SENATE IMPEACHMENT TRIALS — TO REVIEW OR NOT TO REVIEW, WHAT WOULD MARSHALL DO?

Nicole H. Schneider

I. INTRODUCTION

In 1986, United States District Court Judge Walter L. Nixon, Jr. was convicted by a jury on two counts of perjury.[1] More was in store for Nixon, however, than simply a criminal conviction. In addition to his criminal trial, Judge Nixon was subjected to an impeachment trial, the potential effect of which is removal from the bench.[2] Judicial impeachment is also a possibility for judges who are acquitted of criminal charges. For example, in 1983, District Court Judge Alcee Hastings was acquitted by a jury on charges which included conspiracy to solicit and accept a bribe.[3] Notwithstanding his acquittal, Hastings, like Nixon, was subjected to an impeachment trial.[4] In 1989, Hastings and Nixon, facing separate impeachment trials, were both convicted by the Senate and consequently removed from the bench.[5]

In both impeachment trials, the Senate invoked Rule XI of the Rules of

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[1]Nixon v. United States, 881 F.2d 1305, 1307 (5th Cir. 1989). Nixon was charged with three counts of perjury and one count of receiving a bribe. *Id.* The perjury counts of which the jury convicted him were based upon false statements he had made before a Grand Jury during an investigation into whether Nixon had accepted bribes from a wealthy businessman whose son was facing drug charges. *Id.*

[2]Impeachable offenses include "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4. For a more thorough explanation of the impeachment process, see *infra* notes 24-49 and accompanying text. Even though a judge is convicted by a jury of criminal charges, he may continue his duties as a judge until he has been convicted in an impeachment trial. See commentary on Judge Claiborne, *infra* note 46, for examples of such instances.

[3]Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371, 1376 (D.D.C. 1984).

[4]Hastings v. United States, 802 F. Supp. 490, 492-93 (D.D.C. 1992).

[5]*Id.*; Nixon v. United States, 938 F.2d 239, 241 (D.C. Cir. 1991).

Procedure and Practice in the Senate When Sitting on Impeachment Trials.[6] Rule XI permits the Senate to appoint a committee of twelve Senators whose primary function is to conduct an evidentiary hearing and then provide the full Senate with the facts, evidence, and a transcript of the Senate evidentiary proceedings.[7]

Hastings and Nixon both appealed their convictions, contending that the Constitution's Trial Impeachment Clause[8] entitles them to a trial before the full Senate, rather than one before a committee of only twelve Senators.[9] Until 1992, the courts were consistent in holding that such an issue presents a non-justiciable political question.[10] In 1992, however, a federal district court in *Hastings v. United States* ruled otherwise.[11] Announcing that the issue was justiciable and pursuing the case on its merits, Judge Sporkin, a district court judge for the District of Columbia, determined Rule XI was unconstitutional, and therefore, invalid.[12] Accordingly, Judge Sporkin

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[6]*Hastings*, 802 F. Supp. at 492-93.

[7]SENATE MANUAL, S. DOC. NO. 101-1, 101st Cong., 1st Sess. 186 (1989), provides:

> [I]n the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, ... 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.

Id.

[8]U.S. CONST. art. I, § 3, cl. 6. The Trial Impeachment Clause provides, "[t]he Senate shall have the sole Power to try all Impeachments." *Id.*

[9]Hastings v. United States, 802 F. Supp. 490, 492 (D.D.C. 1992); Nixon v. United States, 744 F. Supp. 9, 10 (D.D.C. 1990).

[10]Nixon v. United States, 113 S. Ct. 732, 740 (1993); Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991); *Nixon*, 744 F. Supp. at 14; Hastings v. United States Senate, 716 F. Supp. 38, 43 (D.D.C. 1989).

[11]*Hastings*, 802 F. Supp. at 490, 505.

[12]*Id.* at 505.

overturned Hastings' impeachment conviction and remanded the case to the Senate for a trial before the full Senate.[13] Anticipating that the issue would be heard by the Supreme Court, Judge Sporkin stayed the order until after appeal.[14] A year later, on January 13, 1993, the United States Supreme Court ultimately resolved the issue by announcing in *Nixon v. United States*[15] that the issue of whether Rule XI violated the Trial Impeachment Clause was a non-justiciable political question and thus, not reviewable by the Court.[16]

The inconsistent decisions in *Hastings* and *Nixon* highlight a struggle in which two bulwarks of the Constitution continually fight for prominence. On one side, federal courts stand armed with the power of judicial review.[17] Under the doctrine of judicial review, the courts scrutinize legislative and executive acts, making certain each branch acts within Constitutional limits.[18] In exercising judicial review, the district court in *Hastings* determined that the Senate's trial proceedings violated the Constitution's Trial Impeachment Clause.[19]

On the other side of this constitutional struggle lies the powerful Separation of Powers doctrine which commands the courts to respect the exclusive realm of the other branches of government.[20] Two doctrines, equally essential in maintaining the integrity of the Constitution, come head to head in a clash in which one doctrine must yield to the prominence of the other. As the Supreme Court noted in *Nixon*, because the Constitution provides the Senate with "the sole Power to try all Impeachments,"[21] the

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[13]*Id.*

[14]*Id.*

[15]*Nixon*, 113 S. Ct. at 732, 740.

[16]*Id.* at 740.

[17]*See* Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992). In *Hastings*, Judge Sporkin exercised judicial review to determine that the impeachment trial Hastings had received was unconstitutional. *Id.* at 505.

[18]For an analysis of judicial review, see *infra* notes 63-119 and accompanying text.

[19]*Hastings*, 802 F. Supp. at 505.

[20]For a discussion of the separation of powers doctrine in the context of justiciability, see *infra* notes 120-43 and accompanying text.

[21]U.S. CONST. art. I, § 3, cl. 6.

Separation of Powers doctrine affords the Senate freedom to act without the Court's intervention.[22] Thus, in deference to the Separation of Powers doctrine, the Supreme Court in *Nixon* declared the issue non-justiciable and effectively curbed the scope and power of judicial review.[23]

Part II of this Comment explores the impeachment process as prescribed by the United States Constitution and Congressional acts, and delves into the reasons for placing the impeachment power in the hands of the Senate. Part III introduces the concept of judicial review and its accepted role in maintaining checks and balances among the branches of government. Part IV explores the political question doctrine and its role in maintaining the separation of powers. Part V examines the struggle for prominence between the two doctrines as was evident in *Hastings* and *Nixon*. Finally, this comment concludes in Part VI that judicial review may be invoked in cases such as *Nixon*, without insulting the Separation of Powers doctrine or the respect it affords the legislative and executive branches.

II. IMPEACHMENT IN THE UNITED STATES

A. THE MECHANICS OF THE IMPEACHMENT PROCESS

The United States Constitution provides for removal from office, by means of the impeachment process, of federal judges convicted by the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors."[24] The impeachment process used by Congress is similar to the two-step process of an indictment and trial in a criminal setting.[25] In the first stage of the impeachment process, the House of Representatives impeaches a judge[26] by

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[22]Nixon v. United States, 113 S. Ct. 732, 736-37 (1993).

[23]*Id.* at 740.

[24]U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."). Judges are subject to impeachment in that they are considered to be "civil Officers" pursuant to Article II. *See* Hastings v. United States, 802 F. Supp. 490, 496 (D.D.C. 1992) ("[I]t has become settled law that judges may be impeached as 'civil officers of the United States'. . . .").

[25]CHARLES L. BLACK, JR., IMPEACHMENT: HANDBOOK 6 (1974).

[26]The term "impeachment" means "charge" or "accusation." *Id.*

bringing charges, or "Articles of Impeachment" against him.[27] These charges, analogous to counts in an indictment, collectively comprise a Bill of Impeachment.[28] A vote to impeach by the House requires a simple majority of those House members present.[29]

Once a Bill of Impeachment receives an affirmative vote in the House for one or more Articles, it then proceeds to the second stage. At this stage, just as the Grand Jury sends indictment counts to a trial court and jury, the House sends the Bill of Impeachment to the Senate for a final determination of innocence or guilt.[30] In trying impeachments, the Senate sheds its customary legislative role and dons the robe of a quasi-judicial body.[31] The Senate hears evidence on each Article of Impeachment.[32] After both sides introduce all relevant evidence, call witnesses, and present arguments, the Senate is required to vote separately on each Article of Impeachment.[33] If one or more Article receives a two-thirds vote, the judge is convicted and removed from office.[34]

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[27]*Id.* In Judge Hastings' case, the House of Representatives was made privy to the judge's potential impeachable offenses by the Judicial Conference of the United States. Hastings v. Judicial Conference of the United States, 829 F.2d 91, 96 (D.C. Cir. 1987).

The Judicial Conference is a body comprised of the chief judges of each circuit as well as one district court judge from each circuit. Hastings v. United States, 770 F.2d 1093, 1095 n.2 (1985). The Conference is part of a long chain of entities which acts on potential impeachable offenses by means of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. *Id.* at 1094.

[28]*See* BLACK, *supra* note 25, at 8.

[29]*Id.*

[30]*Id.*

[31]*Id.* at 10.

[32]*Id.* at 11. Although the customary practice has been for the full Senate to hear the evidence, the Standing Rules of the Senate allow a Committee to hear the evidence and report its findings to the full Senate. *Id.* For a further discussion on this Senate Committee, see *infra* notes 41-45 and accompanying text.

[33]BLACK, *supra*, note 25, at 12.

[34]*Id.* The Constitution limits the penalty to removal from the bench and disqualification from holding any future governmental office. 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 of honor, Trust or Profit under the United States . . . ."). The disqualification from office appears to be optional.

In the two centuries since the United States Constitution was ratified, the Senate has held only 17 impeachment trials.[35] Historically, impeachment trials were conducted before the full Senate.[36] By 1936, however, Senators argued that the increase in their duties, as well as the increase in the size of the Senate body from the original 26 to 96 members, made the traditional impeachment trial too cumbersome.[37] In addition, the Senators' attendance at impeachment trials was so poor that some Senators questioned the fairness of such trials.[38] These concerns prompted many Senators to request that the

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BLACK, *supra* note 25, at 13. In the 1989 impeachment of Alcee Hastings, although the Senate removed Hastings from the federal bench, Hastings later ran for and won a seat in the District 23 Congressional race in Florida. *Impeached, Then Elected*, N.Y. TIMES, March 18, 1993, at A23.

[35]Steven I. Friedland, *The Impeachment Process: Still Functional after All These Years?*, 15 DAYTON L. REV. 229, 229 (1990). The civil officers who have been subjected to impeachment trials and the times during which their impeachment proceedings took place are: William Blount, United States Senator from Tennessee, 1797-1799; John Pickering, Judge for the United States District Court for the District of New Hampshire, 1803-1804; Samuel Chase, Associate Justice of the United States Supreme Court, 1804-1805; James Peck, Judge for the United States District Court for the District of Missouri, 1826-1831; West Humphreys, Judge for the United States District Court for the District of Tennessee, 1862; Andrew Johnson, President of the United States, 1867-1868; William Belknap, Secretary of War, 1876; Charles Swain, Judge for the United States District Court for the Northern District of Florida, 1903-1905; Robert Archibald, Judge of the United States Circuit Court of Appeals for the Third Circuit,1912-1913; George English, Judge for the United States District Court for the Eastern District of Illinois, 1925-1926; Harold Louderback, Judge for the United States District Court for the District of California, 1932-1933; Halstead Ritter, Judge for the United States District Court for the Southern District of Florida, 1936; Harry E. Claiborne, Judge for the United States District Court for the District of Nevada, 1986; Alcee Hastings, Judge for the United States District Court for the Southern District of Florida, 1989; Walter L. Nixon, Chief Judge of the United States District Court for the Southern District of Mississippi, 1989. *Id.* at 229 n.1.

[36]Daniel Luchsinger, *Committee Impeachment Trials: The Best Solution?*, 80 GEO. L.J. 163, 167 (1991).

[37]*Id.*

[38]*Id.* at 167-68. In the 1933 trial of California District Court Judge Harold Louderback, for example, attendance reached an all-time low when, at one point, there were only three Senators present at the trial. *Id.* at 168. Judge Louderback was impeached by the House on charges of "[f]avoritism in appointment of incompetent receivers and allowing them excessive fees." JOSEPH BORKIN, THE CORRUPT JUDGE 238 (1962). He was ultimately acquitted by the Senate in May 1933. Luchsinger, *supra* note 36, at 167 n.42.

Senate Judiciary Committee appoint a Committee to hear the evidence.[39] After reviewing various proposals, the Senate adopted Rule XI.[40]

Adopted in 1935, Rule XI permits the Senate to streamline the impeachment trial by substituting the full Senate with a Committee of twelve Senators for purposes of receiving evidence and taking testimony.[41] The Committee provides the full Senate with a written report of the proceedings and testimony conducted by the Committee.[42] In the report, the Committee does not recommend acquittal or conviction but provides only a neutral summary of the proceedings.[43] In addition to the report, the Committee typically provides all Senators access to a tape recording of the Committee proceedings.[44] The tapes are available for approximately one month, after which the full Senate votes on impeachment.[45]

Since the adoption of Rule XI, the Senate has heard four impeachment trials and has invoked Rule XI in three of these trials. The Senate invoked Rule XI for the first time in 1986, for the impeachment trial of District Court Judge Harry E. Claiborne.[46] Although Claiborne was the first officer to be

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[39]Luchsinger, *supra* note 36, at 169.

[40]*Id.*

[41]For a reprint of the relevant parts of Rule XI, see *supra* note 7.

[42]SENATE MANUAL, S. DOC. NO. 101-1, 101st Cong., 1st Sess. 186 (1989).

[43]Hastings v. United States Senate, 716 F. Supp. 38, 39-40 (D.D.C. 1989).

[44]*Id.* at 40. The recording is broadcasted to each Senator's office, and the Senators may replay the tape at their convenience. *Id.* The Senators might use the tape, for example, to evaluate a witnesses' demeanor and credibility. *Id.*

[45]*Id.*

[46]Luchsinger, *supra* note 36, at 163. Judge Claiborne was a District Court Judge for the District of Nevada. United States v. Claiborne, 727 F.2d 842, 843 (9th Cir. 1984). Claiborne was originally indicted and tried on four counts of allegedly accepting bribes, two counts of tax evasion, and one count of filing a bogus financial statement with the Judicial Ethics Committee. United States v. Claiborne, 781 F.2d 1327, 1327 (9th Cir. 1986). Because the first jury failed to reach a verdict regarding any of the counts, the court declared a mistrial. *Id.* The bribery charges were subsequently dropped and Claiborne was retried on the tax and false filing counts. *Id.* Upon being retried, the second jury convicted him in 1983 only on the tax charges. *Id.*

Judge Claiborne began serving his two-year sentence in 1986. Melissa H. Maxman, Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 85 MICH. L. REV. 420, 420 (1987). Interestingly, as he had not yet been removed from the bench by an

tried under Rule XI, his appeals did not focus on the constitutionality of Rule XI.[47] The Senate successfully side-stepped this issue until Alcee Hastings and Walter Nixon were tried and convicted by the Senate in 1989.[48] In both Hastings' and Nixon's trials, the Senate invoked Rule XI.[49]

B. PLACING THE POWER TO TRY IMPEACHMENTS IN THE SENATE

The Senate's impeachment power is an awesome one. It allows the Senate to determine a judge's guilt, remove him from the bench, strip him of his salary, and prohibit him from holding further governmental office.[50] The impeachment power was delegated to the Senate only after the Founders carefully considered other alternatives. For example, many delegates at the Federal Convention of 1787[51] argued that the judicial branch should be

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impeachment conviction, he refused to resign and retained his post, as well as his $78,700 annual salary, for five months of his prison term. *See, e.g.*, Linda Greenhouse, *Senate Preparing for Trial of Judge*, N.Y. TIMES, Oct. 5, 1986, at A41. Claiborne's actions raise questions about the propriety of a criminal trial before an impeachment trial has taken place. *See, e.g.*, Linda Greenhouse, *Judge on Trial in the Senate Asks for 'Spirit of Fair Play,'* N.Y. TIMES, Oct. 8, 1986, at A14. This issue, however, is beyond the scope of this comment. For more information on the constitutionality of allowing criminal prosecution before impeachment, see generally Maxman, *supra*.

[47]Claiborne v. United States, 465 U.S. 1305 (1984) (denying stay of criminal prosecution); United States v. Claiborne, 790 F.2d 1355 (9th Cir. 1986) (rejecting the contention that imprisoning a federal judge who had not yet been impeached was unconstitutional); United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984), *cert. denied*, 469 U.S. 829 (1984) (rejecting Claiborne's contention that a federal judge cannot be prosecuted for a federal crime without first being impeached), *aff'd*, United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985).

[48]Nixon v. United States, 938 F.2d 239, 241 nn.2, 3 (D.C. Cir. 1991); Hastings v. United States, 802 F. Supp. 490, 492-93 (D.D.C. 1992).

[49]*Nixon*, 938 F.2d at 241; *Hastings*, 802 F. Supp. at 492-93.

[50]U.S. CONST. art. 1, § 3, cls. 6, 7.

[51]The Federal or Constitutional Convention provided the forum in which delegates from several states drafted the United States Constitution. Isaac Kramnick, *Introduction* to THE FEDERALIST PAPERS 12-13 (1987) [hereinafter KRAMNICK]. The Convention commenced in Philadelphia on May 17, 1787 and lasted for four months until September 16, 1787. Adrienne Koch, *Introduction* to NOTES OF DEBATES IN THE FEDERAL CONVENTION viii (W. W. Norton & Co. 1987) [hereinafter KOCH]. Fifty-five delegates from New Hampshire, Connecticut, Pennsylvania, New Jersey, Virginia, Massachusetts, New York, Delaware, Maryland, Georgia, South Carolina, and North Carolina were present.

given the power to try impeachments.[52] Ultimately, however, the Founders developed persuasive arguments against empowering the Judiciary. For example, Alexander Hamilton proposed that the colossal responsibility of impeaching a judge should not be trusted to the Supreme Court because its members were too few.[53] Although acknowledging that some efficiency would be lost by choosing the large-bodied Senate,[54] Hamilton preferred to sacrifice efficiency for the independence and trustworthiness of the senatorial

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KRAMNICK, *supra*, at 30.

[52]*See, e.g.*, KOCH, *supra* note 51. James Madison, the mastermind behind the "Virginia Plan," (presented to the delegates of the Federal Convention by Governor William Randolph on May 29, 1787), *id.* at xvi, 30, proposed that the national Judiciary's jurisdiction be extended to cases involving "impeachments of any national officers." *Id.* at 150. Madison's plan further delineated original jurisdiction to the lower courts and appellate jurisdiction to the Supreme Court. *Id.* at 32. William Paterson presented the "New Jersey Plan" on June 15, 1787 to the delegates at the Federal Convention. *Id.* at xvi. The plan provided that the Supreme Court have original jurisdiction to hear and determine "all impeachments of federal officers." *Id.* at 120. Similarly, Alexander Hamilton, a delegate from New York, called for "all impeachments to be tried by a Court to consist of the Chief or Judge of the superior Court of Law of each State." *Id.* at 139. Finally, as late as the final week of the convention, Roger Sherman, a delegate from Connecticut "saw no contradiction or impropriety if [impeaching judges] were made part of the constitutional regulation of the Judiciary establishment. He observed that a like provision was contained in the British Statutes." *Id.* at 537.

[53]THE FEDERALIST No. 65, at 382 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons.").

It is interesting to note that the "Hamilton Plan" originally presented by Hamilton at the Federal Convention advocated an impeachment trial implemented by the judicial branch. KOCH, *supra* note 51, at 139. However, once the Constitution was drafted by the delegates at the Federal Convention, Hamilton took great pains to persuade New Yorkers to ratify the new Constitution. KRAMNICK, *supra* note 51, at 11. He recruited James Madison and John Jay, and together, the three men produced 85 essays which explained and supported various clauses of the Constitution. *Id.* The essays, collectively known as *The Federalist Papers*, were published in New York City newspapers in 1787 and 1788. *Id.* Despite their differences in philosophies, the three men recognized the manifest inadequacy of the Articles of Confederation and thus, chose to work together towards a national solution. *Id.* at 11-12.

[54]3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 551-53 (rev. ed. 1966) ("[T]he Supreme Court were too few in number").

forum.[55] Hamilton further noted that a judge was entitled to two separate trials — one to consider the viability of his criminal charges and another to determine his fate on the bench.[56] Since the courts have the power to preside over and effectively influence the criminal trial, Hamilton concluded that allowing the courts to hear the impeachment proceeding would undermine an accused judge's right to two separate trials.[57] Accordingly, as a means of preserving checks and balances, Hamilton rejected the idea of placing final reviewing authority in the same hands the impeachment power was meant to regulate.[58]

In support of placing the power in the hands of the Senate, Hamilton relied upon certain Constitutional provisions to effectively prevent the Senate from abusing its impeachment power: first, the Constitution splits the impeachment power between the House of Representatives and the Senate, giving neither body the power to both accuse and judge;[59] second, the

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[55]THE FEDERALIST No. 65, *supra* note 53, at 382. Hamilton wrote of the importance of a tribunal that was sufficiently dignified and independent: "[a] deficiency in the first would be fatal to the accused; in the last, dangerous to the public tranquility. The hazard, in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy." *Id.*

[56]*Id.*

[57]*Id.* In furthering this reasoning, Hamilton wrote:

> Would it be proper that the persons who had disposed of [the judge's] fame, and his most valuable rights as a citizen, in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune? . . . That in the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? . . . [B]y making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial.

Id.

[58]*Id.*

[59]THE FEDERALIST No. 66, at 385 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The division of [powers] between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches.").

Constitution requires a concurrence of two-thirds of the Senate to convict.[60] This requirement, Hamilton believed, was as complete a safeguard as one could offer.[61] The House-to-Senate process, as well as the two-thirds conviction requirement, are expressly set forth in the Constitution today, and remain significant checks against the Senate's power to try impeachments.[62]

III. JUDICIAL REVIEW — MAINTAINING CHECKS AND BALANCES

A. ORIGINS AND HISTORY OF JUDICIAL REVIEW

Another significant check against the Senate's power to impeach lies in the doctrine of judicial review. Judicial review is a means of determining whether the legislative and executive branches' actions are constitutional.[63] It is a precious weapon for the judiciary and indeed, is as integral a part of the judicial branch as the sword is to the executive branch and the purse is to the legislative branch.[64] Judicial review is well-received today as a means of maintaining checks and balances among the branches of government, since it allows the Court to declare void executive and legislative acts that contravene the Constitution.[65]

Some scholars have posited that judicial review should not be so eagerly

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[60]*Id.*

[61]*Id.* ("As the concurrence of two thirds of the Senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire."). *See* FARRAND, *supra* note 54, at 428-29 (explaining that the Founders chose a two-thirds majority over the British majority vote method out of concern that the British method would weaken judges' independence).

[62]U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall . . . have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

[63]*See generally* Gordon S. Wood, *The Origins of Judicial Review* 22 SUFFOLK U. L. REV. 1293 (1988); Albert P. Melone & George Mace, *Judicial Review: The Usurpation and Democracy Questions*, 71 JUDICATURE 202 (1987) [hereinafter Melone & Mace]; Kermit L. Hall, *"Think Things, Not Words": Judicial Review in American Constitutional History*, 35 U. FLA. L. REV. 281 (1983); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 20-21 (1978).

[64]THE FEDERALIST No. 78, at 437 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

[65]Wood, *supra* note 63, at 1293.

accepted as an unalterable doctrine.[66] They have noted the lack of any express delegation of authority in the Constitution,[67] and have argued that judicial review allows a branch that is free from popular control to overrule Congressional laws.[68] In response to these arguments, other scholars have reasoned that the Framers did not expressly provide for judicial review because they simply took this power for granted.[69] Hamilton expressly endorsed judicial review, arguing that such a restraint is necessary to ensure that all laws comply with the fundamental law of the Constitution.[70] Under Hamilton's view, the judicial branch was the logical choice to execute the needed doctrine, because the judiciary is responsible for interpreting the law, and is the least dangerous of the three branches in that it can neither make nor enforce laws.[71]

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[66]Eakin v. Raub, 12 S. & R. 330 (Pa. 1825) (Gibson, J., dissenting) ("It is the business of the judiciary, to interpret the laws, not scan the authority of the lawgiver."); *see, e.g.*, William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKEY L.J. 1, 22 (1969) ("the supremacy clause itself cannot be the clear textual basis for a claim by the judiciary that this prerogative to determine repugnancy belongs to it."); Lino A. Graglia, *Judicial Review on the Basis of "Regime Principles": A Prescription for Government by Judges*, 26 S. TEX. L.J. 435, 436 (1985) ("[T]he power [of judicial review] is an extraordinary one, without precedent in either English or civil law — so extraordinary, indeed, that the absence of explicit provision for it in the Constitution might well be taken as establishing that no such power was granted by those who ratified the Constitution.").

[67]GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 15 (10th ed. 1980).

[68]Melone & Mace, *supra* note 63, at 207.

[69]TRIBE, *supra* note 63, at 22-23.

[70]THE FEDERALIST No. 78, *supra* note 64, at 438-49.

[71]*Id.* On the judiciary, Hamilton wrote:

> The judiciary . . . will always be the least dangerous to the political rights of the Constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

Id. at 437-38.

Whatever its origins, judicial review is deeply rooted in our country's history. As early as the 1790's, the Supreme Court was examining Congressional actions to determine whether they were valid and thus enforceable.[72] It was not until 1803, however, that the Supreme Court in *Marbury v. Madison*[73] explicitly claimed the right to review Congressional laws and declare them inconsistent with the Court's own interpretation of the Constitution.[74]

The stage for *Marbury* was set in 1800, when Republican Thomas Jefferson won the Presidential election by defeating incumbent Federalist John Adams.[75] In the last hours of his term, President Adams awarded

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[72]*See generally* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (determining whether a state law was an unconstitutional ex post fact law); Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (holding that Congress had enacted an indirect tax on carriages and thus, the tax was constitutional); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (Supreme Court Justices, in their capacity as circuit justices, agreeing that Congress lacked the authority to order the federal courts to provide the executive branch with advisory opinions concerning the validity of pension claims).

[73]5 U.S. (1 Cranch) 137 (1803).

[74]2 ADRIENNE SEIGEL, THE SUPREME COURT IN AMERICAN LIFE 199 (1987); TRIBE, *supra* note 63, at 20.

[75]WILLIAM H. REHNQUIST, THE SUPREME COURT, 102 (1987) [hereinafter THE SUPREME COURT]. The turn of the nineteenth century was filled with strife between the two political parties, as each fought to have its own philosophies infused into the newborn American government. *See* James M. O'Fallon, *Marbury*, 44 STAN. L. REV., 219, 219 (1992). Fearing defeat in the Presidential election, the Federalists worked to retain control of the judicial branch through congressional acts which permitted President Adams to nominate many Federalists to newly-created federal judgeships. THE SUPREME COURT, *supra*, at 106. The Circuit Court Act, or "Midnight Judges Act" as it came to be known, was passed on February 13, 1801. GUNTHER, *supra* note 67, at 12. Prior to the Circuit Court Act, the circuit courts were comprised of District Court and Supreme Court Justices. *Id.* The new act created six new circuit courts and sixteen new judges to administer these courts. *Id.* All sixteen judges were appointed by John Adams in an attempt to entrench the Federalists in the judiciary. *Id.* The second relevant act, the Organic Act of the District of Columbia, was passed days before the end of Adams' term on February 27, 1801. *Id.* Pursuant to this act, Adams named Marbury and forty-one others as justices of the peace for the District of Columbia. *Id.* These acts encouraged bitter division between Anti-Federalists and Federalist followers so that when Marbury's commission was not delivered, the time was ripe for Jefferson to end the Federalists' manipulation. THE SUPREME COURT, *supra*, at 106-07. Jefferson, sharing his contempt for the Federalists' actions, commented, "on their part, they have retired into the judiciary as a stronghold. There the remains of Federalism are to be preserved and fed from the Treasury, and from that battery all the works of Republicanism are to be beaten down and erased." *Id.* at 107.

judgeships to men who were faithful to Federalist philosophies.[76] One of these appointees, or "midnight judges,"[77] was William Marbury.[78] President Adam's Secretary of State, John Marshall, personally signed and sealed the commissions, but did not take the necessary steps to ensure their delivery.[79] Jefferson, who was sworn in as President the next day, instructed his Secretary of State, James Madison, not to deliver Marbury's commission.[80] Relying on the Judiciary Act of 1789, which authorized the Supreme Court to issue writs of mandamus to public officers, Marbury brought an original action for a writ of mandamus in the Supreme Court.[81] The Chief Justice who was to preside over the case was none other than John Marshall — a midnight judge himself, and President Adams' former Secretary of State.[82]

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[76]THE SUPREME COURT, *supra* note 75, at 106-07.

[77]*Id.* at 105.

[78]*Id.*

[79]GUNTHER, *supra* note 67, at 12-13.

[80]THE SUPREME COURT, *supra* note 75, at 105.

[81]Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154, 173 (1803). The issuance of a writ of mandamus would have directed Madison to deliver Marbury's commission. THE SUPREME COURT, *supra* note 75, at 106. A writ of mandamus (meaning literally, "we command") issues from a court of superior jurisdiction to command a court of inferior jurisdiction or public official to fulfill a duty imposed by law. BLACK'S LAW DICTIONARY 961 (6th ed. 1991).

[82]GUNTHER, *supra* note 67, at 12-13. Marshall had been appointed by President Adams shortly before Adams left office, in 1800. DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 36 (1989). Sensing that the Federalists had already lost in the White House, Adams was determined to place a Federalist as head of the judiciary. THE SUPREME COURT, *supra* note 75, at 103. The judiciary in Adams' time, however, was not the bastion of prestige it is considered to be today. CRUMP ET AL., *supra*, at 36. Adams first attempted to reappoint John Jay who had been America's first Chief Justice. *Id.* Jay refused, as he had earlier resigned to become Governor of New York, a position he considered to be loftier than Chief Justice of the United States Supreme Court. *Id.* Consequently, Adams chose John Marshall. *Id.* Marshall served on the bench from 1801 until his death in 1835. THE SUPREME COURT, *supra* note 75, at 198-200.

Marbury's case presented Chief Justice Marshall with a sticky political dilemma. SIEGEL, *supra* note 74, at 90. Marshall was an obvious affiliate of the Federalist party, as he had served as Secretary of State under Adams and was later appointed Chief Justice by Adams. *Id.*

Yet, deciding the case in favor of the Federalists held potential disastrous

In a landmark opinion, Chief Justice Marshall declared the Judiciary Act of 1789 was unconstitutional.[83] In reaching this conclusion, the Chief Justice first noted that the Constitution affords the Supreme Court original jurisdiction in only limited circumstances, and appellate jurisdiction in all others.[84] Because the issuing of a writ to an appointed judge was not a case in which the Constitution allowed original jurisdiction,[85] Chief Justice

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consequences. *Id.* If Chief Justice Marshall held in favor of Marbury, President Jefferson could decline to execute the order, thus placing the authority and stature of the Supreme Court in question. *Id.* President Jefferson might also have sought to impeach Chief Justice Marshall. GUNTHER, *supra* note 67, at 13-14. Jeffersonians were using the impeachment process as a tool to weaken the Federalist judicial stronghold. *Id.* at 13. In 1802, the House impeached and the Senate convicted U.S. District Court Judge John Pickering of New Hampshire. *Id.* at 13-14. In 1804, the House impeached Supreme Court Justice Samuel Chase for political views he had expressed on the bench regarding the repeal of the Circuit Court Act. *Id.* at 14. Chase was ultimately acquitted. *Id.* Had he been convicted, however, "it would have been a relatively short step . . . for Congress to use impeachment as a method of curbing judges whose rulings did not please the dominant viewpoint in that body." William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 910 (1991). It was widely expected that if Chase was convicted, John Marshall would be the next target. GUNTHER, *supra* note 67, at 14.

On the other hand, if Chief Justice Marshall chose to side with Jefferson and find against Marbury, the judicial branch might be perceived as catering to presidential whim rather than obeying a rule of law. SIEGEL, *supra* note 74, at 199. The Chief Justice solved the dilemma by declaring that the Act upon which Marbury had relied when filing his lawsuit in the Supreme Court, was unconstitutional. *Marbury*, 5 U.S. (1 Cranch) at 175-76.

[83]*Marbury*, 5 U.S. (1 Cranch) at 175-76.

[84]*Id.* at 174. Chief Justice Marshall wrote:

> Original jurisdiction means the power to hear and decide a lawsuit in the first instance, while appellate jurisdiction means the authority to review the judgment of another court which has already heard the lawsuit in the first instance. Trial courts are courts that exercise original jurisdiction; courts of appeals and supreme courts generally exercise appellate jurisdiction.

Id.; THE SUPREME COURT, *supra* note 75, at 110.

[85]*Marbury*, 5 U.S. (1 Cranch) at 175-76. The Constitution provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such

Marshall announced that the Supreme Court could not exercise original jurisdiction.[86]

Chief Justice Marshall declared with confidence that because the Constitution is the supreme law of the land, any law repugnant to the Constitution is void.[87] The Chief Justice then strongly endorsed judicial review as a means of ensuring that the Constitution's law prevails.[88] Through the medium of judicial review, Chief Justice Marshall determined that the Supreme Court did not have jurisdiction to review the case, thereby preserving the Constitution as the supreme law of the land.[89] Judicial review serves to this day to protect the privileges of, as well as the limitations on, the three branches of government.[90]

Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 2. The Chief Justice rejected the argument that this provision did not prevent Congress from changing the Court's jurisdictional limits, noting, "[i]f congress remains at liberty to give this Court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original . . . the distribution of jurisdiction, made in the constitution, is form without substance." *Marbury*, 5 U.S. (1 Cranch) at 174.

[86]Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

[87]*Id.* at 176-79. The Chief Justice reasoned that "[t]he question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." *Id.* at 176.

[88]*Id.* at 177. In furthering this rationale, the Chief Justice stated:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. It two laws conflict with each other, the courts must decide on the operation of each.
> So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 177-78.

[89]*Id.* at 176. As a result, William Marbury never received his commission. THE SUPREME COURT, *supra* note 75, at 114.

[90]*See, e.g.*, Baker v. Carr, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself

B. JUDICIAL REVIEW OF CONGRESSIONAL RULES AND PROCEEDINGS

One area in which today's courts have exercised judicial review is in Congress' rules of proceedings.[91] The Constitution expressly grants Congress the right to determine the rules of its own proceedings.[92] Indeed, it would be impracticable to transact the nation's business without such a delegation of authority.[93] This privilege, however, is not absolute.[94] Consistent with the principles set forth in *Marbury*, the Court may review Congressional rules to ensure they do not violate fundamental rights or ignore constitutional restraints.[95]

In the landmark opinion, *Powell v. McCormack*,[96] for example, the Supreme Court utilized judicial review to determine that Congress had indeed

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a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

[91]Yellin v. United States, 374 U.S. 109, 114 (1963) ("It has been long settled, of course, that rules of Congress and its committees are judicially cognizable.").

[92]U.S. CONST. art. I, § 5, cl. 2 provides, "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." *Id.*

[93]1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 837 (1873).

[94]United States v. Ballin, 144 U.S. 1 (1892). In *Ballin*, the Court reviewed the constitutionality of a Congressional rule which defined a quorum for voting purposes. *Id.* at 5. House Rule XV stated that in determining the presence of a quorum, the members present but not voting would be counted. *Id.* Noting that the Constitution provides only that, "a Majority of each [house] shall constitute a Quorum to do Business," the Court upheld the House's definition. *Id.* at 9.

[95]*Id.* at 5. In addition, the proceedings adopted by Congress must be reasonably related to the result Congress seeks to attain. *Id.* Congress is also obligated to follow its rules once they are adopted. *See, e.g.*, Yellin v. United States, 374 U.S. 109, 121 (1963). At issue in *Yellin* was a House rule which provided that during certain committee investigations, a subpoenaed witness was entitled to be questioned in private if a public hearing would "unjustly injure his reputation." *Id.* at 114-15. Finding the House had not properly followed its rules, the Court held, "[defendant] is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in [its] rule." *Id.* at 121.

[96]395 U.S. 486 (1969).

transgressed constitutional restraints.[97] *Powell* called into question the extent to which "[e]ach House shall be the Judge of the . . . Qualifications of its own Members" as provided for in the Constitution.[98] In *Powell*, the House of Representatives designated a Special Subcommittee to investigate Congressman Adam Clayton Powell Jr.'s possible abuse of travel vouchers.[99] The Committee reported that Powell had met the Constitution's express qualifications for membership[100] but had wrongfully diverted House funds and had submitted false reports on expenditures to the Committee on House Administration.[101] Based upon the Committee's finding of misappropriation, the House voted to exclude Powell from the seat in the 90th Congress to which he had been duly elected.[102]

Powell brought suit, claiming the House acted improperly when determining his qualification for membership based upon the misappropriation charges, rather than solely on the exclusive Constitutional qualifications of age, citizenship, and residency.[103] The Court, noting that the Constitution expressly stated the qualifications to be considered for House membership, determined that the House is empowered to judge only whether a member meets the qualifications enumerated in the Constitution; it is not empowered to be the judge of what the Constitution means by "qualifications."[104] Invoking judicial review, the Court held that the House had removed Powell from office by ignoring constitutional restraints and

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[97]*Id.* at 522, 550.

[98]*Id.* at 519-20. U.S. CONST. art. I, § 5, cl. 1 provides, "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." *Id.*

[99]*Powell*, 395 U.S. at 489-90.

[100]The Constitution provides for the following qualifications to be considered by Congress: "[n]o Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2.

[101]*Id.* at 492.

[102]*Id.* at 492-93.

[103]*Id.* at 493.

[104]*Id.* at 522.

exceeding its enumerated powers.[105]

In some instances, the Court has invoked judicial review to delve even further into Congressional rules of procedures, and has determined that although a rule is constitutional, it is nonetheless, invalid. In *United States v. Smith*,[106] for example, petitioner contested a rule that allowed the Senate to reconsider its vote on an executive branch nomination after the Senate had already notified the President of the nominee's confirmation or rejection.[107] The Court justified the invocation of judicial review by reasoning that, "the construction to be given to the rules affects persons other than members of the Senate."[108] Although the Court found the rule in question to be constitutional, it proceeded to examine the Senate's interpretation of the rule.[109] Despite the Court's policy of giving great weight to the Senate's construction of its rules,[110] the Court nonetheless applied its own interpretation of the rule and declared the Senate's actions invalid.[111] The Court concluded that invoking judicial review was necessary to determine whether a third party's rights had been violated.[112]

Likewise, in *Christoffel v. United States*[113] the Court did not question the constitutionality of a Congressional rule, but rather Congress'

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[105]*Id.* at 550.

[106]286 U.S. 6 (1932).

[107]*Id.* at 30-31.

[108]*Id.* at 33.

[109]*Id.*

[110]United States v. Smith, 286 U.S. 6, 48 (1932). In *Smith*, the Supreme Court stated:

> To place upon the standing rules of the Senate a construction different from that adopted by the Senate itself . . . is a serious and delicate exercise of judicial power. The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better.

Id.

[111]*Id.* at 48-49.

[112]*Id.* at 33.

[113]338 U.S. 84 (1949).

interpretation of the rule.[114] In *Christoffel*, petitioner was convicted of perjury for testimony before a Committee of the House of Representatives.[115] A quorum was present at the commencement of the Congressional session, but not at the point at which petitioner made the alleged perjurious statements.[116] Petitioner contended that because a quorum was not present at the time he made his incriminating statements, the Committee present at the session was not a "competent tribunal" within the meaning of the relevant perjury statute.[117] The Supreme Court agreed, holding that, for the conviction to be valid, the statements must have been made when a quorum was present.[118] Thus, the Court held, although the Congressional rule was facially constitutional, it had been interpreted incorrectly by Congress.[119] Collectively, these cases illustrate the liberal extent to which the Court will invoke judicial review and examine Congressional rules, despite Congress' right to determine the rules of its proceedings.

IV. MAINTAINING SEPARATION OF POWERS — NON-JUSTICIABILITY AND THE RESUSCITATION OF THE POLITICAL QUESTION DOCTRINE

Although the Court often invokes judicial review to protect the rights and limitations afforded in the Constitution, there are other instances when the Court chooses not to address a potential violation of rights "because the matter is considered unsuited to judicial inquiry or adjustment."[120] This is the essence of a claim of non-justiciability: judicial review is precluded where a court concludes for one reason or another that resolution is beyond

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[114]*Id.*

[115]*Id.* at 85.

[116]*Id.* at 86.

[117]*Id.*

[118]*Id.* at 89-90.

[119]*Id.*

[120]Baker v. Carr, 369 U.S. 186, 196 (1962).

its scope.[121] An issue can be non-justiciable because of mootness, lack of standing, ripeness, or because it involves a political question.[122] The political question doctrine, like other types of non-justiciable doctrines, helps maintain the separation of powers among the three branches of government.[123] It is invoked when a court concludes that a certain issue would be more appropriately determined by one of the political branches.[124]

Defining a "political question" is difficult, as it possesses attributes "which, in various settings, diverge, combine, appear, and disappear in

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[121]Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV., 1031, 1037 (1985). Redish posits that a court's decision to invoke the political question doctrine comes from:

> [An] unstated fear that resolution is for some reason beyond its provence — either because the dispute does not lend itself to the development of judicial standards, or because the Court deems itself incapable of assessing the potentially momentous impact of its decision, or because the Court is concerned about the adherence to its decision by the political branches.

Id.

Non-justiciability is to be distinguished from lack of subject matter jurisdiction:

> In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute.

Baker, 369 U.S. at 198. For a further juxtaposition between subject matter jurisdiction and justiciability, see Powell v. McCormack, 395 U.S. 486, 512-18 (1969).

[122]CRUMP ET AL., *supra* note 82, at 65-91.

[123]*Id.* at 72; *Baker*, 369 U.S. at 210 ("[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question.'").

[124]Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 598 (1976).

seeming disorderliness."[125] It is a settled fact, however, that a political question is not simply any issue with political overtones.[126] For a court to rely on the political question doctrine every time it addressed a case involving political action would amount to an abusive game of semantics.[127]

The 1849 Supreme Court decision, *Luther v. Borden*,[128] has been dubbed "the classic representation of the early political question doctrine."[129] In *Luther*, the Court faced the task of determining which party represented the lawful government of Rhode Island.[130] The Court, invoking the political

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[125]Baker v. Carr, 369 U.S. 186, 210 (1962). Indeed, one scholar has posited, "[n]o branch of the law of justiciability is in such disarray as the doctrine of the 'political question.'" CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 74 (4th ed. 1983).

[126]INS v. Chadha, 462 U.S. 919, 942-43 (1983) (striking down a legislative veto provision contained in the Immigration and Nationality Act); *Baker*, 369 U.S. at 209 ("[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question.").

[127]*Baker*, 369 U.S. at 209.

[128]48 U.S. (7 How.) 1 (1849).

[129]*See* Redish, *supra* note 119, at 1036; CRUMP ET AL., *supra* note 82, at 72. Other cases in which the Court has held an issue to be a non-justiciable political question are: Goldwater v. Carter, 444 U.S. 996 (1979) (plurality opinion) (holding that because of the need for a unified voice in foreign affairs, the Court would not decide whether the President could terminate a treaty without congressional approval); Gilligan v. Morgan, 413 U.S. 1 (1973) (holding that the authority to provide for organizing the Militia was committed to Congress and thus, not within the control of the federal courts); Coleman v. Miller, 307 U.S. 433 (1939) (plurality opinion) (holding that the validity of an amendment's ratification was a question better suited to Congressional discretion); Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (holding that "the propriety of what may be done in the exercise of [foreign relations] political power is not subject to judicial inquiry or decision."). For a list of cases in which the courts have consistently invoked the political question doctrine when confronted with a challenge to state action based on the Guaranty Clause, see *Baker*, 369 U.S. at 223-24.

[130]*Luther*, 48 U.S. (7 How.) at 3. Plaintiff and defendants were vying for recognition as the lawful government of Rhode Island. *Id.* at 2-3. Believing that plaintiff was involved in an insurrection to overthrow the government, defendants broke into plaintiff's house in an attempt to arrest him. *Id.* This insurrection is now commonly known as the Dorr's Rebellion. CRUMP ET AL., *supra* note 82, at 72. Defendants attempted to justify their unlawful acts by claiming they were agents of the established lawful government. *Luther*, 48 U.S. (7 How.) at 3. Plaintiffs brought an action of trespass, claiming that the people of Rhode Island had previously displaced the Rhode Island government and thus, defendants no longer represented the state of Rhode Island. *Id.*

question doctrine, refused to decide the issue on two grounds. First, acknowledging that the Constitution guarantees to each state "a Republican Form of Government,"[131] the Court held that it lacked sufficient standards by which to make such a determination.[132] In addition, noting that the President had already recognized defendants as the lawful government,[133] the Court refused to decide the issue, deferring instead to the executive branch's determination.[134]

Over a century later in *Baker v. Carr*,[135] the Court provided a more express definition of a political question by enumerating several factors that are indicative of a political question.[136] In *Baker*, plaintiffs, citizens of the State, challenged a 1901 Tennessee apportionment statute that allocated legislative representation according to the number of qualified voters living in each county.[137] Between 1901 and 1961, Tennessee had experienced substantial growth and population redistribution without the Legislature reconsidering the apportionment statute.[138] Petitioners claimed that the continued implementation of the antiquated statute debased their votes and denied them equal protection of the law.[139] In holding the issue to be justiciable, the Supreme Court listed what are today the hallmarks of a political question inquiry:

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[131]U.S. CONST. art. IV, § 4.

[132]*Luther*, 48 U.S. (7 How.) at 14-15. In *Luther*, the Court determined it was Congress' job to decide which government would be recognized by the states. *Id.* at 10.

[133]*Id.* at 11.

[134]*Id.* at 12, 14-15.

[135]369 U.S. 186 (1962).

[136]Id. at 217.

[137]*Id.* at 189.

[138]*Id.* at 192.

[139]*Id.* at 187-88. The petitioner's claim was based upon the Equal Protection Clause of the Fourteenth Amendment, which reads in pertinent part: "[n]o state shall . . . deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV, cl. 2.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[140]

In the thirty years following *Baker*, despite the numerous cases in which the political question was asserted, the Court has invoked the doctrine and denied judicial review only three times.[141] Recently, in *Nixon v. United States*, the Supreme Court revived the political question doctrine by denying judicial review on the issue of whether Rule XI is constitutional.[142] Before the *Nixon* opinion could be issued, however, District Court Judge Sporkin, in *Hastings v. United States*, held the issue to be justiciable and then proceeded to find Rule XI unconstitutional.[143] *Nixon* and *Hastings* present persuasive arguments in support of invoking the political question doctrine and the doctrine of judicial review, respectively, in the context of Senatorial impeachment proceedings.

V. *HASTINGS v. UNITED STATES* AND *NIXON v. UNITED STATES*

Alcee Hastings was appointed in 1979 to serve as a United States District Court Judge for the Southern District of Florida.[144] Two years later, a federal grand jury indicted Judge Hastings on criminal charges of conspiracy

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[140]*Id.* at 217. The Court in *Baker* noted that many of these factors, such as commitment to other branches, need for finality, and lack of judicially manageable standards, were present in the earlier case of *Luther v. Borden*. *Id.* at 222.

[141]*See* Nixon v. United States, 113 S. Ct. 732 (1993); Goldwater v. Carter, 444 U.S. 996 (1979); Gilligan v. Morgan, 413 U.S. 1 (1973).

[142]*Nixon*, 113 S. Ct. at 732.

[143]Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992).

[144]*Id.* at 492.

to solicit and accept a bribe in return for certain official favors.[145] In addition, the indictment alleged that Hastings had obstructed justice by disclosing to a Washington, D.C. attorney the substance and issue date of a forthcoming judicial order.[146] On February 4, 1983, a jury acquitted Hastings of all charges.[147]

After the acquittal, two district court judges filed a complaint with the Judicial Council of the Eleventh Circuit against Judge Hastings,[148] alleging that Judge Hastings committed the crimes for which he had been previously

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[145]Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371, 1376 (D.D.C. 1984). Hastings was indicted on December 29, 1981, along with William Borders, a Washington, D.C. attorney. *Id.*

[146]*Id.*

[147]*Id.*

[148]*Id.* Chief Judge Anthony A. Alaimo, of the U.S. District Court for the Southern District of Georgia, and Chief Judge William Terrell Hodges, of the U.S. District Court for the Middle District of Florida, both members of the Eleventh Circuit Judicial Council, filed the complaint on March 17, 1983. *Id.* at 1376 n.11. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 authorizes federal judges to discipline fellow federal judges for "conduct prejudicial to the effective and expeditious administration of the business of the courts." Hastings v. Judicial Conference of the United States, 829 F.2d 91, 108 (D.C. Cir. 1987). Under the Act, one alleging such conduct is required to file a complaint with the clerk of the circuit in which the judge sits. *Id.* The clerk must then pass the complaint on to the chief judge of the circuit. *Id.* If the chief judge does not either dismiss the complaint or conclude the action himself, he must appoint a special committee to investigate the matter. *Id.* The committee consists of the chief judge, circuit court judges, as well as district court judges sitting within the circuit. *Id.* Once the committee concludes its investigation, it must file a report with the judicial council of the circuit. *Id.* Next, the judicial council will either take action itself, or refer the matter to the Judicial Conference of the United States. *Id.* If the Conference determines that impeachment may be warranted, it notifies the United States House of Representatives of its determination. *Id.* at 109. For more information on this process, see *Hastings*, 593 F. Supp. at 1371.

At the onset of the Judicial Council's investigation of Judge Hastings's conduct, Judge Hastings brought an action in the United States District Court for the District of Columbia, seeking to enjoin the investigation. *Id.* at 1373. Hastings claimed that the Disability Act violated the Separation of Powers Doctrine, as well as his due process rights. *Id.* The district court rejected Hastings's claims as meritless and denied the injunction. *Id.* at 1385. The court concluded that the Act "does nothing to impinge on the exclusive power of Congress over impeachment[, as] . . . the House is free to pursue the matter or ignore it as it chooses." *Id.* at 1381.

acquitted.[149] As a result of the filing, the House adopted seventeen articles of impeachment against him[150] and days before the commencement of the Senate impeachment trial, Judge Hastings filed suit in the District Court for the District of Columbia to enjoin the Senate proceedings.[151] Hastings claimed that because the Trial Impeachment Clause entitled him to a trial before the full Senate, the use of the Senate's twelve-member evidentiary Committee denied him due process.[152] The district court dismissed the issue as a non-justiciable political question, stating that the Senate's procedures did not offend fundamental notions of justice or violate any constitutional rights.[153] The Senate subsequently convicted Hastings on eight articles, all of which repeated the conspiracy charge of which he had been formerly acquitted.[154] Pursuant to the impeachment and conviction, the

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[149]*Hastings*, 829 F.2d at 95.

[150]Hastings v. United States, 802 F. Supp. 490, 492 (D.D.C. 1992). The first fifteen Articles reiterated the conspiracy charges of which he had been previously acquitted. *Id.*

[151]Hastings v. United States Senate, 716 F. Supp. 38, 39 (D.D.C. 1989).

[152]*Id.* at 39. At the time of Hastings' suit, Walter L. Nixon, Jr., a United States District Judge for the Southern District of Mississippi, had also been impeached by the House. *Id.* Judge Nixon was impeached by the House on May 10, 1989 on three Articles. Nixon v. United States, 938 F.2d 239, 240 (D.C. Cir. 1991). Since Nixon's trial was expected to reach the Senate only a few months after Hastings' trial, Judge Nixon entered Hastings' suit as an intervening plaintiff in support of the claim that Rule XI violated the Trial Impeachment Clause. *Hastings*, 716 F. Supp. at 39.

[153]*Hastings*, 716 F. Supp. at 40 ("It is not this Court's function to tinker with the Senate's procedures or to anticipate problems that could arise. The procedures adopted do not by their terms violate any constitutional rights or offend fundamental notions of justice."). Judge Hastings' additional claims involving double jeopardy, trial expenses and the Speech and Debate Clause were all briefly addressed and rejected. *Id.* at 41-42.

[154]*Hastings*, 802 F. Supp. at 492-93. Hastings' impeachment trial was held in October, 1989. *Id.* at 492. The Senate convicted Hastings on Articles I, II, III, IV, V, VII, VIII, and IX, and acquitted him on Articles VI, XVI, and XVII. The Senate did not vote on Articles X-XV. *Id.* The breakdown of the Senate vote is as follows:

IMPEACHMENT ARTICLE	COMMITTEE VOTE	NON-COMMITTEE VOTE	TOTAL VOTE
I.	7-5 (58%)	62-21 (75%)	69-26
II.	7-5 (58%)	61-22 (73%)	68-27
III.	7-5 (58%)	62-21 (75%)	69-26

Senate removed Judge Hastings from office and stripped him of his salary.[155]

Less than one month after Hastings' impeachment conviction, the Senate held Nixon's impeachment trial.[156] Not only were the Committee hearings broadcast live to each Senator's office, but videotapes were also made available for viewing at a later date.[157] True to its obligations under Rule XI, the Committee did not recommend acquittal or conviction in its report to the Senate.[158] It did note in its report, however, that discrepancies existed between the testimony of different witnesses and that each Senator should be aware of the divergent testimony.[159] The record is silent,

IMPEACHMENT ARTICLE	COMMITTEE VOTE	NON-COMMITTEE VOTE	TOTAL VOTE
IV.	6-6 (50%)	61-22 (73%)	67-28
V.	7-5 (53%)	60-23 (72%)	67-28
VI.	3-9 (25%)	45-38 (54%)	48-47
VII.	7-5 (58%)	62-21 (75%)	69-26
IX.	7-5 (58%)	63-20 (76%)	70-25

135 CONG. REC. S13782, 13785 (daily ed. Oct. 20, 1989).

[155]*Hastings*, 802 F. Supp. at 493.

[156]135 CONG. REC. S14493-14517 (Nov. 1, 1989). On May 10, 1989, the House adopted three Articles of Impeachment against Nixon, charging him with "giving false testimony to the grand jury and bringing disrepute on the federal judiciary." Nixon v. United States, 938 F.2d 239, 240 (D.C. Cir. 1991). Judge Nixon, like Judge Claiborne, refused to resign after being convicted of criminal charges and continued to receive his judicial salary while in prison. *Id.* at 239. *See supra* note 46. The impeachment trial and subsequent conviction, however, effectively removed Judge Nixon from the bench. *See id.*

[157]*Nixon*, 938 F.2d at 240.

[158]*Id.*

[159]Nixon v. United States, 744 F. Supp. 9, 10-11 (D.D.C. 1990) (quoting REPORT OF THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR., S. DOC. NO. 164, 101st Cong., 1st Sess. 18-19 (1989)) ("[T]he committee received dramatically inconsistent testimony concerning the substance, date, and result of these conversations from the participants in the conversations themselves . . . Familiarity with these witness' various, and divergent, testimony . . . is critical to obtaining an

however, as to how many Senators actually viewed the Committee's proceedings.[160]

At trial, Nixon motioned the Committee for a trial before the full Senate.[161] Nixon stressed the questionable credibility of the key witnesses in his case and made several attempts to have the witness' testimony heard before the full Senate.[162] Unpersuaded by Judge Nixon's arguments, however, the Senate refused to abandon its procedural rules.[163] The Senate denied Nixon's motion, permitting him to argue personally before the full Senate, but allowing him to present and cross-examine witnesses only before the Committee only.[164] At the conclusion of the proceedings, the Senate reached the required two-thirds vote to convict.[165]

Undaunted by the Senate's conviction, Nixon commenced suit in the

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understanding of the parties' respective positions.").

[160]*Id.* at 10.

[161]*Id.* at 11.

[162]*Id.* One witness had recanted his testimony at several different times; another had repudiated a prior affidavit and deposition testimony while testifying before the Committee. *Id.*

[163]*Id.*

[164]*Id.* After the Committee filed its report, Nixon submitted a brief to the Senate in which he renewed his motion for a trial before the entire Senate. *Id.* This renewed motion was denied by the Senate by a vote of 90 to 7. *Id.* In addition to the motion, Nixon's brief asserted that the report was misleading and inaccurate due in part to the omission of parts of his own testimony. *Id.*

[165]*Id.* Nixon was convicted on November 3, 1989, on two of the three articles of impeachment which had been previously adopted by the House of Representatives. Nixon v. United States, 113 S. Ct. 732, 734-35 (1993). The breakdown of Senate votes on Judge Nixon's Articles of Impeachment is as follows:

IMPEACHMENT ARTICLE	COMMITTEE VOTE	NON-COMMITTEE VOTE	TOTAL VOTE
I.	9-3 (75%)	8-5 (94%)	89-8
II.	7-5 (58%)	71-14 (84%)	78-19
III.	5-7 (42%)	52-33 (61%)	57-40

Luchsinger, *supra* note 36, at 173 n.104. Note that in the breakdown above, the vote on Article III fell short of the two-thirds Senate vote necessary to convict.

District Court for the District of Columbia, seeking a declaration that the Senate conviction was void.[166] Nixon argued that Rule XI violates the Trial Impeachment Clause because it permits the Senate to hold an impeachment trial with only a quorum of a twelve-member Committee.[167] To highlight the importance of hearing testimony first-hand, Nixon noted that in the three Rule XI impeachment trials, the percentage of Committee members who had voted to acquit was significantly higher than the percentage of non-committee members who had voted to acquit.[168]

The district court acknowledged the questionable constitutionality of Rule XI.[169] Surprisingly, however, even after delving into the merits of Nixon's case and being somewhat persuaded by Nixon's argument, the court concluded the issue was non-justiciable and thus, not reviewable by the court.[170] In reaching this decision, the court relied on principles set forth in *Powell v. McCormack*,[171] where the Supreme Court invalidated Congress' attempt to superimpose its legislative qualifications for House membership against the already identifiable textual limitations set forth in the Constitution.[172]

In light of *Powell*, the district court in *Nixon* examined the Trial

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[166]Nixon v. United States, 744 F. Supp. 9, 10 (D.D.C. 1990). Nixon contended before the district court that the Trial Impeachment Clause "requires the Senate as a body to 'try' an impeachment on the floor of the Senate so that all Senators can, if present, see the witnesses, hear their testimony, and thereby effectively appraise their credibility." *Id.*

[167]*Id.*

[168]*Id.* at 11. Nixon pointed out that the disparate result was equally obvious in the impeachment trials of former Judges Hastings and Claiborne. *Id.* One of the two counts on which Nixon was convicted, and all eight counts on which former Judge Hastings was convicted did not receive the two-thirds majority vote needed to convict. *See id.* This leads one to speculate (as Nixon did) that the counts may not have received the majority in the full Senate had the full Senate been required to hear the evidence first hand.

[169]*Id.*

[170]*Id.* at 14.

[171]395 U.S. 486, 550 (1969) (holding that although Congress has the power to determine whether a House member meets the qualifications for membership, such determination does not exceed a consideration of those qualifications already specifically enumerated in the Constitution).

[172]*Id.* Because Congressman Powell met the qualifications set forth in Article I of the Constitution, the Court upheld his entitlement to retain the seat. *Id.* For more thorough discussion of *Powell*, see *supra* notes 96-105 and accompanying text.

Impeachment Clause.[173] The court noted that the Constitution enumerates three requirements for an impeachment trial, none of which requires a trial before the full Senate.[174] The court opined that Nixon's argument might have been stronger if the Senate had violated one of these express requirements, or if it had denied Nixon "any semblance of a trial."[175] However, the court concluded, Nixon's opportunity "to present and cross-examine witnesses before the Committee" and "to argue personally and by counsel before the full Senate" was sufficient to afford him the constitutionally mandated trial.[176]

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the district court.[177] In reaching its decision, the court of appeals emphasized the magnitude of the Senate's power to try impeachments, noting that, "[n]owhere else does the Constitution explicitly confer on a body the 'sole' power to do anything."[178] The court also explored historical commentary on the Constitution's impeachment provisions and concluded that the Constitution placed sufficient checks on the Senate's power to try impeachments so that

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[173]Nixon v. United States, 744 F. Supp. 9, 14 (D.C.C. 1990).

[174]*Id.* at 14. The Trial Impeachment Clause only requires that: (1) the Senate shall be on oath or affirmation; (2) the Chief Justice must preside when the President of the United States is tried; and (3), two-thirds of the members must vote to convict. U.S. CONST. art. I, § 3, cl. 6.

[175]*Nixon*, 744 F. Supp. at 14.

[176]*Id.*

[177]Nixon v. United States, 938 F.2d 239 (D.C. Cir. 1991).

[178]*Id.* at 241. The court of appeals noted that the only other court to consider the significance of the word "sole" was the United States Court of Claims in *Ritter v. United States*. *Id.* Halstead L. Ritter, a former district court judge, was convicted by the Senate in 1936 without the use of Rule XI. Ritter v. United States, 84 Ct. Cl. 294, 294, *cert. denied*, 300 U.S. 668 (1937). Ritter challenged the constitutionality of his impeachment by the Senate, arguing that the charges against him were not high crimes or misdemeanors. *Id.* Relying on Article I, § 3, cl. 6, which gives the Senate the *sole* power to try impeachments, the court held that only the Senate had jurisdiction of impeachment cases. *Id.* at 296. Thus, the court concluded, it possessed no authority to review the Senate's impeachment proceedings. *Id.* Interestingly, the court based its decision on lack of jurisdiction, rather than lack of justiciability. *Id.* at 300. Clearly, the court had jurisdiction, since the issue was one which arose under Article III, § 2 of the United States Constitution. *See id.* at 294. For a comparison between jurisdiction and justiciability, see *supra* note 121.

judicial review was unnecessary.[179]

Furthermore, the court of appeals expanded on the district court's discussion of *Powell v. McCormack*, noting that *Powell*'s analysis of the political question doctrine relied heavily on the Framers' express intention to make the qualifications of Congressmen unalterable by the Legislature.[180] In contrast, the court in *Nixon* noted, nowhere in the text or history of the Constitution was the legislature prohibited from altering impeachment trial procedures.[181] Thus, the court of appeals concluded, "application of *Powell*'s method — an analysis of the relevant constitutional text and history — leads here to a conclusion of nonjusticiability."[182]

Soon after *Nixon* was decided, Judge Hastings filed an action in the District Court for the District of Columbia, seeking reinstatement to his former office.[183] Hastings claimed that his impeachment, conviction, and subsequent removal from office violated the Constitution.[184] In response, the United States contended that the court of appeals' decision of nonjusticiability in *Nixon* controlled the issue at hand, and thus, precluded the district court from hearing Hastings' case.[185] Presiding over the case, Judge Sporkin disagreed, explaining that significant factual differences between *Hastings* and *Nixon* permitted a finding of justiciability in Judge Hastings' case.[186] First, Judge Sporkin reasoned, whereas Judge Nixon

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[179]*Nixon*, 938 F.2d at 242-43. The circuit court cited to various excerpts from *The Federalist*, as well as to Article I of the Constitution, which divides the duties of the impeachment process between the House and the Senate. *Id.*

[180]*Id.* at 244.

[181]*Id.*

[182]*Id.* In addition to the textual commitment, the Court also determined that the necessity for finality demanded a holding of non-justiciability. *Id.* at 245. The Court summed up its support for the political question doctrine by commenting, "[i]f the political question has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead." *Id.* at 246.

[183]Hastings v. United States, 802 F. Supp. 490, 492 (D.D.C. 1992).

[184]*Id.*

[185]*Id.* at 493.

[186]*Id.*

was found guilty in his criminal trial, Judge Hastings had been acquitted.[187] Thus, the judge concluded, unlike in *Nixon*, where Judge Nixon's criminal conviction could serve as probative evidence of his conduct, the critical evidence proving Hastings' guilt could come only from live witness testimony.[188] Second, Judge Sporkin explained that when the full Senate voted on Hastings' articles, less than two-thirds of the twelve-member Committee who heard Hastings' evidence voted to convict him.[189] In fact, the judge opined, none of the articles of impeachment against Hastings received a majority vote for conviction from the twelve-member Committee, and the chair and vice chair spoke in favor of acquittal.[190] Thus, the judge concluded, the two-thirds majority was reached only by counting the votes of the Senators who did not hear the evidence.[191]

After establishing justiciability, Judge Sporkin addressed the merits of the case.[192] The judge opined that while the Senate has the authority to determine its own impeachment procedures, it must also comply with the Trial Impeachment Clause which requires that the accused receive a "trial."[193] At a minimum, the judge stated, a "trial" must include the receipt of evidence, examination of witnesses, right to counsel, and an opportunity to be heard by the accused.[194] The judge noted that during Hastings' trial, only a quorum of the twelve-member Committee was present when testimony was heard and evidence was submitted.[195] Based upon these considerations, Judge Sporkin concluded that Rule XI did not pass the minimum constitutional requirements for a trial.[196] Accordingly, the judge

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[187]*Id.* at 494.

[188]*Id.*

[189]*Id.*

[190] *Id.* at 493.

[191]*Id.*

[192]Only after establishing jurisdiction and justiciability may a judge decide the case on the merits. Nixon v. United States, 113 S. Ct. 732, 734 (1993).

[193]Hastings v. United States, 802 F. Supp. 490, 501 (D.D.C. 1992).

[194]*Id.*

[195]*Id.* at 502.

[196]*Id.* at 501.

overturned Hastings' impeachment and remanded the case to the Senate for a trial before the full Senate.[197] Anticipating that the issue would be heard by the Supreme Court, Judge Sporkin stayed the order until after appeal.[198]

In January 1993, the Supreme Court affirmed the judgment of the D.C. Circuit Court of Appeals in *Nixon* and held that the issue of Rule XI's constitutionality presents a non-justiciable political question.[199] Adopting the political question definition set forth in *Baker*,[200] the Court examined the text of the Constitution and determined that the issue at hand was textually committed to another branch.[201] In order to determine whether the issue is textually committed, the Court posited, it is necessary to interpret the text in question.[202] Noting that Article I gives the Senate the "sole" power to impeach, the Court opined that the word "sole" indicates that the authority is reposed nowhere else but in the Senate.[203] The Court reasoned that the Senate would not be acting with sole power if the courts could review the Senate's actions to determine whether the Senate's "trial" passed muster.[204]

Next, the Court utilized the second *Baker* factor and declared that the word "try" in the Trial Impeachment Clause lacked the sufficient precision necessary to provide a "judicially manageable standard of review of the Senate's action."[205] The Court opined that the Framers did not intend for

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[197]*Id.* at 505.

[198]*Id.*

[199]Nixon v. United States, 113 S. Ct. 732, 740 (1993).

[200]*See supra* note 140 and accompanying text.

[201]*Nixon*, 113 S. Ct. at 735.

[202]*Id.*

[203]*Id.* Indeed, the Constitution contains the word "sole" in only one other place — "[t]he House of Representatives shall . . . have the *sole* Power of Impeachment." U.S. CONST. art. I, § 2, cl. 5 (emphasis added).

[204]*Nixon*, 113 S. Ct. at 736. Indeed, this was the essence of Justice Stevens' terse concurrence. *Id.* at 740 (Stevens, J., concurring) ("[T]he central fact [is] that the Framers decided to assign the impeachment power to the Legislative Branch.").

[205]*Id.* at 736. Petitioner contended that the word "try" required that the proceedings resemble a judicial trial. *Id.* The Court cited various common definitions of "try" and determined that "the word 'try' . . . has considerably broader meanings than those to

the word "try" to limit the manner in which the Senate could conduct impeachment proceedings.[206] The Court buttressed its decision by noting that the Trial Impeachment Clause enumerated three specific requirements that the Senate must abide by when trying impeachments: (1) the Senate must be under oath when sitting for an impeachment trial; (2) if the President of the United States is to be tried, the Chief Justice shall preside; and (3) a conviction requires the concurrence of two-thirds of the members present.[207] Accordingly, the Court concluded that these precise limitations suggest that the Framers did not intend to restrict the Senate beyond the limits listed.[208]

Moreover, the Court continued, such a lack of guidance in defining "trial" clearly distinguishes the instant case from *Powell*.[209] The Court noted that unlike the word "qualifications" in *Powell*, which is further defined by the Constitution, the meaning of the word "trial" in the Trial Impeachment Clause is not limited by further definition.[210] Thus, holding that the Senate did not violate any express Constitutional provisions by employing the Committee, the Court granted the Senate discretion in dictating the type of impeachment trial to be afforded an accused.[211]

Next, in declining to exercise judicial review, the Court cited the lack of historical and contemporary commentary on judicial review in the impeachment context.[212] This absence was meaningful, the Court portended, in light of the fact that other legislative acts are expressly afforded judicial review.[213] The Court then supported the Founders' decision to

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which petitioner would limit it." *Id.*

[206] *Id.*

[207] *Id.* (citing U.S. CONST. art. I, § 3, cl. 6).

[208] *Id.* at 736.

[209] *Id.* at 739-40.

[210] *Id.* at 737-38.

[211] *Id.* at 740.

[212] *Id.* at 737.

[213] *Id.* For instance, in *The Federalist*, Hamilton supported judicial review for legislative acts regarding bills of attainer, ex post facto laws, and statutes. *See* THE FEDERALIST No. 78, *supra* note 64, at 436-42.

place the power to try impeachments in the hands of the Senate.[214] Emphasizing the importance of maintaining checks and balances, the Court noted that impeachment is the only check the Senate has on the Judicial branch.[215]

Finally, again referring to the *Baker* definition of a political question, the Court determined that the need for finality in an impeachment warrants a decision of non-justiciability.[216] The Court stated that judicial review in the impeachment context could subject the country to years of political uncertainty, especially if the President was impeached.[217] Any future president's actions would be undermined by the chaos, the Court opined, and a judge whose conviction is reversed might find that his seat has been filled in the interim.[218]

VI. ANALYSIS OF THE COURT'S USE OF JUDICIAL REVIEW AND THE POLITICAL QUESTION DOCTRINE IN *NIXON* AND *HASTINGS*

The Supreme Court's decision in *Nixon* to implement the political question doctrine gives strength to the doctrine which, in recent years, has been shunned by the Court as a means of denying judicial review.[219] In this particular battle, the separation of powers doctrine has claimed victory over the doctrine of judicial review. The Court's decision to deny judicial review and invoke the political question doctrine, however, is problematic.

The Court in *Nixon* affords great deference to the word "sole" in the Trial

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[214]*Nixon*, 113 S. Ct. at 737. For a further discussion on the Founders' reasoning for placing the power to try impeachments in the hands of the Senate, see *supra*, Part IIB.

[215]*Nixon*, 113 S. Ct. at 737. *See also* THE FEDERALIST No. 79, at 444 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("[Impeachment] is the only provision . . . which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.").

[216]*Nixon* 113 S. Ct. at 739.

[217]*Id.*

[218]*Id.* The problem of fashioning effective relief also contributed to the Court's decision to deny judicial review. *Id.*

[219]*See* Nixon v. United States, 938 F.2d 239, 258 (D.C. Cir. 1991). In the 30 years since *Baker*, among the numerous cases in which the political question has been asserted as a means of denying judicial review, the Court has invoked the doctrine only three times. *See supra* note 141 and accompanying text.

Impeachment Clause and concludes that the Senate's impeachment procedures are unreviewable.[220] Indeed, the word "sole" is used sparingly in the Constitution.[221] However, independence does not mean isolation.[222] The fact that the Senate has the "sole" power to try impeachments does not necessarily mean that the judicial branch is precluded from reviewing all issues involving impeachment. The Court is still entitled, indeed obligated, to review Congressional rules and procedures to ensure that they do not exceed Constitutional limits.[223] As for the significance of the word "sole" in the Trial Impeachment Clause, it may simply mean that neither the executive nor the judicial branch may try impeachments.

The Court also determined that the word "try" lacked judicially manageable standards.[224] This approach is unconvincing as well. Although the Constitution does not expressly describe what an impeachment trial should entail, the Court still has ample standards with which to define an impeachment trial.[225] As Judge Sporkin noted in *Hastings*, the definition

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[220]Nixon v. United States, 113 S. Ct. 732, 735-37 (1993).

[221]U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. . . .").

[222]Hastings v. United States, 802 F. Supp. 490, 496 (D.D.C. 1992).

[223]United States v. Ballin, 144 U.S. 1, 5 (1892).

[224]*Nixon*, 113 S. Ct. at 736.

[225]For a discussion of such standards, see the district court's argument in Nixon v. United States, 744 F. Supp. 9, 10 (D.D.C. 1990). The court offered three reasons to support Nixon's contention that the word "try" mandated a trial before the entire Senate. First, after examining the clauses in the Constitution that mention impeachment and/or trials, the court deduced that the Framers intended for the Senate to try impeachments, "sitting as a court on questions of law and as jurors on questions of fact." *Id.* at 12. The court noted that Article I, § 3, cl. 6, addressing the Senate's power to try impeachments, incorporates language indicative of criminal jury trials in court, such as "try," "convicted," "judgment," and "cases." *Id.* The district court also cited Article III, § 2, cl. 3, which juxtaposes jury trials with impeachment trials by providing that "[t]he Trials of all Crimes, except in Cases of Impeachment, shall be by jury." *Id.*

Next, the court examined historical sources which revealed that the Senate was chosen over the other branches to try impeachments because the size of the Senate would make removal difficult. *Id.* at 12. Finally, the court likened a Senator's duty in an impeachment trial to that of a federal judge who sits as trier of fact and exposes himself directly to the evidence. *Id.* at 13. The court opined that the Seventh Amendment provides greater deference to the decisions of triers of fact who confront live witnesses rather than to those

of "trial" carries with it certain basic requirements, whatever the context.[226] In addition, there is evidence to support the contention that an impeachment trial should be conducted like a judicial court. First, up until the late stages of the Federal Convention of 1787, the Founders provided for impeachment by the Supreme Court.[227] There is no indication that when the Senate was ultimately chosen, the opportunity for the accused to have a traditional judicial trial was to be eliminated. Second, the Senate decided the number of members on the Rule XI Committee would be twelve — the traditional number for a jury.[228] Third, the Constitution supports the position that an impeachment trial is to be conducted much like a trial for any other crime, with the exception that the Senate is to function as the jury.[229] Collectively, these standards are sufficient to enable the Court to define an impeachment trial.

The Court in *Nixon* also declined to hear the impeachment issue because of the need for finality.[230] The Court conceded, however, that the finality argument is stronger in the context of a presidential impeachment.[231]

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who receive the testimony second-hand. *Id.* (The Seventh Amendment provides: "[i]n Suits at common law . . . no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."); U.S. CONST. amend. VII. For example, the court stated, only under exceptional circumstances may a judge sitting as trier of fact refer a case to a special master to take evidence and give recommendations to the court. *Nixon*, 744 F. Supp. at 13 (citing FED. R. CIV. P. 53(b)). Considerations such as congestion, complexity and length of trial, the court noted, are not exceptional. *Id.* The district court concluded that these restrictions on judges as triers of fact could also apply to the Senate's authority to use a Committee in taking evidence in an impeachment trial. *Id.*

[226]*Hastings*, 802 F. Supp. at 501.

[227]For a discussion on the debates at the Federal Convention, see *supra* Part IIB.

[228]*See, e.g.*, Williams v. Florida, 399 U.S. 78, 87 n.19 (1970) (tracing the history and considerations that eventually led to twelve-member juries); Patton v. United States, 281 U.S. 276, 288 (1930) (declaring that a trial by jury "should consist of twelve men, neither more nor less"); Thompson v. Utah, 170 U.S. 343, 349 (1897) (stating "the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less.").

[229]U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury.").

[230]Nixon v. United States, 113 S. Ct. 732, 739 (1993).

[231]*Id.*

Uncertainty in the context of a judicial impeachment simply does not create repercussions as great as the uncertainty that would arise in the context of a Presidential impeachment. With a presidential impeachment, the interim between the appeal and final decision could foreseeably cause chaos and unrest for every American citizen. A presidential impeachment would also have repercussions internationally, as the country would be in need of the clear, unified voice that is typically provided for by the President of the United States.

Weighing against the Court's interests mentioned above is the need to ensure that Congressional procedures are constitutional. The Court's decision in *Nixon* to invoke the political question doctrine implies that the Court's interest in respecting Congress' impeachment domain outweighs the need to scrutinize Congressional procedures. This conclusion relegates the supremacy of the Constitution, for refusing to review Congress' procedures leaves unanswered the question of whether the Senate has conformed to constitutional standards. This is the price to be paid for a government of checks and balances.

It is debatable, however, whether the Court actually declined to review the Senate's actions. It is true that the political question doctrine and the doctrine of judicial review are mutually exclusive.[232] By invoking the political question doctrine, a court postulates that it will not review the case for a decision on the merits.[233] The Court in *Powell*, however, revealed the paradox that exists with a determination of non-justiciability: a determination of whether a constitutional issue is reviewable necessarily requires a court to initially review the pertinent constitutional language and give it meaning.[234] The Court in *Nixon* went beyond such an initial review, relying on *Powell* to determine that the Senate's actions were indeed

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[232]*See id.* at 734.

[233]*Id.*

[234]Nixon v. United States, 938 F.2d 239, 254 (D.C. Cir. 1991). The district court relied in large part upon *Powell v. McCormack*, where the Supreme Court reasoned:

> In order to determine whether there has been a textual commitment to a co-ordinate department of the Government,, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon [a branch of government] before we can determine to what extent, if any, the exercise of that power is subject to judicial review.

Powell v. McCormack, 395 U.S. at 486, 519 (1969).

constitutionally permissible.[235] Such an analysis goes beyond simply invoking the political question and deciding that the court will not hear the issue. In fact, this analysis supports the conclusion that the Court did not invoke the political question, but rather, reviewed the Senate's procedures and decided the case on the merits.[236]

Valid complaints of Rule XI's questionable constitutionality necessitate a decision on the merits. The unfairness that may result in allowing the Senate to use a Committee was clearly and appropriately highlighted by Judge Sporkin in *Hastings*.[237] Simply reading a transcript of the witness' testimony tells the trier of fact nothing about the witness' demeanor, which may be discerned only by viewing a witness during testimony.[238] The ability to observe demeanor takes on even greater importance when, as in Hastings' case, there has been no former criminal conviction of the accused. When an accused is convicted of criminal charges and subsequently impeached, a certified copy of the conviction provides probative evidence of the accused's conduct. However, where the accused has been acquitted of the same criminal charges which form the basis of his articles of impeachment, as in *Hastings*, no such probative evidence exists. Accordingly, as Judge Sporkin stressed, the evidence proving that the Judge

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[235]Nixon v. United States, 113 S. Ct. 732, 739-40 (1993).

[236]In this respect, several scholars have questioned courts' actions when invoking the political question doctrine. *See* HENKIN, *supra* note 122, at 622. Henkin frowned upon most applications of the political question doctrine, claiming the doctrine "is an unnecessary, deceptive packaging of several established doctrines." *Id.* He asserted that often times, a court which claims to be invoking the political question doctrine is really determining constitutionality and then denying relief. *Id.* In support of Henkin's theory, see *Nixon*, 938 F.2d at 239.

In deciding *Nixon*, the court of appeals went through an analysis on the merits before finally concluding that the issue was non-justiciable. *Nixon*, 938 F.2d at 239; *see id.* at 256 (Edwards, J., dissenting) ("the finding of nonjusticiability becomes largely a shorthand label for the court's ultimate conclusion that there has been no constitutional violation . . . ."). *See also* Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q., 595, 633 (1987) ("The biggest problem with the [political question] doctrine is that it is dishonest. In every instance of its use, the Court in fact decides some important constitutional issue but pretends that it 'has not heard the case.'").

[237]*See* Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992).

[238]WILLIAM REHNQUIST, GRAND INQUESTS 68 (1992) [hereinafter GRAND INQUESTS].

is guilty of "high crimes and misdemeanors" must come from live testimony.[239] As Judge Sporkin so aptly noted in *Hastings*, the majority of the Senate never had first-hand knowledge of the evidence against Hastings because they did not participate in the evidentiary hearings.[240] Indeed, although videotapes of the fact-finding sessions were available to all Senators, the record indicates that only twelve Senators actually viewed them.[241] Arguably, the effect of hearing and viewing the evidence first-hand is reflected in the Senate's voting results.[242] An impeachment conviction requires an affirmative vote of two-thirds of the Senate members present.[243] However, as Judge Sporkin pointed out, *none* of the articles of impeachment against Hastings received a majority vote of conviction from the members of the twelve-member Committee, and the chair and vice chair of the Committee spoke in favor of acquittal.[244] Moreover, this inequitable voting result is not an isolated one, as the recent impeachments of Judge Claiborne and Judge Nixon have produced similar results.[245] In these cases, a disproportionate number of Committee members voted to acquit, begging the important question whether these votes are significantly affected by the opportunity to hear and view the evidence first-hand.

In addition, *Hastings* raises yet another issue, not addressed in Judge Sporkin's opinion, that may deserve judicial review. The Constitution permits impeachment and removal of an officer only after being convicted by

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[239]*Hastings*, 802 F. Supp. at 503. As Judge Sporkin commented:

> Each senator who votes on the impeachment must have the ability to judge the credibility of witnesses and hear with their own ears the evidence as it is presented . . . "[A] mere record of questions and answers tells us noting about what courts call the 'demeanor' of the witness."

Id. (quoting GRAND INQUESTS, *supra* note 238, at 68).

[240]*Id.* at 502.

[241]*Id.* at 502 n.18.

[242]Hastings v. United States, 802 F. Supp. 490, 493 (1992).

[243]U.S. CONST. art. I, § 3, cl. 6.

[244]*Hastings*, 802 F. Supp. at 493.

[245]Friedland, *supra* note 35, at 237; Luchsinger, *supra* note 36, at 170-76.

the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors."[246] Judge Hastings was impeached for and convicted of the very same charges he was acquitted of earlier in a criminal trial.[247] The Senate has the power to convict a judge of "bribery," even if the judge was acquitted by a jury of the same bribery charges in a previous criminal proceeding. As Judge Sporkin noted, a prior guilty conviction would be strong evidence that a judge committed an impeachable offense.[248] In Judge Hastings' case, however, there was no prior conviction available to submit as probative evidence of guilt.[249] To the contrary, Hastings' acquittal held little weight with the Senate, which proceeded to convict him of "bribery." This may be reconciled because of significant factors controlling a criminal case which are not followed in the Senate trial; that of the presumption of innocence, the burden of proof to prove each element of the crime beyond a reasonable doubt, and that the jury verdict must be unanimous - all twelve jurors voting for conviction. The Senate prosecution, it seems, has a much less demanding procedural road to hoe to arrive at a conviction. Should the Supreme Court review the Senate "trial" procedure and bring it closer to that in a criminal trial? In the face of such, it is important to determine whether the Senate is preserving impeachment for true instances of "Treason, Bribery, or other high Crimes and Misdemeanors," or simply using it indiscriminately to punish political adversaries.

Such questions compel the invocation of judicial review. By examining questionable acts of unconstitutionality, the Court can determine whether the other branches are complying with the Constitution, or whether they are supplanting the Constitution and assuming the role of the highest law of the land.

VII. CONCLUSION

It is ironic that, despite the existence of a Constitution which lauds individual rights, "[i]t has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation

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[246]U.S. CONST. art. II, § 4.

[247]Hastings v. United States, 802 F. Supp. 490, 492-93 (D.D.C. 1992). The House adopted seventeen articles of impeachment against Judge Hastings, and the first fifteen reiterated the conspiracy charge of which he had been formerly acquitted. *Id.* at 492.

[248]*Id.* at 494.

[249]*Id.* at 492.

of which the courts cannot give redress."[250] While in some cases, implementation of the political question doctrine by the courts may be warranted, at other times it serves only to deny relief, deprive lower courts of any guidance, and most importantly, leaves unanswered the question of whether the Constitution has been violated. The Supreme Court's recent determination in *Nixon* is an example of one such instance. Subordinating judicial review to the political question doctrine, as done in *Nixon*, unjustifiably sacrifices a monitor that helps assure compliance with the Constitution.

Although both doctrines are equally essential to the maintenance and stability of our American form of government, they are mutually exclusive. Ultimately, one doctrine is supported only at the expense of the other. The exclusion of judicial review sometimes results in the subordination of the Constitution, and an avenue for determining whether an act violates the Constitution is eliminated. In recent years, the Supreme Court has rarely invoked the political question doctrine, perhaps in recognition of this reality. Courts should continue to review Senate procedures for constitutionality, thereby enforcing the supremacy of the Constitution.

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[250]Baker v. Carr, 369 U.S. 186, 197 (1962).