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Written by **Joe Wolverton, II, J.D.** on January 26, 2020

In an Impeachment Trial, Are Senators Jurors?

"Whatever these betrayers of their country get, the people must lose; and, what is worse, must lose a great deal more than the others can get; for such conspiracies and extortions cannot be successfully carried on, without destroying or injuring trade, perverting justice, corrupting the guardians of the publick liberty, and the almost total dissolution of the principles of government."

> — Cato's Letters No. 16, February 11, 1721

With the conclusion of the presentation of the evidence of President Donald Trump's alleged obstruction of Congress and abuse of power — the charges for which he was impeached by the House of Representatives — many politicians and pundits are suggesting that the senators are now to act as jurors.

For example, a *Washington Times* article reporting on a lawmaker passing a note — yes, that was worthy of an article apparently — bore the following title: "Key GOP Senate jurors pass note at Trump impeachment trial."

An NPR story carried the headline: "Impeachment Ceremonial Proceedings Continue As Senators Sworn In As Jurors."

Headline or not, senators hearing impeachment charges are not jurors.

Let's begin with the relevant clause of the U.S. Constitution, Article I, Section 3: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation."

To learn whether the Framers intended senators trying a case of impeachment to be jurors, we need not drink downstream. Another provision of the U.S. Constitution makes it pretty plain that it is impossible that senators were considered jurors.

Article III, Section 2 reads in relevant part: "The trial of all crimes, except in cases of impeachment, shall be by jury."

When read together and read carefully, you will see that Article III, Section 2 explicitly excludes impeachment trials from being tried by a jury. Thus, impeachment trials are heard by some other method.

Further evidence that senators are not jurors in cases of impeachment is found in *The Federalist*, No. 65, written by Alexander Hamilton. In that letter, Hamilton writes, "There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it."

In another part of this political tract, Hamilton explained why senators were preferable to the justices of the U.S. Supreme Court when it comes to trying the president on charges of impeachment:

> Could the Supreme Court have been relied upon as answering this description? It is much to be

> doubted, whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding.

Notice that Hamilton points to the role of senators in "reconciling the people to a decision" with which they are not unhappy. Here, as in other constitutional procedures, the Senate is to serve as a check on the potential haste of the House of Representatives.

Article I, Section 3, contains another provision that logically precludes the possibility of senators being considered jurors by the men who drafted and ratified the U.S. Constitution. Here's the final clause of that section:

> Judgment in Cases of impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Following the road of reason leads to the logical conclusion that if the limit of punishment for conviction after impeachment is removal from office, but a convicted officer holder (the president in our current case) could be subject to a subsequent "trial, judgment and punishment according to law," and guilt in such a legal proceeding would be decided by a jury, wouldn't the Framers simply have provided a process that included a jury and a criminal punishment?

During the impeachment trial of Justice Samuel Chase in 1804, Luther Martin clearly delineated between trial by jury and trial of impeachment:

> The President, Vice President, and other civil officers, can only be impeached. They only in that case are deprived of a trial by jury; they, when they accept their offices, accept them on those terms, and, as far as relates to the tenure of their offices, relinquish that privilege; they, therefore, cannot complain. Here, it appears to me, the framers of the Constitution have so expressed themselves as to leave not a single doubt on this subject.

Later, speaking on the same subject, Martin added:

> The truth is, the framers of the Constitution, for many reasons, which influenced them, did not think proper to place the officers of Government in the power of the two branches of the Legislature, further than the tenure of their office. Nor did they choose to permit the tenure of their offices to depend upon the passions or prejudices of jurors.

Finally, we turn to another clause of the Constitution to refute the claim that senators serve as jurors in an impeachment trial. The relevant clause of Article I, Section 5 reads: "Each House may determine the Rules of its Proceedings."

As the Constitution is silent on the particular procedure to be followed by the Senate in the trial of an impeachment, the Senate is authorized to determine the rules it will follow.

The first version of rules for impeachment trials was written by Thomas Jefferson while he served as vice president. Then, the rules were amended during the impeachment trial of President Andrew Johnson. In 1936, a rule was added allowing for the creation of a trial committee composed of a few senators. These rules were followed during the trial of President Clinton.

I'll give the last word to William Rawle, a Pennsylvania attorney who in 1825 wrote the constitutional law textbook *A View of the Constitution of the United States*. In that influential text, he explained the wisdom of granting the Senate the sole power to try impeachment:

> They are therefore more independent of the people, and being chosen with the knowledge that they may, while in office, be called upon to exercise this high function, they bring with them the confidence of their constituents that they will faithfully execute it, and the implied compact on their own parts that it shall be honestly discharged.
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> Precluded from ever becoming accusers themselves, it is their duty not to lend themselves to the animosities of party or the prejudices against individuals, which may sometimes unconsciously induce the house of representatives to the acts of accusation.
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> Habituated to comprehensive views of the great political relations of the country, they are naturally the best qualified to decide on those charges which may have any connexion with transactions abroad, or great political interests at home, and although we cannot say, that like the English house of lords they form a distinct body, wholly uninfluenced by the passions, and remote from the interests of the people, yet we can discover in no other division of the government a greater probability of impartiality and independence.

Photo: U.S. Senate

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