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HOW MUCH PROCESS IS DUE: THE SENATE IMPEACHMENT TRIAL PROCESS AFTER *NIXON v. UNITED STATES*

Article I of the United States Constitution confers on the Senate the sole power to try officials impeached by the House of Representatives.¹ The Senate Rules of Procedure and Practice² permit the Senate to appoint a committee of peers to conduct impeachment trials and to report its findings of fact to the full Senate for final determination.³ The Committee's role is not to make a recommendation to acquit or convict, but rather to serve as a fact-finding body that provides each senator with suf-

1. U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6. The provisions authorizing impeachment are presented in both Articles I and II of the Constitution. *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6-7; U.S. CONST. art. II, § 4. Article I provides the House of Representatives with the "sole power of impeachment" and the Senate with the "sole power to try" those impeached. *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

Section 4 of Article II of the Constitution subjects the "President, Vice President and all civil officials" to the impeachment process for any "treason, bribery, or other high crimes and misdemeanors" committed. *Id.* art. II, § 4; see THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that this provision subjects Article III judges, as civil officers, to the impeachment process); cf. Robert S. Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103, 104-05 (1986) (discussing removal of judges by imprisonment after conviction as an alternative form of removal to impeachment); Stewart A. Block, Comment, *The Limitations of Article III on the Proposed Judicial Removal Machinery: S. 1506*, 118 U. PA. L. REV. 1064 (1970) (discussing a proposal to establish a method for the removal of judges within the judicial branch as an alternative method for removal through the legislative impeachment powers).

This Comment focuses specifically on the impeachment of judges, who are subject to the process more frequently than other officials and are voicing their concerns to the judicial branch more actively. See *infra* notes 9-11 and accompanying text. Of the fourteen Senate impeachment trials held, eleven involved federal judges. See *infra* note 33 (listing the eight judges tried by the Senate prior to the Senate trials of Judges Claiborne, Hastings and Nixon during the 1980s). It is likely that many of the judges' concerns would apply to executive branch officials because the Constitution's construction subjects all civil officers to impeachment. See U.S. CONST. art. II, § 4, cl. 1 (subjecting the President, Vice President and all civil officers to removal by impeachment). This issue, however, is beyond the scope of this Comment.

2. RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING IN IMPEACHMENT TRIALS, Rule XI, reprinted in REPORT OF THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLE AGAINST JUDGE ALCEE L. HASTINGS, S. REP. NO. 156, 101st Cong., 1st Sess. (addendum C) (1989) [hereinafter Rule XI].

3. *Id.* The committee "shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee." *Id.*

ficient information to make an individual determination regarding an official's guilt or innocence.⁴

Congressional impeachment procedures have generated many constitutional concerns,⁵ including debate over the constitutionality of using a Senate trial committee.⁶ Central to this debate is whether the use of the twelve-senator committee to conduct the Senate impeachment trial violates the constitutional requirement that the Senate "try" all impeachments,⁷ as well as the Constitution's Due Process Clause.⁸ Judges Claiborne, Hastings, and Nixon, impeached under this trial process during the 1980s,⁹ believed that a trial by anything less than a full Senate

4. *Id.*; see also REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 51-52 (1993) (explaining and evaluating the role and procedures of the Senate impeachment trial committee) [hereinafter COMMISSION REPORT]. Congress established the National Commission on Judicial Discipline and Removal pursuant the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5122 (1990) (codified as amended at 28 U.S.C. § 372(c) (Supp. V 1993)). Former Congressman Robert W. Kastenmeier and Michael J. Remington, Esq. served as Chairman and Director, respectively, of the Commission.

5. See *infra* note 10 (discussing other constitutional issues raised by the impeachment process).

6. See *Hastings v. United States*, 802 F. Supp. 490, 492 (D.D.C. 1992), *vacated and remanded*, 988 F.2d 1280 (D.C. Cir. 1993), *dismissed on remand*, 837 F. Supp. 3 (D.D.C. 1993) [hereinafter *Hastings I*]; see also *Nixon v. United States*, 113 S. Ct. 732 (1993) (testing the constitutionality of using a Senate committee during congressional impeachment procedures).

7. U.S. CONST. art. I, § 3, cl. 6.

8. *Id.* amend. V, § 3. Debate also exists as to whether the due process standard can be applied to the impeachment process at all, regardless of justiciability, if impeachment is not considered a criminal proceeding. Buckner F. Melton, Jr., *Federal Impeachment and Criminal Procedure: The Framers' Intent*, 52 MD. L. REV. 437, 438 (1993).

9. The Senate did not use the committee process until Judge Claiborne's trial in 1986. See generally COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, S. REP. NO. 511, 99th Cong., 2d Sess. (1986) (first report filed by a Senate impeachment committee). Judge Claiborne was impeached and removed from office for the "high crimes and misdemeanors" of willfully and knowingly falsifying his personal income tax returns over a number of years. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE, H. REP. NO. 688, 99th Cong., 2d Sess. 1-3 (1986) (stating the grounds for impeachment).

Judge Hastings, a judge for the U.S. District Court for the Southern District of Florida, was impeached and removed from office for "the high crimes and misdemeanors" of conspiring to reduce jail sentences in return for \$150,000 and for perjuring himself while a witness at his own criminal trial. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF ALCEE L. HASTINGS, H. REP. NO. 810, 100th Cong., 2d Sess. 1-5 (1988). Judge Walter Nixon, a U.S. District Court Judge for the Southern District of Mississippi, was impeached for jeopardizing the integrity of the court by perjuring himself before a grand jury that investigated his handling of a drug smuggling trial involving the son of a personal friend. 135 CONG. REC. S14,634-36 (daily ed. Nov. 3, 1989). Both Judges Claiborne and Nixon were convicted in judicial courts prior to their impeachments. *United States v. Nixon*, 816 F.2d 1022, 1023 (5th Cir. 1987) (affirming a jury trial conviction), *cert. denied*, 484 U.S. 1026 (1988); *United States v. Claiborne*, 765 F.2d 784, 805 (9th Cir. 1985) (affirming a jury

violated their due process rights.¹⁰ To voice their concerns, these judges brought actions in federal court expecting the judicial branch to resolve this debate by holding the current Senate trial process unconstitutional.¹¹ However, in 1993 the Supreme Court, in *Nixon v. United States*,¹² held that the constitutionality of Senate procedure, including the use of a trial committee, is a political question and, therefore, non-justiciable.¹³ Thus, without the Court's clear determination regarding the constitutionality of

conviction), *cert. denied*, 475 U.S. 1120 (1986). Judge Hastings, however, was acquitted in a jury trial prior to his impeachment. Although outside the scope of this article, it is of interest to note that Judge Hastings unsuccessfully argued that his impeachment subsequent to acquittal was also unconstitutional. *Hastings I*, 802 F. Supp. at 500-01.

The Senate enacted Rule XI, the provision creating the option of using a committee for impeachment trials, in 1935. Daniel Luchsinger, Note, *Committee Impeachment Trials: The Best Solution?*, 80 GEO. L.J. 163, 169 (1991). The provision is permissible under Article I, Section 5 of the Constitution which provides that each house of Congress will enact its own rules of procedure. See generally *Nixon v. United States*, 113 S. Ct. 732 (1993) (holding that Congress' constitutional authority includes the power to create its own procedural rules).

10. *Nixon*, 113 S. Ct. at 736; *Hastings I*, 802 F. Supp. at 500; see also *Claiborne*, 765 F.2d 784. The due process violation was one of the central arguments made by Judges Nixon and Hastings during their efforts to have their impeachment convictions reversed by the judiciary. *Nixon*, 113 S. Ct. at 735-39; *Hastings I*, 802 F. Supp. at 500. See *infra* notes 58-79 and accompanying text for a discussion of their efforts. Other procedural issues debated include whether the decrease in the income of impeached judges, which results from their hefty legal fees, violates the constitutional provision requiring that a federal judge's income never be decreased; whether a judge already criminally convicted also can be impeached without violating the double jeopardy provisions of the Constitution; and whether the Constitution requires the impeachment process to precede a judicial proceeding. See *Hastings I*, 802 F. Supp. at 500-01. This Comment is limited to discussing the issue of the legitimacy of the Senate trial-by-committee process used in the most recent trials during the 1980s. See *id.* (arguing that the trial process is unconstitutional).

11. Judge Hastings brought three separate cases at different stages during the impeachment process. See *Hastings I*, 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded*, 988 F.2d 1280 (D.C. Cir. 1993), *dismissed on remand*, 837 F. Supp. 3 (D.D.C. 1993); *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C.), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989); *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986). Judge Nixon's case culminated in the Supreme Court's decision in *Nixon v. United States*, 113 S. Ct. 732 (1993).

12. 113 S. Ct. 732 (1993).

13. *Id.* at 738-40. The terms "political question" and "non-justiciable" were defined extensively by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 209-37 (1962). The Court found that in determining whether a question is a political one, courts should focus on whether designating the question to a political department is appropriate and whether a "lack of satisfactory criteria for a judicial determination" exists. *Id.* at 210. The Court additionally held that a political question is nonjusticiable under the function of the separation of powers. *Id.*; see *infra* notes 60-62 and accompanying text (discussing the definitions of these terms).

the Senate procedure, the debate continues as to whether the use of an impeachment trial committee is the most equitable procedure available.¹⁴

The debate involves striking a balance between maintaining an equitable process for individuals who are subject to an impeachment trial and the significant time constraints such a process might impose on the Senate.¹⁵ To address these factors effectively, it is necessary to consider what the framers intended when they granted the Senate the power to try impeachments.¹⁶

This Comment first reviews the development of the Senate's current impeachment process, focusing specifically on the impeachment of judges. In particular, this Comment explains the enactment of the Senate trial-by-committee process and reviews the role of the Senate trial committee during the three impeachment trials in which it was utilized. This Comment then discusses the specific concerns presented by the trial-by-committee process as analyzed in *Nixon v. United States*,¹⁷ and evaluates the impact of the Court's reasoning that the impeachment process is non-justiciable under the political question doctrine. Despite the Court's holding, this Comment finds that any trial procedure that the Senate uses should, in fairness to the impeached parties, satisfy the due process standard. Further, this Comment tests the trial-by-committee process and determines that the current process not only satisfies the Constitution's due process requirement, but, in light of severe time constraints on today's Senate, is necessary as the most efficacious process available.

Finally, this Comment reviews various recommendations and alternatives for reform, including those recently suggested by the National Commission on Judicial Discipline and Removal.¹⁸ While this Comment

14. See *infra* notes 51-57 and accompanying text (discussing the criticisms that several experts have made since the 1980s).

15. See, e.g., *Nixon*, 113 S. Ct. at 738-40; *Hastings I*, 802 F. Supp. at 503-05; Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1 (1989) (discussing, in an historical context, the complexities of the impeachment process in both houses of Congress, as well as recently proposed alternatives); Robert S. Peck, *Jurist before the Bench: Challenging Impeachment Procedures for Federal Judges*, 79 A.B.A. J., Feb. 1993, at 56 (reviewing the history of Judge Nixon's impeachment and acknowledging the need for procedural reform); Luchsinger, *supra* note 9 (opposing the Senate's current trial-by-committee process); see also *infra* notes 89-93 and accompanying text (discussing the due process test as presented in *Mathews v. Eldridge*).

16. Specifically, the question is whether the framers intended the impeachment trial process to include a trial by the entire Senate, as those in favor of the due process argument claim, or whether the lack of detail in the Constitution indicates that the Senate has the power to delegate this power to a smaller Senate body, or even to another branch of government. *Hastings I*, 802 F. Supp. at 501-05.

17. 113 S. Ct. 732 (1993).

18. See generally COMMISSION REPORT, *supra* note 4 (evaluating the current process and outlining its recommendations for reform).

determines that no reform is needed for due process purposes, it concludes that certain recommended measures may effectively increase efficiency in the Senate impeachment process.

I. IMPEACHMENT TRIAL PROCEDURE

A. *The Development of Congressional Impeachment Power—The Framers' Intent*

The framers constructed the Constitution's impeachment provisions to ensure that the impeachment process serves as a check on the power of both the judicial and executive branches.¹⁹ In discussing the rationale for granting the impeachment power to Congress, Alexander Hamilton called the impeachment process a "national inquest" and found that Members of Congress, as representatives of the people, would serve as the best judges of officials during a national inquiry.²⁰ In his words, no body other than the Senate would be "sufficiently independent" nor have the "confidence" and "necessary impartiality" to responsibly impeach other officials.²¹

The framers included a number of procedural requirements for the impeachment process in the Constitution. In addition to granting the House the sole power to impeach²² and the Senate the sole power to try²³ those impeached, the Constitution explicitly requires that senators be under

19. THE FEDERALIST NO. 65 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also COMMISSION REPORT, *supra* note 4, at 29 (discussing the importance to the framers of creating an independent process to serve as a further check and balance on the branches during impeachment). See generally Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707 (1987-88) (focusing specifically on the framers' intent when drafting the provisions regarding who is subject to impeachments, the sanctions available, and what offenses are impeachable).

20. THE FEDERALIST NO. 65, at 397 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The best "inquisitors for the nation [are] the representatives of the nation themselves." *Id.* In *Federalist Paper No. 65*, Alexander Hamilton analyzed the benefits of granting the impeachment trial power to the Senate, as well as the arguments for granting the power to either of the other two branches of government and concluded that the grant of power to the Senate represented the most democratic approach for an impeachment trial. *Id.*; see also Melissa H. Maxman, Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420, 434-38 (1987) (advocating the constitutional interpretation that the drafters' intention that impeachment be the sole method of removal for judges is but one more example of the balancing of powers between the branches).

21. THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton reached his determination about the role of the Senate trial, in part, by ruling out an alternative plan to use the Supreme Court. *Id.* He found that the Supreme Court could not be relied on as having the fortitude, degree of credit, or the authority necessary for the task. *Id.* Hamilton, instead, thought that the trial body should be more numerous and less restricted by the rules of a judicial court. *Id.* at 398-400.

22. U.S. CONST. art. I, § 2, cl. 5.

23. *Id.* art. I, § 3, cl. 6.

oath while sitting for trial proceedings;²⁴ that a conviction occur by only a two-thirds majority vote of senators present;²⁵ and, that the removal from office and the disqualification from holding any other federal office represent the most extreme penalties for conviction.²⁶ Aside from these provisions and a few additional provisions not relevant here, the impeachment process, including the use of the trial-by-committee process, is left to the discretion of Congress.²⁷

Debate over the Senate trials during the drafting of the Constitution addressed many of the same concerns that today's critics voice.²⁸ Some concerns centered on the notion that giving the Senate the power to try impeached parties would be contrary to the separation of powers doctrine because it would grant the Senate judicial-type powers.²⁹ In defense of the proposed Senate authority, Hamilton wrote that the "partial intermixture" of departments is necessary in this case as "an essential check in the hands of [the Senate] upon the encroachment of [the other branches]."³⁰

24. *Id.*

25. *Id.*

26. *Id.*; COMMISSION REPORT, *supra* note 4, at 28-29. The provision regarding available penalties for conviction of an impeachment indicates explicitly that, although the punishments are limited, the person still may be subject to indictment, trial, conviction, and penalty by a judicial court. U.S. CONST. art. I, § 3, cl. 7.

27. Some experts believe that "[t]he gap that is left as to the rest of the specifics of the Senate's trial is to be filled according to the discretion of the Senate, as provided in article I, section 5 that '[e]ach House may determine the Rules of its Proceedings.'" Gerhardt, *supra* note 15, at 94 (footnote omitted); *see also* Nixon v. United States, 113 S. Ct. 732, 746 (1993) (White, J., concurring) (discussing the constitutional basis for leaving it within the Senate's discretion for determining procedure); 132 CONG. REC. S15,767 (daily ed. Oct. 9, 1986) (statement of Sen. Specter) (stating that "[t]he Constitution does not dictate the manner in which the trial shall be conducted The Senate thus has the authority to fashion rules that govern" the impeachment trial process).

28. *See* Nixon, 113 S. Ct. at 737-39; Gerhardt, *supra* note 15, at 11-18 (discussing the framers' debate over the Senate impeachment trial process); *infra* notes 100-04 and accompanying text (discussing whether the framers intended the use of trial committees).

29. THE FEDERALIST NO. 66, at 401-02 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. *Id.* Hamilton further explained that the impeachment power provisions, in combination with the Senate's confirmation power provision, are among the best examples of balancing governmental powers. *Id.* He added that both the requirement that the House impeach prior to a Senate trial and the Appointments Clause, which requires the President to nominate appointees whom the Senate must confirm, limit the Senate's impeachment and confirmation powers. *Id.*

In fact, the grant of the power of appointments to the Senate, in addition to the impeachment trial power, provides for one solution to the current criticisms of the impeachment process. *See infra* notes 219-24 and accompanying text (discussing the importance of greater scrutiny by the Senate during the appointment process to avoid selecting unqualified and unworthy judges).

*B. The Procedure and Problems Associated with the Senate
Trial Committee*

Impeachment trials, judicial or otherwise, do not occur frequently.³¹ Since the drafting of the Constitution, the Senate has tried eleven judges, and only seven have been convicted.³² Eight of these trials occurred prior to 1937 before a full Senate—prior to the Senate's creation of the trial-by-committee process.³³ Some of these impeachment trials were lengthy processes and marked by low Senate attendance.³⁴ In response, the Senate enacted Rule XI, which is a procedural rule that provides the Senate with the option of using a trial committee made up of twelve senators.³⁵

If the Senate decides to try by committee, rather than by full Senate, Rule XI, as enacted by the Senate, requires that the trial committee prepare a complete transcript of the impeachment proceedings, including all testimony before the Committee.³⁶ The full Senate then makes its final

31. COMMISSION REPORT, *supra* note 4, at 29.

32. *Id.* at 29-30. Of these, three trials and convictions (Judges Claiborne, Hastings, and Nixon) occurred in a three year period from 1986-1989; these three occurred after a fifty year gap during which there were no judicial impeachment trials. *Id.*

33. As noted by the National Commission on Judicial Discipline and Removal, the eight judges were:

John Pickering, U.S. District Judge for the District of New Hampshire (1803-1804); Samuel Chase, Associate Justice of the United States Supreme Court (1804-1805); James Peck, U.S. District Judge for the District of Missouri (1826-1831); West H. Humphreys, U.S. District Judge for the District of Tennessee (1862); . . . Charles Swaine, U.S. District Judge for the Northern District of Florida (1903-1905); Robert Archbald, Circuit Judge, U.S. Court of Appeals for the Third Circuit, then serving as Associate Judge of the U.S. Commerce Court (1912-1913); Harold Louderback, U.S. District Judge for the Northern District of California (1932-1933); Halsted Ritter, U.S. District Judge for the Southern District of Florida (1936).

COMMISSION REPORT, *supra* note 4, at 29-30.

34. For example, in 1933, the impeachment proceedings against Judge Harold Louderback took 76 days. COMMISSION REPORT, *supra* note 4, at 51; *see also* Bruce Fein & William B. Reynolds, *Judges on Trial: Improving Impeachment*, LEGAL TIMES, Oct. 30, 1989, at 24 (discussing the length of early impeachment trials among the reasons for reform of process). In addition to the time factor, attendance by the full Senate was low, as senators complained that the trial interfered with their legislative duties. COMMISSION REPORT, *supra* note 4, at 52; *see also* David O. Stewart, *Impeachment by Ignorance*, 76 A.B.A. J., June 1990, at 52 (reviewing the history of the impeachment process as part of an argument for reform). In fact, at the 1913 impeachment trial of Judge Robert Archbald, attendance rarely "topped 20 of the 94 Senators then in office, and . . . [v]ery few senators . . . attended consistently." Peck, *supra* note 15, at 58.

35. COMMISSION REPORT, *supra* note 4, at 51; *see* Rule XI, *supra* note 2 (providing the Senate with the option of appointing 12 of its members to a trial committee). *See infra* note 36 for the partial text of Rule XI.

36. Specifically, Rule XI provides that:

judgment relying primarily on its review of this transcript.³⁷ Rule XI also requires that the trial committee call the accused to appear during the trial.³⁸ The Rule limits the scope of the trial to the articles of impeachment or the specific charges brought by the House of Representatives.³⁹ Further, the Committee must refer all dispositive motions made by the parties—that is, all decisions that might deprive the full Senate of its constitutional duty to make a final judgment⁴⁰—to the full Senate for determination.⁴¹ Although the Committee has substantial fact-finding authority, the Committee has no authority to make conclusions⁴² or to recommend the acquittal or conviction of the individual.⁴³ Instead, the Committee provides each senator with an impartial report that includes a

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.

Rule XI, *supra* note 2.

37. *Id.*; see also COMMISSION REPORT, *supra* note 4, at 51-52.

38. See COMMISSION REPORT, *supra* note 4, at 50 (stating that the Senate must call the accused to appear before it).

39. Rule XI, *supra* note 2; see also COMMISSION REPORT, *supra* note 4, at 50 (stating that “[t]he Senate’s jurisdiction is narrowly circumscribed by the case brought before it by the House”). The impeachment procedure in the House and Senate is analogous to the judicial process of a grand jury indictment followed by a trial which is limited by the scope of the indictment. See Rose Auslander, *Impeaching the Senate’s Use of Trial Committees*, 67 N.Y.U. L. REV. 68, 74 (1992); Melton, *supra* note 8, at 447-48 (discussing the analogy between congressional impeachment procedure and grand jury procedures).

40. COMMISSION REPORT, *supra* note 4, at 52. Any evidentiary or other ruling that might affect the full Senate’s final determination of guilt or innocence must be referred to the full Senate for decision. *Id.*

41. Rule XI, *supra* note 2; COMMISSION REPORT, *supra* note 4, at 52; see also *infra* text accompanying note 112 (discussing the requirement that, to prevent any final judgments by the trial committee, dispositive motions be referred to the full Senate).

42. See *infra* text accompanying note 110-11.

43. REPORT OF THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE ALCEE HASTINGS, S. REP. NO. 156, 101st Cong., 1st Sess. 3 (1986) [hereinafter HASTINGS TRIAL REPORT]; see also Luchsinger, *supra* note 9, at 186 (analogizing the current process to the trial by master process in the courts). In his article Luchsinger argues that the current process is unconstitutional because the accused is deprived of a hearing before a full Senate, but that an amendment to allow the trial committee to make an initial recommendation to the full Senate would be one step toward making the Senate trial-by-committee process acceptable. *Id.* at 186-87.

When drafting Rule XI, the senators initially granted the committee the authority to make recommendations to the Senate regarding the accused’s guilt or innocence, but this provision was eliminated because the Senate did not want the committee’s authority to supersede the requirement for a full Senate debate. *Id.* at 187.

complete transcript of the trial committee's hearings, and also gives the full Senate the opportunity to view videotapes of the proceedings.⁴⁴ After reviewing these materials, the full Senate determines whether it will hear any witnesses.⁴⁵ The full Senate then holds a debate and votes.⁴⁶

After the Senate first appointed and used a trial committee in 1986, concerns developed over whether the process violated the Due Process Clause of the Constitution.⁴⁷ Under the Due Process test presented by the Supreme Court in *Mathews v. Eldridge*,⁴⁸ a court must evaluate the procedure or law that allegedly jeopardizes an individual's right to life, liberty, or property by balancing the private interests affected by the official action against the importance of the official action in question.⁴⁹ The standard is satisfied if a court finds that there is no available alternative to the official action in question and that the burden on the private interests is not unduly severe.⁵⁰

The due process claims at issue arise specifically from the concern that erroneous deprivation of judgeships result from the trial committee pro-

44. See Rule XI, *supra* note 2, at 51; COMMISSION REPORT, *supra* note 4, at 51; *Hastings v. United States Senate*, 716 F. Supp. 38, 39 (D.D.C. 1989) (discussing the trial committee's responsibility to report impartially to the full Senate).

45. COMMISSION REPORT, *supra* note 4, at 52.

46. *Id.*

47. Luchsinger, *supra* note 9, at 163-64. The Due Process Clause requires that government actions against a person's life, liberty, or property be procedurally fair. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 13.8, at 483-84 (3d ed. 1986). Specifically, the clause states that an individual may not be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The courts historically defined the term property broadly to include public employment. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (holding that the Ohio statute in question created a property right for civil service employees); *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972) (holding that a de facto tenure program can give rise to a property interest in a professorship position), *overruled as stated in Board of Trustees v. Sullivan*, 773 F. Supp. 472 (D.D.C. 1991). Although the courts have never held that the impeachment process is subject to the due process requirement, most experts agree that the expectation of a lifetime tenure in a judgeship amounts to a property right under the clause. See, e.g., COMMISSION REPORT, *supra* note 4, at 131-33 (Sen. Heflin's separate statement). "Federal judges have . . . a property right to their jobs, and that right warrants due process protections." *Id.* at 131; see also Luchsinger, *supra* note 9, at 180-81 (stating that a federal judgeship meets the recently expanded definition of property under the Due Process Clause).

48. 424 U.S. 319 (1976).

49. *Id.* at 335. Specifically, a procedure of law will meet the due process standard if it balances "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* (citation omitted); see also COMMISSION REPORT, *supra* note 4, at 132 (Sen. Heflin's separate statement) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

50. Cf. *Mathews*, 424 U.S. at 348-49.

ceedings: specifically, from the decisions of eighty-eight senators who do not view the trial directly;⁵¹ the lack of attendance, even by the committee members;⁵² and from the inadequate time given by the full Senate in its consideration.⁵³ Furthermore, critics argue that the availability of a full transcript for review is not a satisfactory alternative to a full Senate trial.⁵⁴

Some experts also believe that statistics collected after the three 1980s impeachment trials lend credence to their argument that the inability of senators to hear testimony directly during the impeachment trial-by-committee violates due process principles.⁵⁵ The argument is that by denying

51. Plaintiff's Compl. for Declaratory and Injunctive Relief at 33, *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989) (No. 89-1602) [hereinafter *Hastings Complaint*] (complaint from an earlier suit stating that the Senate's use of a committee deprives the accused of his due process rights because each Senator fails to devote the appropriate time during the trial). In his complaint, Judge Hastings argued that "[t]he Constitution imposes upon every Senator the duty to serve as both judge and juror, and those responsibilities cannot be properly delegated" to a trial committee. *Id.*; see also *Nixon v. United States*, 113 S. Ct. 732, 735 (1993) (mentioning similar arguments made by Judge Nixon); COMMISSION REPORT, *supra* note 4, at 132 (Sen. Heflin's separate statement); Luchsinger, *supra* note 9, at 182.

52. In his experience on the 1986 committee for Judge Claiborne's impeachment trial, Senator Howell Heflin (D-AL) was frustrated by the committee's poor attendance. Howell T. Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 JUDICATURE 123, 124 (1987) [hereinafter *The Impeachment Process*]. A quorum of seven senators is required, but, according to Heflin, this is unsatisfactory in comparison to the requirements of a jury trial before a judicial court. *Id.* Senator Heflin remarked, "[h]ow can a United States Senator carry out his constitutionally mandated impeachment responsibilities if he does not participate in either the committee hearing or have an opportunity to gain knowledge of the case from a full trial on the Senate floor?" *Id.*

53. 132 CONG. REC. S15762 (daily ed. Oct. 9, 1986) (statement of Sen. Bingaman). Although Senator Bingaman supported the Senate's procedure during the trial of Judge Claiborne, he voiced concern over the adequacy of the full Senate's debate in making its final determination. *Id.*; see also *Hastings Complaint*, *supra* note 51, at 33 (detailing Hastings' arguments against a committee trial).

54. *The Impeachment Process*, *supra* note 52, at 124. According to Stewart's argument, the framers of the Constitution granted the Senate the impeachment trial power to have a "more numerous" body as the audience and thus intended that the impeachment trial take place before a full Senate. Stewart, *supra* note 34, at 52. In keeping with the framers' intent, some argue that any burden associated with the trial by the full Senate should be overcome, particularly in light of the infrequency of impeachment trials. See *id.* at 52-55; see also *Hastings Complaint*, *supra* note 51 (arguing that the Senate should suspend legislation to devote the necessary time and attention).

55. *Hastings I*, 802 F. Supp. at 502; Stewart, *supra* note 34, at 52; Luchsinger, *supra* note 9, at 182. For example, prior to the use of the committee, only 50% of impeached judges tried were convicted. COMMISSION REPORT, *supra* note 4, at 29-30. In comparison, all three of the judges recently subject to the trial-by-committee process were convicted. *Id.*; Stewart, *supra* note 34, at 52, 54. Furthermore commentators argue that a greater proportion of senators on the committee voted to acquit than the senators who did not hear the testimony directly. See *Hastings I*, 802 F. Supp. at 492 (arguing this point before the district court). In Judge Nixon's case before the United States District Court for the

the judges the right to present their cases before the full Senate, they also are deprived of procedural due process.⁵⁶ Specifically, these commentators theorize that the trial-by-committee process "allows the majority of Senators to vote on an impeachment without hearing evidence firsthand."⁵⁷

C. *The Impact of Nixon v. United States on the Senate Trial Process*

1. *Bringing the Judges' Concerns before the Courts: Nixon v. United States*

Judge Hastings began raising his constitutional concerns in court even before the completion of his own impeachment trial.⁵⁸ The courts in both his case and Judge Nixon's addressed whether the cases were nonjusticiable under the political question doctrine.⁵⁹ The Supreme Court explained the test for whether a controversy presents a nonjusticiable political question in *Baker v. Carr*.⁶⁰ There, the Court held that a controversy is nonjusticiable where (1) there is textual evidence⁶¹ that the Constitution has committed to a particular political department the issue in controversy or

District of Columbia Court, one of the judges hearing the case admitted that, given the conviction statistics prior to the use of the committee process, the Senate might not have convicted Judge Nixon if all of the senators heard the evidence directly. Garry Sturgess, *Sympathetic Ear for Impeached Judge*, LEGAL TIMES, Aug. 20, 1990, at 7. Sturgess cites Judge Oberdorfer's opinion in the district court's decision in *Nixon v. United States* in which Judge Oberdorfer found that the failure of two-thirds of the trial committee members to vote for Judge Nixon's conviction indicated that if the full Senate had heard the testimony directly it would have voted to acquit. Despite Judge Oberdorfer's findings, the district court never reached the merits of the case. *Id.*; see also *Nixon v. United States*, 744 F. Supp. 9, 14 (D.D.C. 1990) (discussing the difference between the ways judges and juries try facts), *aff'd*, 938 F.2d 239 (D.C. Cir. 1991), *aff'd*, 113 S. Ct. 732 (1993).

56. For example, one critic, David Stewart, concludes that "[b]y preventing the accused from effectively presenting his case to all senators, the committee trial denies the accused a fair opportunity to defend himself." Stewart, *supra* note 34, at 54.

57. Auslander, *supra* note 39, at 78.

58. See *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1094 (1985), *cert. denied*, 477 U.S. 904 (1986); *Hastings I*, 802 F. Supp. 490 (D.D.C. 1992); *Hastings v. United States Senate*, 716 F. Supp. 38, 39 (D.D.C.) (brought by both Judges Hastings and Nixon), *aff'd* 887 F.2d 332 (1989).

59. See *Hastings I*, 802 F. Supp. at 493-98. Judge Sporkin found that Judge Hastings' case was justiciable, but the case was later dismissed as a result of the Supreme Court's holding in *Nixon*. See *Hastings v. United States*, 837 F. Supp. 3 (D.D.C. 1993); see also *Nixon*, 744 F. Supp. at 13 (holding the judge's constitutional claim against the Senate impeachment process nonjusticiable).

60. 369 U.S. 186 (1962). In *Baker v. Carr*, the Court found that issues relating to redistricting are not political questions and are, therefore, justiciable. *Id.* at 237.

61. Specifically, a "textual commitment" is present when the Constitution has assigned the determination of a question to a body other than the courts. GERALD GUNTHER, CONSTITUTIONAL LAW 397 (11th ed. 1985); NOWAK, *supra* note 47, § 2.15(d), at 109-10.

(2) where there is “a lack of judicially discoverable and manageable standards for resolving it.”⁶²

Judge Nixon argued in his case that the *Baker* test was not met and that his complaint was justiciable under the Supreme Court’s holding in *Powell v. McCormack*.⁶³ In *Powell*, the Supreme Court held that the House of Representatives’ decision to exclude a duly elected member was justiciable.⁶⁴ The *Powell* Court determined that any expulsion of a Member of Congress arising from the Constitution’s explicit provision regarding removal⁶⁵ is reviewable by the Court.⁶⁶ Likewise, any of the House’s efforts to expel on other grounds, such as those in *Powell*,⁶⁷ are not political questions and are reviewable.⁶⁸

After persistent and lengthy efforts on the part of both Judges Hastings and Nixon,⁶⁹ the Supreme Court decided without dissent in *Nixon* that the constitutionality of the Senate’s impeachment process is a political question and thus, is nonjusticiable.⁷⁰ The Supreme Court examined the

62. *Baker*, 369 U.S. at 217; see also Luchsinger, *supra* note 9, at 176-80. In his 1992 article, Luchsinger analyzed the trial-by-committee process under the *Baker* test for justiciability and wrote that “[n]one of [the] barriers to the merits are present when evaluating” this process. Luchsinger, *supra* note 9, at 176. In 1993, the Supreme Court held otherwise. See *infra* note 69-81 and accompanying text (discussing the Supreme Court’s holding in *Nixon v. United States*).

63. See *Nixon v. United States*, 113 S. Ct. 732, 739 (1993) (discussing *Powell v. McCormack*, 395 U.S. 486 (1969)).

64. *Powell*, 395 U.S. at 549.

65. The constitutional provisions at issue in *Powell* were Article I, Section 5, which provides Congress with the authority to review the qualifications of its Members, and Article I, Section 2, which specifically presents the only qualifications necessary for membership in the House. U.S. CONST. art. I, § 5, cl. 1; *id.* art. I, § 2, cl. 1-2; see *Powell*, 395 U.S. at 493, 521.

66. *Nixon*, 113 S. Ct. at 739-40 (discussing the *Powell* Court’s decision in relation to the *Nixon* holding); *Powell*, 395 U.S. at 493, 521.

67. *Powell*, 395 U.S. at 522. Specifically, the *Powell* Court held that the House is limited under Article I, Section 5 to a review of the qualifications and expulsion provisions presented by the Constitution in Article I, Section 2. *Id.* Also, because of the Constitution’s “textual commitment” to the House, any of the House’s efforts to expel one of its Members on these or other grounds (as presented in *Powell*) is justiciable. *Id.*

68. *Id.*

69. See *supra* notes 58-59 (listing the judicial proceedings brought by Judges Hastings and Nixon).

70. *Nixon*, 113 S. Ct. at 740 (Stevens, J., White, J., Blackmun, J., and Souter, J., concurring). After his Senate conviction, Judge Nixon brought this action in the United States District Court for the District of Columbia for a declaratory judgment and reinstatement, arguing that the procedure under the Senate’s Rule XI is unconstitutional because it does not provide for a trial by the full Senate. *Nixon v. United States*, 744 F. Supp. 9 (D.D.C. 1990), *aff’d*, 938 F.2d 239 (D.C. Cir. 1991), *aff’d*, 113 S. Ct. 732 (1993). In addition to resolving Nixon’s concerns, the Supreme Court’s decision in *Nixon* effectively halted Judge Hastings’ judicial efforts as well. *Hastings I*, 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded*, 988 F.2d 1280 (D.C. Cir. 1993), *dismissed on remand*, 837 F. Supp. 3 (D.D.C.).

Constitution's Impeachment Clause⁷¹ and noted the specificity of the requirements within it.⁷² Regarding the first sentence of the Impeachment Clause, which provides the Senate with the "sole power to try,"⁷³ the Supreme Court held that this phrase is not only "a textually demonstrable constitutional commitment" of impeachment power to the Congress,⁷⁴ but also that it lacked "sufficient precision to afford any judicially manageable standard of review."⁷⁵

The Court also reviewed and rejected Judge Nixon's argument that the Constitution's use of the word "try"⁷⁶ is a limited constitutional grant and is therefore justiciable under *Powell*.⁷⁷ The Court analyzed the definition of the term "try" and concluded that it is not so specific in meaning as to require the Senate to perform this duty in a particular manner.⁷⁸ Contrary to Nixon's argument, the Court additionally held that the use of the term "sole" in Article I, section 3, clause 6 amounts to a textually demonstrable commitment of the power to try impeachments to the Senate.⁷⁹

71. U.S. CONST. art. I, § 3, cl. 6.

72. Specifically, the Court outlined the requirements of the Constitution, including the requirements that the Senate must: (1) take an oath; (2) convict by a two-thirds majority; and (3) have the Chief Justice sit when trying the President. *Nixon*, 113 S. Ct. at 735-36.

73. U.S. CONST., art. I, § 3, cl. 6.

74. *Nixon*, 113 S. Ct. at 735 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In making the determination that the Senate trial procedure is nonjusticiable, Justice Rehnquist, writing for the majority, noted that the analysis of what amounts to a textually demonstrable constitutional commitment is not separate from, but rather relates to, the analysis of what is a lack of judicially discoverable and manageable for resolving it. *Id.*; see RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 103-04 (1973). Berger quoted Professor Herbert Wechsler, a supporter of the nonjusticiability of impeachment: "Who . . . would contend that the civil courts may properly review a judgment of impeachment when [the Constitution] declares that the 'sole power to try' is in the Senate? That any proper trial of an impeachment may present issues of the most important constitutional dimension . . . is simply immaterial . . ." *Id.* Berger, however, personally found that the trial process should be appealable to the Supreme Court when constitutional violations arise. *Id.* at 111-12.

75. *Nixon*, 113 S. Ct. at 736.

76. See U.S. CONST. art. I, § 3, cl. 6. "The Senate shall have the sole power to try all impeachments." *Id.* (emphasis added).

77. *Nixon*, 113 S. Ct. at 736.

78. *Id.* Specifically, the Court determined that the term "try" does not require the Senate to try the impeached party in the same manner as a judicial court. *Id.* Thus, the Court held that the meaning of "try" is not so specific as to provide the Court with a judicially discoverable and manageable standard for resolving whether the Senate's method of trial by committee is unconstitutional. *Id.*

79. *Id.* The Court reviewed the dictionary meaning of the word "sole": "having no companion,' 'solitary,' 'being the only one,' and 'functioning . . . independently and without assistance or interference.'" *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2168 (1971)). The Court held that, given those definitions, it is difficult to argue that the Senate would have "sole" power if its decision was judicially reviewed. *Id.* Specifically, the Court wrote that "[i]f the courts may review the actions of the Senate in order to

Finally, the Court further found its analysis consistent with the framers' intent and held that if the framers envisioned judicial review, they would have explicitly stated so.⁸⁰ The *Nixon* Court reasoned that judicial review was inconsistent with the framers' intention that the impeachment process serve as a check on the judicial branch and that criminal trials and impeachment trials be handled by separate bodies.⁸¹

2. *The Issue of Fairness is Left in the Hands of the Senate*

The Supreme Court's holding in *Nixon*, precluding judicial review of the Senate trial procedure, prevents any judicial evaluation of the fundamental fairness of the impeachment trial-by-committee process.⁸² Underlying the Court's holding, however, is the issue of what standard of fairness, if any, the Senate should impose on itself.⁸³ As a result of *Nixon*, the Senate is free to establish its own impeachment process, as long as the process does not violate a specific constitutional restriction within the impeachment clause.⁸⁴ Congress demonstrated an interest in the issue of fairness prior to the Supreme Court's decision in *Nixon* by

determine whether that body 'tried' an impeached official, it is difficult to see how the Senate would be 'functioning . . . independently and without assistance or interference.' " *Id.*

80. *Id.* at 737-38.

81. *Id.* at 738. Additionally, Justice Souter stated, in his concurrence, that judicial review should occur only where "governmental order" is threatened. *Id.* at 748 (Souter, J., concurring).

82. Thus, in light of *Nixon*, and as evidence of the finality of the courts' jurisdiction over the issue of fairness in the impeachment trial process, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the holding of United States District Court in *Hastings v. United States*, 802 F. Supp. 490 (1992), that the trial-by-committee process violates the judge's due process rights. *Hastings v. United States*, 988 F.2d 1280 (D.C. Cir.), *dismissed on remand*, 837 F. Supp. 3 (D.D.C. 1993).

Although the *Nixon* majority did not reach the merits of the case, Justice White, in his concurrence, did reach them and found—in opposition to the district court in *Hastings*—the Senate process to be constitutional. *Nixon*, 113 S. Ct. at 740-47 (White, J., concurring); see *infra* notes 100-04 (discussing in detail Justice White's concurrence).

83. In holding *Nixon's* claim non-justiciable, the Supreme Court wrote that "[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive." *Nixon*, 113 S. Ct. at 739. Thus, the procedural questions are left to the Senate's own determination. COMMISSION REPORT, *supra* note 4, at 53-54; see BERGER, *supra* note 74, at 120 (stating that if the impeachment process is not reviewable, it must at least yield to due process).

84. See Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 Ky. L.J. 643, 675-77 (1988). For example, if the Senate were to try the President without the Chief Justice presiding, as required by Article I, Section 3, Clause 6 of the Constitution, the conviction would be reviewable by the Supreme Court under its holding in *Powell v. McCormack*, 395 U.S. 486 (1969). As the *Nixon* Court wrote, a case is reviewable if Congress extends its procedural bounds beyond those established by the Constitution. *Nixon*, 113 S. Ct. at 740.

creating the National Commission on Judicial Discipline and Removal (National Commission) to review all issues relating to the subject of judicial discipline.⁸⁵

II. ANALYSIS OF THE SENATE TRIAL-BY-COMMITTEE PROCESS IN A CONSTITUTIONAL CONTEXT

The Due Process Clause mandates that the Senate consider standards of fairness so that its trial proceedings are conducted with uniformity and consistency. It simply requires that when a government action jeopardizes a person's life, liberty, or property, the government action in question must be conducted fairly.⁸⁶ Although many, including the proponents of the full Senate trial, believe that the Due Process Clause always requires the right to a hearing,⁸⁷ constitutional scholars have found that the Due Process Clause requires only fair procedures, not necessarily a hearing.⁸⁸

85. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5122 (codified as amended at 28 U.S.C. § 372(c) (Supp. V 1993)). With regard to the impeachment trial process, the Commission acknowledged, in its final report, the current Senate debate over the issue of whether to apply the Due Process Clause to impeachment trials and, if so, what procedures are necessary to meet the standards of this clause. COMMISSION REPORT, *supra* note 4, at 53-54. The Commission encourages continued debate by the senators on the issue of fairness and concludes that, as a "collegial institution," the senators will determine the best procedures for impeachment trials. *Id.*

86. U.S. CONST. amend V; BERGER, *supra* note 74, at 120 (" 'Due process' has been epitomized . . . as the 'protection of the individual against arbitrary action.' " (quoting *Ohio Bell Tel. Co. v. Public Serv. Comm'n*, 301 U.S. 292, 302 (1937))); NOWAK, *supra* note 47, § 13.8.

87. See NOWAK, *supra* note 47, § 13.2 (discussing this common belief); see also *Nixon*, 113 S. Ct. at 737 (discussing Nixon's argument that the trial-by-committee process violates due process by not affording the entire Senate the opportunity to testimony); *Hastings I*, 802 F. Supp. at 504-05 (arguing that the fundamental constitutional concept of due process demands trial by full Senate).

88. NOWAK, *supra* note 47, § 13.8. Meeting the due process standard does not mean that the Senate is bound in its trial to meet the procedural requirements of a traditional judicial trial. *Nixon*, 113 S. Ct. at 736. In analyzing the fairness of the current Senate trial process, it should not be compared to the procedure used in a criminal or civil trial. Auslander, *supra* note 39, at 96-98. There are obvious differences in its procedure. The Senate is not bound by the federal rules of evidence, by a particular standard of proof, by a requirement that the factfinders view witnesses directly or by a requirement to hold a trial by jury. And, in any event, those rules may not be necessary for the Senate to meet the fairness requirements of due process. *Nixon*, 113 S. Ct. at 745-46 (White, J., concurring); see COMMISSION REPORT, *supra* note 4, at 53-54 (acknowledging the current debate over what procedures are needed, if any, to meet the due process requirements).

Even some of those who believe the trial-by-committee process is justiciable and violative of due process concede that the impeachment process is *sui generis*—neither criminal nor civil in nature. Auslander, *supra* note 39, at 74 (citing *Hastings v. United States Senate*, 716 F. Supp. 38, 41 (D.D.C.), *aff'd*, 887 F.2d 352 (D.C. Cir. 1989)); see Rotunda, *supra* note 19, at 719-20 (discussing standard of proof issues and the difference between the im-

The test presented in *Mathews v. Eldridge*⁸⁹ is the typical method for determining whether a procedure is fundamentally fair.⁹⁰ For due process purposes, the Senate trial-by-committee process must be weighed and analyzed under the factors enunciated in *Mathews*.⁹¹ Analyzing the impeachment trial process by using the *Mathews* factors involves a weighing of whether the judge's right to a property interest, a judgeship, might be erroneously deprived by the trial-by-committee process and whether any alternative procedures exist that might protect that right.⁹² If such

peachment process and judicial procedures). See generally Melton, *supra* note 8, at 456-57 (discussing the framers' intent that the impeachment process not be considered a criminal proceeding). Judge Sporkin, who held that the Senate trial-by-committee violated Judge Hastings' due process rights, stated that "[t]here is no reason to believe that the full panoply of due process protections that apply to a trial by an Article III court necessarily apply to every proceeding. Impeachment trials are unique and are entitled to be carried out using procedures that benefit their special nature." *Hastings I*, 802 F. Supp. at 504. However, Judge Sporkin held that the Senate process still must be conducted under the basic principles of due process. *Id.*; see COMMISSION REPORT, *supra* note 4, at 53-55 (discussing the differences between impeachment trials and criminal trials).

89. 424 U.S. 319 (1976); see *infra* notes 90-166 and accompanying text (discussing the *Mathews* test for due process, which balances the individual's life, liberty, and property rights against the importance of the government's interest, and applying test to the Senate trial procedure).

90. NOWAK, *supra* note 47, § 13.8, at 491 (citing *Little v. Streater*, 452 U.S. 1 (1981); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), as examples of *Mathew's* application); see also Luchsinger, *supra* note 9, at 181-82 (using the *Mathews* test in determining the validity of the Senate process).

At least one author has found that the *Mathews* test is inappropriate when applied to the impeachment trial process because, she argues, the test is used only to determine if a trial is necessary at all, not to determine if the trial is fair. Auslander, *supra* note 39, at 91. However, experts support the argument that the *Mathews* test is appropriate not only in determining whether a trial is required, but also as a method of determining the precise hearing procedures. NOWAK, *supra* 47, § 13.8.

91. The test presented in *Mathews* weighs the following factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

92. See *id.* at 335; COMMISSION REPORT, *supra* note 4, at 132 (Sen. Heflin's separate statement); Luchsinger, *supra* note 9, at 181. This Comment does not discuss the first factor of the *Mathews* test because it concurs in the finding that there is a private interest at stake and that the determination that a lifetime judgeship amounts to a property right under the Due Process Clause, as determined by several Supreme Court decisions. See *supra* note 47 and accompanying text (listing cases supporting the principle that guaranteed public employment amounts to a property right); see also NOWAK, *supra* note 47, § 13.5 (d), at 479 (stating that "[i]f the government gives the employee assurances of continual employment . . . then, there must be a fair procedure to protect the employee's interests").

alternatives exist, it must be determined how burdensome they would be on the Senate.⁹³

The analysis below finds that, given all of these factors, the current Senate procedure is fundamentally fair.⁹⁴

A. The Trial-by-Committee Process Does Not Erroneously Deprive Judges of Their Right to Life Tenure

1. The Trial-by-Committee Process is Consistent with the Framers' Intent

Judges recently subjected to the Senate impeachment process argue that trial-by-committee is unfair. Specifically, these judges contend that the only way a senator would be able to cast an informed vote on impeachment is if they personally witnessed the hearing in a full Senate trial.⁹⁵ For this argument to prevail, however, the judges must show that the framers' use of the word "try" was, in effect, a restriction preventing the Senate's reliance on a fact-finding committee.⁹⁶ A review of the framers' intent when drafting the Impeachment Clause refutes this contention.⁹⁷

The fact that the framers delegated the trial process to the Senate at all may be evidence that they sought to avoid the traditional trial process. As Chief Justice Rehnquist noted in *Nixon*, the framers specifically sought a trial by the Senate rather than by the judiciary.⁹⁸ The goal of such a designation may have been not to replicate the efficiency of the judicial court, but rather to make the process more democratic by placing it with the Senate.⁹⁹

93. See *Mathews*, 424 U.S. at 335; COMMISSION REPORT, *supra* note 4, at 132 (Sen. Heflin's separate statement); Luchsinger, *supra* note 9, at 181.

94. Yet, some authors have analyzed the committee trial process against the *Mathews* test and found that it does *not* satisfy the due process test. See, e.g., Luchsinger, *supra* note 9, at 181. In his article, Luchsinger opined that a judge's property interest, i.e., his judgeship, is unduly deprived by the substantial risk that the judge will be erroneously removed during a process in which 88 senators do not view any direct testimony. *Id.*

95. *Nixon v. United States*, 113 S. Ct. 732, 734-35 (1993); *Hastings I*, 802 F. Supp. 490, 502 (D.D.C. 1992); *Hastings Complaint*, *supra* note 51, at 32-33.

96. *Nixon*, 113 S. Ct. at 740-47 (White, J., concurring). In fact, however, Justice White held, in his concurrence in *Nixon*, that the Senate trial committee process was justiciable and, on the merits, found that the framers intended flexibility where they used the word "try." *Id.* at 745; see also U.S. CONST. art. I, § 3, cl. 6. (using the word "try" in giving the Senate impeachment trial authority).

97. See, e.g., *Nixon*, 113 S. Ct. at 745-46 (White, J., concurring) (holding that the current process meets due process standards, in part, because of its consistency with the framers' intent).

98. *Nixon*, 113 S. Ct. at 738-39.

99. See *infra* note 150 and accompanying text (indicating that the framers did not intend to create an efficient process, but rather a flexible one).

In fact, the framers encouraged flexibility in the process.¹⁰⁰ The framers felt that severe procedural limitations should not burden the Senate trial process.¹⁰¹ Additional evidence suggests that some framers intended that the Senate use a committee process similar to the method used by England's House of Lords—a committee for the fact-finding portion of the trial.¹⁰² Finally, the Constitution grants the authority to each house of Congress to create self-governing rules and procedures.¹⁰³ There is no evidence that this provision does not apply to the impeachment process, as well as to Congress' other procedures.¹⁰⁴

2. *Trial-by-Committee is Practical and Fair in Light of the Modern Senate*

At least one senator argued that the Senate's workload and time constraints have rendered the framers' intentions that the Senate determine its own procedure outdated, impractical, and unfair.¹⁰⁵ There is significant evidence available, however, that the Senate trial process—and the trial-by-committee—remains fair and practical, especially in light of the modern Senate's workload.¹⁰⁶ The framers probably did not envision a

100. *Nixon*, 113 S. Ct. at 746 (White, J., concurring) (citing THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE U.S. § LIII (2d ed. 1812)).

101. Alexander Hamilton wrote in the *Federalist Papers* that the process can never be "tied down by . . . strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges." THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Notably, the *Nixon* Court referred to Justice Story who, when analyzing the Impeachment Clause, once said that there is a difference in a judicial court proceeding, where strict rules are necessary in order to protect the accused, and an impeachment trial, in which strict rules are unnecessary and, in fact, ill-suited for such a trial of a political nature. *Nixon*, 113 S. Ct. at 746 (White, J., concurring).

102. *Nixon*, 113 S. Ct. at 745-46 (White, J., concurring) (citing THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE U.S. § LIII (2d ed. 1812), which discusses that the framers were aware that the House of Lords used a fact-finding committee during impeachment trials).

103. U.S. CONST. art I, § 5, cl. 2. The Constitution states that "Each House may determine the rules of its proceedings." *Id.*; see *Nixon*, 113 S. Ct. at 746 (White, J., concurring).

104. *Nixon*, 113 S. Ct. at 746 (White, J., concurring) (reasoning that the formation of a trial committee was nothing more than a determination by the Senate of its own trial procedures).

105. See *The Impeachment Process*, *supra* note 52, at 125; COMMISSION REPORT, *supra* note 4, at 131 (separate statement by Senator Heflin) (arguing that the current trial by committee process violates the Due Process Clause).

106. Burbank, *supra* note 84, at 650 (opposing a constitutional amendment to change the impeachment process and defending the current impeachment process); see Maxman, *supra* note 20, at 420 (arguing that the impeachment process, even with its complexities, most effectively preserves judicial independence and impartiality in accordance with the Constitution).

Senate as large in number and in agenda as today's Senate, but the process they created continues to be flexible.¹⁰⁷

The Senate's trial-by-committee process is an efficient and fair process in which it is not necessary that every senator participate directly to cast an informed vote.¹⁰⁸ The proceedings are broadcast live to every senator's office and are recorded on videotape for the senators' viewing.¹⁰⁹ In addition, each senator receives a complete transcript of the proceedings.¹¹⁰ Finally, the committee performs only a fact-finding role. It does not make any recommendations and cannot alter any of the full Senate's final determinations.¹¹¹ In fact, any dispositive motions brought before the committee are forwarded to the full Senate for determination.¹¹²

Some critics argue that the fact that a significant percentage of committee members voted to acquit the three judges who were most recently convicted¹¹³ is evidence that the other senators, who were not on the committee and voted to convict, were uninformed.¹¹⁴ This argument does not consider the characteristic that distinguishes the Senate impeachment process from the judicial court system: a senator's individual

107. "[T]he framers crafted a process that has proved to be efficacious, durable, and flexible: efficacious in that impeachment works; durable in that the process withstands the test of time; and flexible in that a modern day impeachment can be molded to meet current procedural and institutional pressures." Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 778 (1987-88); see also *Nixon*, 113 S. Ct. at 736 ("[T]he Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require" (quoting *Dillon v. Gloss*, 256 U.S. 368, 376 (1921))).

108. Kastenmeier & Remington, *supra* note 107, at 778; see also Burbank, *supra* note 84, at 687-88. Burbank correctly explains that those who doubt the constitutionality of the committee process because there is no direct testimony to the Senate cannot rely on the argument that the use of the word "Senate" in the Constitution's impeachment trial provision means *full* Senate. *Id.* Burbank analogizes, for example, that the grant to the Supreme Court of original jurisdiction has been found to permit delegation of authority to only one of the nine Justices in certain situations; and, secondly, that the framers, such as Thomas Jefferson, actually contemplated the use of a committee such as the current one. *Id.*

109. COMMISSION REPORT, *supra* note 4, at 51; see *supra* notes 36-46 and accompanying text (discussing Senate Rule XI and the Senate trial-by-committee process).

110. Rule XI, *supra* note 2; COMMISSION REPORT, *supra* note 4, at 51.

111. COMMISSION REPORT, *supra* note 4, at 51; see *supra* text accompanying notes 36-46 (discussing Senate Rule XI and the Senate trial-by-committee process).

112. COMMISSION REPORT, *supra* note 4, at 51-52; see also Mitch McConnell, *Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change*, 76 KY. L.J. 739, 743 (1987-88) (discussing the limits on Senate committee authority).

113. See *supra* notes 55-57 and accompanying text (discussing the trial committee members' votes in the three recent trials).

114. *Id.*

decision is not required to be based on a particular standard of proof.¹¹⁵ Unlike established evidentiary standards in criminal and civil courts, senators are not guided by any standard.¹¹⁶ Their decisions are based on their individual evaluations of the evidence.¹¹⁷ The delineation between those senators who voted to acquit and those who voted to convict does not indicate conclusively a lack of knowledge by certain senators because there is no required evidentiary burden.¹¹⁸ Rather, it also may indicate that each senator considered the evidence and formulated a judgment, without the aid of a standard-of-proof guideline.¹¹⁹

The benefit of using a trial-by-committee process is that it enables the Senate to focus on its legislative duties and impeachment duties simultaneously. Prior to the use of a trial-by-committee process, impeachment trials by the full Senate could take as long as seventy-six days to complete.¹²⁰ Under the burden of a full Senate trial, it is unlikely that the senators also would be able to consider the several thousand legislative measures introduced in each Congress.¹²¹ Moreover, the trial-by-committee process still ensures a fair and efficient process for the parties on trial.¹²² In fact, the three trials using the trial-by-committee process were

115. COMMISSION REPORT, *supra* note 4, at 59-60; *see also* David Johnston, *Hastings Ousted as U.S. Judge by Senate Vote*, N.Y. TIMES, Oct. 21, 1989, at A1 (acknowledging the lack of a uniform standard of proof).

116. Evidence in criminal cases must indicate guilt "beyond a reasonable doubt" for a judge or jury to convict and evidence in civil cases must indicate guilt by either a preponderance of the evidence or by clear and convincing evidence, depending on the charge. PAUL H. ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 11 (1988) (noting the differences between civil and criminal trials and explaining the necessity that a person's guilt be proven beyond a reasonable doubt for conviction in a criminal trial); *see* MICHAEL H. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 755 (1983) (discussing the varying burdens of proof and production and defining the terms "preponderance of the evidence" and "clear and convincing" as "resting between more probably true than not true"); *see also* COMMISSION REPORT, *supra* note 4, at 59-60 (discussing what, if any, standard should be established by the Senate); *infra* note 197 and accompanying text (discussing the standard of proof issue).

117. COMMISSION REPORT, *supra* note 4, at 59-60.

118. *Id.*

119. *See infra* notes 185-204 and accompanying text (discussing whether the Senate should adopt a standard of proof to aid the committee process).

120. COMMISSION REPORT, *supra* note 4, at 51 (discussing Judge Louderback's hearing and the length of the trials prior to enactment of Rule XI); *see also supra* note 34 (further discussing the full Senate process).

121. The number of legislative measures—bills, amendments, and resolutions—introduced during the 102d Congress totaled 16,398. J. Craig Crawford, *Capitol Hill: Who Wields a Big Stick?*, ORLANDO SENTINEL, Oct. 3, 1993, at A1, A19.

122. *See* Luchsinger, *supra* note 9, at 167-70 (discussing the rationale for the Senate enactment of Rule XI).

efficient¹²³ and fair in the treatments of all the parties.¹²⁴ The Senate report filed by the Hastings Impeachment Committee confirms that each party was given equal time to present their cases and “[n]either party was denied the opportunity to call a witness because of the unavailability of time.”¹²⁵

B. The Alternatives to the Trial-by-Committee Process are Unduly Burdensome

1. Trial by the Full Senate is Unduly Burdensome and More Unfair than the Trial-by-Committee

In the two most recent impeachment proceedings, Judge Hastings and Judge Nixon argued that the entire Senate should suspend legislative and executive business so that senators could devote the necessary time and attention to the impeachment proceedings.¹²⁶ Indeed, a full Senate hearing appears plausible given that there have been only eleven judicial impeachment trials by the Senate in a two-hundred-year period.¹²⁷ Considering, however, that of those hearings, the three most recent were held over the course of a three-year period,¹²⁸ that at least one potential impeachment is currently pending,¹²⁹ and that the number of federal

123. The three trials averaged 10 days in length and even Judge Nixon's attorney did not question the time frame of the trial process. Stewart, *supra* note 34, at 55 (arguing that the short time frame in fact makes it possible to conduct a full Senate trial).

124. See, e.g., HASTINGS TRIAL REPORT, *supra* note 43, at 165-72 (summarizing the procedures taken by the trial committee to ensure that all parties and witnesses testify); Jack Brooks et al., *Justice for Judges, and the 'National Inquest,'* LEGAL TIMES, May 6, 1991, at 28-29 (arguing that the entire proceedings against Hastings were fair).

125. HASTINGS TRIAL REPORT, *supra* note 43, at 170 (stating that the parties in the Hastings trial were given a total of 80 hours to present their cases). As one senator also recognized after the Claiborne trial, the Senate has an immense burden in the impeachment process, but the “[Senate's Special Impeachment] Committee saved countless hours of the full Senate's time and exerted tremendous influence on the Senate's ultimate decision.” McConnell, *supra* note 112, at 760.

126. *Hastings Complaint*, *supra* note 51, at 33. David Stewart, the attorney who represented Judge Nixon before the Senate and the courts, similarly argued that because impeachment trials are not an everyday occurrence and that the experience of the committee trials is a task that can be performed in a short period of time, the Senate should suspend their other activities for a full Senate trial. Stewart, *supra* note 34, at 55. Despite the three trials during the late 1980s, Stewart states that impeachment trials occur, on average, one in every 13 years. *Id.*

127. COMMISSION REPORT, *supra* note 4, at 29.

128. Judges Claiborne, Hastings, and Nixon were impeached and removed between 1986 and 1989. See *supra* note 9 and accompanying text (discussing the grounds for impeachments for each judge); see also COMMISSION REPORT, *supra* note 4, at 30 (discussing the grounds of all parties impeached, tried and convicted).

129. COMMISSION REPORT, *supra* note 4, at 36. Among the judges currently awaiting possible impeachment is U.S. District Court Judge Robert Aguilar. See *Fellow Judges Let Aguilar Return to Bench*, THE S.F. CHRONICLE, May 20, 1994, at B3. Aguilar's case is

judges is increasing,¹³⁰ impeachment trials may become a more common occurrence.¹³¹

In fact, a full Senate trial would result in low attendance, thereby making the quality of the deliberations more unfair than the trial-by-committee process.¹³² The Senate enacted Rule XI because, even in the early 1900s, senators realized the impracticality and unfairness of a trial by the entire Senate.¹³³ Thus, given the larger and more active Senate of the 1990s, it is unlikely that attendance¹³⁴ or efficiency¹³⁵ at a full Senate trial would be any better than it was in 1935.¹³⁶

particularly similar to Judge Hastings case in that an appellate court found him innocent of criminal charges that he leaked a wire tap and obstructed a grand jury investigation. *Id.* Congress has not yet decided whether to initiate impeachment proceedings. *Id.*

130. There are currently 842 federal judges with lifetime tenure; in 1936, there were 224 such judges. COMMISSION REPORT, *supra* note 4, at ii.

131. *See id.*

132. *See supra* note 34 and accompanying text (discussing the low attendance prior to the enactment of Rule XI in the 1930s). *But see* Stewart, *supra* note 34, at 55 (arguing that impeachments are infrequent enough to warrant the extra effort on the part of the Senate for a full trial).

133. Luchsinger, *supra* note 9, at 167-69. At the Louderback impeachment in 1933, there were only three senators in the chambers at one point. *Id.* Prior to the enactment of Rule XI, Senate impeachment trials were conducted on the Senate floor before a full Senate and even then, when the Senate was not as large in number nor its agenda as full, attendance was lacking. *Id.* In a 1913 impeachment trial, "attendance . . . rarely topped 20 of the 94 senators then in office." Peck, *supra* note 15, at 58; *see also* Auslander, *supra* note 39, at 97. Even Auslander, who argues that the current trial process violates due process, concedes that the full Senate would need to correct its attendance record to meet the due process standard that she applies. *Id.*

134. *See* COMMISSION REPORT, *supra* note 4, at 51. Even though all 100 senators today still do not hear all of the testimony directly, it is arguable that access to videotapes, trial transcripts and committee reports, in fact allow senators today to be *more* informed than the senators burdened with a full Senate trial in the 1930s. *See* notes 37-46 and accompanying text (discussing Rule XI and the full Senate's access to evidentiary materials).

135. Despite the argument that a full Senate trial would be more inefficient than the committee process, lawyers for the most recently impeached judges argued before the courts that a full Senate trial would not be too time consuming or burdensome. Stewart, *supra* note 34, at 55. *But cf.* COMMISSION REPORT, *supra* note 4, at 51 (noting that the 1935 full Senate trial of Judge Louderback lasted 76 days); *see also supra* note 34 (discussing the Senate procedure prior to the enactment of Rule XI).

136. One reason that the trial by committee is time-efficient may be that not all 100 senators are active participants in the fact-finding process. If there were full attendance and participation, for example, in the fact-finding process, the length of the trial process could become unduly burdensome on the Senate. This presents an interesting "catch 22" where the desire for full attendance may increase the length and inefficiency of the trial process. *But see* Stewart, *supra* note 34, at 55 (implying that the full Senate could complete a trial in the same amount of time as the trial committee).

2. Recommended Alternatives to Senate Impeachment Are Contrary to the Separation of Powers Notion of the Constitution

Several alternatives have been proposed that would provide for a speedier removal, either by an automatic removal procedure or by permitting the Senate to delegate its removal powers to another branch of government.¹³⁷ There are two types of proposals that present particular concerns. One proposal would penalize a federal judge convicted of a felony by automatically suspending him or her from office.¹³⁸ A second proposal would grant the judicial branch the authority to police its peers.¹³⁹ Advocates of judicial branch self-policing are unconcerned that such a plan would undercut judicial independence, arguing instead that the courts are equally concerned with this issue.¹⁴⁰ Their argument sup-

137. See COMMISSION REPORT, *supra* note 4, at 158 (discussing several alternative proposals).

138. *Id.* (discussing the legislative proposal of Senator Strom Thurmond (R-SC)). A separate but related debate exists regarding the co-existence and timing of the impeachment process in relation to the criminal prosecution process. Some argue that criminal indictments, convictions, and imprisonment should not be made prior to the impeachment of government officials because such judicial actions amount to removal from office and are thus contrary to the Constitution's provisions. Analysis of this debate is, however, beyond the scope of this Comment. See generally Gerhardt, *supra* note 15, at 77-82 (providing a general discussion of the co-existence of judicial action and impeachment action).

139. There are actually several such proposals. One proposal would grant the Supreme Court, or a federal judicial tribunal, the authority to discipline judges with removal from office or a reduction in pay. Burbank, *supra* note 84, at 695 & n.248 (discussing Sen. DeConcini's proposal, S.J. RES. 370, 99th Cong., 2d Sess. (1986)).

Others would permit such discipline for judges who bring "disrepute on the Federal Courts or the administration of justice by the courts" or alternatively would grant a judicial tribunal appointed by the Chief Justice the authority to try cases initiated by the attorney general. Burbank, *supra*, note 84, at 695 (quoting S.J. Res. 113, 100th Cong., 1st Sess. (1987) (introduced by Sen. DeConcini)); see also Stephen B. Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, 71 JUDICATURE 13 (1987-88) [hereinafter *Politics and Progress*]; Fein & Reynolds, *supra* note 34, at 24-25; Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870 (1930) (discussing proposals for the removal of judges by the courts); COMMISSION REPORT, *supra* note 4, at 158-59 (Appendix I) (outlining statutory proposal to allow the courts disciplinary authority). A third proposal would establish a bifurcated system in which a commission would investigate charges and act as a grand jury and a "Court of the Judiciary" would have removal powers as a trial court. *The Impeachment Process*, *supra* note 52, at 125; COMMISSION REPORT, *supra* note 4, at 159 (separate statement of Sen. Heflin) (supporting a proposal under which the Senate would appoint individuals to those bodies).

140. Shartel, *supra* note 139, at 876-77. Bruce Fein and William Reynolds note that their proposal does not threaten judicial independence because

[n]either the legislative nor executive branch could compel removal of a judge for alleged misconduct; that authority would be lodged solely within the federal judiciary itself. Nor will iconoclastic judges need fear the ire of their brethren, for two reasons: Initiation of charges would be in the hands of the attorney general,

porting such procedures is that not only are the courts better equipped than the Senate to try cases, but they also are more eager than the Senate to discipline judges who do their profession a disservice.¹⁴¹

Although the proposals suggesting alternatives to the Senate process vary in technique, they all would provide the judicial branch with a significant, if not exclusive, role in the impeachment process.¹⁴² This notion directly conflicts with the Constitution's explicit grant of impeachment authority to Congress.¹⁴³

The suggestion that judges could be removed from office by other judges clashes with the framers' intention that Congress' power to impeach and remove serve as a "check" on the power of the judiciary¹⁴⁴ and as a method for maintaining judicial independence.¹⁴⁵ The Constitution also provides that the impeachment of an official does not preclude a

and the felony standard would sharply circumscribe the discretion of both the prosecutor and the presiding judges in a removal proceeding.

Fein & Reynolds, *supra* note 34, at 25.

141. Shartel, *supra* note 139, at 875-76.

142. See *supra* notes 137-54 and accompanying text (outlining the proposals for judicial involvement). Judicial involvement in the disciplinary process is not a new concept. Through a congressional delegation of authority, The Judicial Councils, Reform, and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), the judicial branches' Judicial Conference already plays a role in the impeachment process by screening complaints filed against judges. 28 U.S.C. § 372(c) (1988 & Supp. V 1993). This role, however, is not the only method by which a complaint may be filed, and in any event, is secondary to the role of Congress because it has no authority to remove. See *infra* note 172 (further discussing provisions of the 1980 Act).

143. See, e.g., U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6. The Constitution explicitly separated the criminal court process and the impeachment process. *Id.* In opposing an early proposal to delegate impeachment powers to another branch of government, one scholar of the process addressed the Constitution's use of the word "sole" in the Impeachment Clause by stating that:

The Framers certainly would not have been so meticulous in the use of words, so careful to use this particularly strong word in the vesting of the impeachment power, unless they had in mind . . . to make it clear to all forever that, in the American system, no significance should be given to [proposals] whereby the power to charge misconduct for the purpose of obtaining removal of a civil officer from office was held to be lodged in any other than that legislative body directly representing the whole people.

Maxman, *supra* note 20, at 434 (quoting Merrill E. Otis, *A Proposed Tribunal: Is it Constitutional?*, U. KANSAS CITY L. REV. 1, 25-26 (1939)).

144. Alexander Hamilton saw the need for flexibility during impeachment proceedings and argued that such flexibility would be found only in a "numerous court" such as the Senate and not in the traditional procedures of the judicial branch. THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also COMMISSION REPORT, *supra* note 4, at 24 (arguing that automatic removal from office upon conviction would eliminate the congressional check on improper prosecutorial targeting of judges).

145. COMMISSION REPORT, *supra* note 4, at 18; THE FEDERALIST NOS. 65, 79 (Alexander Hamilton); see also McConnell, *supra* note 112, at 751 (reiterating the importance of protecting judges from overly aggressive discipline by their peers).

criminal trial.¹⁴⁶ Alexander Hamilton saw this provision as further impetus for the use of two different branches in the two trials so as to decrease the risk that one verdict might influence the other.¹⁴⁷

Finally, the use of a federal tribunal or another judicial body to remove judges also would conflict with the concept that removal is best performed by the nations' representatives, as opposed to tribunal members who would be un-elected and unaccountable to the U.S. citizens.¹⁴⁸ The impeachment process is, by design, a political one and will remain so only in the hands of Congress.¹⁴⁹ Congressional impeachment authority may not foster optimum efficiency—an important concern to the officials impeached; but efficiency was not the motivating factor in the drafting of the Constitution.¹⁵⁰

In addition to the constitutional issues previously discussed, the proposal that a judge be suspended from office pending impeachment upon a felony conviction presents additional concerns.¹⁵¹ It directly contradicts the Constitution's provision that the penalty of removal from lifetime

146. U.S. CONST. art. I, § 3, cl. 7; *Nixon v. United States*, 113 S. Ct. 732, 738 (1993).

147. THE FEDERALIST NO. 65, at 399 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Specifically, he promoted the "double security intended [impeached parties] by a double trial" of both the Senate impeachment trial and the court criminal trial. *Id.*; BERGER, *supra* note 74, at 113-14.

148. THE FEDERALIST PAPER NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that too much judicial authority in the impeachment process would conflict with the importance of accountability for those given the authority to impeach); see COMMISSION REPORT, *supra* note 4, at 24 (noting that a judicial body created to discipline and remove federal judges would be non-elected and, at best, imperfectly accountable to voters) see also *supra* notes 20-21 and accompanying text (discussing the advantages of using a "numerous body" such as the Senate in the impeachment process).

149. One critic opposed to an increase in judicial authority in the impeachment process wrote that "Congress is the only governmental branch with any intrinsic checks on frivolous or vindictive accusations" and that proposals to shift the authority to another branch "neglect significant policy concerns in their attempt to respond rapidly to immediate political pressures." Maxman, *supra* note 20, at 443, 450-51 (footnote omitted).

150. In fact, Senator Leahy stated during the Hastings trial that the process was "made purposefully cumbersome to preserve the Constitution." *Impeachment: Time to Change the System?*, N.Y. TIMES, Aug. 11, 1989, at A12; see also Maxman, *supra* note 20, at 447-48 (emphasizing the value of using a complex impeachment process). Consistent with this notion, the court of appeals wrote in *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986), that "'[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Id.* at 1111 (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)); see also Catz, *supra* note 1, at 108 (stating that "the admittedly cumbersome process is claimed . . . to be purposely designed to prevent a whimsical assault on our judicial integrity").

151. COMMISSION REPORT, *supra* note 4, at 12; Catz, *supra* note 1, at 106-07 (finding that removal other than by impeachment is contrary to Constitutional intent); see U.S. CONST. art. I, § 3, cl. 7.

tenure for judges is reserved to the impeachment process.¹⁵² In fact, removal from office and disqualification from future federal positions are the only penalties available to the Senate upon an impeachment conviction.¹⁵³ Furthermore, a proposal for suspension without pay for a felony conviction violates Article III of the Constitution, which explicitly exempts impeachment trials from the trial-by-jury requirement because the penalty imposed would be the result of a jury verdict.¹⁵⁴

3. *A Constitutional Amendment Permitting Alternative Procedures for Removing Judges Is Unduly Burdensome and Unnecessary*

Many proponents for change recognize the constitutional problems that their alternatives present and, therefore, propose that they be adopted through a constitutional amendment.¹⁵⁵ A constitutional amendment would grant new power to the judicial branch, thereby upsetting the equilibrium between the three branches of government and potentially weakening the independence of the judicial branch.¹⁵⁶ No greater reason exists today than 200 years ago to increase the judiciary's authority or to disrupt the balance between the three branches of government.¹⁵⁷ In addition to ignoring the Constitution's original intent,¹⁵⁸ enacting a constitutional amendment unduly burdens the current system.¹⁵⁹

152. U.S. CONST. art. I, § 3, cl. 7. "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office . . . under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law." *Id.*

153. *Id.*; see also Catz, *supra* note 1, at 106-08 (reviewing the views of several historians, judges, and politicians that judges may only be removed from office upon impeachment conviction).

154. U.S. CONST. art. III, § 2, cl. 3. "The trial of all crimes, except in cases of impeachment, shall be by jury . . ." *Id.*; see also BERGER, *supra* note 74, at 81 (noting that the Constitution exempted impeachment from trial by jury).

155. *The Impeachment Process*, *supra* note 52, at 123. Supporting a constitutional amendment, Senator Heflin wrote, "I have concluded that our current impeachment rules were written for an era that has passed and a Congress that has changed." *Id.* What motivates these proponents is that "[p]roceeding by way of constitutional amendment has the distinct advantage of mooted arguments rooted in the decent obscurity of arrangements framed two hundred years ago." Burbank, *supra* note 84, at 649.

156. Burbank, *supra* note 84, at 650.

157. *Politics and Progress*, *supra* note 139, at 22.

158. *Id.*; see also Burbank, *supra* note 84, at 649.

159. See Burbank, *supra* note 84, at 649-50 (cautioning those who propose constitutional amendments to evaluate drastic alternatives before undertaking a change in the Constitution); see also COMMISSION REPORT, *supra* note 4, at 24.

Few proposed amendments are adopted,¹⁶⁰ and the amendment process is costly¹⁶¹ and lengthy.¹⁶²

Thus, under the *Mathews* due process test,¹⁶³ of which its third prong requires an analysis of any burdens presented by alternatives to the current impeachment process, a constitutional amendment would introduce an undue and unnecessary burden.¹⁶⁴ Any amendment to the Constitution should be consistent with the original intent of the framers.¹⁶⁵ Shifting authority between the branches of government threatens the clear goal of the framers to create a balance of power between the three branches of government.¹⁶⁶

III. REFORMING THE EXISTING PROCESS: ADDRESSING FAIRNESS CONCERNS CONSISTENT WITH CONSTITUTIONAL INTENT

Nixon v. United States vests the Senate with the responsibility for determining what "complex machinery" is needed to ensure a fair impeachment process.¹⁶⁷ Although the current trial-by-committee process

160. Between the year of the adoption of the Constitution and 1986, only 26 of approximately 5,000 proposed constitutional amendments have been added. Maxman, *supra* note 20, at 431 n.64.

161. Burbank, *supra* note 84, at 649.

No matter what the subject, the transaction costs of a constitutional amendment are enormous, and they increase as the subject becomes more controversial.

... When the subject of a proposed constitutional amendment involves matters that are basic to the operations of one branch of the federal government, transaction costs are as nothing compared to the costs of potential error in treating a polycentric problem as if it had only one dimension.

Id. (footnote omitted).

162. Fifty-seven years elapsed between the Thirteenth Amendment's first proposal and its enactment. Maxman, *supra* note 20, at 431 n.64.

163. See *supra* notes 89-94 and accompanying text (discussing the *Mathews* test).

164. Burbank, *supra* note 84, at 696. "Constitutional amendment is . . . an expensive way to experiment with alternatives to current arrangements, and neither institutional self-interest nor institutional power is a compelling argument for change when those arrangements are designed to preserve the countervailing power of another institution." *Id.*

165. See Burbank, *supra* note 84, at 649-50. Change by constitutional amendment should result from a "comparative assessment not just of current arrangements and proposed alternatives under a new constitutional grant but also of adjustments that might be made with fidelity to the provisions of the Constitution and thus without change to those provisions." *Id.* at 650.

166. See *id.* at 649-50; see also THE FEDERALIST NO. 48 (James Madison) (discussing the importance of separating the powers of government and creating checks and balances); *id.* No. 66 (Alexander Hamilton) (discussing how the impeachment process established in the Constitution meets the "separation of powers" and "checks and balances" goals).

167. See *supra* notes 58-81 and accompanying text (discussing the impact of *Nixon*); see COMMISSION REPORT, *supra* note 4, at 54. One author wrote that the impeachment authority

satisfies the due process standard presented in *Mathews*,¹⁶⁸ the question remains as to whether the current process can be improved to address some of the critics' concerns over the trial-by-committee process.¹⁶⁹

Prior to *Nixon*, Congress enacted the Judicial Improvements Act¹⁷⁰ in 1990 to create the National Commission on Judicial Discipline and Removal¹⁷¹ which released its final report in late 1993.¹⁷² The final Com-

is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of power to fire it, and a large mark to aim at.

JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 283 (1888).

168. This analysis indicates that the process is not only fair, but that its alternatives are either unduly burdensome or unfair. See *supra* notes 89-94 and accompanying text (discussing the due process test used to analyze the trial-by-committee process).

169. See *supra* notes 47-57 and accompanying text (discussing the critics concerns).

170. Pub. L. No. 101-650, 104 Stat. 5122 (1990) (codified as amended at 28 U.S.C. § 372 (1988 & Supp. V 1993)). The 1990 Act was subsequently amended with minor technical changes and additional funding provisions. See Pub. L. No. 102-395, 106 Stat. 1858 (1992); Pub. L. No. 102-368, 106 Stat. 1118 (1992); Pub. L. No. 102-198, 105 Stat. 1623 (1991); Pub. L. No. 102-27, 105 Stat. 136 (1991).

171. The Commission included 13 members appointed by the President Pro Tempore of the Senate, the Speaker of the House, the Chief Justice, the President and the Conference of Chief Justices of the States. National Commission on Judicial Discipline and Removal Act, Pub. L. No. 101-650, § 411, 104 Stat. 5124, 5125 (1990).

172. See COMMISSION REPORT, *supra* note 4. The purpose of the Commission was to investigate problems and issues related to judicial discipline and removal, evaluate the advisability of proposing alternatives, and submit its findings to Congress, the Chief Justice, and the President. Pub. L. No. 101-650, 104 Stat. 5124-25 (1990). As the Commission report indicates, the Commission reviewed both the problems associated with the current process, as well as proposals to replace it and concluded that "adjustments in current arrangements are, in fact, both feasible and preferable to more radical reform." COMMISSION REPORT, *supra* note 4, at 5. It concluded from its analysis that neither trial by the full Senate nor a constitutional amendment to change the forum of the impeachment process is a viable alternative to the current process. *Id.* at 22-26, 53-55. It explained:

A trial committee provides a forum in which a representative number of Senators evaluate critical evidence, expedite the gathering of evidence for removal proceedings, and reduce the amount of interference with legislative business caused by time-consuming proceedings. The question becomes whether the operations of a Rule XI trial committee can be improved.

Id. at 5.

Even prior to the creation of the Commission, Congress attempted to address some of the concerns about the trial-by-committee process by enacting the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372(c) (1988)). Prior to 1980, the only disciplinary action available for judicial misconduct was criminal conviction or impeachment. See COMMISSION REPORT, *supra* note 4, at 1-4 (discussing the institutional role (e.g., peer pressure) that the judicial branch played in the disciplinary process and how that role prompted Congress to enact the 1980 Act). The Act created a formal supplement to the impeachment process and decreased the burden on Congress, particularly the burden of the House of Representative to address all claims of misconduct. The committees, however, have no authority to remove judges. *Id.* at 166; see also *Judicial Councils Reform and Judicial Con-*

mission report includes numerous proposals to improve the impeachment process.¹⁷³ Of the recommendations made with regard to the Senate trial process, implementation of three proposals is particularly necessary: (1) to allow issue preclusion; (2) to adopt a standard of proof; and (3) to create a more rigid appointments process.¹⁷⁴ These three improvements would successfully address some of the critics' concerns regarding fairness and efficiency while protecting the Senate's impeachment authority.¹⁷⁵ The Commission proposal, that the Senate Committee make a recommendation to the full committee on whether to convict,¹⁷⁶ however, should not be adopted because it is contrary to the framers' original intent.¹⁷⁷

A. The Senate Trial Committee Should Not Perform Unnecessary and Duplicative Fact-Finding in the Case of Previously Convicted Judges

While it is unconstitutional to permit the automatic removal of judges who are convicted of felonies,¹⁷⁸ it is permissible, even encouraged, that the Senate trial committee use any facts already collected by a judicial court in a prior proceeding, particularly if the conviction has been affirmed.¹⁷⁹ The Commission proposes that the entire Senate make a de-

duct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. § 372(c)(9) (1988)) (creating a review process for claims of judicial misconduct).

173. COMMISSION REPORT, *supra* note 4, at 147-55.

174. *See id.* at 148-50. While the Commission agrees that issue preclusion and a more rigid appointments process are essential, it does not support establishing a standard of proof. *Id.*

175. *See id.* at 149-50.

176. *Id.* at 149.

177. *See infra* notes 208-18 and accompanying text (addressing whether the trial committee's recommendation would be contrary to the framers' intent).

178. *See supra* notes 142-47 and accompanying text (discussing the intention of the framers to keep the power of impeachment in the hands of the Senate); *see also* COMMISSION REPORT, *supra* note 4, at 57 (implying that a constitutional amendment would be necessary for such automatic removal).

179. Burbank, *supra* note 84, at 690-91 (suggesting that a guilty verdict should be an indicator of great persuasive effect); *see also* COMMISSION REPORT, *supra* note 4, at 57 (finding that a constitutional amendment for automatic removal is undesirable, but that the Senate rules should allow for issue preclusion). The fact that the district court dismissed Judge Hastings' claim of double jeopardy supports this argument. *Hastings I*, 802 F. Supp. 490, 500 (D.D.C. 1992) (holding that impeachment is wholly separate from the criminal trial process). In his suit, Hastings claimed that the impeachment subsequent to an acquittal in criminal court amounted to double jeopardy. *Id.* Judge Sporkin dismissed this claim. *Id.* If the Senate uses issue preclusion, one might wonder whether this is contrary to the theory that the two procedures are separate, as well as how, in a situation such as Hastings', one could be convicted after his criminal acquittal. As Auslander points out, however, there are few restrictions on permissible evidence in the Senate. Auslander, *supra* note 39, at 70 n.10. Thus, the level of evidence permitted in a Senate impeachment trial is

termination early in its trial proceedings as to which matters are precluded.¹⁸⁰ The use of issue preclusion by the Senate committee would not jeopardize the “double security” presented by the separation of the criminal trial and impeachment trial, because a person is convicted in a criminal court by the strictest standard of proof—beyond a reasonable doubt.¹⁸¹ Conviction by such a standard is sufficient for use in the impeachment trial where no evidentiary burden currently is imposed, and where the potential penalty is far less severe than the loss of liberty.¹⁸² Adopting issue preclusion would not affect the quality of the factual findings made by the Senate committee, nor would it threaten the Senate’s function in making an independent determination.¹⁸³ Issue preclusion would, however, save the Senate significant time now spent on duplicative fact-finding.¹⁸⁴

B. *The Senate Should Establish a Permanent Standard of Proof*

Although *Nixon v. United States* held that the Senate is not required to adopt a standard of proof with respect to the impeachment process,¹⁸⁵ the Senate Rules should, nevertheless, require members to make their individual determinations based on a particular standard of proof.¹⁸⁶ Adopting a standard of proof will encourage each senator, whether a member of the trial committee or not, to review the provided evidence with enough

much greater than in a criminal trial. *Id.* Accordingly, a different conclusion in the separate courts is conceivable.

180. COMMISSION REPORT, *supra* note 4, at 57-58.

181. *Id.* at 58; *see supra* notes 88, 179 (discussing the necessary procedural differences between impeachment trials and criminal trials); *see also supra* note 116 and accompanying text (discussing the lower evidentiary burden required in Senate impeachment trials in comparison to criminal proceedings).

182. *See* COMMISSION REPORT, *supra* note 4, at 58; *see also* CONG. REC. S14,636 (daily ed. Nov. 3, 1989) (statement of Sen. Levin) (stating that this determination does not conversely mean that a not guilty verdict in a criminal case will free a person from an impeachment conviction). The burden to meet for removal from office is less than beyond a reasonable doubt because the penalty is not as severe as the loss of liberty. Rotunda, *supra* note 19, at 719; *see infra* notes 185-204 and accompanying text (discussing the need to establish a standard of proof as guidance in the Senate trial process and what that standard should be).

183. COMMISSION REPORT, *supra* note 4, at 58; Burbank, *supra* note 84, at 691.

184. COMMISSION REPORT, *supra* note 4, at 58-59; *see* Burbank, *supra* note 84, at 690.

185. *See supra* note 78 and accompanying text (reviewing the *Nixon* Court’s interpretation of the term “try”).

186. Rotunda, *supra* note 19, at 719. Rotunda discusses the various degrees of proof established in the judicial courts, applies those models to the impeachment process, and determines that the proof needed for the severity of impeachment falls somewhere between the high standard of proof for criminal conviction and the lowest used in civil cases. *Id.*

care to reach an informed determination.¹⁸⁷ Moreover, adopting a standard of proof will safeguard fairness in light of the increasing potential for future impeachment trials.¹⁸⁸ With the increase in the number of Article III judges and in the number of judges that could be subject to impeachment proceedings,¹⁸⁹ it is essential that the Senate has a uniform and consistent impeachment trial system in place.¹⁹⁰ Although the framers emphasized the need for flexibility,¹⁹¹ this need should be balanced against the need to ensure that two judges tried within a short time of one another, on similar charges and facts, will meet a similar fate and will not be subject to excessive political biases.¹⁹² Establishing a standard of proof is not a "strict rule" since it does not impinge upon the framers' intent that each senator should make an independent judgment. Instead, it simply guides senators in reaching their decisions.¹⁹³

Although the adoption of a standard of proof provides considerable advantages, senators vary in their opinions as to which standard is most viable.¹⁹⁴ Some senators support a standard of proof beyond a reasonable doubt, believing that there is little difference between criminal trials and the impeachment process and desiring to maintain the separation of

187. At least one former Congressman has opined that Members of Congress currently give insufficient consideration during the congressional process and stated that the process is dramatically affected at any given time by the opinions of what a majority of congressional members consider serious enough for impeachment. Maxman, *supra* note 20, at 444 n.135 (citing 116 CONG. REC. H11913 (1970) (statements of former Rep. Gerald Ford)).

188. See *supra* notes 128-31 and accompanying text (discussing the potential for future impeachments).

189. See *supra* notes 129-30 and accompanying text.

190. See Maxman, *supra* note 20, at 422-23, 447 (discussing the growth in the number of judges and the vagueness in the Constitution as to when and why judges may be impeached).

191. See THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the need "of a numerous court" that "can never be tied down by . . . strict rules").

192. In fact, the impeachment process was used as a political tool early in this nation's history. Melton, *supra* note 8, at 441-44 (recounting the impeachment of Senator Blount, a Republican, by the Federalist-dominated Congress); Auslander, *supra* note 39, at 87-88 (stating that when the Republicans came to dominate, particularly when Thomas Jefferson became President, they also used impeachment against Federalist District Judge John Pickering and Supreme Court Justice Samuel Chase). Such attempts to use impeachment for political purposes should not be repeated and can be avoided, in part, by using a standard of proof.

193. The National Commission opposes the adoption of a standard of proof stating that "any member is entitled to establish the highest, the medium, [or] a lower standard to govern his or her analysis of the evidence." COMMISSION REPORT, *supra* note 4, at 60 (quoting testimony of Senator Strom Thurmond before the National Commission on Judicial Discipline and Removal (May 15, 1992)).

194. See *supra* notes 185-93 and accompanying text (discussing advantages of establishing a standard of proof); see also COMMISSION REPORT, *supra* note 4, at 59-60.

powers between the branches.¹⁹⁵ These arguments fail to recognize, however, the differences between criminal and impeachment proceedings and the constitutional importance of keeping these proceedings separate.¹⁹⁶ Others claim that, because the impeachment process is a political one, the lower standard of preponderance of the evidence used in civil trials is sufficient.¹⁹⁷ Under this standard, however, there is a strong risk that senators would impose too serious a punishment for some judges whose guilt is not guaranteed.¹⁹⁸ Such a risk jeopardizes the high level of quality of federal officials that the impeachment process was meant to foster.¹⁹⁹

An intermediate clear and convincing standard provides the most balanced approach for impeachment trials.²⁰⁰ Impeachment trials are a hybrid of criminal and civil proceedings,²⁰¹ and, thus, the standard of proof that the senators use should be a median of the two standards used in those two proceedings.²⁰² The clear and convincing standard meets this prerequisite.²⁰³ Moreover, the peers committee that investigates claims of judicial conduct uses the clear and convincing standard, prior to rec-

195. See *supra* notes 187-94 and accompanying text; COMMISSION REPORT, *supra* note 4, at 59-60; see also Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1238 (1991) (noting the Senate's rejection of Judge Claiborne's request for a "beyond a reasonable doubt" standard).

196. See *supra* notes 88, 179 and accompanying text (discussing differences between impeachment and criminal trials); see also Gerhardt, *supra* note 15, at 91 (additionally noting that "[t]oo rigid a standard might allow [judges] to remain in office even though the entire Senate was convinced [of his or her guilt]"); BERGER, *supra* note 74, at 113 (explaining the framers' intent to maintain two types of trials).

197. COMMISSION REPORT, *supra* note 4, at 59; CHARLES L. BLACK, *IMPEACHMENT: A HANDBOOK* 17 (1974) (recommending a preponderance of the evidence standard while also recognizing the importance of the senators' individual judgments).

198. Gerhardt, *supra* note 15, at 91; see also Rotunda, *supra* note 19, at 719.

199. See COMMISSION REPORT, *supra* note 4, at 27 (discussing the framers' intention that impeachment exist to remove officials from office for wrongdoing).

200. See COMMISSION REPORT, *supra* note 4, at 60. Proponents of this standard argue that "[i]t gives force to the purpose of remedying judicial abuse of power, while recognizing the competing interests of avoiding unjustified removals and protecting judicial independence." *Id.* In fact, many senators applied the clear and convincing standard in the Hastings trial. Johnston, *supra* note 115, at A1, A7.

201. Gerhardt, *supra* note 15, at 90 (establishing that impeachment is "not strictly either a criminal or a civil proceeding"); see *supra* note 86 and accompanying text (discussing the separation of criminal trials and impeachments); see also Auslander, *supra* note 39, at 70 n.10 (stating that the burden of proof for impeachment trials is not as great as for criminal trials).

202. Gerhardt, *supra* note 15, at 90-91.

203. See Rotunda, *supra* note 19, at 719. The clear and convincing standard is used in the judicial courts as the intermediate standard between the harshest criminal action and the lowest civil action. *Id.*

ommending the most severe cases to the House of Representatives for impeachment.²⁰⁴

C. The Senate Trial Committee Should Not Recommend a Verdict to the Full Senate

Among its recommendations, the National Commission proposes that each trial committee member transmit individual recommendations to the full Senate.²⁰⁵ The Commission promotes this recommendation as a method by which all senators can benefit from any effect that hearing direct testimony may have had on the trial committee members.²⁰⁶ Other proponents of this amendment suggest that a recommendation would provide "some assurance that decisions as to the conduct of those proceedings were made by a group large enough to approximate differences in the Senate as a whole."²⁰⁷

Presenting the entire Senate with a recommendation made by a twelve-senator committee would negatively impact each senator's ability to make an individual judgment regarding an accused's guilt or innocence.²⁰⁸ Such an effect would be contrary to the framers' intent.²⁰⁹ The framers anticipated that the decision to convict an impeached party would be based on the individual judgment of each senator.²¹⁰ Requiring eighty-eight senators to defer to or, at most, consider only the recommendation of twelve senators, rather than the evidence as a whole, would be contrary to the framers' reason for granting the Senate the right to try impeached parties.²¹¹ In a matter as serious as impeachment, the framers

204. Brooks, *supra* note 124, at 29. The peers committee acts pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. See *supra* note 172 (describing the 1980 Act).

205. COMMISSION REPORT, *supra* note 4, at 149.

206. *Id.* at 56.

207. Burbank, *supra* note 84, at 689. Daniel Luchsinger presents a detailed procedural process for the recommendation process. See Luchsinger, *supra* note 9, at 187. It would "provide for random selection of senators reflecting the partisan representation of the Senate, require a two-thirds committee majority for a guilty recommendation, require the attendance of a quorum of senators during the trial, and require the full Senate to give deference to the committee." *Id.*

208. Rule XI does not include a recommendation provision because the Senate did not want the committee to control the full Senate debate. See *supra* notes 36-46 and accompanying text (discussing the provisions of Rule XI); see also Luchsinger, *supra* note 9, at 170 n.64.

209. See *supra* notes 20-21 and accompanying text (discussing the framers' desire that the process not be limited to the opinions of a small number of people).

210. See *supra* notes 20-21 (discussing the opinion that senators would serve as independent and impartial judges).

211. THE FEDERALIST NO. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Alexander Hamilton wrote that no other body of government would be "suffi-

would not have viewed as sufficient a decision by each senator that resulted simply from a review of a recommendation made by less than a quarter of the Senate.²¹²

Some proponents of the Commission's recommendation might argue that each senator would still be able to make an individual decision,²¹³ and that the recommendation would further inform each senator.²¹⁴ In reality, providing a recommendation to today's senators, who are pressured to focus all available time on legislative and other official matters,²¹⁵ would provide a perfect excuse not to give the accused's verdict its deserved consideration.²¹⁶ The purpose of the trial committee is not to supersede a full Senate debate or vote.²¹⁷ Recommendations to the full Senate are not necessary to ensure that senators make their decisions based on complete facts.²¹⁸

D. In the Future, the Senate Must Thoroughly Review Judges During the Confirmation Process

In addition to its Constitutional authority to try impeachment cases, the Senate has an additional 'check' over the judiciary—the authority to confirm judges nominated by the President.²¹⁹ This authority has become increasingly important as the size of the judiciary has grown.²²⁰ Due to the recent increase in the federal judicial body, the confirmation authority is especially significant with regard to judicial appointments. Experts suggest that there could be 1,000 federal judges by the year 2000.²²¹ As the National Commission posits, “[i]f even a small percentage of the incumbents were to regularly ‘go wrong’—and refuse to leave office until

ciently independent” for the trial authority. *Id.* In addition, he wrote that there would be no better “inquisitors” than “the representatives of the nations themselves.” *Id.* at 397.

212. Hamilton's desire that the process be performed by a “numerous court” is evidence of this belief. *Id.* at 398.

213. It is not clear whether Luchsinger's separate proposal would permit senators to make their own determinations because the proposed amendment to Rule XI requires deference to the committee's recommendation. *See* Luchsinger, *supra* note 9, at 187-90.

214. *Id.*

215. *See supra* note 121 (discussing the number of bills under consideration during the 102d Congress).

216. Unfortunately, this analysis does not cast a positive light on the senators' motivations, but it is a realistic analysis.

217. Luchsinger, *supra* note 9, at 170 n.64. The reason for enacting Rule XI was to provide a more effective method for fact-finding and to provide the full Senate with a fact report on which they could base their analysis and their vote.

218. Rule XI adequately addresses this concern in its provision that gives the full Senate the option to rehear or call new witnesses. Rule XI, *supra* note 2.

219. U.S. CONST. art. II, § 2, cl. 2.

220. *See* COMMISSION REPORT, *supra* note 4, at ii.

221. *Id.*

removed by the Senate—might each Congress be processing at least one judicial impeachment?”²²²

The Senate should invoke added care in future judicial confirmations. This final recommendation obviously would not improve the impeachment process directly, but it would assist in slowing the frequency of impeachments.²²³ With a carefully administered appointment process, where only the most qualified judges are selected and confirmed, concerns regarding the impeachment trial process would diminish because the number of trials would decrease.²²⁴

IV. CONCLUSION

In correctly deciding that the issues presented in *Nixon v. United States* are nonjusticiable, the Supreme Court left the Senate with the monumental task of judging the fairness of its own impeachment trial proceedings.²²⁵ This task involves a balancing between ensuring that the accused is given a fair trial, and protecting the framers' original intent that the impeachment process serve as a 'check' on the judicial branch, as well as a protector of judicial independence. The Senate trial-by-committee process meets this balancing test under the *Mathews* due process analysis. The current process does not erroneously jeopardize a judge's right to her profession. Furthermore, the alternatives to the current process would create an unduly burdensome result.

Regardless of the current process's efficiency and value, Congress has responsibly recognized the need to review possible improvements.²²⁶ The final report of the National Commission provides a solid platform from which to work.²²⁷ A more rigid appointment process and the adoption of issue preclusion are both viable proposals that could reduce the number of impeachments and increase overall efficiency, respectively. Moreover, Congress must espouse a standard of proof, whereby a consistent level of treatment is afforded to all officials threatened with impeachment.

222. *Id.*

223. This Comment does not delve into the appointments process, except to reveal that an improved appointments process necessarily affects the impeachment process.

224. *Id.* at 81.

225. *Id.* at 51.

226. See Pub. L. No. 101-650, 104 Stat. 5124 (1990) (codified as amended at 28 U.S.C. § 372(c) (Supp. V 1993) (creating the National Commission on Judicial Discipline and Removal).

227. See generally COMMISSION REPORT, *supra* note 4 (acknowledging the benefits of the current process and the risks involved with changes requiring constitutional amendments and presenting recommendations for review).

Ultimately, adhering to such a process will better ensure that the weights on both sides of the scale of fairness and constitutional intent are equally balanced.

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