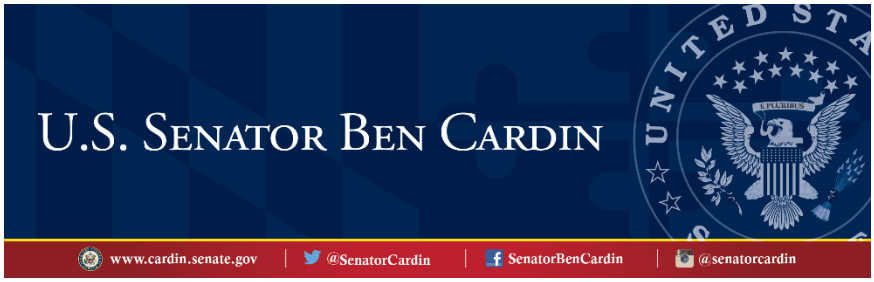

Background:

In *Nixon v. United States*, petitioner Walter L. Nixon, Jr. asked the Supreme Court whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, § 3, cl. 6. That Clause provides that the "Senate shall have the sole Power to try all Impeachments." Without considering the merits of the claim, the Court ruled that the claim was not "justiciable" – in other words, the claim raised an issue over which the Court could not exercise its judicial authority.

In a concurring opinion, Justice Byron White (joined by Justice Harry Blackmun) disagreed with the majority on the non-justiciability of the claim but concurred in the judgement "because the Senate fulfilled its constitutional obligation to "try" petitioner." Justice White found that the Framers of the U.S. Constitution clearly intended "that the term 'try' as used in the impeachment trial clause in Art. I, § 3, cl. 6 meant that the Senate should conduct its proceeding in a manner" that a "reasonable judge" would deem a trial. Justice White acknowledged that the Senate "has very wide discretion in specifying impeachment trial procedures," but stated that the Senate "would abuse its discretion" if it were to "insist on a procedure that could not be deemed a trial by reasonable judges." Justice White elaborated, writing, "[W]ere 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."

Justice David Souter, in another concurring opinion, agreed that the claim before the Court was not justiciable, but expressed the following view:

> If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply "a bad guy," *ante*, at 239 (White, J., concurring in judgment), judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.

Justice John Paul Stevens, in a third concurring opinion, declined to consider "improbable hypotheticals like those mentioned by Justice White and Justice Souter" because "respect for a coordinate branch of the Government forecloses any assumption" that "they will ever occur."

If a narrow majority of the Senate prevents additional relevant documents from being entered into the trial record, or prohibits the testimony of key witnesses with firsthand knowledge of President Trump's actions and intentions, we will be confronted with a scenario that Justice Stevens would likely have regarded as "improbable," but which will no longer **be either improbable or hypothetical – it will be occurring**.

As Paul Savoy, a former prosecutor in the office of the Manhattan District Attorney and law school professor, recently wrote in *The Atlantic*,

> Contrary to [Senator] McConnell's assertion that impeachment is actually a "political process" and that "there's not anything judicial about it," [Alexander] Hamilton described the Senate in *Federalist No. 65* as possessing a "judicial character as a court for the trial of impeachments," and in *Federalist No. 66*, he repeatedly referred to the Senate as "a court of impeachments."
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> . . . Because no reasonable judge would refuse to allow witnesses with personal knowledge of the facts to testify in an ordinary trial, it is the Constitution itself that establishes the right of House managers to call witnesses like the former national security advisor John Bolton. (Paul Savoy, *The Atlantic*, "An Impeachment Trial Without Witnesses Would Be Unconstitutional," January 23, 2020.)

According to Mr. Savoy, concurring opinions generally have limited authority as precedents, but impeachment is different because there is virtually no Supreme Court precedent at all. The only precedent Senator McConnell has cited are the Senate Rules themselves and the organizing resolution (S. Res. 16) that Democrats and Republicans were able to agree on in the Clinton impeachment trial. So, finding even two opinions of Supreme Court Justices is significant.

While it is true the majority in the *Nixon* case failed to find in the use of the word "try" in the Impeachment Trial Clause any "judicially manageable standard of review," this does not mean that there are no constitutional standards to apply. There are constitutional limitations, but it is up to the Senate to say what they are. In seeking guidance in the matter, the Senate should look to Justice White's "reasonable judge" standard.

Mr. Savoy also noted that when the Court says this is a non-justiciable or "political" question, what it is actually saying is that the question is not just for the Senate to decide. More broadly, the Court is saying that the question is for the American people to decide. Impeachment is precisely the kind of situation in which citizens have an important part to play, not only in their role as voters, but in actually creating constitutional meaning.

A Quinnipiac University poll, taken January 22 – 27, during the first week of the Senate trial, shows that 75 percent of registered voters polled say that "witnesses should be allowed to testify in the impeachment trial." This includes 49 percent of Republicans, 75 percent of independents and 95 percent of Democrats.

A supermajority of the American people believe that the Constitution requires a fair and impartial trial, with witnesses. The opinion of the American people in a non-justiciability context is as authoritative as an opinion of the Supreme Court. In short, citizens should be invited to express their opinions as directly and powerfully as possible because this is part of the process of creating constitutional meaning in a constitutional democracy.

The Senate should adhere to the Framers' intention for the Senate to sit as an impeachment "court" that, in Justice White's words, conforms to "a procedure that could . . . be deemed a trial by reasonable judges". And the Senate should heed the will of the majority of American people. In this instance, there is a confluence of the historic intention of the Framers and the contemporary opinion of the American people: the Senate should allow additional evidence and call witnesses to testify.

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