Judicial Review of Senate Impeachment Proceedings: Is a Hands Off Approach Appropriate

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I. INTRODUCTION

The Supreme Court has decided numerous cases in its history that establish doctrines and principles to be applied in determining whether a particular case may be reviewed by the federal courts. While the Constitution provides that the federal courts may hear any "case or controversy" that arises under federal law,1 Supreme Court jurisprudence has significantly narrowed the class of cases that actually qualify as such a "case or controversy."2 Among these judicially created "justiciability doctrines" is the political question doctrine3 under which the Court deems certain issues to be beyond the jurisdiction of the federal courts to adjudicate.

Much controversy has surrounded the Supreme Court's use and analysis of the political question doctrine as a means to prevent federal court review of particular cases.4 The decision of the Supreme Court in Walter Nixon v. United States5 is the latest application of this doctrine, again raising questions of the appropriate application of the doctrine in limiting the power of the federal courts.

Walter L. Nixon Jr. was the former Chief Judge of the United States District Court for the Southern District of Mississippi.6 Nixon was sentenced to prison after being convicted in 1987 of two counts of making false statements before a federal grand jury.7

2. See infra notes 33-38 and accompanying text.
3. See infra notes 50-86 and accompanying text.
4. See infra notes 54-57 and accompanying text.
6. Id. at 734.
7. Id.
The grand jury investigation arose from allegations that Nixon had accepted bribes from a Mississippi businessman in exchange for which Nixon asked a local district attorney to cease an investigation of the businessman's son.\(^8\)

Following his conviction, the House of Representatives on May 10, 1989, adopted three Articles of Impeachment for High Crimes and Misdemeanors. The first two Articles charged Nixon with falsely testifying before the grand jury and the third charged him with bringing disrepute to the Federal Judiciary.\(^9\) The House then presented the Articles of Impeachment to the Senate, after which the Senate voted to invoke Impeachment Rule XI,\(^10\) providing that the presiding officer could appoint a committee of Senators to "receive evidence and take testimony."\(^11\)

The Senate committee proceeded to conduct four days of hearings at which ten witnesses, including Nixon, testified.\(^12\) As

\(^8\) Id. Surprisingly, while in prison, Nixon actually continued to receive his judicial salary because he refused to resign from his office. Id.

\(^9\) Id.


In the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all of the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

\(^11\) Nixon, 113 S. Ct. at 734 (quoting SENATE MANUAL at 186).

\(^12\) Id. (citing S. REP. NO. 164, 101ST CONG., 1ST Sess. 4 (1989)). Specifically, the House managers called a total of four witnesses. Nixon v. United States, 744 F. Supp. 9, 10 (D.D.C. 1990), aff'd, 938 F.2d 239 (D.C. Cir. 1991), aff'd, 113 S. Ct. 732 (1993). An additional six witnesses, including Nixon, testified for the defense. Id. The hearing was also broadcast live to all Senators' offices and videotaped "for future reference." Id. However, it is unknown how many Senators actually took advantage of these opportunities to view the proceedings conducted by the committee. Id.
required by Rule XI, the committee thereafter presented the full Senate with a complete record of the evidence as well as a report summarizing both the contested and uncontested facts. In addition, Nixon and the House impeachment managers presented final briefs to the full Senate, made oral arguments including a personal appeal by Nixon himself, and the parties were questioned by Senators. Following these proceedings, the Senate voted, by more than the Constitutionally required two-thirds majority, to convict Nixon on two of the three Articles. Judgment was therefore entered by the presiding officer, removing Nixon from his office as a United States district judge.

Following his removal, Nixon sued in district court, arguing that the Senate’s proceedings pursuant to Rule XI violated its constitutional duty to “try” all impeachments because he was not afforded a hearing before the full Senate. Nixon sought a declar-
tory judgment that his conviction by the Senate was void and that he was entitled to reinstatement of his judicial salary and privileges.\textsuperscript{18} The district court held that his claim was non-justiciable,\textsuperscript{19} and the District of Columbia Circuit Court of Appeals affirmed.\textsuperscript{20}

The district court reasoned that the Senate's denial of Nixon's motion to be tried by the full Senate was not the type of constitutional violation that the Supreme Court has recognized as justiciable.\textsuperscript{21} However, the court went on to state that Nixon might have been able to prevail and obtain the relief sought were he "convicted without any semblance of a trial."\textsuperscript{22} But, upon a review of the procedures afforded Nixon, the district court concluded that they did not "result[] in the dimension of departure from the Constitution's textual commitment to the Senate of the 'sole Power to try all Impeachments' as to make this controversy justiciable and the claim meritorious."\textsuperscript{23}

Senate to "try" an impeachment on the Senate floor so that all Senators present may view witnesses, hear their testimony, and effectively judge their credibility. 744 F. Supp at 10. Since only "the Senate" is granted authority to "try" impeachments, Nixon claims that his conviction and Senate Rule XI violate the literal requirements of Article I. \textit{Id.}


The Senate's refusal to grant Nixon a trial before the full Senate was distinguished from the House's actions in Powell based on the absence of any requirement in the Constitution that the \textit{full} Senate try all impeachments. \textit{Nixon}, 744 F. Supp. at 14. The Senate's decision was deemed to more closely resemble "a procedural ruling pursuant to the Senate's rule making authority created by Article I, § 5, cl. 2, as to the type of trial to be accorded this particular plaintiff . . . ." \textit{Id.}

23. \textit{Id.} The District Court has confused the issues with this final statement. The court first determines that because of the commitment of the sole power to try impeachments to the Senate, that the Senate has full, unreviewable authority to determine the procedures it engages. \textit{Id.} This determination leads to Nixon's claim being deemed non-justiciable — the court cannot review the merits because it is without the Constitutional power to do so. See \textit{infra} notes 34-38 and accompanying text. Nevertheless, the court goes on to review on the merits the type of proceeding conducted by the Senate in hearing Nixon's case, stating that the proceedings were not so inadequate as to violate the Senate's duty to "try" impeachments. \textit{Nixon}, 744 F. Supp. at 14. Thus, according to the court's statement, had Nixon's conviction been without "any semblance of a trial," his claim would have been justiciable and "meritorious." \textit{Id.}
Two judges of the District of Columbia Circuit Court of Appeals concluded that Nixon's claim was non-justiciable pursuant to the political question doctrine and independent analysis of the Constitution's impeachment provisions. However, Judge Harry T. Edwards, while concurring in the judgment, dissented on the issue of justiciability, stating that the matter was justiciable in the federal courts. Judge Edwards nevertheless concluded that on the merits, Nixon received a fair trial by the Senate committee and was not deprived of his constitutional rights.

The Supreme Court affirmed the judgment of the circuit court, holding Nixon's claims to be non-justiciable pursuant to the political question doctrine. The Court concluded that the word "try" in the Constitution "lacks sufficient precision to afford any judicially manageable standard of review." The Court stated that this lack of standards bolstered its conclusion that the issue has been textually committed solely to the Senate, therefore bringing impeachment procedures within the ambit of the political question doctrine. Justice White, while concurring in the judgment, took the approach of Judge Edwards of the D.C. Circuit. Justice White found no prohibition forbidding the Court from reviewing the merits of Nixon's case, but concluded that the trial Nixon received was constitutional on the merits.

Where the district court errs is in its conclusion that the Senate's decision to utilize the hearing committee was a decision committed solely to the Senate and therefore unreviewable by the federal courts so long as the procedures afforded the individual being tried are adequate. By considering to any extent the actual hearing's procedures and protections, the court is reaching the merits of Nixon's claims. However, if the Senate's exercise of power here is non-justiciable, the court can never reach the merits because it lacks jurisdiction on the issue. See infra notes 33-34 and accompanying text.

24. Nixon, 938 F.2d at 246. Judge Stephen F. Williams concluded that impeachment claims of a federal judge could never be judicially reviewed because the result would be that the judiciary would have final, unreviewable control over the one procedure designed to restrain the judiciary, resulting in a "checkmate" situation. Id. Judge Randolph concurred in the judgment, but based his conclusion that Nixon's claim was non-justiciable on his own independent review of the Constitutional impeachment provisions. Id. at 247. He found that the determination of the impeachment issue had been committed to another branch of the federal government, not the courts. Id. While recognizing that his conclusion may fall within the realm of the political question doctrine, Judge Randolph found "no need to rely on [that] somewhat 'amorphous' doctrine . . . ." Id. at 248.

25. Id.

26. Id.


28. Id. at 736.

29. Id.

30. Id. at 740-41.
This comment argues that, contrary to the majority opinion of the Supreme Court, Justice White's approach is correct and the Court should have held Nixon's claims to be justiciable and reached the merits of his claims. The majority's reasoning is cursory and unpersuasive, leading the reader to question whether the Court was finding the matter non-justiciable in blatant avoidance of the difficult task of reviewing the Senate's procedures and the fear of causing a political upheaval. The Court's conclusion that it cannot ascertain the meaning of "try" in order to review the Senate's procedures does not comport with its past constitutional jurisprudence. Furthermore, the Court refuses to distinguish between the substantive judgment either to convict or acquit on Articles of Impeachment and the procedural aspects by which such a determination is made. By blurring this distinction, the Court reaches the result it desires by emphasizing the separation of powers concerns and the importance of impeachment proceedings as a check on the judiciary. Because the judiciary should arguably play absolutely no part in the substantive determination, the Court bootstraps the procedural component to its ultimate judgment that impeachments are in no way subject to judicial review.

II. BACKGROUND

A. The Justiciability Doctrines

The federal judicial power is defined in Article III, Section 2 of the United States Constitution. Specifically, Article III provides that the federal courts are vested with the power to hear nine categories of "cases" or "controversies." The Supreme Court has interpreted this case or controversy requirement as imposing substantial constitutional limits on the federal judicial power. Where no case or controversy within the meaning of Article III is found to exist, the federal courts are without power to adjudicate the controversy.

31. Those nine categories are: (1) cases arising under the Constitution, the Laws of the United States, and Treaties made under their Authority; (2) cases affecting ambassadors, public ministers or consuls; (3) cases of admiralty and maritime law; (4) controversies to which the United States is a party; (5) controversies between two or more States or between a State and citizens of another state; (7) controversies between citizens of different states; (8) controversies between citizens of the same state claiming lands under grants of different states; and (9) controversies between a state or citizens thereof and a foreign state, citizens or subjects. U.S. CONST., art. III.

In addition to the constitutional restrictions limiting the jurisdiction of the federal courts, the Supreme Court has imposed several additional limitations on the federal judicial power that are derived neither from the text of the Constitution nor the intent of the Framers in drafting the document. Rather, the Court has developed these additional limitations as a result of their interpretations of Article III and the construction of principles necessary for "prudent judicial administration." This latter category of limitations, termed "prudential," precludes federal judicial review in the interests of policy considerations even though the Constitution imposes no such limitations.

Together these constitutional and prudential limitations comprise the justiciability doctrines which operate to determine those matters federal courts may hear and decide, and those which must be dismissed. Supreme Court decisions are the source of both the constitutional and prudential limits on justiciability. These doctrines include the "prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine." The Supreme Court determines whether a particular restriction on federal judicial power derives from constitutional or prudential principles. Certain doctrines, such as standing, have been explained by the Court as deriving from both constitutional and prudential principles, while others, such as the political question doctrine, have yet to be identified as falling within either category of limitation.

The policy considerations underlying the justiciability doctrines are often identical, making clear distinctions between the constitutional and prudential aspects of the limitations difficult. Several principles in fact underlie all justiciability doctrines. For example,

33. Id.
34. Id.
35. Id.
36. Id. The prohibition against advisory opinions ensures that a federal court's decision will have an effect on the parties to the litigation in a case where an actual dispute exists between the parties. Id. § 2.2, at 43. Standing involves the determination of whether a complaining party is the proper individual to bring the matter before the federal forum — it answers the question of who may litigate. Id. § 2.1, at 41. Ripeness and mootness answer the question of when a matter may be litigated, with ripeness preventing premature litigation and mootness preventing adjudication of disputes that have been resolved. Id. § 2.1, at 42.
37. Id. § 2.1, at 39.
38. Id.
39. Id.
separation of powers concerns are an important factor underlying the development of the justiciability doctrines, limiting the judiciary's power to review the acts of the President and Congress. The conservation of judicial resources is also promoted by the justiciability doctrines, ensuring that the courts spend their time focusing on those matters most deserving of judicial review.

In addition, the doctrines operate to preclude from review cases that do not present concrete controversies. This requirement is premised on the belief that parties with a personal stake in the outcome of the litigation will be best suited to fully present the court with all relevant information necessary to properly decide the case. Thus, concrete controversies with adverse parties are best suited for judicial review.

Fairness — to litigants as well as individuals not party to the controversy — is another important policy underlying the justiciability doctrines. The federal courts are prevented by the doctrines from hearing cases in which litigants are attempting to adjudicate the rights of persons who are not parties to the lawsuit. By preventing such situations from arising, the interests of third parties who may be satisfied with the present state of affairs are protected from having their situation altered. Furthermore, because court decisions almost always affect many individuals even where an individual seeks to litigate on his or her own behalf, fairness is best promoted by limiting judicial review to situations where it is indeed necessary.

The need for these limitations, however, must be balanced against the importance of federal judicial review. While the Supreme Court has repeatedly addressed the policy considerations supporting the limitation of federal judicial power, it is equally important that the federal forum be available for the adjudication of constitutional violations and for the prevention and remedy of federal law violations. Accordingly, the justiciability doctrines must be applied so as not to prevent the federal courts from fulfilling their crucial constitutional role.

40. Id.
41. Id.
42. Id. § 2.1, at 40.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
The appropriate balance to be struck between judicial review and judicial restraint, however, is not easily ascertained. The dispute surrounding this issue has been ongoing, and turns in essence upon the appropriate role of the federal courts. The controversy extends to the Supreme Court's treatment of the justiciability doctrines. The dispute is centralized over the extent to which the Court has expanded the doctrines to preclude judicial review. A related issue is the nature of Court's decisions — should the Court be firm and predictable or flexible and malleable in construing the doctrines? Regardless of how these issues are ultimately settled (if ever), it is clear that the justiciability doctrines are a cornerstone of federal jurisdiction.

B. The Political Question Doctrine

The political question doctrine "postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution." In applying this doctrine, the Supreme Court has held that it will not decide certain challenges to government actions alleged to be unconstitutional although all jurisdictional and the other justiciability requirements are met. Instead, the Court leaves the constitutionality determination to the politically accountable branches — Congress and the President. The doctrine thus constrains the subject matter that is appropriate for federal court review.

The doctrine has been described as "the most confusing of the justiciability doctrines" and as an "enigma." Moreover, the doctrine itself has been called a misnomer because federal courts in reality deal with political issues on a regular basis. Much of the

48. Id.
49. Id. § 2.1, at 41.
51. CHEMERINSKY, supra note 32, § 2.6, at 124.
52. Id.
53. Id.
54. Redish, supra note 30, at 1031.
55. CHEMERINSKY, supra note 32, § 2.6, at 125. Examples of such involvement in political issues by the Supreme Court include United States v. Nixon, 418 U.S. 683 (1974), where President Nixon was ordered to comply with a subpoena to produce audio tapes of presidential conversations needed as evidence in a criminal proceeding. Also, in Nixon v. Herndon, 273 U.S. 536 (1927), the Court declared unconstitutional racial discrimination that existed in the Texas Democratic political primary. Id.
difficulty and confusion that surrounds the doctrine is a result of the Supreme Court's political doctrine jurisprudence: The Court has defined the doctrine very differently over the course of many years.56

The Supreme Court first articulated the political question doctrine in Marbury v. Madison.57 Marbury dealt with the nature of Presidential decisionmaking, distinguishing certain executive decisions as being solely within the President's discretion. By virtue of the President's having been vested with "certain important political powers," he can be held accountable for his discretionary decisions only through the political process.58 Chief Justice Marshall thus described the political question as "[q]uestions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court."59 Cases where individual rights were at stake were distinguished from political questions and the Court stated that such cases could never be political questions.60

The political question definition set forth in Marbury was quite narrow, for it would require the Court to decide all cases that came before it unless its interpretation of the Constitution leads it to find that the determination of the issue has been committed to another branch of the government for decision.61 This early construction of the doctrine would therefore require review of a claim that an individual right has been infringed. However, more recent Court decisions have expanded the realm of the political question doctrine such that today there are instances where individuals alleging specific constitutional violations and concrete injury are precluded from judicial review of their claims.62

The Supreme Court set forth its most detailed analysis of the political question doctrine in Baker v. Carr.63 In that case, the Court ultimately held that the doctrine should not be applied. Yet,

56. CHEMERINSKY, supra note 32, § 2.6, at 125.
57. 5 U.S. (1 Cranch) 137 (1803).
58. Id. at 165.
59. Id. at 170.
60. Id.
61. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-13, at 96 (2d ed. 1988).
63. 369 U.S. 186 (1962).
in formulating its statement of the political question doctrine, the Court failed to articulate useful criteria to determine when the subject matter presented involves a non-justiciable political question. Specifically, the Court stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

These criteria appear useless when closely examined. For example, the Constitution does not provide for judicial review, let alone place limits upon it through "textually demonstrable commitment" of issues to other branches. Moreover, the text of the Constitution is written in "broad, open-textured language" such that it is impossible to discern "judicially discoverable and manageable standards" from the document itself. Indeed, one commentator has described the doctrine as being "impossible for a court or a commentator to apply . . . to identify what cases are political questions."

The Supreme Court has invoked the political question doctrine in several political contexts, including challenges to uphold the requirement of a republican form of government and actions to review the electoral process. The doctrine has also been invoked

64. CHEMERINSKY, supra note 32, § 2.6, at 126.
66. CHEMERINSKY, supra note 32, § 2.6, at 126.
67. Id.
68. Id. § 2.6, at 127.
70. CHEMERINSKY, supra note 32, § 2.6, at 127.
71. In Luther v. Borden, 48 U.S. (7 How.) 1 (1849), the court held that a challenge to the Rhode Island government as violating the republican form of government clause, article IV, section 4, of the Constitution, presented a political question unreviewable in federal court.
72. See Colgrove v. Green, 328 U.S. 549, 552-554 (1946) (holding challenge to con-
to declare issues related to foreign affairs to be outside the realm of justiciable questions.\textsuperscript{73}

Conversely, the Court refused to apply the political question doctrine in \textit{Powell v. McCormack},\textsuperscript{74} a case involving review of the internal decisions of Congress. In \textit{Powell} the House of Representatives had refused to seat Adam Clayton Powell despite the fact that he had been elected to the position.\textsuperscript{75} The House attempted to exclude Powell based on the findings of its Committee that Powell had presented falsified expense accounts.\textsuperscript{76} The Court looked to Article I, Section 5 of the Constitution, which states that Congress may under certain circumstances expel a member, and distinguished the House's actions as \textit{excluding} rather than expelling.\textsuperscript{77} The Court further concluded that no political question was posed because it found Article I, Section 5 to be "at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution" namely, age, citizenship, and residence.\textsuperscript{78} Because the House considered a factor outside the constitutionally provided criteria, and the criteria were specifically enumerated, the Court was able to discern that the House's conduct was unconstitutional.

Until very recently, the Supreme Court had not decided whether the impeachment provisions of Article II, Section 4 of the Constitution present a political question.\textsuperscript{79} The Constitution provides that the House has the sole power of impeachment, while the Senate has the sole power to try all impeachments.\textsuperscript{80} Thus, two issues could arise in the impeachment context for judicial review: (1) whether the offenses leading to impeachment were sufficient as a

\textsuperscript{73.} See Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (declaring foreign relations to be committed to legislative and executive branches).

\textsuperscript{74.} 395 U.S. 486 (1969).

\textsuperscript{75.} Id. at 489.

\textsuperscript{76.} Id. at 490.

\textsuperscript{77.} Article I, § 5 of the Constitution provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." U.S. CONST. art I, § 5.

\textsuperscript{78.} Powell, 395 U.S. at 549.

\textsuperscript{79.} CHEMERINSKY, supra note 32, § 2.6, at 144.

\textsuperscript{80.} U.S. CONST. art. I, § 2 and § 3.
matter of substantive constitutional law to support an impeachment decision; and (2) whether the individual's procedural due process rights were adequately protected by the impeachment procedures.\textsuperscript{81} The former category of challenge — substantive requirements — arguably should never be subject to judicial review.\textsuperscript{82} Judicial restraint is particularly appropriate because impeachment is an extraordinary remedy.\textsuperscript{83}

However, total judicial abdication should not be the approach taken by the courts with respect to impeachment. Rather, courts should proceed with deference to congressional determinations and caution in any such proceeding, but review should nevertheless take place in order to "uphold the Constitution and protect the separation of federal powers."\textsuperscript{84} This judicial review is imperative when constitutional \textit{procedural} requirements are allegedly transgressed.

A distinction could be drawn between the procedural requirements of the impeachment process and the substantive judgment of impeachment that certain conduct constitutes a high crime or misdemeanor warranting removal from office.\textsuperscript{85} The substantive determination could be left to the sole and exclusive judgment of Congress. The Courts would then be free to interpret and enforce the procedural requirements mandated by the Constitution. The Supreme Court has not made this distinction in construing the political question doctrine. Whether the Court should, however, depends upon what the appropriate role of the federal judiciary is in our system of government.\textsuperscript{86}

\begin{itemize}
\item \textsuperscript{81} Chemerinsky, supra note 32, § 2.6, at 144.
\item \textsuperscript{82} See Charles L. Black, Jr., Impeachment: A Handbook 53-54 (1974) (describing "absurdity" of position that could occur in which a President, having been impeached by the House and tried, convicted and removed by the Senate, after appealing to the Supreme Court could be reinstated for the remainder of his term based on the Court's disagreement with the House's and Senate's judgments). See also Chemerinsky, supra note 32, § 2.6, at 145 ("[a] constitutional crisis of unprecedented magnitude would arise if Congress impeached and convicted a president, but the federal courts invalidated that decision.").
\item \textsuperscript{83} Chemerinsky, supra note 32, § 2.6, at 145.
\item \textsuperscript{84} Id. (footnote omitted).
\item \textsuperscript{85} See generally id.
\item \textsuperscript{86} Id.
\end{itemize}
III. WALTER NIXON V. UNITED STATES

A. The Majority Opinion

The Supreme Court's majority opinion, written by Chief Justice Rehnquist, begins with a de novo review of the justiciability of Nixon's claims. The Court explains that "a controversy is nonjusticiable — i.e., involves a political question — where there is a ‘textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .’"87 The first inquiry requires interpretation of the text in question to determine the extent of textual commitment.88 However, in making this determination, the Court explained that lack of judicially manageable standards may bolster the conclusion that an issue has been textually committed to a coordinate branch of government.89

The justiciability of Nixon’s claim rests upon the Court’s interpretation of Article I, Section 3, Clause 6 of the Constitution, which confers upon the Senate the authority to preside over impeachment actions.90 That Article provides:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The Court found the word “sole” in the first sentence to indicate that authority is exclusively reposed in the Senate and nowhere else.91 The remainder of the clause specifies requirements to which the Senate proceedings must conform.92

The Court next turned to an examination of the word “try” and the intent of the Framers in using that term.93 Nixon argued that to “try” required more than merely to vote, review or judge.94

88. Id.
89. Id.
90. Id.
91. Id.
92. Id. at 736.
93. Id.
94. Id.
Rather, he contended that both at the time the Constitution was written and today, to try means to hear the evidence, not to scan a cold record. 95 Therefore, argued Nixon, the courts may review the proceedings afforded him by the Senate as to whether or not he was "tried" before being convicted. 96

The Court rejected Nixon's position, finding "several difficulties" with it. 97 It stated that Nixon's construction of the term was too narrow by both today's definitions and those of 1787. 98 Because of the "variety of definitions," the Court concluded that the Framers did not intend the term "try" to constitute an implied limitation on the Senate's method of trying impeachments. 99 Therefore, concluded the Court, the word "try" lacked sufficient precision to afford a judicially manageable standard for judicial review of the Senate's procedures. 100 This conclusion was bolstered by what the Court viewed as three "very specific requirements" that are imposed on the Senate in trying impeachments: (1) members must be under oath or affirmation; (2) a two-thirds vote is required to convict; and (3) when the President is tried, the Chief Justice presides. 101 The precise nature of these requirements, stated the Court, led to its conclusion that "try" was not intended to impose additional limits on the Senate's choice of proceedings. 102

The Court next considered the significance of the word "sole" in the first sentence of Clause 6. The common sense meaning of that word, according to the Court, is that the Senate shall have exclusive authority to determine whether acquittal or conviction is appropriate in impeachment cases. 103 To allow judicial review of the Senate's actions as to whether an individual had been "tried" would prevent the Senate from operating independently and without outside interference. 104

95. Id.
96. Id.
97. Id.
98. Id. The Court specifically looked to dictionaries from 1785 defining "try" as "to examine" or "to examine as a judge," and compared those definitions with more modern definitions, circa 1971, defining "try" as "to examine or investigate judicially," "to conduct the trial of," or "to put to the test by experiment, investigation, or trial." Id. (citations omitted).
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id. Nixon made several arguments with respect to the word "sole" in the first
The Court went on to state that "history and contemporary understanding of the impeachment provisions" support its interpretation of the Clause's language. Specifically, the Court found it significant that neither party offered any evidence from the Constitutional Convention or contemporary commentators alluding to the possibility of judicial review of the impeachment process. This silence in light of other specific references to judicial review of the Legislature's conduct was "quite meaningful" to the Court.

Furthermore, the Court discussed the Framers' conclusion to rest the authority to try impeachments with the Senate rather than the judiciary. The Framers chose the Senate over the Supreme Court because of its representative capacity and the difficulties of enforcement that could arise if the justices' determination conflicted with the accusations brought. Moreover, the Court noted that the Supreme Court was deemed to be too small in number by the Framers to entrust to it the "awful discretion" which an impeachment proceeding necessarily involves.

The Court continued, noting two additional reasons why the sentence of Clause 6. First, he argued that the word has no substantive meaning and was a cosmetic edit by the Committee of Style after ratification of the substance of the clause. The Court rejected this argument because the Committee only revised the language, perfecting what the Framers had agreed to. Also, the Court concluded that Nixon's argument would mean that the second-to-last draft would always govern where the Convention passed the Committee's final version, however, Nixon's argument was refuted. Id.

Second, Nixon argued that "sole" did not bear on justiciability in light of the prohibition on the President's pardoning power in impeachment cases. Such a limit would not have been necessary if the Senate had exclusive authority to deal with such questions, according to Nixon. Id. The Court distinguished a pardon as mitigating punishment for a crime, not an overturning of a conviction. Therefore, the exclusion of the pardoning power from impeachment proceedings was not inconsistent with the Senate's authority to determine its impeachment procedures. Id.

Nixon's third argument was that "the Senate" meant only the full Senate, not a committee (nor obviously the courts or a jury), could try impeachments. The Court found the argument to be an unnatural reading and stated that such a construction would bring within judicial purview numerous claims that "the Senate" imposed limitations on procedures the Senate may adopt. Id. Nixon's construction would also be inconsistent with the Court's construction of Clause 6 as a whole. Id.

105. Id.
106. Id.
107. Id. at 737.
108. Id. at 738.
109. Id.
110. Id.
111. Id.
judiciary was deemed to be the inappropriate tribunal to have a role in impeachments. First, impeachments were likely to involve two sets of proceedings — a criminal trial and an impeachment trial. These forums were specifically separated to “avoid raising the specter of bias and to ensure independent judgments.” Second, judicial review of impeachments would be inconsistent with the Framers’ insistence on a system of checks and balances because impeachments are designed as a check on the judiciary. The Court viewed Nixon’s argument as placing final reviewing authority of impeachment decisions in the hands of the body meant to be regulated by the process of impeachment.

Additionally, Nixon made the argument that judicial review of the impeachment process is necessary as a check on the legislature. He argued that allowing the legislature to interpret the Impeachment Clause free from review would be a usurpation of the judicial power. The Court rebutted Nixon’s argument by pointing to two constitutional safeguards it claimed were established by the Framers in anticipation of this same objection. The first safeguard is the division of the impeachment power between two legislative bodies — the House to accuse and the Senate to try. The second safeguard is the supermajority requirement of a two-thirds vote.

Concluding its textual commitment analysis, the Court indicated additional reasons for its conclusion that Nixon’s claim should be non-justiciable. Specifically, the “lack of finality and difficulty of fashioning relief” were cited as supporting the Court’s conclusion. The Court expressly adopted the circuit court’s argument that to open the door to judicial review of the Senate’s impeachment procedures would lead to chaos in the country’s political

112. Id.
113. Id. The Constitution explicitly provides for such separate proceedings in Article I, § 3, Clause 7. ld.
114. Id. (citation omitted).
115. Id.
116. Id.
117. Id. at 739.
118. Id.
119. Id.
120. ld. The Court quoted Hamilton’s explanation that “as the concurrence of two-thirds of the senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.” ld. (quoting The Federalist No. 65, at 442 (J. Cooke ed. 1961)).
121. Id.
life. This effect, especially true were the President to be impeached, coupled with the question of what relief if any a court may provide other than setting aside a conviction, led to the conclusion that Nixon’s claim should be non-justiciable.

Nixon’s final argument was likewise rejected by the Court. This argument was based on the Supreme Court’s earlier decision in Powell v. McCormack. Powell turned upon the Court’s determination of whether and to what extent the Constitution committed authority to the House of Representatives to judge its members’ qualifications. Because the Constitution specifically enumerated three requirements for membership in the House, the Court determined that the qualifications the House could require were precise and limited. Thus, Powell’s claim was justiciable because to allow the House to determine its members’ qualifications unreviewed would allow defeat of the express enumeration of qualifications. To the contrary, however, allowing the Senate to interpret the meaning of “try” would not defeat the purpose of any other constitutional provision. Thus, the Court concluded that “the word ‘try’ does not provide an identifiable textual limit on the authority which is committed to the Senate.”

122. Id.
123. The Court explained:
This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted senate might conduct if its first judgment of conviction were invalidated.

Id.

124. 395 U.S. 486 (1969) (see supra notes 74-78 and accompanying text for a discussion of this case).
125. Nixon, 113 S. Ct. at 739.
126. Id.
127. Id. at 740.
128. Id.
129. Id.
B. The Concurring Opinions

Justice White's concurrence, in which Justice Blackmun joined, was the only opinion which was based upon a finding that Nixon's claims were justiciable. Justice White began his opinion with a recognition of the unlikely event that the Senate would adopt a procedure that could not be deemed to constitute a trial by reasonable judges. Nevertheless, he concluded that it would be unwise to vest in Congress unreviewable discretion, thereby inviting the Senate to "find an excuse, in the name of other pressing business, to be dismissive of its critical role in the impeachment process."

130. Justices Stevens, White and Souter each filed separate concurring opinions. The opinions of Justices Stevens and Souter will not be examined at length, but are mentioned here for completeness.

Justice Stevens, in a brief concurrence, emphasized the importance of respect to a coordinate branch of government. He noted that nothing in the history of the Senate's exercise of its impeachment powers suggests that the Senate is not well aware of the profound importance of its task. Id. at 740. Further, he explained that the hypotheticals mentioned by Justices White and Souter (envisioning acts by the Senate that seriously threaten the integrity of a conviction such as a coin-toss or summary determination) were improbable where proper respect was afforded the Senate. Id.

Justice Souter agreed with the majority that Nixon's claims presented a nonjusticiable political question. Id. at 747. He concluded that the Impeachment Trial Clause "contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to 'try' impeachments." Id. at 748. In addition, Justice Souter found two other considerations that confirm his conclusion that the case is non-justiciable. The first is adherence to a political decision that has already been made, and the second is the potential embarrassment that could ensue from "multifarious pronouncements by various departments on one question." Id. (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). He also noted that judicial review of impeachment decisions would disrupt the functioning of the government. Id.

Justice Souter also, as mentioned above, discussed situations where judicial interference may be appropriate — as where the Senate's actions go well beyond the scope of its authority. Id.

131. Justice White stated: "The Court is of the view that the Constitution forbids us even to consider [Nixon's] contention. I find no such prohibition and would therefore reach the merits of the claim." Id. at 740. While Justice White ultimately concluded that on the merits, Nixon received a constitutional "trial" by the Senate's procedures, this analysis will not be reviewed as a discussion of the merits is beyond the scope of this comment.

132. Id. at 741.

133. Id. Justice White noted that at oral arguments, the Solicitor General had been asked whether under the Government's theory (that the Senate has sole authority to decide procedures) the constitutional direction that the Senate "try" impeachments would be satisfied if the Senate, without affording any procedures, found the accused guilty of being a "bad guy" and thus convicted without further proceedings. The Government's counsel answered "yes" — indicating to Justice White the necessity of not vesting the Senate with absolute authority in this context. Id.
Justice White next examined the majority's determination that a textually demonstrable commitment of the issue to another political branch exists and that the question can nonetheless not be determined for lack of judicially discoverable and manageable standards. First, he rejected the majority's construction of the question of textual commitment as whether exclusive responsibility for a particular governmental function is conferred upon a political branch. Rather, he found "the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power."

An examination of the Constitution for such explicit and unequivocal textual commitments, however, exposes the paucity of such grants of power. Yet, the majority found such a commitment in the word "sole" in Clause 6, emphasizing that the word is used only twice in the Constitution, both times with respect to the impeachment powers. Justice White rejected the significance the majority placed upon the words having been used only twice, pointing out that the Framers used the words to ensure the separation of the prosecutorial and adjudicative functions of the impeachment process between the two bodies. Moreover, Justice White found the majority's "willingness to abandon its obligation to review the constitutionality of legislative acts merely on the strength of the word 'sole'" to be perplexing.

The majority's review of the history of the Impeachment Clause also is rejected by Justice White. He finds the majority's statements explain why the Senate rather than the judiciary was chosen to try impeachments, but rejects the argument that the Impeachment Clause history supports the majority's con-

134. Id.
135. Id.
136. Id.
137. Id. at 742. The House of Representatives is granted the "sole" power to impeach, and the Senate the "sole" power to try impeachments. See U.S. Const. art. I, § 2, cl. 5 and § 3, cl. 6.
138. Nixon, 113 S. Ct. at 742. The majority, therefore, identified the wrong body — the judiciary — as being the body meant to be excluded by the word "sole." The Framers intent was to ensure that the House of Representatives played no role in the impeachment trial process. Id.
139. Id. An analogy was drawn to the phrase in Article I, § 1 providing that "All legislative powers" are granted to the House and Senate. Justice White illuminates the inconsistency of the Court's approach inasmuch as it has never considered undue the interference created by its deciding difficult questions of legislative power. Id.
140. Id.
clusion that the judiciary was to play no part in the impeachment process. 141

Upon further review of the relevant history of the Impeachment Clause, Justice White concludes that according to the majority: "... the Framers' [sic] conferred upon Congress a potential tool of legislative dominance yet at the same time rendered Congress' exercise of that power one of the very few areas of legislative authority immune from any judicial review." 142 Thus, he states, the majority's argument, not Nixon's, truly upsets the careful design the Framers created: for in a genuinely balanced system, impeachment trials by the Senate would function as a control mechanism upon the judiciary while judicial review would guarantee that minimal procedural standards are adhered to by the Senate. 143

Next, Justice White reviewed the majority's contention that the word "try" does not comprise a judicially manageable standard. 144 Also criticized is the majority's attempt to distinguish this case from Powell v. McCormack. 145 First, the majority's argument that it is impossible to ascertain the meaning of "try" as the Framers intended is rejected. 146 Second, Justice White criticizes the majority's focus upon the manageability of "try" in its legal sense and its rejection of the standard as presenting "no identifiable textual limit." 147 Clearly if the Court has the ability to interpret elusive constitutional standards such as "Commerce ... among the

141. Id. at 742-43. Justice White stated that this history clearly establishes that the Framers thought that officials' public misdeeds should be tried by the representatives of the people. Id. at 742. Furthermore, the fledgling judiciary was inadequately prepared to tackle political issues and in any event ought not to try both impeachment and criminal trials emanating from the same controversy. Id. It was also clear that the Legislature was chosen in order to act as an important check on the almost unrestrained judiciary. Id.
142. Id. at 743.
143. Id.
144. Id. at 743-44. The majority's position is summarized as follows: because of the multiple denotations of the word "try," the Court is unable to conclude that the term was intended to constitute a limit upon the methods chosen by the Senate to conduct impeachments. Id. at 744. And, says the majority, compared with the three specific requirements in the Impeachment Trial Clause (the oath requirement, a two-thirds vote, and control over Presidential impeachments by the Chief Justice), "try" was not meant to operate as a limitation on the Senate and further indicates the unmanageability of the term. Id.
145. Id. See generally supra notes 74-78 and accompanying text for a discussion of Powell.
146. Id. It is noted that the Framers most likely intended the word "try" in its legal sense, especially in light of the use of the words "tried" and "trial" in the third sentence of the Impeachment Clause ("when the President of the United States is tried") and in Article III, § 2, Clause 3 ("the Trial of all Crimes, except in Cases of Impeachment"). Id.
147. Id.
several States” and “due process of law,” argues Justice White, discerning the significance of the word “try” should present no greater an obstacle.\textsuperscript{148} Moreover, one might expect that if any concept were to fall within the realm of judicial ability it would be that dealing with procedural justice.\textsuperscript{149}

IV. ANALYSIS

The majority’s declination to review the claims of Walter Nixon on the ground that they present a non-justiciable political question is the improper approach for the judiciary to take. Rather, the Supreme Court’s proper role, as well as that of the lower federal courts, is to review the procedures afforded to ensure minimal constitutional protections, especially in light of the grave consequences to the individual once impeached.\textsuperscript{150} By declaring that the Senate has unreviewable authority to conduct impeachment hearings in any manner it deems appropriate, the Court shuns its duty as enforcer of the Constitution.

Not only does the Court reach the wrong conclusion on the question of justiciability, but the analysis and rationale upon which it rests its decision is unconvincing. The Court first concludes that the word “try” in the Impeachment Trial Clause lacks sufficient precision to afford a judicially manageable standard.\textsuperscript{151} However, as Justice White explained, the courts are fully competent to interpret and apply this standard, particularly when considered in light

\textsuperscript{148} Id. at 745. Moreover, Justice White criticizes the majority for its conclusion that since judicial review could result in an upheaval of the political process, especially were a President’s impeachment trial held unconstitutional, “the Court ought to refrain from upholding the Constitution in all impeachment cases.” Id. at 745 n.3. The Senate’s precipitation of a crisis should not be grounds for the judiciary to abandon its Constitutional duties. Id. at 745.

\textsuperscript{149} Id. Justice White’s analysis of the Senate’s use of a Rule XI committee and its compatibility with the requirement that the Senate “try” impeachments is omitted, as discussion of the merits of Nixon’s claim is beyond the scope of this comment. Justice White ultimately concludes that the use of the evidence gathering committee is compatible with the constitutional requirement that the Senate “try” impeachment cases. Id. at 747. The majority’s refusal to reach this determination, he states, arises out of a “laudable” deference to the authority of the legislature that ultimately does “violence” to the Constitution. Id. The deference that should be afforded the legislature instead can be found in the Constitution, which affords the Senate ample discretion in conducting impeachments. Id.

\textsuperscript{150} Indeed, the majority recognized the consequences of impeachment as “dooming to honor or infamy the most confidential and the most distinguished characters of the community.” Id. at 738.

\textsuperscript{151} See supra notes 93-102 and accompanying text.
of other constitutional doctrines of even less clarity that have been interpreted. For example, the Due Process Clause of the Fifth and Fourteenth Amendments has been interpreted numerous times.\textsuperscript{152} Also, the Equal Protection Clause, another amorphous requirement, has been given substantive meaning by the Courts.\textsuperscript{153} Inasmuch as courts "try" criminal and civil cases regularly in fulfillment of their essential purpose, it would seem appropriate to infer that the Framers intended the Senate's proceedings to resemble these judicial trials.\textsuperscript{154}

The Court not only concluded that "try" was a judicially unmanageable standard, but also determined that the Framers' assignment of exclusive power to the Senate to try impeachments meant that the judiciary could play no part whatsoever in the impeachment process.\textsuperscript{155} The majority's analysis of the significance of this "sole" power to try impeachments, however, is misleading. The Senate is vested with the exclusive power to hear the facts and decide the fate of an individual impeached by the House of Representatives.\textsuperscript{156} That the judiciary should have absolutely no role in the determination on the merits of whether a judgment of acquittal or conviction is appropriate is clear. This substantive determination was specifically taken out of the realm of judicial review because of its import as a limitation on the unrestrained judiciary.\textsuperscript{157}

Nevertheless, the majority concludes that "sole" indicates that the judiciary cannot review the procedural aspects of the Senate's conduct either.\textsuperscript{158} By blurring the distinction between the substantive determination and the procedural mechanisms used to reach

\textsuperscript{152} See generally Tribe, supra note 61, at 629-32, 663-768 (procedural due process); 553-86, 1302-435 (substantive due process).

\textsuperscript{153} See generally id. at 1436-672.

\textsuperscript{154} Judge Edwards, dissenting from the D.C. Circuit Court's majority opinion, argued that:

[b]y using a word used elsewhere in the Constitution to refer to judicial proceedings, the framers appeared to reveal an intention that Senate impeachment "trials" would bear some rough likeness to the sort of "trials" carried out in criminal courtrooms.


\textsuperscript{155} See supra notes 93-102 and accompanying text.

\textsuperscript{156} See supra notes 103-11 and accompanying text.

\textsuperscript{157} See supra notes 111-20 and accompanying text. The judiciary was considered to be unrestrained because of its independence and unaccountability to the public. See Nixon, 113 S. Ct. at 743 (White, J., concurring).

\textsuperscript{158} See supra notes 103-04 and accompanying text.
that determination, the Court effectively gives the Senate free reign with respect to this most powerful tool. But, the Court does not stop there. It continues, attempting to bolster its argument that "history and contemporary understanding of the impeachment provisions" support its reading of the language by pointing out that neither Nixon nor the Government offered evidence of any reference in the Constitutional Conventions or in modern commentary alluding to the possibility of judicial review in this context.  

This argument too must be seen as the facade it really is. As established 190 years ago in *Marbury v. Madison*, the federal courts have the power to review the constitutionality of legislative acts and conduct even though judicial review is not mentioned anywhere in the constitution. Justice Marshall therein stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is." The Supreme Court was thus deemed the final arbiter of the Constitution. Obviously, Nixon's inability to produce evidence from the annals of the Constitutional Convention referencing judicial review does not therefore compel the conclusion that the judiciary cannot review any component of the impeachment process.

Moreover, the Court's argument that the mention of judicial review of ex post facto laws, bills of attainder and statutes at the Constitutional Convention does not necessarily exclude from judicial review the Impeachment Trial Clause. Taken to its logical conclusion, the majority's argument would mean that any constitutional provision other than the three specifically mentioned would be exempt from judicial review. The Supreme Court's jurisprudence, interpreting significantly more than just these three provisions, belies this notion.

Furthermore, another of the majority's arguments can be turned on its head. Specifically, the majority argued that the Senate was chosen for the tribunal to try impeachments because Framers believed the Supreme Court was too few in number to be entrusted with such broad discretion. This fact, stated the majority, supported its conclusion that the Court should have no role in the impeachment process. When considered in practical terms, a group

159. *Nixon*, 113 S. Ct. at 737.
160. 5 U.S. (1 Cranch) 137 (1803).
161. *Id.* at 177.
162. See *supra* notes 105-09 and accompanying text.
163. See *supra* notes 109-11 and accompanying text.
of seven or nine individuals was deemed too small a number to handle impeachments. Yet the Senate committee established consisted of a small group of Senators, whose function was to do all factfinding and report to the full Senate. Inasmuch as the full Senate did not receive further evidence and also because it is doubtful that many Senators viewed the hearings held by the committee, it is quite possible that the Framers’ intent has been frustrated by the use of a small number of persons to effectively “try” Nixon’s case.

The majority makes the additional argument that judicial review in the instant situation would eviscerate an important constitutional check placed on the judiciary by the Framers. This argument is disingenuous in light of the review actually being sought by Nixon. It is not the review of the substantive determination of guilt or innocence and appropriateness of impeachment, but review of the procedures implemented to reach that decision that is sought to ensure that a “trial” has occurred.

This point is even more evident when considered in conjunction with the majority’s claim that sufficient checks on the Legislature already exist, so there is no need for judicial review. The majority points to the division of powers between the House and Senate with respect to impeachments as well as the supermajority vote requirement as constituting such sufficient checks. When viewed in another light, however, it appears that these checks may indeed be insufficient. The fact of the matter is that the Senate did not hear the evidence first hand, but rather read the report depicting the observations and perceptions of a small group of individuals. Where the vote is based on such second-hand evidence, even a two-thirds majority vote requirement may be insufficient to counter any prejudicial effect emanating from the opinions of such a small committee.

Moreover, in cases where credibility and veracity of witnesses is a key issue, as was the case in Nixon’s trial, the appropri-

164. See supra notes 10-13 and accompanying text.
165. See supra notes 112-16 and accompanying text.
166. See supra notes 112-20 and accompanying text.
167. As noted by the district court, one of the key witnesses at the trial testifying against Nixon recanted earlier testimony in the federal criminal trial, but later recanted the recantation before the Senate Committee. Nixon v. United States, 744 F. Supp. 9, 11 (D.D.C. 1990), aff’d, 938 F.2d 239 (D.C. Cir. 1991), aff’d, 113 S. Ct. 732 (1993). Furthermore, another key witness repudiated a prior sworn affidavit and deposition testimony before the Senate Committee. Id.
ateness of second-hand evidence gathering would seem greatly diminished. In fact, this was one of Nixon's contentions in his quest for judicial review. Nixon submitted tabulations showing that in the full Senate's vote to convict him, a substantially greater percentage of Senate committee members voted to acquit him than did non-committee members who had not heard the evidence nor viewed any witnesses. Had the Senators heard the evidence directly, it is possible that because less than two-thirds of the committee members had voted to impeach Nixon on one of the counts, the full Senate might also have voted to acquit had it viewed the evidence.

Besides its textual commitment argument, the Court states that lack of finality and the difficulty of fashioning relief further counsel against a finding of justiciability. The Court employs the oft cited slippery slope argument that opening the door to judicial review in this instance would expose the political life of the country to months or perhaps years of chaos. This argument, too, lacks the persuasiveness the Court would attribute it. Judicial review of Nixon’s claim, resulting in a holding of unconstitutional procedures being employed, would require that a new “trial” be granted. The Senate would undoubtedly rectify the constitutional pitfalls of its committee system in such a circumstance to ensure that all future impeachment proceedings satisfied constitutional procedural requirements.

The majority also espoused its fear that a Presidential impeachment may be overturned in such a situation, thereby jeopardizing the legitimacy of any successor, hampering his effectiveness. This fear seems unfounded when the likely practical significance of a finding of unconstitutionality of the “trial” afforded is considered. As stated above, the Senate is most likely to modify its procedures to cure the constitutional defects. One would certainly expect such a modification were a Presidential impeachment being considered — the Senate would not be willing to take the chance that its impeachment decision would be overturned based on the inadequacy of its procedures. Thus, the majority’s argument, while appear-

168. Id. at 11.
169. Id. The district court noted that “[t]his showing lends support to [Nixon’s] claim of unfairness.” Id.
170. See supra notes 121-22 and accompanying text.
172. Id.
The argument in favor of justiciability and review on the merits is also bolstered by the recent decision of the District Court for the District of Columbia in Hastings v. United States.\textsuperscript{173} Hastings was another federal district court judge who was impeached and had a trial by a Senate committee consisting of twelve senators. Hastings was convicted by the Senate and subsequently removed from office.\textsuperscript{174} He challenged the Senate’s proceedings as unconstitutional and the district court held that the trial was in fact unconstitutional and deprived him of his due process rights.\textsuperscript{175}

The Hastings court distinguished Nixon on its facts, emphasizing Hastings’ acquittal on the criminal charges from which the Articles of Impeachment stemmed. Nixon was convicted on the criminal charges brought against him. Thus the court stated that it was imperative that Hastings receive a trial before the full Senate because, unlike Nixon, there was no transcript of a criminal conviction that could be made a part of the record of impeachment.\textsuperscript{176} Rather, it was necessary that the Senate hear all of the evidence itself to make its own independent determination. Nevertheless, despite this factual difference, several of the court’s arguments regarding justiciability and the importance of a full Senate trial are applicable to Nixon’s case and support the conclusion that in fact a review of the merits of his claim should have occurred.

First, the Hastings court pointed out that impeachments are not political issues — it is a judicial proceeding undertaken by the Senate that is necessary to maintain the independence of the judiciary.\textsuperscript{177} The court argued that to deem impeachments a political matter unreviewable by the judiciary could result in the political party that controls Congress impeaching federal judges in order to give that party a judicial seat to fill.\textsuperscript{178} This result would obviously be in contradiction of the purposes of the Framers in constructing the impeachment process.

Second, the court rejected the argument that since “impeachment trials are wholly the province of the legislative branch . . . that the judicial branch can never reach any issue that involves im-

\textsuperscript{174} Id. at 492-93.
\textsuperscript{175} Id. at 501, 504-05.
\textsuperscript{176} Id. at 494.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 495 n.5.
peachment. Independence is not isolation." To the contrary, the court concluded that to allow the Senate free reign of impeachments without any check on any abuse of that power would destroy the judiciary's independence. In such a situation, the judiciary could no longer fulfill its role as the countermajoritarian force in our system of government.81

Finally, the court reviewed the constitutionality of the procedures afforded Judge Hastings and concluded that they were constitutionally insufficient. Specifically, the court found the Senators to have acted in a reviewing capacity rather than a fact-finding capacity. Basic notions of fairness mandate that those who are to make the final judgment must be present to find all of the facts. Recognizing the burden that trial by the full Senate imposes upon the Senators' conduct of their business, the court concluded nonetheless that such procedures are necessary and that in any event the burden will be imposed infrequently. It found paramount the respect due the judiciary as a coordinate branch of government.

In light of these strong arguments, it is clear that the Supreme Court in Nixon v. United States should have found the issue of the Senate's use of a committee to try Nixon's impeachment to be justiciable. Whether or not Nixon received all the procedural protections to which he is constitutionally entitled, the Court failed to fulfill its own constitutional role by refusing to assess the merits of Nixon's allegations. While it is unlikely that the Senate will disregard its constitutional duty and engage in procedures that do not have any semblance of a trial, by refusing to subject this area to judicial review, the Senate is afforded unreviewable and unchecked discretion to exercise its impeachment powers. In the foreseeable event of an impeachment in which the Senate goes too far in constraining the procedures afforded the impeached individual, the question remains how the Court would respond. Surely it would be undesirable for the Court in the future to change its

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179. Id. at 496.
180. Id. at 497.
181. Id. at 498.
182. Id. at 502.
183. Id. The court acknowledged that the Senate did take its role seriously and had the intention of fulfilling its constitutional duty, but stated that "unfortunately, the Senate cared too much about expediency. Justice cannot always be constrained by time." Id.
184. Id. at 503.
185. Id.
position on this issue due only to the egregiousness of the Senate’s procedures.

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