

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WALTER L. NIXON, Petitioner v. UNITED STATES

CASE NO: 91-740

PLACE: Washington, D.C.

DATE: October 14, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WALTER L. NIXON, :

4 Petitioner :

5 v. : No. 91-740

6 UNITED STATES :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, October 14, 1992

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 DAVID O. STEWART, ESQ., Washington, D.C.; on behalf of the
15 Petitioner.

16 KENNETH W. STARR, ESQ., Solicitor General, Department of
17 Justice, Washington, D.C.; on behalf of the
18 Respondent.

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C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	DAVID O. STEWART, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	KENNETH W. STARR, ESQ.	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF	
9	DAVID O. STEWART, ESQ.	
10	On behalf of the Petitioner	52
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 91-740, Walter L. Nixon v.
5 the United States. Mr. Stewart.

6 ORAL ARGUMENT OF DAVID O. STEWART

7 ON BEHALF OF THE PETITIONER

8 MR. STEWART: Mr. Chief Justice, and may it
9 please the Court:

10 We challenge in this case Senate Impeachment
11 Rule XI, under which the Senate failed to conduct the
12 impeachment trial of Walter Nixon when it removed him as
13 Chief Judge of the United States District Court for the
14 Southern District of Mississippi.

15 The constitutional requirement of a Senate
16 impeachment trial means that the accused must have the
17 opportunity to present his case, to present witnesses and
18 to confront witnesses against him before the duly convened
19 Senate, which requires the presence of a quorum of the
20 Senators.

21 Under Impeachment Rule XI, however, the trial
22 occurred in this case only before a committee of 12
23 Senators which required a quorum of only 7.

24 The impeachment trial requirement is important,
25 because it ensures to the greatest extent possible --

1 QUESTION: -- I suppose when you call it a trial
2 before 12 Senators.

3 MR. STEWART: Well, Your Honor, we do think that
4 the proceeding that anyone comfortable with judicial
5 proceedings would identify as the trial did in fact occur
6 before the committee, and indeed, if you look at Rule
7 11 --

8 QUESTION: Well, that's what the case is all
9 about, I suppose.

10 MR. STEWART: It is indeed.

11 QUESTION: Yes, all right.

12 MR. STEWART: The Impeachment Trial Clause
13 ensures that the Senate will approach the cases and
14 exercise its ultimate power to remove executive and
15 judicial officers with great care and deliberation.

16 QUESTION: Well, Mr. Stewart, you refer to it as
17 the Impeachment Trial Clause. It says the Senate shall
18 have the sole power to try all impeachment -- you might
19 just as well refer to it as the sole power clause.

20 MR. STEWART: Well, Your Honor, that certainly
21 has been the position of respondents, that that is the
22 only -- that word sole is the only relevant word in the
23 passage, and that word cuts off all review by the courts,
24 but I think that that reading of that word hangs such a
25 tremendous amount on that word that it's really not

1 defensible.

2 QUESTION: Well, I -- you know, certainly that
3 would be a fairly partial way to refer to it. I think to
4 call it the Impeachment Trial Clause is an equally partial
5 way to refer to it. You're entitled to do it, certainly.

6 MR. STEWART: I'm not trying to be partial here,
7 Your Honor, I am simply trying to demonstrate -- to
8 describe it -- it does seem to describe an impeachment
9 trial.

10 QUESTION: You can be partial. The other side's
11 going to be partial, too. That's the system we have here.

12 MR. STEWART: Fair enough.

13 QUESTION: It's all right.

14 (Laughter.)

15 MR. STEWART: But there are several elements
16 that the trial and other elements of the Constitution
17 require a limited -- that limit the power of the Senate in
18 conducting these impeachments. The Framers insisted that
19 removal, the exercise of this ultimate power, can only be
20 when there's proof of an offense -- a high crime or
21 misdemeanor, treason, or bribery -- and a conviction must
22 be based, in the words of the Federalist Papers, on a real
23 demonstration of innocence or guilt.

24 Another element by which they tried to control
25 the impeachment and removal power was by providing a two-

1 thirds majority had to be present, and another element we
2 think is very important here and brings us here today is
3 that the Senate must conduct the impeachment trial acting
4 in judicial character as a court.

5 QUESTION: Well, Mr. Stewart, do you think the
6 high crimes and misdemeanors language is such that the
7 interpretation by this Court could supersede that of the
8 Senate? In other words, supposing your client were in a
9 position where he had been removed from office but instead
10 of claiming that the trial requirement that you see there
11 had not been met, he said he was not guilty of anything
12 that could be called a high crime or misdemeanor.

13 MR. STEWART: Yes, Your Honor, I think that
14 could be reviewable, and that the Court has to face up to
15 that. It's not presented here, of course, but yes, we do
16 think that would be reviewable here, and maybe it would be
17 useful for me to address directly the question of sole
18 power and the question of reviewability, which we think
19 really the respondents have hung so much on.

20 An ordinary reading of the clause -- the Senate
21 shall have the sole power to try impeachments -- sole
22 would simply describe the fact that the Senate has the
23 power to try the case, and no other forum has the power to
24 try the case, and that --

25 QUESTION: What would the language have meant,

1 in your view, if the word sole were not there, if it
2 simply said the Senate shall have the power to try all
3 impeachments?

4 MR. STEWART: Well, of course, that's the way
5 the clause was written as it was initially approved, and
6 it was only in the Committee of Style that the word sole
7 was adopted. It means that the Senate has the power to
8 determine trial procedures.

9 Admission of evidence, there are lots of
10 elements of a Senate trial that do not resemble a court
11 trial. For example, there's no standard of proof. The
12 Senate has refused to have a standard of proof, and we
13 don't think that would be reviewable, but what does remain
14 reviewable is whether there was a trial at all.

15 QUESTION: Well, would it be reviewable, in your
16 view, if a quorum was not present at all times, and could
17 a Senator vote ultimately who had not heard all of the
18 evidence, in your view? I mean, what are you getting --
19 asking the Court to get into?

20 MR. STEWART: Your Honor, those are two
21 different questions, I think, and let me try to answer
22 them separately.

23 The question whether a Senator could vote
24 without having heard all the evidence, my answer to that
25 is yes. All that's required is that there be a quorum

1 present, and that by definition means you could have as
2 many as 49 Senators not present and those Senators might
3 well vote. Many Senators in the past have asked to be
4 excused from voting if they didn't hear the evidence, but
5 there's no constitutional issue presented.

6 Your initial question, though, was is there a
7 problem if there as not a quorum present, and my answer to
8 that, I think, has to be yes, that that would be the
9 Senate was not duly constituted. If it is in the record
10 that the Senate was not duly constituted and the Senate
11 recklessly went ahead with the trial anyway over the
12 objection of the accused, that would in fact be
13 reviewable. There you would have no trial actually being
14 held before the Senate.

15 QUESTION: But you think it is a trial if people
16 who haven't been present at the proceedings come in and
17 vote. You consider that a trial.

18 MR. STEWART: It is a Senate trial as provided
19 in the Constitution, yes. A Senate trial is --

20 QUESTION: I don't know how you're drawing the
21 line between the one and the other.

22 MR. STEWART: If you look at --

23 QUESTION: I thought a trial means you present
24 evidence before someone who then decides, the person to
25 whom the evidence has been presented. You say that's not

1 what a trial is.

2 MR. STEWART: I have no problem with the
3 proposition that the Framers intended all Senators to be
4 present, but what they provided in the text of the
5 Constitution is that the Senate can conduct its business
6 with a quorum present. If the Senate is then in that
7 Impeachment Trial Clause to try the case, then it need
8 only have a quorum present.

9 QUESTION: You say a quorum present during the
10 trial, right?

11 MR. STEWART: Yes, sir.

12 QUESTION: But it can be a different -- your
13 point is, it can be a different quorum.

14 MR. STEWART: Yes, sir.

15 QUESTION: One portion of the Senate can hear
16 the evidence, and another portion vote, and that's a
17 trial.

18 MR. STEWART: Surely undesirable from a point of
19 citizenship --

20 QUESTION: I know it's undesirable. I don't
21 think it's a trial.

22 MR. STEWART: But yes. Yes.

23 QUESTION: What about this Court, if we exercise
24 original jurisdiction and appoint a master, and we don't
25 all sit there and hear the evidence. Have we conducted a

1 trial that fails to meet the Constitution?

2 MR. STEWART: Those proceedings do not resemble
3 an impeachment proceeding to the extent that they involve
4 stripping an individual of rights. In that kind of case
5 there is a statutory provision --

6 QUESTION: Oh, well, I think they could involve
7 a great many rights -- water rights, or one thing and
8 another -- that are terribly important.

9 MR. STEWART: But there is no provision in the
10 Constitution that provides that the trial must be before
11 this Court in those cases. The only provision that would
12 be applicable, I think, would be the Seventh Amendment
13 which might well, when you had an individual present,
14 provide a right to a jury, and indeed there is a statute
15 that provides for a jury trial right in those
16 circumstances in this Court. Of course, it hasn't been
17 used for many years, but there is that right.

18 QUESTION: What would you do if the Senate did
19 not allow the accused official to face and confront the
20 witnesses against him?

21 MR. STEWART: Your Honor, I'm not sure I
22 completely understand the question. If the --

23 QUESTION: Well, the Senate says you can't
24 cross-examine any of the witnesses against you.

25 MR. STEWART: Your Honor, I think that would

1 be --

2 QUESTION: And you can't be in the room when
3 they're testifying.

4 MR. STEWART: To answer the first question, you
5 can't cross-examine the witnesses, we state that the
6 irreducible requirement of the trial is the opportunity to
7 present your case, present your witnesses, and confront
8 the witnesses against you, so there would be a right of
9 cross-examination, and you could pose that hypothetical
10 where there is no right of cross-examination, and I would
11 say that is not a trial, but if the issue were one of the
12 scope of cross-examination, that would be one confined to
13 the discretion of the Senate.

14 QUESTION: What is the standard? If you can
15 refer to a word in the Constitution to resolve the issue,
16 then we have jurisdiction, is that about the way it goes?

17 MR. STEWART: There has to be a specific
18 requirement in the Constitution, and I draw this from
19 Baker and Carr and also from Powell v. McCormack.

20 If there is a specific requirement like the two-
21 thirds majority vote, like the requirement that the House
22 impeach officers before they face trial in the Senate, if
23 there is that specific requirement, then that is a
24 justiciable question, and that's one that the courts have
25 to decide.

1 QUESTION: Mr. Stewart, in both the trial of
2 Samuel Chase and the trial of Andrew Johnson there was a
3 great deal of motion being made and demands made for
4 continuance on the part of the defendants, and the Senate
5 insisted in both cases that they be brought to trial much
6 more rapidly than would be conceivable in an ordinary
7 criminal case. You know, they were given something like
8 10 days to prepare.

9 Is that something that would be reviewable as an
10 incident of a trial if the claim were made that we simply
11 did not have a fair opportunity to prepare?

12 MR. STEWART: No, sir, and in those instances as
13 I recall the case was extended for a substantial period of
14 time and there certainly was an opportunity to prepare,
15 but no, I do not think that would be reviewable.

16 QUESTION: Well, would you say that if you're
17 going to be divested of the office of associate justice or
18 of President that 10 days was sufficient to prepare?

19 MR. STEWART: No, I would not, an interestingly,
20 I think the Framers imposing the Trial Clause were very
21 wise to impose the Trial Clause, because when you're
22 dealing with the chief justice or a justice of the Supreme
23 Court or the President, there is a political attention to
24 this which I think will slow down the process in most
25 instances.

1 You point out instances where it didn't, but in
2 fact there were partisans for those individuals who
3 attempted to support them and defend their rights. When
4 you're dealing with a lower court judge you don't have
5 those protections.

6 QUESTION: So you would read the Trial Clause
7 differently if you're dealing with a lower court judge
8 than if you're dealing with some highly visible official?

9 MR. STEWART: I don't mean to say that, Your
10 Honor, no. What I mean to say is, it simply highlights
11 the importance of the trial when you're dealing with a
12 lower court judge.

13 QUESTION: You rest your argument on the
14 assumption that the meaning of the word trial is clear.
15 Would your position be the same if we conclude that the
16 meaning of the word trial in this context is ambiguous?

17 MR. STEWART: Your Honor, I think to rule in our
18 favor the Court has to conclude that the word try does
19 have meaning and the meaning is as we say that there is an
20 irreducible requirement of an opportunity to present your
21 case and confront your case, and that meaning I don't
22 think is so elusive when you compare the impeachment
23 clause to other clauses of the Constitution creating
24 powers for the Senate -- for example, the power to be the
25 judge of elections. That doesn't have any element of

1 confronting witnesses or presenting witnesses. That's
2 simply a requirement of a decision.

3 In this instance, though, try means something
4 else, and I think respondent's position, in order to rule
5 for them you really have to say that try is the same as be
6 the judge as, and when you look at the history, when the
7 first Senate, which included Framers, had to apply both of
8 these provisions when they were applying the Elections
9 Clause they had evidentiary proceedings before committees,
10 but when they were applying the Impeachment Clause, when
11 they were conducting impeachment trials they did those
12 before the Senate.

13 That was the common sense understanding of the
14 time, and I think that case casts an important light on
15 the question before the Court here.

16 QUESTION: All right, but if we should disagree
17 with you about the clarity of meaning, do I understand you
18 correctly to concede that the case should -- and we
19 conclude that the word is ambiguous, do I understand you
20 correctly to concede that the case should be decided just
21 as it would be as if we were dealing with an issue which
22 the Constitution did not expressly address in any way?

23 In other words, we would defer by a conclusion
24 of nonjusticiability to the Senate to make the
25 determination and leave it where it is.

1 MR. STEWART: Your Honor, I think we would lose.
2 I'm not exactly comfortable as to whether that is a
3 nonjusticiable question or simply we would lose on the
4 merits.

5 QUESTION: But that's the least of your
6 concerns.

7 MR. STEWART: Yes, sir.

8 QUESTION: Okay.

9 QUESTION: Is this part of your argument, that
10 the issue is justiciable?

11 MR. STEWART: Yes, it is, and I'd be happy to
12 address it, because it seems to me that justiciability, as
13 I was saying earlier, hangs so much on the word sole. A
14 reasonable reading of the word sole is that it means
15 simply that the Senate has the power to try the case and
16 no other forum does.

17 It's not that the word excludes judicial review.
18 If the Framers intended to exclude judicial review of
19 impeachments, why not do so? Why not say that the
20 judicial power shall extend to all cases arising under the
21 Constitution except impeachments? That's what they did in
22 the Pardon Clause. The Pardon Clause says that the
23 presidential power to pardon shall extend to all cases
24 except cases of impeachment.

25 Well, the Framers didn't do that, and that seems

1 very persuasive to us in two respects. First, they
2 clearly did not choose to exclude judicial review,
3 therefore the ordinary presumption of judicial review, the
4 power of this Court to say what the law is, applies, but
5 by the same token when they didn't accept this notion that
6 impeachment trial is this island, unreachable by any other
7 entity, that they recognized unless they excluded the
8 President from exercising pardon power, well then, he
9 would have the power to exercise -- to pardon individuals
10 who had been impeached and convicted.

11 QUESTION: Could the accused official waive the
12 right that you claim is his? Suppose an official says
13 this is very complicated testimony and I want Senators who
14 can focus on the testimony, and the Senate says we'll have
15 the evidence presented before a committee of 15 Senators,
16 and he wants that, can he do that and then refer the
17 matter to the whole Senate?

18 MR. STEWART: Absolutely. I think any
19 individual can waive a constitutional right, and I think
20 in fact --

21 QUESTION: But if you were a Senator I take it
22 you would stand up on the floor of the Senate and say I
23 must point out that this is an unconstitutional
24 proceeding.

25 MR. STEWART: If I were a Senator and I objected

1 to that because I wanted to hear the testimony, then I
2 would have the right to go listen to the testimony.

3 QUESTION: Well, I think you'd have the
4 obligation to tell your colleagues that they are
5 proceeding in an unconstitutional manner, wouldn't you?

6 MR. STEWART: You would have the -- you could do
7 so, but no, I don't think that that is proceeding in an
8 unconstitutional manner, because the right inheres in the
9 individual, and if the individual chooses to waive that
10 right, he certainly has the power to do so.

11 And indeed, when the Impeachment Rule XI was
12 adopted in 1935, the history of it clearly indicates that
13 the Senate -- many of the Senators, at least, thought that
14 this was a right only -- that could only be waived, and
15 that it could not be forced to have an impeachment accused
16 go to trial before a committee and not before the full
17 Senate. In the intervening 50 years before the next
18 impeachment, apparently that understanding was lost.

19 QUESTION: So you really are suggesting we treat
20 this case as though there hadn't been any trial at all in
21 terms of judiciability.

22 MR. STEWART: Yes, Your Honor. There was no
23 trial before the Senate. That is our view.

24 And indeed, when you look at what respondents
25 are saying when they have to present their position on the

1 merits of this claim, they propose an extraordinarily
2 artificial concept, that well, the trial happened before
3 the Senate even though all of the testimony and all of the
4 proceedings were before the committee, and that just
5 violates basic concepts of common sense, and its
6 untenable.

7 And even if you look at the text of Rule XI,
8 Rule XI speaks in terms of either the Senate conducting
9 the trial, the committee conducting the trial, or the
10 Senate shall conduct the entire trial itself. That's the
11 last words of the rule.

12 QUESTION: Well, when the Constitution gives
13 this Court original jurisdiction in certain matters --
14 those, for example, in which a State is a party, don't you
15 think that meant that the trial would be before us? Isn't
16 that what original jurisdiction meant to the Framers?

17 MR. STEWART: Your Honor, I'm not sure that I --
18 I think that's certainly a tenable view, but it is not the
19 use of the word try. It does not say that the Supreme
20 Court --

21 QUESTION: No, it doesn't use the word try, but
22 doesn't original jurisdiction contemplate that the trial
23 would be before the Supreme Court, and yet we do exactly
24 what you say can't be done in the Senate trial. That is,
25 have a master take the evidence.

1 MR. STEWART: I think it may well have been an
2 intent, but it is not expressed, and moreover there is no
3 right to assert except in the case of an individual, that
4 the States cannot assert a Seventh Amendment right to a
5 jury trial.

6 QUESTION: How about an ambassador?

7 MR. STEWART: I don't believe so.

8 QUESTION: An ambassador is not an individual,
9 then, in your view.

10 MR. STEWART: Your Honor, I would have to review
11 the Seventh Amendment again, but I don't think that is the
12 intent behind that provision.

13 Let me also comment, though, there is an
14 important problem also with respondent's position with
15 respect to this -- how you read the word try, whether
16 there is content in the word try, because if there is no
17 content in the word try, there is no stopping point to
18 their position.

19 Then it's okay to have the trial before a
20 committee. Then it's okay to have the trial before a
21 single Senator, or it's okay, as the Senate argued below,
22 to have simply a paper trial where you just introduce a
23 transcript and have the Senate vote, and that begins to
24 look very much like a proceeding that the framers
25 expressly rejected.

1 It was a very important event at the end of
2 the -- towards the end of the constitutional Convention,
3 when John Dickinson proposed that there be removal of
4 judges by address. It's an English proceeding which also
5 had been incorporated in a couple of State Constitutions.

6 In removal by address there is no requirement of
7 an accusation or that there be some claim of offenses, or
8 that there be a trial. It's simply a petition presented
9 to the legislature that this judge be removed, and when he
10 presented this proposal the delegates were very negative
11 about it.

12 Edmund Randolph of Virginia said that it would
13 weaken the independence of judges. James Wilson of
14 Pennsylvania protested that this would make judges subject
15 to every gust of fashion, so they clearly intended that
16 this be a true trial proceeding, and removal by address
17 was rejected, and I think once this Court adopts or
18 permits the Senate to adopt the short cut that has been
19 adopted here, there is no stopping point.

20 QUESTION: Well, that doesn't necessarily
21 follow. I mean, I can agree with you that the word trial
22 has to have some content, but I can disagree that we are
23 the ones to enforce it. I mean, can I believe it has
24 indeed a content but it's up to the Senate to assure that
25 that content has been faithfully complied with?

1 MR. STEWART: Your Honor, I think that comes
2 back to the question of is it the Senate's sole power to
3 decide what is the content, or is it this Court's power to
4 say what the law is, to construe the law, and I think an
5 impeachment, just as in questions of the viability of a
6 commission to be a magistrate of the District of Columbia,
7 this Court must exercise jurisdiction, just review the
8 question in the absence of anything that denies
9 jurisdiction or in the absence of any indication that
10 there are no judiciable standards to apply.

11 QUESTION: Well, you are running a slippery
12 slope kind of an argument -- if trial doesn't mean
13 anything, where does it end? The slippery slope goes down
14 the other side of the hill, too, doesn't it?

15 If we say that the trial does have a content,
16 then we have to begin to decide what other things are
17 connected with trial. There are all sorts of imaginable
18 things that trial ordinarily entails. Are we going to be
19 reviewing all of those?

20 MR. STEWART: No, Your Honor, I don't think so,
21 because we have attempted to provide the line we think
22 needs to be applied here, which is the trial is the
23 opportunity to present witnesses and to confront
24 witnesses. It is not --

25 QUESTION: And what if --

1 MR. STEWART: Excuse me.

2 QUESTION: What if there's a mistake made so
3 that one element is not there? Is the whole thing
4 automatically invalid, or is there some harmless error
5 concept?

6 MR. STEWART: I don't understand. A mistake --

7 QUESTION: You know harmless error.

8 MR. STEWART: The admission of hearsay --

9 QUESTION: Well, whatever. Let's assume at one
10 brief portion, when very unimportant evidence was being
11 presented, it dropped below a quorum. That invalidates
12 the whole proceeding, or is there a harmless error rule?

13 MR. STEWART: Your Honor, I think there has --

14 QUESTION: Now, if you say there's a harmless
15 error rule, I'm going to say, well then we have to
16 evaluate the weight of the evidence, don't we? So you
17 better not say that.

18 MR. STEWART: I wasn't going to say that.

19 (Laughter.)

20 QUESTION: So there's no harmless error rule at
21 all.

22 MR. STEWART: I appreciate being helped.

23 QUESTION: The slightest mistake, and the whole
24 thing goes out.

25 MR. STEWART: Well, that's like if there was a

1 two-thirds requirement and they're only one vote short of
2 two-thirds, does this Court say well, they were awful
3 close? I don't think so. I think you have to apply the
4 constitutional requirements that are there.

5 QUESTION: What about applying the confrontation
6 clause to the admission of hearsay -- you know, various
7 exceptions to the hearsay rule? Is that challengeable on
8 the grounds that the Senate improperly applied the hearsay
9 rule?

10 MR. STEWART: No, Your Honor, I do not think
11 that admissibility questions like that, whether -- one of
12 the impeachment trials in 1986 involved papers that
13 were -- the argument was that they were improperly seized.

14 QUESTION: But failure to allow cross-
15 examination is raisable in your view.

16 MR. STEWART: I think that is the irreducible
17 requirement, yes, sir.

18 QUESTION: What about an undue shortening of
19 cross-examination?

20 MR. STEWART: Your Honor, that is the point at
21 which you would have to have a court look at the question.
22 I think in almost all instances it would not be
23 reviewable, but you could pose a hypothetical where you're
24 given 30 seconds of cross-examination -- you could pose
25 that hypothetical to me and I would have to say that is

1 not a trial.

2 And I want to emphasize here that we really are
3 talking about very few provisions of the Impeachment Trial
4 Clause, or the impeachment clauses generally, that would
5 be reviewable: the two-thirds majority, the requirement
6 that the chief justice preside over presidential
7 impeachments, and the requirement of the trial.

8 QUESTION: The two-thirds majority, you would
9 have witnesses in the chamber who would -- I mean, is it
10 only what -- you said before, if it appears in the record
11 that there is not a -- why does it have to appear in the
12 record?

13 Couldn't you have witnesses come in with
14 affidavits saying I was there, and although nobody in the
15 Senate asked for a quorum call, there was not a quorum?
16 Wouldn't we have to accept that? Why does it have to be
17 in the record?

18 MR. STEWART: Well, no, I think there would be
19 certainly be an obligation on defense counsel to call to
20 the attention of the court -- the Senate --

21 QUESTION: Right.

22 MR. STEWART: As a court that there is the
23 absence of a quorum.

24 QUESTION: Yes, but the Senate ignores it. The
25 presiding officer --

1 MR. STEWART: If the Senate is so reckless as to
2 ignore it, and it is stated --

3 QUESTION: Then you'd come to us with your
4 affidavits and say there was not a quorum.

5 MR. STEWART: We state it on the record, yes,
6 sir.

7 QUESTION: And we're going to judge whether
8 there was a quorum in the Senate on the basis of
9 affidavits provided by your witnesses.

10 MR. STEWART: One of the virtues of the video
11 age we're in is that the Senate proceedings are now
12 televised. There would be wonderful evidence as to
13 whether there was a quorum present. But yes, if the
14 quorum clause is to be enforced, it would have to be
15 reviewed by the Court.

16 QUESTION: Well, actually, you don't come to us,
17 you come to the district court --

18 MR. STEWART: Yes, sir.

19 QUESTION: And then to the court of appeals, and
20 then to this Court, and in the case, say, of an
21 impeachment of the President, that could go on easily 2-
22 1/2 years, I should think, probably 3 --

23 MR. STEWART: Your Honor, that's --

24 QUESTION: And I think you ought to address the
25 argument that the Solicitor General makes that this would

1 put this Nation at grave risk in the event of an
2 impeachment of the President that was winding its way
3 through the courts on judicial review.

4 MR. STEWART: Your Honor, you pose a very
5 difficult question. Indeed, it would leave this Court
6 having to choose which constitutional crisis is more
7 desirable -- to have a President removed by
8 unconstitutional means, or to have a period of some
9 ambiguity, admittedly, while that's resolved by the Court.

10 It could be resolved with dispatch. The
11 Pentagon Papers case took, I believe, 19 days from
12 publication until the decision by this Court. It would
13 have to be resolved with dispatch. But if --

14 QUESTION: But it's not just the delay. It
15 means that judges, some of whom have been appointed by the
16 President who's being impeached will be involved in the
17 process and the integrity and the independence of the
18 court may come into question, which would cause severe
19 damage to the courts as an institution over time.

20 MR. STEWART: Your Honor, I think the most
21 pernicious effect on the Constitution and on the history
22 of this country would be if this Court would simply -- and
23 the courts in general simply avert their eyes from an
24 unconstitutional impeachment and surely an
25 unconstitutional impeachment --

1 QUESTION: Mr. Stewart, don't you think that
2 Framers who had enough foresight to provide for original
3 jurisdiction by this Court in cases involving ambassadors,
4 in cases involving the States, would also have had enough
5 foresight to provide for original jurisdiction by this
6 Court if they thought that the courts were being able to
7 review at least impeachments of the President? But it
8 doesn't appear in the Original Jurisdiction Clause.

9 This problem you've just been discussing with
10 Justice Kennedy is an obvious problem that anyone would
11 consider, wending its way up to the Supreme Court,
12 impeachment of the President. It would have been in the
13 original jurisdiction of this Court, wouldn't it?

14 MR. STEWART: Your Honor, I don't think so. I
15 think that it would involve the interpretation of a
16 constitutional provision as to which the ordinary
17 processes of judicial review would reasonably be applied,
18 and again, I would turn back to the Pardon Clause. The
19 failure to exclude judicial review seems to us extremely
20 articulate here and important for the construction of the
21 clause.

22 I would ask to reserve the balance of my time
23 for rebuttal.

24 QUESTION: Very well, Mr. Stewart. General
25 Starr, we'll hear from you.

1 ORAL ARGUMENT OF KENNETH W. STARR

2 ON BEHALF OF THE RESPONDENT

3 MR. STARR: Mr. Chief Justice, and may it please
4 the Court:

5 Rule XI of the United States Senate was adopted
6 in 1935. That rule permits but it does not require the
7 appointment of a committee for a limited function of
8 gathering evidence, and in crafting that rule the Senate
9 was responding to its own experience, because with the
10 growth in that body's responsibilities, at times evidence
11 was being presented before a virtually empty Senate
12 chamber.

13 In fashioning that rule, the Senate was
14 exercising a power that was entrusted to it by the
15 Constitution -- by Article 1, section 3, clause 6 -- which
16 vests sole power in the Senate to try all impeachments.

17 QUESTION: Are the committee hearings part of
18 the trial?

19 MR. STARR: Yes.

20 QUESTION: Then I take it if the President were
21 impeached and a committee was sitting the chief justice
22 would preside over the committee.

23 MR. STARR: It is very possible that that would
24 be the case, but I think --

25 QUESTION: Well, he would have to if it's part

1 of the trial, wouldn't he?

2 MR. STARR: I think that is quite arguably the
3 case, Justice Kennedy.

4 I do think, by the way, that the Senate would
5 see fit not to use that procedure with respect to the
6 impeachment of a President or a justice of this Court, and
7 again, I think it's important to know where did this rule
8 come from and why?

9 It was first suggested in 1904, based on
10 experience, a sense on the part of -- a felt sense on the
11 part of Senators, some of whom had served in the House of
12 Representatives, had been impeachment managers themselves,
13 and who were sharply critical of the way in which the
14 process was now working.

15 And certainly that has been of concern to the
16 Senate since, in 1985, we had the spectacle of a United
17 States district judge who had been duly convicted of a
18 crime, that conviction had been affirmed on appeal, and a
19 suggestion had been made by the Judicial Conference of the
20 United States that impeachment might be appropriate.

21 We have had, unfortunately, three impeachments
22 in recent years, and the Senate has been concerned,
23 therefore, about the orderliness of the proceedings and
24 yet the fairness of the proceedings.

25 QUESTION: But General Starr, when that rule was

1 adopted in 1904 according to your opponent here it was
2 contemplated that it would be voluntary on the part of the
3 person being impeached, and indeed, maybe many of them
4 would prefer to be tried by 12 Senators who were there
5 than by 100 who weren't, so one can see why that would
6 have some attraction.

7 MR. STARR: Justice Scalia, it's fair to say
8 that the Senate was not of one mind with respect to the
9 constitutionality of Rule XI. There were clearly some
10 Members of the Senate who thought this was improper, and I
11 think, by the way, that's one of the redeeming aspects of
12 this.

13 The Senate has taken this very seriously, has
14 examined the constitutional questions very seriously, and
15 it is true that, as Mr. Stewart has noted, that Senator
16 Ashurst, the chairman of the Judiciary Committee in 1935
17 expressed that view, that he contemplated that it would be
18 an optional procedure, but other Senators didn't agree
19 with that, and that certainly is not what the rule itself
20 contemplates.

21 It's the judgment of the Senate as to whether
22 it's appropriate or not, and particularly given here, in
23 the modern age, where -- and this was referred to by Mr.
24 Stewart -- we now live in the age where proceedings are
25 videotaped. These were videotaped. They were broadcast

1 live, and a full transcript of the proceedings was made
2 available to all of the Senate, and then -- this, I think,
3 in terms of what happened here, the argument has thus far
4 been at the level of the abstract. Let me, if I may, make
5 one very concrete point.

6 Judge Nixon appeared before the entire United
7 States Senate. He answered questions before the entire
8 United States Senate. He faced them as his judges. They
9 are not jurors. They are Senators who remain Members of
10 the United States Senate who take a constitutional oath
11 and who sit in judgment, and he and his able counsel
12 argued evidentiary points.

13 And at no point in those proceedings while their
14 option for a full trial was there -- there was no waiver
15 of that. I'm not suggesting this. But in terms of what
16 happened in these proceedings, not one word was mentioned
17 with respect to invoking that part of Rule XI which
18 permits the Senate to bring specific witnesses before
19 them. In fact, to the contrary.

20 One of the characters who appeared in this
21 unfortunate drama was a lawyer in Hattiesburg named
22 Carroll Ingram. In his closing argument, Mr. Stewart
23 said, look at the videotape of Carroll Ingram. you will
24 believe Carroll Ingram.

25 The Senate sat there with the quorum, with great

1 dignity, asking questions through written questions
2 promulgated by the presiding officer. Not once was the
3 United States Senate urged to bring a specific witness.

4 In fact, the argument presented to the United
5 States Senate in this case was, we want you to go through
6 this mountain of materials, and you will see so many
7 contradictions and testimony by various and sundry
8 witnesses that the case against Judge Nixon falls apart.

9 Let me come back to the theoretical point. The
10 theoretical point is what impeachment means. We don't
11 rest our submission on sole power to try. We think that
12 is indicative of the Framers' intent, but our submission
13 rests in part on the structure of the Constitution itself
14 and what impeachment means, as well as the fact that the
15 end result of impeachment of an officer of the executive
16 branch or an officer of the judiciary is a judgment.

17 And the Constitution by its terms contemplates,
18 says that the President, Vice President and all civil
19 officers shall be removed upon conviction. As Justice
20 Kennedy put it, how unthinkable it would be for the
21 conviction of a President of the United States to then be
22 subject to judicial review. The text itself contemplates
23 finality, but more than that, when we go back to the
24 framing we know that what was in the minds of the Framers
25 was a process of checking the civil officers of Government

1 outside the Article I branch.

2 QUESTION: Well, we could issue a stay pending
3 appeal, General Starr, I guess, right -- a stay or removal
4 pending appeal, or something like that?

5 MR. STARR: You have the raw power to do that,
6 but I don't think that it would be a constitutional act.

7 QUESTION: Who would we direct that to, the
8 Senate?

9 MR. STARR: It seems to me --

10 QUESTION: I assume the removal is automatic.
11 The Senate doesn't do the removal. It occurs by virtue of
12 the Constitution.

13 MR. STARR: I think that is right, because the
14 judgment is what removes. What happened here was, Judge
15 Nixon sued several individuals, but they carry on
16 administrative functions in this connection -- the
17 Secretary of State, the recipient of the document, and so
18 forth.

19 He has not asked for that sort of injunctive
20 relief, and so yes, I think while it is theoretically
21 possibly, it is unthinkable that the Court would actually
22 issue a stay of the --

23 QUESTION: I notice in the recent district court
24 there has been a district court judgment reversing an
25 impeachment of another judge --

1 MR. STARR: Precisely.

2 QUESTION: And the end of the judgment was that
3 the case is remanded to the Senate.

4 MR. STARR: That is correct. In that particular
5 instance, the district judge saw fit to stay his own
6 judgment. We think that was quite wise of the district
7 judge --

8 (Laughter.)

9 MR. STARR: But it does suggest that with a
10 large judiciary, not only, unfortunately, are impeachments
11 going to now happen with greater regularity than in our
12 first two centuries of existence -- we have about 800
13 Article III judges. Does this represent a threat to
14 judicial independence, the use of this committee
15 proceedings?

16 I say with all respect that no one who has made
17 a study -- and I've watched all the videotapes, I've
18 watched the entirety of the proceeding, and I don't think
19 that anyone who watches those proceedings will come away
20 with the sense at all that this proceeding represents a
21 threat to judicial independence.

22 QUESTION: May I ask, General Starr, do you
23 think the Senate or the House could have impeached a judge
24 and merely recited the fact that he had been convicted of
25 a crime and that was the ground of impeachment and then

1 the evidence of that be sufficient before the Senate to
2 remove him?

3 MR. STARR: Yes, I do --

4 QUESTION: So you think all of this was process
5 and may not have even been necessary.

6 MR. STARR: I think it was not necessary, but I
7 think, Justice Stevens, that clearly a majority of the
8 Senators did feel -- and I know Mr. Stewart's position is
9 that there is a constitutional right to a separate
10 proceeding that must involve a sense of what the evidence
11 was in the case, and that's the sober judgment of the
12 Senators.

13 And one of the points I would like to leave the
14 Court with today is that one of the reasons that the
15 Senate has been sober in its judgment is its sense that
16 this is it, this is the end of the road, this is our
17 judgment. They take that responsibility quite seriously.

18 QUESTION: -- you say the Senate would have the
19 power just to impeach based on a criminal conviction.

20 MR. STARR: To convict. If there are
21 articles -- we do agree that there must be articles of
22 impeachment presented, exhibited to the Senate, but once
23 that is done, yes, Justice White, they have the power to
24 do that, and some Members of the Senate have expressed the
25 view that no one should remain sitting on the Federal

1 bench who's been duly convicted of a felony.

2 Others have said, well, but look, Senator
3 Mathias in some reflections in the mid-1980's said there
4 are some strange felonies on the books. In Idaho, it is a
5 felony to poison a neighbor's cat. Perhaps that would not
6 be automatic -- but this was obviously a serious matter.

7 Judge Nixon feels that this entire proceeding
8 was wrong-headed, was vexatious, was unjust, but those
9 points were presented to the courts, were exhaustively
10 examined by the courts, and were exhaustively examined by
11 the House of Representatives, as reflected by the
12 statements of the floor manager, the impeachment manager,
13 Representatives Edwards, who said he was concerned about
14 possible Department of Justice misconduct. They examined
15 carefully whether there had been misconduct and found no
16 evidence of it. That was the same result found in a 2255
17 proceeding after a 2-day hearing in Jackson, Mississippi.

18 QUESTION: That may well be, General Starr. You
19 know, it was all very good in this case, but you're really
20 arguing before us that it really doesn't matter whether it
21 was very good or not.

22 MR. STARR: That's correct.

23 QUESTION: They could have impeached him for
24 poisoning a neighbor's cat --

25 MR. STARR: That is correct.

1 QUESTION: And called that a high crime and
2 misdemeanor and you'd say that's good enough for you --

3 MR. STARR: That's correct.

4 QUESTION: And there could have not been a
5 quorum present. If there was no quorum present, would we
6 be able to review it --

7 MR. STARR: We'd have to accept -- I think this
8 Court's decisions in Ballin and Field v. Clark say we
9 accept the records of the Senate. We do not impeach those
10 records --

11 QUESTION: Suppose it's clear on the records of
12 the Senate that there was not a quorum present?

13 MR. STARR: I think that the judgment still
14 stands. I think we are moving closer to the --

15 QUESTION: What if --

16 MR. STARR: Possible arena of Powell v.
17 McCormack.

18 QUESTION: What if the record shows that there
19 was not a vote of two-thirds of the Senate to convict?

20 MR. STARR: We think that as long as the records
21 themselves are being accepted, that it does seem to us
22 that we are in the arena of Powell v. McCormack at that
23 stage.

24 That was part of the insight of Powell, and
25 Powell's looking to the text but looking to more than

1 that, looking to the history of the text and to understand
2 the intent of the Framers, and that two-thirds majority
3 requirement is very important in the opinion of the
4 Framers for the very reason that this was to be a very
5 considerable check by the United States Senate on the
6 House of Representatives that might get carried away.

7 QUESTION: So in your view that might be
8 justiciable.

9 MR. STARR: Yes.

10 QUESTION: Is the claim before us today --
11 should we treat it as nonjusticiable, or just committed by
12 the text to the discretion of the Senate?

13 MR. STARR: The former because of the latter,
14 that the text itself, when we also contemplate the
15 structure of the Constitution and the purpose of
16 impeachment in our system of separated powers, that it
17 does satisfy, it seems to us, at a minimum two of the
18 criteria laid down by this Court in *Baker v. Carr*, a
19 textual commitment to the Senate.

20 Why do we say that? The reason we say that is
21 because the grant of the sole power to try in our judgment
22 carries with it the power to determine the procedures that
23 will be employed. That's a -- it's not expressed, I
24 concede that --

25 QUESTION: So you do want us to rule that the

1 question of the meaning of trial is textually committed to
2 the Senate.

3 MR. STARR: Yes.

4 QUESTION: You do want us to rule --

5 MR. STARR: Yes, we do, but even if -- and this
6 Court has struggled, as have we and others, with the
7 political question doctrine. I also commend to the
8 Court's careful attention Judge Randolph's concurring
9 opinion in which he says, political question doctrine
10 difficulties aside, Louis Hicken and all that, what I see
11 when I read the entire text is a commitment that as a
12 matter of constitutional interpretation there is no role
13 for the Court to play with respect to what procedures
14 should be employed.

15 QUESTION: That leaves open the two-thirds vote,
16 the quorum and all those other issues, for future
17 litigation, then.

18 MR. STARR: It does indeed. It seems to us that
19 when we look at the entirety, that full paragraph of
20 clause 6, there are three procedures that are enumerated.
21 A violation of one of those enumerated procedures brings
22 us, in our view, into the domain contemplated by this
23 Court in *Powell v. McCormack*.

24 We have not challenged *Powell v. McCormack*, so
25 if there is a violation of one of those procedures, it

1 seems to us that is a justiciable claim, but the claim
2 here is a very limited one. All of the evidence should
3 have been adduced, no matter how detailed, about -- Wiley
4 Fairchild's drinking habits and listening to Hank Williams
5 Sr. music should all be laid before the full Senate, day
6 after day after day.

7 That's the claim, and that, we think, is a
8 judgment that the Senate can take into account in
9 determining whether to employ Rule 11, but recall again,
10 Rule 11, not only is it not obligatory, but after the
11 committee has worked its will, the committee itself -- and
12 several members of the committee did, by the way.

13 Senator Heflin served on the committee, and when
14 the issue came, when Judge Nixon said, I want my motion
15 for a full trial heard before the United States Senate, it
16 was overwhelmingly rejected by the Senate, but several
17 Members of the committee voted in favor of that.

18 These are judgments, and judgments are going to
19 differ just as they do on this court, but it's a sober and
20 a solemn judgment, and one of the reasons is, is because
21 it is a final judgment. That's what --

22 QUESTION: I suppose that at least what the
23 Senate -- the procedure the Senate might adopt, I suppose
24 they would have to call it a trial, wouldn't they?

25 MR. STARR: It seems to me -- they might have to

1 call it a trial in one sense, but Justice White, here's
2 the reason I'm struggling with that. I think the word try
3 meant something different to the Framers. We've cited --

4 QUESTION: Well, whatever it meant, they have to
5 be able to -- they have to fit it within the word try.

6 MR. STARR: They have to fit it within the word
7 try.

8 Now, what did the Framers mean by try, and we
9 have given to the Court the 1755 Samuel Johnson
10 dictionary -- to examine or to examine as a judge -- and
11 just as this Court examines as a judge in original cases
12 by having a special master do, by the way, considerably
13 more, and you don't appoint one of your own members as the
14 special master, you have appointed either a retired judge
15 or even someone who has never exercised Article III powers
16 as a special master.

17 QUESTION: So if the Senate has a rule -- had a
18 rule that anyone who's been convicted, any Federal officer
19 who's been convicted of a felony, and the judgment is
20 final, we just automatically -- he is automatically
21 guilty. All it needs is to have the court record before
22 it, and the show is all over. Is that trying? I suppose
23 it is to you, as far as you're concerned.

24 MR. STARR: Because you use the word automatic,
25 it concerns me as to whether there, Justice White, is that

1 examination as a judge. The application -- and it does
2 seem to me -- and Mr. Stewart does have a point that there
3 must be an individualized judgment in an impeachment, and
4 if the Senate says we're so tired of all these impeachment
5 that here's our automatic rule. You're out if you've been
6 convicted of a felony, and we're not going to listen to
7 anything at all.

8 QUESTION: So if they did that, that in your
9 view would be judicially reviewable.

10 MR. STARR: It might be in terms of whether
11 there was an examination at all, whether the Senate was
12 examining as a judge, but it might be.

13 It is totally unthinkable -- and I don't think
14 that in any way takes away from the integrity of our
15 submission that the procedures, the specific procedures
16 that are going to be used in coming to judgment, as
17 opposed to an automatic rule that you are automatically
18 divested of office, but the procedures that are used in
19 coming to judgment we think has been textually entrusted
20 to the Senate, and for good reasons -- for the reasons of
21 finality as well as the structural.

22 QUESTION: And those procedures that you refer
23 to as having been entrusted to the Senate are in other
24 words those which are not necessarily implied by the word
25 trial itself.

1 MR. STARR: That's correct, because as we've
2 noted in our brief, Rufus King, one of the delegates who
3 also served on the Committee of Style, referred to the
4 President and members of the legislature being tried by
5 their electors --

6 QUESTION: What if we took --

7 MR. STARR: A judgment -- I'm sorry.

8 QUESTION: I'm sorry. What if we disagreed with
9 you on the 18th Century sense of trial which was
10 incorporated into the text? What if we concluded that in
11 fact trial did require the actual presence of the finders
12 of fact during the reception of all of the evidence and we
13 so defined the word try in the impeachment clause?

14 Would you then find -- would you then concede
15 that the failure to follow that procedure which was
16 implied by the very notion of trial was judiciable?

17 MR. STARR: If I concede that -- I'm sorry, I'm
18 not sure I follow the language.

19 QUESTION: Would you concede that we would have
20 a judiciable -- the courts would have a judiciable
21 controversy here if, 1) we concluded as a matter of law
22 the trial implied the reception of evidence directly by
23 the findings of fact?

24 MR. STARR: No. No, I'm sorry.

25 QUESTION: You would not concede that.

1 MR. STARR: I would not concede that, because it
2 seems to me that -- and now I'm going to be formalistic,
3 and that is I'm going to rely on the sole -- the grant of
4 that sole power to try, it seems to me, carries with it
5 the interpretive power to determine what the procedures
6 are going to be.

7 QUESTION: But --

8 MR. STARR: But -- sorry.

9 QUESTION: Why, then, don't you say the same
10 thing with respect to the interpretive power to determine
11 what is a two-third majority? Is it the difference
12 between an issue of law and an issue of fact that leads to
13 different answers?

14 MR. STARR: It seems to me that we are in two
15 structurally different domains. What we know of the
16 decision of the founding laws is that this was the body,
17 the numerous court that would hear --

18 QUESTION: Right.

19 MR. STARR: And sit in judgment.

20 QUESTION: Could I just short-circuit this,
21 maybe make this simpler --

22 MR. STARR: Yes.

23 QUESTION: Than I started out to make it. You
24 concede that if the Senate records showed that there was
25 less than a two-thirds majority, that there would in fact

1 be a justiciable issue on declaratory judgment.

2 MR. STARR: Yes.

3 QUESTION: Now, do you concede that because that
4 is an issue of fact which is easily resolved?

5 MR. STARR: No.

6 QUESTION: Why? Why do you concede that?

7 MR. STARR: No. The reason we concede that is
8 because of the structure as we understand the law to be,
9 and that is, under Powell v. McCormack, we look, as the
10 Court did -- may I say just a word about Powell?

11 Powell said, we have this term, qualifications.
12 What does that mean? The House of Representatives has
13 come up with its own view. We have difficulty with that,
14 Powell v. McCormack said, because we see that there's a
15 specific definition in the Constitution, and more than
16 that, we go to history and we understand that in terms of
17 democratic theory it was very important for that
18 definition in the text of the Constitution to be it. The
19 House could not go beyond that, beyond that text.

20 Here it seems to us that when we look at the
21 text as a whole the two-thirds requirement was viewed as
22 critically, pivotally important at the founding in terms
23 of protection of civil officers against abuse.

24 QUESTION: So it's a difference in emphasis,
25 then.

1 MR. STARR: It's the fact --

2 QUESTION: If, for example -- if I varied my
3 example and said trial not only means the -- not only
4 requires the presence of all the fact-finders but they had
5 said trial, parenthesis, at which of course all Members of
6 the Senate will be present, end paren, you would find
7 there had not been such a commitment to the Senate simply
8 by virtue of the emphasis on that requirement and the need
9 to enforce it somehow beyond the Senate itself.

10 MR. STARR: You're using the term emphasis, and
11 without trying to quibble, I'm trying to say, Justice
12 Souter, that I am emphasizing the fact that the text
13 itself specifically defines what the majority is. It's
14 not five-eighths, its two-thirds. The text answers that,
15 and Powell v. McCormack says this Court can and should
16 vindicate that.

17 The real analogy would be, therefore, if exactly
18 the hypothetical you posit existed in the text. Mr.
19 Stewart's difficulty is the text does not yield up an
20 answer to the question of what does it mean to try.

21 We have sought to divine its meaning by going
22 back to 18th Century materials, but the text doesn't yield
23 up the answer, and if the text itself doesn't yield up the
24 answer, there is more than one way to go about a trial,
25 thus, the use of special masters is a way to go about a

1 trial.

2 The use of United States magistrates is the way
3 to go about a trial. The Article III officer does not
4 necessarily have to be there for the taking of all
5 evidence, and by the way -- may I make this point? -- Mr.
6 Stewart found it very difficult, and I think he is finding
7 it difficult here today, to create this image, the perfect
8 set of a fact-finding body.

9 In his colloquy with Justice Scalia, he admitted
10 that they do not sit as jurors, as fact-finders in that
11 sense.

12 QUESTION: General Starr --

13 MR. STARR: Yes, I'm sorry.

14 QUESTION: Supposing that during an impeachment
15 trial of the Senate the chief justice dies, and the Senate
16 says well, there's by statute created the office of vice
17 chief justice. We're going to let him preside, because it
18 would just be catastrophic to wait for the appointment of
19 a chief justice while this impeachment is pending.

20 MR. STARR: This is the impeachment of the
21 President.

22 QUESTION: The impeachment of the President.
23 Can the Senate not do that because of the specific
24 language the chief justice shall preside? Would that
25 action by the Senate followed by the presiding by the vice

1 chief justice be judicially reviewable?

2 MR. STARR: It seems to me that under our theory
3 I have to admit that if the chief justice, whoever it be,
4 he or she, the acting chief justice is not in the Chair,
5 then that is judicially reviewable.

6 QUESTION: You have to admit --

7 QUESTION: General Starr, do you think this
8 question of reviewability is a front-end jurisdictional
9 question?

10 MR. STARR: I think it is a most appropriate
11 first question --

12 QUESTION: Well, I know, but --

13 MR. STARR: To answer, and yet --

14 QUESTION: Jurisdictional?

15 MR. STARR: I don't think it divests you of -- I
16 think you have jurisdiction, obviously, to decide that,
17 but the most --

18 QUESTION: So you think it would be proper to
19 say, well we assume judiciability without deciding it, but
20 we think the Senate clearly had the power to do what it
21 did.

22 MR. STARR: It seems to me that while you're not
23 drained of jurisdiction to do that, in terms of the
24 appropriateness of the exercise of the judicial power, if
25 in fact the matter has been entrusted to another branch,

1 then it seems to me that it is part of your duty to
2 resolve that question first as opposed to saying that is
3 such a difficult question, but it's actually easy for us
4 when we move to the merits to say this is a perfectly
5 sensible procedure.

6 I do think that it is the Court's obligation to
7 wrestle with the judiciability question as to whether it's
8 appropriate for you to examine the merits of what the
9 Senate did.

10 QUESTION: General Starr, if I understand your
11 theory, you're quite trial does not have a precise
12 content, but surely it has some content. I mean, there's
13 something that it's just not a trial. Let's say we refuse
14 to hear a whole bunch of relevant evidence because we're
15 too busy, we don't want to waste any more time. Now,
16 that's -- is that a trial?

17 MR. STARR: Yes. Yes.

18 QUESTION: What if you refuse to hear to hear
19 all evidence, you just don't let the defendant put on any
20 evidence at all. Is that a trial?

21 MR. STARR: Yes, it is, under --

22 QUESTION: What is not a trial, in your view?
23 Is there anything that is not a trial?

24 MR. STARR: I suggest a difficulty with the
25 automatic rule that we're not going to consider anything

1 at all because we have an automatic rule which we're going
2 to apply, because it does seem to me that the term try
3 means that you're coming to judgment, but yes, if you --

4 QUESTION: I think it's an artificial system
5 you're setting up when you say two-thirds has a meaning
6 and chief justice shall preside has a meaning, oath or
7 affirmation has a meaning, but trial has no meaning
8 whatever. I agree it doesn't have a precise meaning, but
9 it has some meaning.

10 MR. STARR: I think it does -- I'm sorry, in the
11 abstract, of course it has meaning, but who's going to
12 give content to the meaning in our view is the Senate.

13 QUESTION: At the margins. Everybody will agree
14 that a certain thing is not a trial. We refuse to hear
15 any evidence.

16 MR. STARR: But Justice Scalia, my point is
17 this. Even though you as a judge, as a justice, do not
18 agree with the Senate's definition, our point is it's
19 their power to decide, and even though you say, gee --

20 QUESTION: I may agree with that, but I would
21 say the same about the chief justice presiding, about the
22 two-thirds, and all the rest of it as well.

23 MR. STARR: Well, that's fine, if you want to
24 view that as nonjudicial, that's fine.

25 (Laughter.)

1 MR. STARR: We have not submitted -- we have not
2 in any way --

3 QUESTION: Well, I just don't see any logical
4 basis for drawing a line between the two.

5 MR. STARR: If I may say so with all respect,
6 that may be the difficulty that you're having with Powell
7 v. McCormack as opposed to our submission.

8 QUESTION: If you say -- if that's the operative
9 word that you say the Senate must construe, I take it then
10 you don't rely on sole power. Your argument would be the
11 same if it said the Senate shall try.

12 MR. STARR: Absolutely. Absolutely. It has
13 been entrusted to the Senate, for reasons that go beyond
14 the text and include the structure and the purpose of
15 impeachment.

16 QUESTION: So the House could impeach saying the
17 judge is a bad guy and the Senate could take a vote
18 without any trial or anything else and say -- they
19 unanimously say the judge is a bad guy.

20 MR. STARR: Justice White, my theory has to --
21 leads me to answer that question yes.

22 QUESTION: Yes.

23 MR. STARR: But will you permit me also to say
24 that will not happen, and we saw that, by the way, in
25 1986, when there was a hue and cry by virtue of the

1 removal, means he is no longer President, but there is an
2 opportunity for that to be remedied in the courts, and it
3 does create unwarranted and unhappy ambiguity, but the
4 Twenty-fifth Amendment contemplates that in the case of
5 presidential incapacity.

6 There's weeks when the Congress can review that
7 issue. That ambiguity will proceed. We don't embrace it,
8 we would lament it, but neither can the Court shrink from
9 deciding the constitutional issue that would be presented.

10 Finally, I would say that it is --

11 QUESTION: Mr. Stewart, I suppose after these
12 arguments are over the nine of us could go in the back
13 room and just flip a coin or draw straws as to how the
14 decision should come out and it would be promulgated.
15 That would be wrong. It would be unconstitutional. Who
16 would reverse us for that?

17 (Laughter.)

18 MR. STEWART: That is not reversible, Your
19 Honor.

20 QUESTION: It is not reversible. So it is
21 theoretically possible that a branch of Government may do
22 something that is wrong, that is even unconstitutional,
23 but that just can't be reversed.

24 MR. STEWART: And of course, Your Honor, we're
25 not saying that the Senator's reasons for voting are

1 removal, means he is no longer President, but there is an
2 opportunity for that to be remedied in the courts, and it
3 does create unwarranted and unhappy ambiguity, but the
4 Twenty-fifth Amendment contemplates that in the case of
5 presidential incapacity.

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19 Honor.

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21 theoretically possible that a branch of Government may do
22 something that is wrong, that is even unconstitutional,
23 but that just can't be reversed.

24 MR. STEWART: And of course, Your Honor, we're
25 not saying that the Senator's reasons for voting are

1 subject to review by this Court. If the Senator is voting
2 to impeach a female judge because she's a woman and that
3 Senator doesn't think women should be on the bench, well
4 of course, that's not reviewable.

5 QUESTION: But you're saying they can't draw
6 straws or flip a coin, but we can.

7 MR. STEWART: We are not going to the decision.
8 They can reach their decision how they want, but they have
9 to have a trial. That's what the Framers wanted.

10 They knew -- they were familiar with the caprice
11 of human nature and they were familiar with capricious
12 legislatures and they knew they couldn't control them, but
13 what they did provide was that there had to be a trial and
14 a procedure that would lead to a real demonstration of
15 guilt or innocence and hope to lead them to be responsible
16 legislators.

17 QUESTION: The issue is somebody has to be
18 trusted as the last word, isn't that the simple issue? Is
19 it going to be this Court, which may flip a coin -- we can
20 act unconstitutionally, just as the Senate can. The only
21 issue is, who is going to have the last word and be
22 unreviewable, and you say it must be us, and the other
23 side says it must be the Senate in impeachment.

24 MR. STEWART: If I may answer the question --

25 QUESTION: Yes, you may.

1 MR. STEWART: I think not only do I say it must
2 be you, but in fact General Starr has clarified that point
3 by saying it must be you when it's a two-thirds vote, and
4 it must be you on other provisions, and the only issue
5 here is whether we really have presented a right to be
6 enforceable.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Stewart. The case is submitted.

10 (Whereupon, at 11:03 a.m., the case in the
11 above-entitled matter was submitted.)
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CERTIFICATION

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Walter L. Nixon, Petitioner v. United States

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BY *Lona M. May*

(REPORTER)