

Antifederalist No. 64

On the Organization and Powers of the Senate. (Part 3)

Taken from the New York Journal, Nov. 22, 1787 by "Cincinnatus" It appears to have been written in answer to James Wilson's Antifederalist # 12).

I come now, sir, to the most exceptionable part of the Constitution -- the Senate. In this, as in every other part, you [James Wilson of Pennsylvania] are in the line of your profession Law, 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 Federal 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. 2nd. 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. 3rd. 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, they will 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 control the representative in this 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 inquiry, 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 and seduce -- so armed with power to screen or to condemn -- so fortified against suspicion and inquiry -- 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 forget 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 defense of the people. . . . Its transcendent and incommunicable power of impeachment -- that high source of its dignity and control -- in which alone the majesty of the people feels his scepter, 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. . .

"When the legislative and executive powers are united in the same person, or in the same corps," [says Montesquieu] "there can be no liberty. Because, it may be feared, that the same monarch or senate will make tyrannical laws, that they may execute them tyrannically." I am aware that this great man is speaking of a senate being the whole legislature; whereas the one before us is but a branch of the proposed legislature. But still the reason applies, inasmuch as the legislative power of the senate will enable it to negative all bills that are meant to control the executive; and from being secure of preventing any abridgment, they can watch every pliant hour of the representative body to promote an enlargement of the executive powers. One thing at least is certain, that by making this branch of the legislature participant in the executive, you not only prevent the legislature from being a check upon the executive, but you inevitably prevent its being checked or controlled by the other branch.

To the authority of Montesquieu, I shall add that of Mr. De Lolme, whose disquisition on government is allowed to be deep, solid, and ingenious. . . . "It is not only necessary," [says he] "to take from the legislature the executive power which would exempt them from the laws; but they should not have even a hope of being ever able to arrogate to themselves that power." To remove this hope from their expectation, it would have been proper, not only to have previously laid down, in a declaration of rights, that these powers should be forever separate and incommunicable; but the frame of the proposed constitution should have had that separation religiously in view, through all its parts. It is manifest this was not the object of its framers; but, that on the contrary there is a studied mixture of them in the senate as necessary to erect it into that potent aristocracy which it must infallibly produce. In pursuit of this daring object, than which no greater calamity can be brought upon the people, another egregious error in constitutional principles is committed. I mean that of dividing the executive powers between the senate and president. Unless more harmony and less ambition should exist between these two executives than ever yet existed between men in power, or than can exist while human nature is as it is, this absurd division must be productive of constant contentions for the lead, must clog the execution of government to a mischievous, and sometimes to a disgraceful degree; and if they should unhappily harmonize in the same objects of ambition, their number and their combined power would preclude all fear of that responsibility, which is one of the great securities of good, and restraints on bad governments. Upon these principles Mr. DeLolme has foreseen that "the effect of a division of the executive power is the establishment of absolute power in one of continual contention;" he therefore lays it down, as a general rule . . . "for the tranquility of the state it is necessary that the executive power should be in one." I will add, that this singlehood of the executive is indispensably necessary to effective execution, as well as to the responsibility and rectitude of him to whom it is entrusted.

By this time I hope it is evident from reason and authority, that in the constitution of the senate there is much cunning and little wisdom; that we have much to fear from it, and little to hope, and then it must necessarily produce a baneful aristocracy, by which the democratic rights of the people will be overwhelmed.

It was probably upon this principle that a member of the convention, of high and unexceeded reputation for wisdom and integrity, is said to have emphatically declared, that he would sooner lose his right hand, than put his name to such a constitution.

CINCINNATUS