President "would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or being some way or other

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[16] *The Federalist* No. 76 at p. 457 (Clinton Rossiter ed., 1961).

personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."[17]

Thus, having decided on shared appointment power, why place the power of advice and consent in the Senate rather than the House? The House was thought too numerous in size, too prone to political factionalism, and too unstable in composition to pass on nominations. The Senate, by contrast, was a continuing body, which could be called together frequently to act on nominations. But note again—part of the argument for vesting the power in the Senate was that as a result of its composition it was perceived as being less prone to political faction than the House.

Had the Framers known that judicial nominations would evolve into a highly-political process, rather than one focused on qualifications and character of the nominated party, would they have designed the nomination and confirmation process differently? Well, again the issue depends on a comparison as to other alternatives. But it is significant to note that since the Constitution was ratified the overwhelming majority of states that entered the union rejected the federal plan for selecting judges—significant because while they were certainly aware of the federal plan and they *could have* adopted it, they affirmatively chose to do something different. Typically they have chosen one of two paths: either so-called "merit selection" of judges by a small group (often dominated by

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[17] *Id.* at 458.

members of the state bar) or some form of democratic process (election or retention).

Hamilton rejected the idea of selecting judges through delegating the power to a small group without political accountability, a process that looks very similar to the modern "merit-selection" or "Missouri Plan" for selecting judges, a process that is often criticized because of its lack of transparency and accountability. Hamilton heaps vituperation upon a similar process that existed in New York State during that period that vested the appointment power in a council of three to five members. As he describes it, "This small body, shut up in a private apartment, impenetrable to the public eye, proceed to the execution of the trust committed to them."[18] And while the governor is one of the members of the commission, it is not known how much control he has over the process or how the selections were made. Thus, there is little ability to determine whether selections were made for legitimate rather than illegitimate purposes, whether the positions are filled with those men who are best qualified to hold them "or whether he prostitutes that advantage to the advancement of persons whose chief merit is their implicit devotion to his will and to the support of a despicable and dangerous system of personal

[18] *Id.* at 461.

influence."[19] Thus, it seems clear that the Framers would have been skeptical of something like the modern "Missouri Plan."

But what about democratic election of judges? The *Federalist* contains little discussion of this option and what it says is largely off point, noting that it would be impracticable for the public to pass on every nomination every time an opening arose. But they provide no discussion of the process as it has evolved of judges serving for fixed terms subject to reelection or recall. But the more important question to ask is to what extent was the nomination and confirmation process established by the Constitution predicated on the notion that nomination and confirmation would be a largely non-political process focused on selecting judges of sufficient qualifications and character to be able to uphold the independence of the judiciary as an independent branch of the government? For if that was the purpose then the original scheme makes eminent sense. It would make sense to vest the advice and consent power in the Senate and share responsibility between the indirectly-elected Senate and the President. But if the judiciary is seen as primarily a political body and judicial nominations are seen as largely political activities, then this arrangement makes much less sense. Indeed, the case for a more democratic role for judicial selection becomes highly compelling—which may explain why states that entered the union after

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[19] *Id.* at 462.

the ratification of the Constitution have rejected the model established by the federal Constitution.

On this point, I would conclude that it is unclear whether the Framers would have preserved the nomination and confirmation process the way it is had they known that the Senate would be politically elected.

Treaty Ratification

The final significant power of the Senate is the power in Article II, Section 2 to ratify Treaties, with a two-thirds vote of the Senate. While again it appears that this power was versed in the Senate in part because of the indirect nature of the election of Senators, it seems plausible that the process for ratifying treaties would have been the same even if it had been known that the Senate would be democratically elected.

Writing in *Federalist* 64, Jay offers several reasons for the Senate's role in ratifying treatise, some of which appertain to the indirect election of the Senate and the type of man that indirect election was likely to produce. Jay argued that the indirect method of electing Senators, as well as the indirect method of electing the President via the Electoral College, would tend to mean that those doing the nominating (state legislatures and the Electoral College) would "in general be composed of the most enlightened and respectable citizens" who in turn would select "those men only who have become the most distinguished by their

abilities and virtue, and in whom the people perceived just grounds for confidence."[20] Moreover, this selection of high-quality men would be reinforced by the more stringent age eligibility for serving as President or Senator, which would tend to further promote the selection of wise and worldly men. As a result, the treaty power would be vested in those most best able to understand the national interest and "whose reputation for integrity inspires and merits confidence." Moreover, the Senate's status as a continuing body made them available to act quickly on Treaties, if necessary. By contrast, the youth, short terms, and lack of continuity of House members rendered them unsuited for a role in the treaty power.

Jay's discussion of the role of the Senate in the ratification of treaties is brief, thus it is difficult to know what he would say for sure. But it appears that much of his focus is on the relative age and experience of Senators, rather than their independence from politics via indirect election.

Structural Protections: Bicameralism and Federalism

A final place in which the indirect election of Senators was essential to the constitutional system was in the furtherance of the systems of bicameralism and federalism in the Constitution. The purpose of bicameralism is to reduce the influence of interest-group faction by basing

[20] *The Federalist* No. 64 at 391 (Clinton Rossiter ed., 1961).

the composition of the two houses of the legislature on different constituency bases. Thus, indirect election of Senators was supposed to further bicameralism by requiring a concurrence of both a majority of the people and a majority of the states to any government action.[21] Moreover, the selection of Senators by state legislatures was seen as the primary protection for federalism by enabling states to block legislative overreaching by the national government.[22]

Adoption of direct election clearly eroded both of these functions. First, by basing selection of the House and Senate on direct election, the Seventeenth Amending increased the similarity of constituencies between the two houses, thereby making them more vulnerable to special interest influences. Second, by eliminating the role of state legislatures in selecting Senators, this important institutional protection for federalism was eviscerated. Today Senators, like House members, treat purported fealty to federalism as purely political and instrumental to their reelection prospects, rather than having any direct or indirect incentive to defend federalism as a constitutional principle.

Having said that, I think that the Framers clearly would have remained supportive of bicameralism, even the watered-down version that we have today. I do not think that the idea that we have dramatically reduced the spread of constituencies between the two houses would have

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[21] *See* Zywicki, *supra* note 1, at 1131-37; Zywicki, *supra* note 6, at 176-80.

[22] *See* Zywicki, *supra* note 6, at 169-175.

caused them to get rid of bicameralism. Other provisions, such as the longer terms of Senators and the independence from public passions that might be expected to produce, would still provide some functional role for bicameralism. With respect to federalism, it seems clear that the Framers thought that selection of Senators by state legislatures was both a necessary and sufficient condition for the protection of federalism and that had they anticipated that Senators would be democratically elected it seems likely that they would have made additional precautions in the Constitution to create clear protections for federalism.[23]

Conclusion

In this short essay I have tried to sketch out some of the unique implications of hyperpartisanship for the role of the Senate under the Constitution. In particular, I have argued that the unique powers granted to the Senate under the Constitution depended in part on its status as a body selected by indirect election. In particular, its role in the impeachment proceedings as a sort of fact-finding jury seems to make sense *only* in a world in which Senators were selected on criteria other than partisan affiliation. With respect to the Senate's role to provide advice and consent to Presidential nominations, the issue is murkier.

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[23] I discuss some of these implications for current reform proposals in Zywicki, *supra* note 6, at 219-32.

Nevertheless, the Senate's role here seemed to be based at least in part on the assumptions that judicial nominations would be less a matter of politics than a matter of qualifications, character, and temperament. If that is the inquiry, then it would make sense to vest confirmation power in the Senate. But once judicial nominations evolved into a political process, the structure of the nomination process, including the Senate's advice and consent role, became more questionable. And indeed, most states that have entered the union since the Constitution was ratified have expressly rejected the national government's mode of judicial selection. With respect to the Senate's role in ratifying treaties it is difficult to say, but is at least to some extent grounded on the indirect election of Senators and the type of person that process was predicted to produce.

With respect to bicameralism and federalism the indirect election of Senators again was important. With respect to bicameralism, the whole notion of bicameralism was predicated on the idea that the two houses of Congress would be predicated on different constituencies. Nevertheless, the virtues of bicameralism appear sufficient that the Framers would have supported it any way. With respect to federalism, by contrast, the demise of the Senate as a voice for the states as federalism evolved as a matter of political expediency rather than constitutional principle would have likely led to the Framers to build-in alternative protections for federalism.