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Impeachment Sidebar: The Senate Trial

Jerry Goldfeder's *Impeachment Sidebar* addresses various legal issues relating to the impeachment process. This is the fourth installment.

Why is it that the Senate was selected to try an impeached public official?

By [Jerry H. Goldfeder](#)



Many Americans think it odd that senators act as both judges and jury in the impeachment process, not to mention that some announce in advance of the trial how they will vote. This concern is not new. Some senators at President Bill Clinton's impeachment trial also voiced strong views in advance of the evidence, and those trying President Andrew Johnson did the same. Unlike a potential juror in a generic criminal trial who expresses a pro-defense or prosecution bias, senators are automatically seated without *voir dire*. There is no law or convention that disqualifies a senator because of predisposition, self-interest or political affiliation. One may reasonably ask, then, why is it that the Senate was selected to try an impeached public official?

Alexander Hamilton argued in [Federalist Papers No. 65](#) that the Senate was the appropriate body to conduct an impeachment trial. "Where else than in the Senate," he asked, could be found "a tribunal sufficiently dignified, or sufficiently independent?" He continued: "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?*" (emphasis in original).

Hamilton is obviously being more aspirational than descriptive. After all, whether

appointed by state legislators, as the original Constitution provided, or elected by the voters, as the 17th Amendment mandated in 1913, senators have always been chosen through a political process—and thus are inevitably drawn to partisan considerations.

Hamilton supported the Founders' choice with his usual rhetorical style—by disparaging other options. For instance, he rejected the Supreme Court as the appropriate body to sit in judgment at an impeachment trial. Although one may think that courts would act impartially in a way that senators probably could not, Hamilton spurned this idea on two grounds. The Court was too few in number to deliberate fairly; and it would be unjust for it to rule on a former public official's guilt or innocence if a criminal prosecution was brought after removing him from office. Hamilton presented other alternatives, such as representatives of the several states or employees of the federal government, but found fault with these ideas as well. In sum, although he acknowledged that choosing the Senate as the trier of an impeached official was not ideal, its selection was not “bad and pernicious.” In any event, he argued, the proposed impeachment process appeared reasonable because it followed the English model—impeachment by the House of Commons, trial by the House of Lords.

Under the Founders' analysis, and the centuries-old English practice, senators were, therefore, the right people to conduct an impeachment trial. The fact that they were chosen through a political process did not mean they could not execute the “awful discretion” that awaited them in an impeachment trial. Indeed, Hamilton *expected* that the “passions of the whole community” would be “agitated,” dividing the nation into those “more or less friendly or inimical to the accused.” In other words, a trial of an impeached public official would necessarily be imbued with political considerations.

As it did during the impeachment trials of Presidents Johnson and Clinton, the Senate is exercising its role as contemplated by our Founders, some 233 years ago. Perhaps reform of the process is required, but observers of the current trial should not be surprised.

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Previous installments in this series:

[*Impeachment Sidebar: Historical Context*](#)

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