SUPREME COURT OF THE UNITED STATES

No. 91–740

WALTER L. NIXON, PETITIONER *v.* UNITED STATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 13, 1993]

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

Petitioner contends that the method by which the Senate convicted him on two articles of impeachment violates Art. I, §3, cl. 6 of the Constitution, which mandates that the Senate "try" impeachments. The Court is of the view that the Constitution forbids us even to consider his contention. I find no such prohibition and would therefore reach the merits of the claim. I concur in the judgment because the Senate fulfilled its constitutional obligation to "try" petitioner.

It should be said at the outset that, as a practical matter, it will likely make little difference whether the Court's or my view controls this case. This is so because the Senate has very wide discretion in specifying impeachment trial procedures and because it is extremely unlikely that the Senate would abuse its discretion and insist on a procedure that could not be deemed a trial by reasonable judges. Even taking a wholly practical approach, I would prefer not to announce an unreviewable discretion in the Senate to ignore completely the constitutional direction to "try" impeachment cases. When asked at oral argument whether that direction would be satisfied if, after a House vote to impeach, the Senate, without any procedure whatsoever, unanimously found the accused guilty of being "a bad guy," counsel for the United States answered that the Government's theory

"leads me to answer that question yes." Tr. Oral Arg. 51. Especially in light of this advice from the Solicitor General, I would not issue an invitation to the Senate to find an excuse, in the name of other pressing business, to be dismissive of its critical role in the impeachment process.

Practicalities aside, however, since the meaning of a constitutional provision is at issue, my disagreement with the Court should be stated.

The majority states that the question raised in this case meets two of the criteria for political questions set out in *Baker* v. *Carr*, 369 U. S. 186 (1962). It concludes first that there is "`a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" It also finds that the question cannot be resolved for "`a lack of judicially discoverable and manageable standards.'" *Ante*, at 3.

Of course the issue in the political question doctrine is *not* whether the Constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, *e.g.*, Art. I, §8, and it is not thought that disputes implicating these provisions are nonjusticiable. Rather, the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.

Although *Baker* directs the Court to search for "a textually demonstrable constitutional commitment" of such responsibility, there are few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment. Conferral on Congress of the power to "Judge" qualifications of its members by Art. I, §5 may, for example, preclude judicial review of whether a prospective member in fact meets those qualifications. See *Powell* v. *McCormack*, 395 U. S. 486, 548 (1969). The courts therefore are usually left to infer the presence of a political question from the text and structure of the Constitution. In drawing the inference that the Constitution has committed final interpretive authority to one of the political branches,

courts are sometimes aided by textual evidence that the judiciary was not meant to exercise judicial review — a coordinate inquiry expressed in *Baker*'s "lack of judicially discoverable and manageable standards" criterion. See, *e.g.*, *Coleman* v. *Miller*, 307 U. S. 433, 452–454 (1939), where the Court refused to determine the life span of a proposed constitutional amendment given Art. V's placement of the amendment process with Congress and the lack of any judicial standard for resolving the question. See also *id.*, at 457–460 (Black, J., concurring).

The majority finds a clear textual commitment in the Constitution's use of the word "sole" in the phrase "the Senate shall have the sole Power to try all impeachments." Art. I, §3, cl. 6. It attributes "considerable significance" to the fact that this term appears in only one other passage in the Constitution. *Ante,* at 6. See Art. I, §2, cl. 5 (the House of Representatives "shall have the sole Power of Impeachment"). The Framers' sparing use of "sole" is thought to indicate that its employment in the Impeachment Trial Clause demonstrates a concern to give the Senate exclusive interpretive authority over the Clause.

In disagreeing with the Court, I note that the Solicitor General stated at oral argument that "[w]e don't rest our submission on sole power to try." Tr. Oral Arg. 32; see also *id.*, at 51. The Government was well advised in this respect. The significance of the Constitution's use of the term "sole" lies not in the infrequency with which the term appears, but in the fact that it appears exactly twice, in parallel provisions concerning impeachment. That the word "sole" is found only in the House and Senate Impeachment Clauses demonstrates that its purpose is to emphasize the distinct role of each in the impeachment process. As the majority notes, the

Framers, following English practice, were very much concerned to separate the prosecutorial from the adjudicative aspects of impeachment. *Ante*, at 11 (citing The Federalist No. 66, p. 446 (J. Cooke ed. 1961)). Giving each House "sole" power with respect to its role in impeachments effected this division of labor. While the majority is thus right to interpret the term "sole" to indicate that the Senate ought to "`functio[n] independently and without assistance or interference,'" *ante*, at 6, it wrongly identifies the judiciary, rather than the House, as the source of potential interference with which the Framers were concerned when they employed the term "sole."

Even if the Impeachment Trial Clause is read without regard to its companion clause, the Court's willingness to abandon its obligation to review the constitutionality of legislative acts merely on the strength of the word "sole" is perplexing. Consider, by comparison, the treatment of Art. I, §1, which grants "All legislative powers" to the House and Senate. As used in that context "all" is nearly synonymous with "sole" — both connote entire and exclusive authority. Yet the Court has never thought it would unduly interfere with the operation of the Legislative Branch to entertain difficult and important questions as to the extent of the legislative power. Quite the opposite, we have stated that the proper interpretation of the Clause falls within the province of the judiciary. Addressing the constitutionality of the legislative veto, for example, the Court found it necessary and proper to interpret Art. I, §1 as one of the "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *INS* v. *Chadha*, 462 U. S. 919, 945 (1983).

The majority also claims support in the history and early interpretations of the Impeachment Clauses, noting the various arguments in support of the

current system made at the Constitutional Convention and expressed powerfully by Hamilton in The Federalist Nos. 65 and 66. In light of these materials there can be little doubt that the Framers came to the view at the Convention that the trial of officials' public misdeeds should be conducted by representatives of the people; that the fledgling judiciary lacked the wherewithal to adjudicate political intrigues; that the judiciary ought not to try both impeachments and subsequent criminal cases emanating from them; and that the impeachment power must reside in the Legislative Branch to provide a check on the largely unaccountable judiciary.

The majority's review of the historical record thus explains why the power to try impeachments properly resides with the Senate. It does not explain, however, the sweeping statement that the judiciary was "not chosen to have any role in impeachments."[1] *Ante,* at 9. Not a single word in the historical materials cited by the majority addresses judicial review of the Impeachment Trial Clause. And a glance at the arguments surrounding the Impeachment Clauses negates the majority's attempt to infer nonjusticiability from the Framers' arguments in support of the Senate's power to try impeachments.

What the relevant history mainly reveals is deep ambivalence among many of the Framers over the very institution of impeachment, which, by its nature, is not easily reconciled with our system of checks and balances. As they clearly recognized, the branch of the Federal Government which is possessed of the authority to try impeachments, by having final say over the membership of each branch, holds a

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[1]This latter contention is belied by the Impeachment Trial Clause itself, which designates the Chief Justice to preside over impeachment trials of the President.

potentially unanswerable power over the others. In addition, that branch, insofar as it is called upon to try not only members of other branches, but also its own, will have the advantage of being the judge of its own members' causes.

It is no surprise, then, that the question of impeachment greatly vexed the Framers. The pages of the Convention debates reveal diverse plans for resolving this exceedingly difficult issue. See P. Hoffer & N. Hull, Impeachment in America, 1635–1805, pp. 97–106 (1984) (discussing various proposals). Both before and during the convention, Madison maintained that the judiciary ought to try impeachments. *Id.*, at 74, 98, 100. Shortly thereafter, however, he devised a quite complicated scheme that involved the participation of each branch. *Id.*, at 74–75. Jefferson likewise had attempted to develop an interbranch system for impeachment trials in Virginia. *Id.*, at 71–72. Even Hamilton's eloquent defense of the scheme adopted by the Constitution was based on a pragmatic decision to further the cause of ratification rather than a strong belief in the superiority of a scheme vesting the Senate with the sole power to try impeachments. While at the Convention, Hamilton advocated that impeachment trials be conducted by a court made up of state court judges. 1 Records of the Federal Convention of 1787, pp. 292–293 (M. Farrand ed. 1966). Four months after publishing the Federalist Nos. 65 and 66, however, he urged the New York Ratifying Convention to amend the Clause he had so ably defended to have the Senate, the Supreme Court, and judges from each state jointly try impeachments. 5 The Papers of Alexander Hamilton 167–168 (H. Syrett ed. 1962).

The historical evidence reveals above all else that the Framers were deeply concerned about placing in any branch the "awful discretion, which a court of impeachments must necessarily have." The

Federalist No. 65, p. 441 (J. Cooke ed. 1961). Viewed against this history, the discord between the majority's position and the basic principles of checks and balances underlying the Constitution's separation of powers is clear. In essence, the majority suggests that the Framers' conferred upon Congress a potential tool of legislative dominance yet at the same time rendered Congress' exercise of that power one of the very few areas of legislative authority immune from any judicial review. While the majority rejects petitioner's justiciability argument as espousing a view "inconsistent with the Framers' insistence that our system be one of checks and balances," *ante*, at 10, it is the Court's finding of nonjusticiability that truly upsets the Framers' careful design. In a truly balanced system, impeachments tried by the Senate would serve as a means of controlling the largely unaccountable judiciary, even as judicial review would ensure that the Senate adhered to a minimal set of procedural standards in conducting impeachment trials.

The majority also contends that the term "try" does not present a judicially manageable standard. It notes that in 1787, as today, the word "try" may refer to an inquiry in the nature of a judicial proceeding, or, more generally, to experimentation or investigation. In light of the term's multiple senses, the Court finds itself unable to conclude that the Framers used the word "try" as "an implied limitation on the method by which the Senate might proceed in trying impeachments." *Ante*, at 5. Also according to the majority, comparison to the other more specific requirements listed in the Impeachment Trial Clause — that the senators must proceed under oath and vote by two-thirds to convict, and that the Chief Justice must preside over an impeachment trial of the President — indicates that the word "try" was not

meant by the Framers to constitute a limitation on the Senate's conduct and further reveals the term's unmanageability.

It is apparently on this basis that the majority distinguishes *Powell* v. *McCormack*, 395 U. S. 486 (1969). In *Powell*, the House of Representatives argued that the grant to Congress of the power to "Judge" the qualifications of its members in Art. I, §5 precluded the Court from reviewing the House's decision that Powell was not fit for membership. We held to the contrary, noting that, although the Constitution leaves the power to "Judge" in the hands of Congress, it also enumerates, in Art. I, §2, the "qualifications" whose presence or absence Congress must adjudge. It is precisely the business of the courts, we concluded, to determine the nature and extent of these constitutionally-specified qualifications. *Id.*, at 522. The majority finds this case different from *Powell* only on the grounds that, whereas the qualifications of Art. I, §2 are readily susceptible to judicial interpretation, the term "try" does not provide an "identifiable textual limit on the authority which is committed to the Senate." *Ante*, at 14.

This argument comes in two variants. The first, which asserts that one simply cannot ascertain the sense of "try" which the Framers employed and hence cannot undertake judicial review, is clearly untenable. To begin with, one would intuitively expect that, in defining the power of a political body to conduct an inquiry into official wrongdoing, the Framers used "try" in its legal sense. That intuition is borne out by reflection on the alternatives. The third clause of Art. I, §3 cannot seriously be read to mean that the Senate shall "attempt" or "experiment with" impeachments. It is equally implausible to say that the Senate is charged with "investigating" impeachments given that this description would substantially overlap with the House of

Representatives' "sole" power to draw up articles of impeachment. Art. I, §2, cl. 5. That these alternatives are not realistic possibilities is finally evidenced by the use of "tried" in the third sentence of the Impeachment Trial Clause ("[w]hen the President of the United States is tried . . ."), and by Art. III, §2, cl. 3 ("[t]he Trial of all Crimes, except in Cases of Impeachment . . .").

The other variant of the majority position focuses not on which sense of "try" is employed in the Impeachment Trial Clause, but on whether the legal sense of that term creates a judicially manageable standard. The majority concludes that the term provides no "identifiable textual limit." Yet, as the Government itself conceded at oral argument, the term "try" is hardly so elusive as the majority would have it. See Tr. of Oral Arg. 51–52. Were the Senate, for example, to adopt the practice of automatically entering a judgment of conviction whenever articles of impeachment were delivered from the House, it is quite clear that the Senate will have failed to "try" impeachments.[2] See, *id.*, at 52. Indeed in this respect, "try" presents no greater, and perhaps fewer, interpretive difficulties than some other constitutional standards that have been found amenable to familiar techniques of judicial construction, including, for example, "Commerce . . . among the several States," Art. I, §8, cl. 3, and "due process of law." Amdt. 5; see *Gibbons* v. *Ogden*, 9 Wheat. 1, 189 (1824) ("The subject to be regulated is

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[2]It is not a sufficient rejoinder to this example to say, with one of the Court of Appeals judges below, that it postulates a "monstrous hypothetical abuse." See 290 U. S. App. D. C. 420, 427, 938 F. 2d 239, 246 (1991). The unlikelihood of the example being realized does not undermine the point that "try" has a definable meaning and thus ought to be regarded as judicially manageable.

commerce; and our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word"); *Mathews* v. *Eldridge*, 424 U. S. 319, 334 (1976) ("`"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances'") (quoting *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961)).[3]

The majority's conclusion that "try" is incapable of meaningful judicial construction is not without irony. One might think that if any class of concepts would fall within the definitional abilities of the judiciary, it

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[3]The majority's *in terrorem* argument against justiciability — that judicial review of impeachments might cause national disruption and that the courts would be unable to fashion effective relief — merits only brief attention. In the typical instance, court review of impeachments would no more render the political system dysfunctional than has this litigation. Moreover, the same capacity for disruption was noted and rejected as a basis for not hearing *Powell*. *Powell* v. *McCormack,* 395 U. S. 486, 549 (1969). The relief granted for unconstitutional impeachment trials would presumably be similar to the relief granted to other unfairly tried public employee-litigants. Finally, as applied to the special case of the President, the majority's argument merely points out that, were the Senate to convict the President without any kind of a trial, a constitutional crisis might well result. It hardly follows that the Court ought to refrain from upholding the Constitution in all impeachment cases. Nor does it follow that, in cases of Presidential impeachment, the Justices ought to abandon their Constitutional responsibilities because the Senate has precipitated a crisis.

would be that class having to do with procedural justice. Examination of the remaining question — whether proceedings in accordance with Senate Rule XI are compatible with the Impeachment Trial Clause — confirms this intuition.

Petitioner bears the rather substantial burden of demonstrating that, simply by employing the word "try," the Constitution prohibits the Senate from relying on a fact-finding committee. It is clear that the Framers were familiar with English impeachment practice and with that of the States employing a variant of the English model at the time of the Constitutional Convention. Hence there is little doubt that the term "try" as used in Art. I, §3, cl. 6 meant that the Senate should conduct its proceedings in a manner somewhat resembling a judicial proceeding. Indeed, it is safe to assume that Senate trials were to follow the practice in England and the States, which contemplated a formal hearing on the charges, at which the accused would be represented by counsel, evidence would be presented, and the accused would have the opportunity to be heard.

Petitioner argues, however, that because committees were not used in state impeachment trials prior to the Convention, the word "try" cannot be interpreted to permit their use. It is, however, a substantial leap to infer from the absence of a particular device of parliamentary procedure that its use has been forever barred by the Constitution. And there is textual and historical evidence that undermines the inference sought to be drawn in this case.

The fact that Art. III, §2, cl. 3 specifically exempts impeachment trials from the jury requirement provides some evidence that the Framers were anxious not to have additional specific procedural requirements read into the term "try." Contemporaneous commentary further supports this view. Hamilton, for example, stressed that a trial by

so large a body as the Senate (which at the time promised to boast 26 members) necessitated that the proceedings not "be tied down to . . . strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges . . . ." The Federalist No. 65, p. 441 (J. Cooke ed. 1961). In his extensive analysis of the Impeachment Trial Clause, Justice Story offered a nearly identical analysis, which is worth quoting at length.

> "[I]t is obvious, that the strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments; the rigid manner, in which the discretion of judges is limited, and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents; and the adherence to technical principles, which, perhaps, distinguishes this branch of the law, more than any other, are all ill adapted to the trial of political offences, in the broad course of impeachments. And it has been observed with great propriety, that a tribunal of a liberal and comprehensive character, confined, as little as possible, to strict forms, enabled to continue its session as long as the nature of the law may require, qualified to view the charge in all its bearings and dependencies, and to appropriate on sound principles of public policy the defence of the accused, seems indispensable to the value of the trial. The history of impeachments, both in England and America, justifies the remark. There is little technical in the mode of proceeding; the charges are sufficiently clear, and yet in a general form; there are few exceptions, which arise in the application of the evidence, which grow out of mere technical rules and quibbles. And it has repeatedly been seen, that the functions have been better understood, and more liberally and justly expounded by

statesmen, then by mere lawyers." 1 J. Story, Commentaries on the Constitution of the United States §765, p. 532 (3d ed. 1858).

It is also noteworthy that the delegation of fact-finding by judicial and quasi-judicial bodies was hardly unknown to the Framers. Jefferson, at least, was aware that the House of Lords sometimes delegated fact-finding in impeachment trials to committees and recommended use of the same to the Senate. T. Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States §LIII (2d ed. 1812) ("The practice is to swear the witnesses in open House, and then examine them there: or a committee may be named, who shall examine them in committee . . ."), reprinted in Jefferson's Parliamentary Writings, The Papers of Thomas Jefferson, Second Series 424 (W. Howell ed. 1988). The States also had on occasion employed legislative committees to investigate whether to draw up articles of impeachment. See Hoffer & Hull, at 29, 33. More generally, in colonial governments and state legislatures, contemnors appeared before committees to answer the charges against them. See *Groppi* v. *Leslie*, 404 U. S. 496, 501 (1972). Federal courts likewise had appointed special masters and other fact finders "[f]rom the commencement of our Government." *Ex parte Peterson*, 253 U. S. 300, 312 (1920). Particularly in light of the Constitution's grant to each House of the power to "determine the Rules of its Proceedings," see Art. I, §5, cl. 2, the existence of legislative and judicial delegation strongly suggests that the Impeachment Trial Clause was not designed to prevent employment of a factfinding committee.

In short, textual and historical evidence reveals that the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures. Without identifying the exact contours of these procedures, it is sufficient to say

that the Senate's use of a factfinding committee under Rule XI is entirely compatible with the Constitution's command that the Senate "try all impeachments." Petitioner's challenge to his conviction must therefore fail.

Petitioner has not asked the Court to conduct his impeachment trial; he has asked instead that it determine whether his impeachment was tried by the Senate. The majority refuses to reach this determination out of a laudable desire to respect the authority of the legislature. Regrettably, this concern is manifested in a manner that does needless violence to the Constitution.[4] The deference that is

[4]Although our views might well produce identical results in most cases, the same objection may be raised against the prudential version of political question doctrine presented by JUSTICE SOUTER. According to the prudential view, judicial determination of whether the Senate has conducted an impeachment trial would interfere unacceptably with the Senate's work and should be avoided except where necessitated by the threat of grave harm to the constitutional order. As articulated, this position is missing its premise: no explanation is offered as to why it would show disrespect or cause disruption or embarrassment to review the action of the Senate in this case as opposed to, say, the enactment of legislation under the Commerce Clause. The Constitution requires the courts to determine the validity of statutes passed by Congress when they are challenged, even though such laws are passed with the firm belief that they are constitutional. The exercise of judicial review of this kind, with all of its attendant risk of interference and disrespect, is not conditioned upon a showing in each case that without it the Republic would be at risk. Some account is

owed can be found in the Constitution itself, which provides the Senate ample discretion to determine how best to try impeachments.

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therefore needed as to why prudence does not counsel against judicial review in the typical case, yet does so in this case.

In any event, the prudential view cannot achieve its stated purpose. The judgment it wishes to avoid — and the attendant disrespect and embarrassment — will inevitably be cast because the courts still will be required to distinguish cases on their merits. JUSTICE SOUTER states that the Court ought not to entertain petitioner's constitutional claim because "[i]t seems fair to conclude," *post*, at 2, that the Senate tried him. In other words, on the basis of a preliminary determination that the Senate has acted within the "broad boundaries" of the Impeachment Trial Clause, it is concluded that we must refrain from making that determination. At best, this approach offers only the illusion of deference and respect by substituting impressionistic assessment for constitutional analysis.