Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CURSIVE *v.* UNITED STATES, ET AL.

REVIEW TO THE UNITED STATES GOVERNMENT

No. 07–05. Argued April 17, 2019—Decided May 7, 2019

President Procursive, petitioner here, was impeached by the House of Representatives on four articles of impeachment. The first, Article 1, alleged a false arrest. The second, Article 2, alleged that he withheld information from Congress. Articles 3 and 4 took issue with petitioner's hiring practices; in Article 3, a violation of an anti-nepotism statute is alleged, and in Article 4 it is alleged that the President jeopardized national security by employing JamesMontagu in his personal staff. Following a Senate trial, petitioner was convicted on all four articles and pursuantly removed from office. Petitioner alleges procedural defects with his trial and removal votes stemming from what he claims was an inadequate trial and what he asserts was the failure of Members of Congress to constitutionally swear into office. Second, he alleges substantive defects with each article of impeachment.

Held: Articles 2, 3, and 4 of petitioner's impeachment are unconstitutional and struck down. Article 1, however, is not found unconstitutional and is therefore upheld. As such, petitioner's request to vacate his removal from office is denied.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, III, and IV–A, rejecting petitioner's oath and due process arguments, and finding impeachment Articles 2, 3, and 4 unconstitutional. Pp. 1–14.

1. The political question doctrine and *Nixon* v. *United States*, 506 U. S. 224 (1993), are not based in constitutional imperatives. Rather, they stem from "judicial policy" and prudential concerns. *Federal Election Comm'n* v. *Raps*, 6 U. S. ___, ___ (2018) (slip op., at 6, n. 2). The justifications underlying the doctrine and *Nixon*, however, are inapplicable in the Anytime Review context. Accordingly, this case presents justiciable questions. Pp. 5–8.

Syllabus

2. Petitioner's argument about the invalidity of Congressional oaths is rejected because he has failed to adduce sufficient evidence to support this claim. He has not, to any extent, proven that each and every Member of Congress was not constitutionally sworn, nor could he. Almost no forms of evidence would suffice to conclusively prove this type of claim. Pp. 8–11.

3. Petitioner's Due Process Clause arguments are rejected because the Clause was never understood to apply in impeachment proceedings in the exact same way it does in other contexts. Additionally, even if the Clause did apply in that way, the process provided for petitioner was entirely adequate as a constitutional matter. Pp. 11–12.

4. The holding from the *Ichigo* cases that "only those offenses which are at least 'crimes and misdemeanors' may be 'high crimes and misdemeanors'" is reaffirmed. The holding flows directly from "basic canons of interpretation, commonsense grammatical understanding, and even the unambiguous text of the Constitution." Pp. 12–13.

5. Because Articles 2, 3, and 4 are inconsistent with *Ichigo*, they are unconstitutional. None alleges a legitimate criminal offense. Additionally, Article 2 raises constitutional questions under the doctrine of executive privilege. Pp. 12–14.

THE CHIEF JUSTICE, joined by JUSTICE GORSUCH, JUSTICE BORK, and JUSTICE STEWART, did not find impeachment Article 1 unconstitutional and accordingly upheld it. Pp. 14–16.

1. Petitioner did not argue that a stricter standard than the *Ichigo* standard was applicable, so the Court assumed that *Ichigo* was the appropriate standard and found that Article 1 did not violate *Ichigo*. Pp. 14–15.

2. Impeachment for a past offense that is unrelated to the acquisition of an office is not categorically prohibited by the Constitution. Without evidence of pretext for impeachment on "constitutionally-prohibited grounds" (for instance, claims of Presidential maladministration or as retaliation for judicial decisions), "closer scrutiny" is not warranted. Pp. 15–16.

3. Petitioner did not adduce evidence to warrant application of "closer scrutiny of Congress' motives." Therefore, good faith must be presumed. Pp. 15–16.

JUSTICE BRANDEIS concurred in the judgment upholding impeachment Article 1 because he would overrule *Ichigo* and limit Supreme Court review of impeachments to very narrow circumstances when separation of powers principles are implicated. Pp. 1–4.

Syllabus

HOLMES, C. J., delivered the opinion of the Court, except as to Part IV–B. GORSUCH and BORK, JJ., joined that opinion in full; PITNEY and DOUGLAS, JJ., joined except as to Part IV–B; CHASE, J., joined except as to Parts III–B and IV–B; and STEWART, J., joined as to Parts III and IV–B. BORK, J., filed a concurring opinion. STEWART, J., filed an opinion concurring in part and concurring in the judgment. PITNEY, J., filed an opinion concurring in part and dissenting in part. CHASE, J., filed an opinion concurring in part and dissenting in part, in which PITNEY and DOUGLAS, JJ., joined as to Part I. BRANDEIS, J., filed an opinion concurring in the judgment in part and dissenting in part. O'CONNOR, J., took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 07–05

PROCURSIVE, PETITIONER *v.* UNITED STATES, ET AL.

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[May 7, 2019]

CHIEF JUSTICE HOLMES delivered the opinion of the Court, except as to Part IV–B.

The Constitution gives Congress the power to, with a majority vote in the House and a two-thirds vote in the Senate, remove government officials who have committed "Treason, Bribery, severe inactivity, or other high Crimes and Misdemeanors." Art. II, §4. Like all powers bestowed by the Constitution, this process of impeachment and removal may only be used in a manner that is consistent with the Constitution. The Constitution establishes several substantive and procedural requirements which were deemed essential by the Framers to the impeachment process. Each requirement is mandatory and none are more or less essential than any other.

In this case, former President Procursive challenges his impeachment and removal on the grounds that many of these requirements went unmet in his removal from office. In addition to making multiple procedural arguments that broadly challenge the entire impeachment process conducted with respect to him, he also alleges substantive issues with the particular articles of impeachment levied against him. If any of his broader arguments prove to be

successful, this Court would be obligated to order his reinstatement. For his substantive attacks to be successful in securing his reinstatement, however, he would need to prevail on all of them; he would need to demonstrate that each and every article of impeachment passed by Congress against him was unconstitutional.

Due to the gravity of these proceedings, this case naturally also raises questions about the propriety of this Court hearing impeachment challenges at all. Indeed, this Court has not yet directly considered the applicability of the political question doctrine in the Anytime Review context, nor has it ever addressed the tension which seems to exist between the cases in the *Ichigo* series and *Nixon* v. *United States*, 506 U. S. 224 (1993).

For the sake of cohesion and understanding, this opinion will begin with a discussion of the facts underlying the case, from there moving to the justiciability issues, and finally settling on the merits of petitioner's arguments, starting with the procedural claims and ending on the substantive ones.

I

A

During the first Presidential election season of 2019, then-incumbent President Dralian decided to seek re-election. Perhaps in an effort to consolidate support or stave off any potential challengers, he chose to name the popular Secret Service Director, Procursive, as his running-mate. The two ran an admirable campaign, meeting with voters and hosting several events, energizing the electorate and ultimately unifying it behind them. Any major opposition dissipated and when the time came to vote, the duo was elected in a landslide victory with substantial turnout. The two became President and Vice President-elect.

But days before he was scheduled to commence his second term, President Dralian notified the Secretary of State that

he had decided not to assume office come inauguration day. As a result, Procursive became President-elect and was sworn in as President instead.

Procursive's history, however, did not begin with his selection as President Dralian's running-mate. Indeed, as mentioned before, he had served as Director of the Secret Service prior to such selection. Like most others selected to lead an agency, Procursive attained his role through an extensive period of dedicated service and by proving his leadership qualities to those in charge in a number of situations. A directorship of the Secret Service is an accomplishment worthy of commendation.

But like any other person who has led a law enforcement agency, Procursive has a record which is hardly without blemishes. Indeed, the very nature of the role "Director of the Secret Service" invites criticism and fosters hostility from those who feel wronged by his agency or who feel they would be better suited for his job. It is unsurprising, then, that there exist videos alleging "false arrests" and other crimes by Director Procursive. It *is* surprising, however, that unlike many others in leadership roles, he has never been convicted of any crime.

President Procursive therefore justifiably assumed that his history would remain in the past. He was wrong.

B

After taking office as President, Procursive immediately faced political pushback. Faced with a Congress which viewed him as either unworthy or unfit, President Procursive, who lacked much political experience, was unable to accomplish much on the legislative side beyond obtaining confirmation of his Vice Presidential nominee, Bakedgoods.

It was not long after his Vice President was confirmed that Procursive's relationship with Congress deteriorated to its lowest point. Indeed, on or around March 23, 2019, responding to accusations that some individuals connected

with Procursive's Intelligence Community had been involved in DDOSing/DOXing, the House Foreign Affairs Committee opened an investigation into the President and his administration. As part of its investigation, the Committee subpoenaed the President to testify. In response, the President invoked executive privilege and declined to testify.

Shortly after, other revelations were made about the President's hiring practices. Indeed, it was asserted that the President had unlawfully engaged in nepotism by hiring his cousin to work in the Secret Service on his personal detail. Additionally, claims of impropriety were made relating to the President's decision to hire JamesMontagu, a former intelligence-leaker and member of the FBI watchlist, to work in his White House Office.

All of this culminated in a unanimous vote by the House of Representatives to impeach the President on March 31st.[1]

C

Following the passage of Procursive's four articles of impeachment by the House, THE CHIEF JUSTICE, pursuant to his constitutional role as the presiding officer in Presidential impeachment trials, convened the Senate to receive the articles. The articles were exhibited by the House managers and an oath/affirmation of impartiality was administered to each Senator. The Senate then adjourned to allow ample time for both the House managers and the President's defense team to prepare for the trial.

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[1] Petitioner did not, at this time, seek from this Court a pre-emptive stay of his impeachment under the All Writs Clause to preserve his position in office in the event of a Senate conviction while review proceedings were ongoing. As a result, in the event of a fully favorable judgment for petitioner, reinstatement would present a great deal of additional work as to the unwinding of any significant actions.

On the day of the trial, both sides were given an opportunity to present opening statements and examine evidence. Due to time constraints, however, the Senate voted to forgo closing statements from both sides. Although some Senators requested that the President's team's time be cut short, neither THE CHIEF JUSTICE nor the Senate allowed such to occur.

Subsequent to the President's trial, the Senate voted to convict him of all four articles of impeachment, but declined to disqualify him from holding future offices. The President was thus removed from office. In response, he filed this case, challenging his removal on various constitutional grounds.

We granted review, 7 U. S. ___ (2019).

II

Before proceeding to the merits of this case, we must first consider the question of justiciability. Indeed, some have suggested that all impeachment challenges present nonjusticiable political questions, see, *e.g.*, Brief for the House of Representatives as *Amicus Curiae*, at 5–6. To a large extent, they rely on our ruling in *Nixon* v. *United States*; this case therefore presents an opportunity to clarify the scope of that holding.

For the reasons set forth below, we hold that the political question doctrine and *Nixon* do not apply in the Anytime Review context, and that, even if they did, *Nixon* does not directly apply to the circumstances of this case or the challenges raised through it.

A

The political question doctrine is an innocuous principle of judicial restraint. This Court has applied it several times in the past. In *Baker* v. *Carr*, 369 U. S. 186 (1962), we established six tests to determine the existence of a nonjusticiable political question:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*, at 217.

Though these tests are oft-repeated and in some instances treated as inflexible, it is important to remember what it is we are dealing with. The political question doctrine is merely a "judicial policy" which "*counsels* against considering what *we have termed* 'political questions.'" *Federal Election Comm'n* v. *Raps*, 6 U. S. ___, ___, n. 2 (2018) (slip op., at 1, n. 2) (emphasis added). It is not mandated by the Constitution. Indeed, when addressing what we have described as a "similar doctrine of justiciability" and its "relationship" to the *constitutional* principle of "jurisdiction," *ibid.*, we have said directly that it "does not . . . g[o] to the Court's jurisdiction." *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 9).

Amici's reliance on the political question doctrine is therefore somewhat surprising. The doctrine has only ever been applied in the context of cases arising under this Court's ordinary jurisdiction, which we have expressly distinguished from "cases arising under the Anytime Review Clause." *Ultiman* v. *United States*, 6 U. S. ___, ___, n. 3 (2018) (*per curiam*) (slip op., at 3, n. 3). This case is an Anytime Review case. Attempting to shoehorn Any-

time Review cases like this one into the doctrinal framework set forth by *Baker* and its progeny this late after the inception of the Clause and after dozens of decisions potentially conflicting with that framework, including those of the *Ichigo* series, would be nothing short of judicial revisionism.

Were we to attempt to do so regardless, it would be an uncomfortable fit. The Anytime Review Clause was designed specifically to expand this Court's jurisdiction and to provide additional checks on the political branches beyond those contained in the original Constitution. It was intended to ensure that the People of the United States are protected against constitutional encroachments even in areas where efficient and effective judicial review was not previously available. In that vein, the specific import of the Anytime Review Clause is that we may review "any . . . action" done by the political branches, in particular in significant or egregious cases. To apply the political question doctrine to Anytime Review cases would constitute unseemly disregard for the purposes which motivated the adoption of the Anytime Review Clause and would subvert its plain meaning.

Furthermore, history illustrates that when the Clause was first adopted, it was not understood to be bound by the political question doctrine. In this Court's early history after the Clause's ratification, impeachment challenges were regularly heard, including in the *Ichigo* series.

Amici's remaining arguments about Framers' intent are refuted by the fact that the comments by the Framers which they cite, besides being removed from context,[2] are pre-Anytime Review Clause and do not inform ap-

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[2] *Amici* argues that the Framers did not want judicial review of impeachments and to that effect cites comments some of them made about not having the Judiciary be the body to *try* impeachments. This is a

plication of that Clause, which was *precisely intended* to significantly alter the role of the Judiciary in cases such as these.

B

In any event, *amici* overstates the relevance of *Nixon* in this case. Although *Nixon* provided discussion on a number of issues, it did so in dicta; the sole holding of *Nixon* is that "the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate." *Nixon*, *supra*, at 238. In this case, there is no argument that the Senate did not "try" petitioner as required by the Impeachment Trial Clause. *Nixon* does not reach this case whatsoever.

III

Petitioner makes two broad procedural arguments challenging his impeachment and removal. The first argument is that the Members of Congress who removed him were not duly sworn into office in-game as the Constitution requires and therefore could not remove him. The second is that the Due Process Clause applies to impeachments and that he was denied a fair process as required by the Clause.

For the reasons set forth below, we reject both arguments.

A

Oath Argument

The Twenty-Third Amendment to the Constitution provides that "[b]efore a Senator or Representative is able to

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flawed line of reasoning; trying impeachment in the first instance and hearing challenges to them, one being based on both factual (*e. g.*, "are they guilty?") and *political* (*e. g.*, "even if they are guilty, is this something we should do?") considerations, and the other solely on the import of the law, are two fundamentally different tasks. The Framers were clear that they only doubted the ability of judges to make the political aspect of the decision. Our analysis here does not require us to make any political judgment.

exercise his Office, he must take the [Congressional oath of office] in-game." Petitioner argues that no Member of Congress has done this oath in-game as the Constitution requires. We address *Amici* and the Government's counter-arguments in turn.

1

Both *Amici* and the Government first argue that petitioner lacks standing to make this argument and that this Court lacks jurisdiction to answer it in his favor.

The standing argument is that if the Members of Congress did not take their oath of office in a constitutionally-valid manner, then they could not receive President Dralian's constitutionally-required designation of petitioner as his Vice Presidential candidate and that therefore, under his own argument, petitioner would not be entitled to reclaim the Presidency and could therefore obtain no relief. This argument is certainly creative, to be sure, but it fails to consider the fact that it is entirely possible that the Members of Congress at the time of impeachment were not duly sworn, while those at the time of running-mate designation were. It is not a natural conclusion of petitioner's argument that his designation was invalid. Additionally, other premises of this argument lack merit.

The jurisdictional argument is similarly flawed. It asserts that if the oaths of the Members of Congress were invalid, then the Senate could not have legitimately confirmed eight of the nine Justices on this Court.[3] It is therefore argued that if the Court were to accept petitioner's argument, it would lack jurisdiction to do so. But, once again, the Senators who voted to confirm those Justices are not of necessity the same as those who voted on the impeachment;

[3] This number appears to have no basis in any reality, speculative or otherwise, and is construed as an exaggeration to illustrate a point.

confirmation invalidation would not be a natural consequence of accepting petitioner's oath argument.

2

Amici falls back on a second argument: that discord servers may be constitutionally designated as "in-game" by Congress. This argument fails because it erases any distinction between what is in-game and what is not. At the time this Constitution was adopted, it was well-established that group business was transacted almost exclusively through two mediums: in ROBLOX games or through social media like Discord and Twitter. Expanding the definition of in-game to include discord servers would defeat the entire purpose of the Constitution specifically mandating Congressional oaths be done in-game: to promote the conduct of more business through ROBLOX games.

3

Nevertheless, we must reject petitioner's oath argument because it is simply absurd. It is made entirely *ipse dixit*: petitioner has adduced absolutely no evidence whatsoever to support his claim that no Senator or Representative was constitutionally sworn in. That is a major claim and the burden of persuasion is correspondingly high. Speculative or abstract claims about general patterns and practice are simply insufficient. It is worth noting that virtually any kind of evidence would be insufficient.

Testimony by non-Members of Congress about standard procedures would be inadequate because they presumably lack particular knowledge about such procedures. Testimony from a presiding officer or member of either chamber about standard procedures would be flawed because it is entirely possible that Members of Congress performed the oath in-game at some other time without regard for standard procedures. Even testimony by every single Member of Congress that they were not properly sworn would be insuf-

ficient because it would open the door for *post hoc* disavowing of oaths and would enable Congress to nullify past action in a manner not contemplated by the Constitution.

For present purposes, we need not specify what evidence would be adequate; today, it suffices to say the oath argument is entirely rejected and these forms of evidence are not acceptable.

B

Due Process Argument

The Fifth Amendment's Due Process Clause states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Petitioner argues violation of his rights under the Clause by claiming that he was denied a fair opportunity to present a defense at his impeachment trial. This argument is rejected for two reasons.

First, the Due Process Clause was never understood to apply to impeachment proceedings in the same exact way it applied to non-impeachment matters. Indeed, the prerequisite for the attachment of its protections is a deprivation of "life, liberty, or property." In impeachment cases, any such connection is tenuous at best; while some relevant interests may be implicated, the implications are narrow enough that application of the Due Process Clause's full protection would be unwarranted. It would require a monumental effort to derive from the text or history of the Due Process Clause any intent to impose substantial new restrictions on the impeachment process beyond those set forth in the unamended Constitution.

Second, even if the Due Process Clause did apply fully in this context, there is nothing to suggest that petitioner was provided with anything less than a completely adequate opportunity to present his case. The Senate did not deny him the ability to introduce evidence or examine witnesses; it was only after his counsel rested and suggested adjournment that the Senate voted to adjourn. Deliberate care was

taken by the Senate to ensure that the trial was fair and adequate and we are confident that the trial did not deny petitioner the ability to fully make his defense against the articles of impeachment.

IV

As petitioner's broader procedural arguments have failed, it is now appropriate to consider his substantive challenges to the articles of impeachment. For each, he alleges that no impeachable offense occurred. The Court also requested briefing on whether impeachments for offenses which took place prior to an official obtaining office that do not arise from their effort to obtain such office violate the Constitution. We address the articles now, beginning with Articles 2 through 4, then finishing with Article 1.

A

Articles 2–4

Since this Court's penultimate ruling in the *Ichigo* series, it has been established law that a prerequisite to the existence of a high crime or misdemeanor is the existence of a crime or misdemeanor. We reaffirm this understanding. Indeed, this conclusion flows directly from basic canons of interpretation, commonsense grammatical understanding, and even the unambiguous text of the Constitution.

Start with canons of interpretation. The "surplusage canon is a basic presumption that the legislature does not waste words." *British* v. *Ozzymen*, 3 U. S. 60, 66 (2017). Indeed, it is elementary that "words cannot be meaningless, else they would not have been used." *United States* v. *Butler*, 297 U. S. 1, 65 (1936); accord, *British*, *supra*, at 66–67. It would be difficult to understand why the Framers chose specifically to enumerate permissible bases for impeachment, see *supra*, at 1, if, as the Government argues, "anything goes." Tr. of Oral Arg. at 7. The Framers did not understand impeachment as an unlimited power and the surplusage canon confirms as much. It would be

impermissible, for instance, for a President to be removed for wearing a shirt Congress does not like or supporting a policy Congress does not support. There must, at the very least, be real criminal conduct.

This understanding is further reinforced by basic grammar. The Government would have us read "high crimes and misdemeanors" to refer to a malleable class of acts entirely defined by Congress *through the impeachment process* (sort of a "make it up as we go" type of thing). Troublingly, the Government suggests that a "high crime or misdemeanor" may not even have to be a crime at all. *Ibid.* This makes little sense grammatically. The word "high" does not swallow the phrase "crimes and misdemeanors"—its common use does not entail that whatsoever. Instead, in this context, it is an adjective which modifies two nouns. Grammar dictates that an adjective cannot transform a noun into something it is not: as used here, it merely provides specificity and directs us to a subset of the provided noun.

If none of this were enough, the Constitution expressly and unambiguously affirms the view that impeachable offenses must be offenses for which criminal prosecution is possible. It states that any person "convicted" in impeachment proceedings "shall nevertheless be liable and subject to *Indictment*, *Trial*, *Judgement* and *Punishment*, according to Law." U. S. Const., Art. I, §3, cl. 7 (emphasis added). This provision makes clear that it must at least be *possible* for a person to be pursued through criminal proceedings for the charges used to impeach them. That possibility would not exist if Congress impeached for something that does not constitute a legitimate criminal offense.

Our conclusion and holding that only those offenses which are at least "crimes and misdemeanors" may be "high crimes and misdemeanors," and thus our reaffirmation of the *Ichigo* cases, brings us to Articles 2–4 of petitioner's impeachment.

Not one of these three articles alleges a legitimate criminal offense. Article 2 pertains to the withholding of information from Congress,[4] which is not itself a criminal offense. Article 3 alleges violation of an anti-nepotism statute, but that statute is noncriminal. Finally, Article 4 faults petitioner for hiring JamesMontagu to his personal staff, but that is not a criminal offense of its own. Congress did not cite this as being a criminal act and we have no reason to assume it in fact is.

We accordingly conclude that Articles 2, 3, and 4 of petitioner's impeachment are unconstitutional.

B

Article 1

Article 1, on the other hand, specifically charges a criminal offense: 18 U. S. C. §242, deprivation of rights under color of law. This charge arises from an alleged false arrest incident which occurred when petitioner was still Secret Service Director. The only question directly presented as to the constitutionality of this article is if a government official may be impeached for conduct which occurred prior to them assuming their present office and which had no relation to

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[4] Article 2 also raises important questions about executive privilege. The President surely cannot be impeached for the legitimate exercise of his constitutional prerogatives. Congress' contention that executive privilege is "controversial and has very questionable standing," H. Res. 65, is refuted by this Court's decision in *United States* v. *Nixon*, 418 U. S. 683, 715 (1974) (noting the "high degree of respect due the President of the United States" and affirming that it is "necessary . . . to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice."). It is ultimately the role of the Judiciary to "'say what the law is' with respect to [a] claim of privilege," *Nixon*, *supra*, at 704–705 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)), so Congress would often be better served by pursuing subpoena enforcement through judicial proceedings instead of immediately resorting to impeachment on potentially invalid grounds.

them obtaining that office.[5]

We begin by noting that Article 1 arises from offenses which were done while petitioner was at least acting in a public capacity (notably one of high stature). Our analysis would naturally be different if the past offense arose from private conduct or from a lower office.

As a fundamental matter, it is inconsistent with the underlying purposes of impeachment for the process to be used to punish past offenses, in particular if those offenses were known prior to the official in question taking office. It would represent a defiance of the People's will, especially, if the official was elected by the People and then removed by Congress for facts known to the People during the election process. That said, the Constitution does not categorically proscribe the use of past conduct as grounds for impeachment. Indeed, such impeachments may sometimes be justified in discrete cases based on the totality of circumstances. However, if there is evidence to suggest that such past conduct is being used as a pretext for impeachment on constitutionally prohibited grounds,[6] closer scrutiny of Congress' motives may be in order and more searching review

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[5] Petitioner did not urge us to identify new rules beyond those given definition in the *Ichigo* series, so we assume for the purposes of this opinion that the at-least-a-crime standard promulgated there and reaffirmed in this opinion, *supra*, at 12–14, for enforcement of the "high crimes and misdemeanors" requirement is the appropriate standard. It is entirely possible, however, that in future cases a more stringent rule may arise—our opinion does not foreclose that possibility. However, because that is not the case today, the only question relating to Article 1's constitutionality is about its use of past offenses.

[6] For instance, the Framers explicitly rejected the idea that Presidential maladministration could constitute grounds for impeachment and there is also ample evidence suggesting that "federal judges may not be removed from office" in retaliation "for their judicial acts." Part II, "Relations Between the Congress and the Judiciary," of the 2003 Year-End Report on the Federal Judiciary, by Chief Justice William H. Rehnquist. These examples illustrate that Congress cannot leverage the impeachment power, either directly or by pretext, to subordinate the

appropriate.

In this case, however, the total absence of evidence adduced by petitioner indicating impermissible ulterior motives on the part of Congress, as well as the uniquely high status petitioner held at the time of those offenses, and because petitioner has not urged us to adopt a stricter threshold than that set forth in *Ichigo* for determining which offenses may be deemed "high crimes and misdemeanors," we are left with little choice but to uphold Article 1.[7] That does not stop us from noting that what Congress has done in this case is commit a grave miscarriage of justice. Dredging up an elected President's past, indeed a mere good-faith false arrest, as a means of justifying his removal is not only antidemocratic, it is dangerously near unconstitutional. Although we are unable to conclude, for the reasons previously stated, that Article 1 is unconstitutional, we cannot say with confidence that in future cases similarly abusive articles of impeachment will be upheld. Those which are overtly abusive raise significant constitutional questions.

Members of Congress ought to be more principled in their use of impeachment and must take heed not to allow personal agendas—or personal aspirations—to cloud their decision-making process. Impeachment is not a power to be used lightly. It was crafted for those extreme situations when the President had, in the form of a crime, committed an "egregious abus[e] of authority" so serious that removal was the only remaining option. Sunstein, Impeachment (2017). Contributing to the trivialization of the process is something all involved may come to regret.

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other branches in a manner inconsistent with the Framers' separation of powers.

[7] Petitioner urges us to review the facts of the Article 1 charge de novo, but we conclude that de novo review would be inappropriate in this context. Assuming clear error is the appropriate standard, we conclude that Congress' factual conclusions as to Article 1 are not clearly erroneous.

* * *

For the foregoing reasons, we hold Articles 2, 3, and 4 of petitioner's impeachment unconstitutional and strike them down. Article 1, however, is not ruled unconstitutional and is upheld. The Court therefore rejects petitioner's request to vacate his removal from office.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 07–05

PROCURSIVE, PETITIONER *v.* UNITED STATES, ET AL.

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[May 7, 2019]

JUSTICE BORK, concurring.

I join THE CHIEF JUSTICE's opinion without reservation.

I write separately to emphasize, like the Court, that Article 1 "raise[s] significant constitutional questions." *Ante*, at 16 (opinion of HOLMES, C. J.). Because petitioner did not advance any argument for a more exacting standard to evaluate High Crimes and Misdemeanors Clause claims than was expounded in the *Ichigo* cases, we are "unable to conclude . . . that Article 1 is unconstitutional." *Ibid.* But that should not be taken as a conclusion that Article 1 is *constitutional*. Rather, out of respect for Congress, this Court will typically not strike down legislative actions unless it is firmly convinced they are unconstitutional. Upholding Article 1 is not a conclusion that Congress acted permissibly.

Although I join Part IV–B of the Court's opinion, much like JUSTICE CHASE I harbor serious doubts about the adequacy of the *Ichigo* test. The test never presumed to be conclusive as to the constitutionality of an article of impeachment and exists as simply one means by which *unconstitutionality* can be proven. Passing the *Ichigo* test does not (or should not) exonerate a suspect article of impeachment. Indeed, *Ichigo* merely addresses the need for a crime or misdemeanor: it does not ensure that such an offense is of the "high" variety. I suspect, but do not assert, that the founding generation understood only those crimes which

cause "injuries . . . immediately to the society itself" to be "high." Hamilton, Federalist No. 65. The Framers referred specifically to crimes which would "seldom fail to agitate the passions of the whole community." *Ibid.* They anticipated "violation[s] of some public trust." *Ibid.* All evidence from the founding era indicates that the Framers did not understand the High Crimes and Misdemeanors Clause to encompass small-time offenses like false arrests.

Had petitioner advanced a standard for distinguishing between "high" crimes and non-"high" crimes, the Court may have been in a better position to discern one. However, petitioner's decision not to do so, as well as the dearth of precedent to guide this debate, would make any attempt to do so impractical and likely prone to error. It would be akin to driving in the pitch-black night without headlights or even a steering wheel. The Court is correct to decline to undertake that risky endeavor.

The analysis in this case and the several opinions by individual Justices may prove helpful in the future in deriving additional rules from the Constitution governing the use of impeachment. See *AcidRaps* v. *Federal Elections Comm'n*, 6 U. S. ___, ___ (2018) (slip op., at 4) ("Statements of individual Justices, though not binding, can be particularly helpful in discerning the law.").

SUPREME COURT OF THE UNITED STATES

No. 07–05

PROCURSIVE, PETITIONER *v.* UNITED STATES, ET AL.

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[May 7, 2019]

JUSTICE STEWART, concurring in part and concurring in the judgment.

Today the Court is asked to overturn the impeachment and removal of President Procursive. The Articles of Impeachment alleged false arrest, false assertion of executive privilege, nepotism and endangering national security. Petitioner challenges the factual and legal basis of these articles and argues that the conduct of the proceedings violated the Fifth Amendment and that the Senators were improperly sworn in.

Because the Respondent failed to challenge the holdings in *Ichigo*, I would overturn Articles 2–4 but would uphold Article 1. I would reject the Due Process challenge because the Petitioner has failed to present evidence to support the argument. I would also reject the arguments relating to improper oath of office for the same reason.

While I have some real, grave concerns about *Ichigo*, I do not believe that it would be appropriate to overturn it in this particular matter. Neither the Respondent nor *amici* have argued in favor of overturning *Ichigo*. The Respondent, on the contrary, referred to *Ichigo* to further their argument. See Brief for Respondent 6. That is an implicit concession.

Given this concession, "[i]t would be inappropriate for us to reexamine in this case, without the benefit of the parties' briefing" whether *Ichigo* should be overturned. *United*

States v. *International Business Machines Corp.*, 517 U. S. 843, 855 (1996). Furthermore, it would be "most unfair" to procursive as he "was entitled to rely on" the Government's concession. *Ashcroft* v. *Iqbal*, 556 U. S. 662, 692 (2009) (Souter, J., dissenting).

Respondent and *amicus* argue that *Ichigo* is irrelevant because it internally distinguishes precedent and reasoning, as many decisions did at the time. I reject this argument. In any matter, we should look to the *ratio decidendi* of the Court's decision. "Indeed the radiating potencies of a decision may go beyond the actual holding." *Hawks* v. *Hamill*, 288 U. S. 52, 58 (1933). The "precedents" section of the *Ichigo* opinion acted much broadly in the same manner as the holdings of any opinion. However, "[d]isagreement with either [dicta or decisions], even though permissible, is at best a last resort, to be embraced with caution and reluctance." *Id.*, at 60.

I agree with the Court's judgment and reasons for reaching it based off *Ichigo*, but I don't see a need to re-examine the case. The critical concession makes this unnecessary. I concur with the majority's decision with respect to the Due Process and Oath argument and otherwise concur with the judgment.

SUPREME COURT OF THE UNITED STATES

No. 07–05

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ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[May 7, 2019]

JUSTICE PITNEY, concurring in part and dissenting in part.

I agree with the overall census of the decision of the Court. When put under investigation the petitioner's arguments for the most part do not hold any water, and Articles 2–4 are, constitutionally speaking, flawed.

I write to add further discussion to the topic of high crimes and misdemeanors. The Constitution undeniably establishes three separate powers, with a system of checks and balances between the three. This is more commonly known as the separation of powers and has been affirmed and reaffirmed in multiple cases by this Court. See *INS* v. *Chadha*, 462 U. S. 919 (1983); *Zivotofsky* v. *Kerry*, 576 U. S. ___ (2015).

As discussed in the Court's opinion, the Constitution grants Congress with the sole power of impeachment. I do not intend on discussing the upper limits of the much contested scope of the phrase "treason, bribery, high crimes and misdemeanors" as I believe it would be in vain and would bear no reasonable outcome on the controversy at hand given that neither party has contested that 18 U. S. C. § 242 does not constitute an impeachable offence, but rather the discussion is regarding whether it has any bearing being committed before the petitioner took office. I do wish to bring to the attention of all parties that the Constitution,

taking a minimalist approach, merely *implies* that an individual will be "liable and subject to Indictment, Trial . . ." U. S. Const., Art. I, Sec. 4, and does not *guarantee* it.

At-will service is the action of serving an organization or individual at the will of both you and the organization or the individual you serve. This means you can leave your service at any time, and your employer may remove you at any time. In the context of the Federal Government, members of the President's cabinet serve at-will. They are both free to leave at any time and free to be removed by the President at any time. In contrast to this, Supreme Court Justices, for example, do not serve at-will to Congress, even though it is the Senate who confirm a nominee to the bench. Justices are free to leave their post at any time, but the Constitution guarantees that Congress cannot remove them at any time.

This is important to understand as it provides us with clarification that "High Crimes and Misdemeanors" cannot be a catch-all clause, because it would imply that the President and the Judicial Branch serve at-will to Congress. We know that because of the separation of powers this does not align with the Constitution's provisions.

SUPREME COURT OF THE UNITED STATES

No. 07–05

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[May 7, 2019]

JUSTICE CHASE, with whom JUSTICE PITNEY and JUSTICE DOUGLAS join as to Part I, concurring in part and dissenting in part.

"That does not stop us from noting that what Congress has done in this case is commit a grave miscarriage of justice." *Ante*, at 16 (opinion of HOLMES, C. J.). The Court fallaciously holds that, beguiling that it is "dangerously *near* unconstitutional," *ibid.* (emphasis added), Article 1—which was the only article that the Court found itself rather undecided on, with some of the Justices changing their views on it following my memorandum—will not be considered for further examination because of two different, rather trifling reasons. Thus, these reasons apparently "left [the Court] with little choice but to uphold Article 1." *Ibid.* The justifications are of course quite absurd, and the Court's mere two pages of explanation make it no less so.

I

We have previously struck and deliberated on impeachments, even going as far as to create our own arguments, due to the provided arguments' lack of legal aptitude: the Constitution specifically reserves for us a very important, and clear-cut, jurisdiction of review, referring to the Anytime Review Clause, jurisdiction that extends above and beyond certain regularities, certain constituents—constituents that have changed dramatically over time and from real life. The doctrine sitting behind the issue brought

before us is a fairly modest one: normally, the legislature and the public should have few options for dealing with misconduct within either Branch, beyond generating statutes that limit and direct a degree of power—the Governments have the constitutional obligation to ensure that they do not turn the force of their own political will, such as what we've seen in this case, following closer examination of the Court, between themselves, and they have a corresponding obligation to resist such efforts—that is simple.

One of the original disputes at hand, however, was whether the Court should pronounce and answer such *political questions* in the first place, or whether the power to do that is solely the Senate's—and since we've already determined that it is our duty, and in our power, to decide the validity of each individual article, then we must equally inquire if every article meets the constitutional impeachment standard. By saying that three of the Articles are invalid because they're not in-line with precedent, is saying that they're not high crimes or misdemeanors—and the reason we uphold *Ichigo* now is that we believe that's an important, bottom-line, democracy-safeguarding standard, one that we must build on, to ensure that all impeachments reach the "high" caliber—as this article, and the impeachment itself, has proven us that such standard is *not* always reached.

What we see today, in this case, and now in the public opinion's eyes after a marginal deal of time, is the result of the greatly misunderstood exceptional structure of our Constitution, compared to many other forms of Government—the two political powers, the two branches, the President's Executive and the Legislative, were divided in a vigorous and robust manner by our Founders—we wanted this to be a continuous contradiction and disagreement of powers. Despite the fact that many people would consider it inconvenient to have a gridlock created by these principles, "excess of law-making seems to be the disease to which our

governments are most liable, it is not impossible that this part of the Constitution may be more convenient in practice than it appears to many in contemplation." Hamilton, Federalist No. 62.

The foundations of impeachment, historically and traditionally speaking, are nothing more than terms of art—such terms' sense must be very carefully interpreted by looking at the way they were well known and accepted as being at the time the Constitution was written. Artlessly put, it defined a political trial, used for offenders that could escape common law indictment—and only those that hold an office of high importance could do so because they were exempt from trial at common law. However, another requirement was added to the traditional sense of the legislative tool, the impeachment, one that should've and would've stopped our Congress from trivial impeachment, unlike the English Commons' usage of this tool.

The matter is far simpler than the Court's opinion made it out to be, following their ways of individually, independently analyzing each article: can we *reasonably* construct deprivation of rights under the color of law, a false arrest, a crime that is so *common*, so *minor*, as being a *high* crime? *No*. We cannot reasonably construct that, nor should we.

Impeachment has become a tool for the Legislative that has, in recent times, rendered the Executive dependent on them, the founders did account for such events where the Constitution simply failed to account for a tyrannical, excessive exercise of legislature: they made us. The Constitution merely sets boundaries for the people, and us, to patrol—words, while at times vague, operate under unchanging values, values that are meant to apply to the circumstances of today: in the end, we need to think about the repercussions and consequences of our actions, whether it is my approach or more of an original approach, we are activists of democracy, protectors of it—our actions must

revolve around that. Democracy that takes into account protecting individuals, minorities, and others from dominant tyranny.

II

In Part III–B, the Court holds that "the Due Process Clause was never understood to apply to impeachment proceedings in the same exact way it applied to non-impeachment matters." Reading the rest of the holding, though, offers a surprising readiness to change from "same exact" to "none," an approach to the Clause that I simply disagree with.

I hold that any judicial effort to overrule a compelling decision of the authors and ratifiers of the Constitution and the Bill of Rights, the same people that went on record opposing without qualification the idea that impeachment was a criminal process subject to constitutional criminal provisions, would still be a right one.

As Justice White held in his concurrence, meeting the due process standard does not mean that the Senate is bound in its trial to meet the procedural requirements of a traditional judicial trial. In analyzing the fairness of the current Senate trial process, it should not be compared to the procedure used in a criminal or civil trial, as there are obvious differences in its procedure. The Senate is not bound by the Federal Rules of Evidence, by a particular standard of proof, by a requirement that the factfinders view witnesses directly or by a requirement to hold a trial by jury. And, in any event, those rules may not be necessary for the Senate to meet the fairness requirements of due process. The standard of due process, yet another beautiful term of art within our prepossessing Constitution, presented in *Mathews* should be reasonably embedded, and built more on, in an impeachment case.

* * *

Today's opinion is the product of a Court that lost its

fundamental sense of integrity to its own powers, devolving into mockingly upholding Article 1. One of the most revealing, truthful, statements in today's opinion is the Court's grim yet veracious warning to Congress and the way they "ought to be more principled in their use of impeachment and must take heed not to allow personal agendas." *Ante*, at 16. "Contributing to the trivialization of the process is something all involved may come to regret." *Ibid.*

Indeed. The moment when impeachment becomes trivialized is the moment when our nation loses its fundamental sense of integrity, and thus concludes my dissent.

SUPREME COURT OF THE UNITED STATES

No. 07–05

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ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[May 7, 2019]

JUSTICE BRANDEIS, concurring in the judgment in part and dissenting in part.

For Articles 1 and 2, I concur in the Court's judgment. And for Article 3 and 4, I respectfully dissent from the Court's judgment.

Article 1

I write separately to concur in the judgment, with my own opinion, regardless of the fact that it has to do with upholding the *Ichigo* case.

THE CHIEF JUSTICE once asked me, "[S]o you would overturn the *Ichigo* cases?" I responded with a yes, because I believe the that political cases shouldn't be mandated by the Judicial Branch, dictating what charges are viable or not. Impeachment trials are far different from criminal trials by their process and the Judicial Branch should provide no accountability in political cases. As mentioned by *amici* in his first brief, "[i]n the United States, . . . impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." See 145 Cong. Rec. 26 (1999). *Amici* continues explaining, "[t]he Framers did not want the Judicial Branch to have the power to impeach because it would, naturally, omit any public opinion on the issue." Brief for Johnnie Cochran as *Amicus Curiae* 4 (hereinafter Cochran Brief). This made me realize that our decisions in reviewing impeachments makes us part of the impeachment process and this mainly

why I don't agree with the *Ichigo* cases, as it involves us in reviewing and mandating impeachment cases. I elaborate on this further, see *infra*, at 2.

JUSTICE CHASE did approach me on this subject explaining how it is fundamental to have the Judicial Branch oversee the Nation's actions, essentially advocating the Anytime Review Clause. However, I still believe that the separation of powers is necessary and that Senate has a role in deciding this for the Nation. I suggest that we let the Senate do its job in deciding "political crimes and misdemeanors," Cochran Brief 4; in simple words, I want to uphold Congress' decision mainly so that their decision can be rendered, not to uphold the previous Court's ruling regarding the "High Crimes and Misdemeanor."

Article 2

Extraordinarily, I decided to hold my opinion differently on this matter, concurring in judgment with the rest of the Court without any contradiction to my previous Opinion regarding Article 1. I wish to assert the value the separation of powers, mentioned earlier, *supra*, at 1–2. Executive privilege should not be neglected, as it would impact the function of separation of powers. "[T]his inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These 'occasion[s] for constitutional confrontation between the two branches' are likely to be avoided whenever possible." *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974). The Supreme Court also stated that "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process," *ibid.*, establishing an "executive immunity" defense for high office-holders. Once executive privilege is asserted,

Congress can no longer expect that he or she is withholding information from them. It is fair to say that impeaching one regardless intentionally disregards the separation of powers, which is why I decided to vote extraordinarily to overturn this article rather than upholding it to avoid the collision between the two branches.

Articles 3 and 4

For the last two articles, I write to dissent, continuing my opinion mentioned, *supra*, at 1–2.

Since this Court did establish a guideline in the *Ichigo* cases, limiting impeachment charges to the scope of "high Crimes and Misdemeanor" through interpretation of the law, it has been intensively argued and believed that only the Judicial Branch interprets the law. Therefore, through the Anytime Review Clause , it has been commonly adopted that the Supreme Court decides the fate of the articles of impeachment.

Amici, being the only one to argue against the petitioner's theory multiple times. "The Petitioner asks this Court to adopt a new theory for impeachments, one that makes it impossible for Congress to make any headway on impeaching anyone for anything since they, according to the Petitioner, cannot interpret what the Constitution means by a high crime or misdemeanor, rendering the Congress's power to impeach moot." See Cochran Brief 4.

In fact, the Supreme Court did recognize that "Senate shall have the *sole* Power to try all Impeachments." See generally *Nixon* v. *United States*, 506 U. S. 224 (1993). *Amici* adds that "the commonsense meaning of the word 'sole' is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted." . . . '[I]f the courts may review the actions of the Senate in order to determine whether that body 'tried' an impeached official, it is difficult to see how the Senate would be 'functioning . . . independently and without assistance or

interference.' [*Nixon*, *supra*, at 231] . . . (referencing a definition previously offered for the word "sole")." *Ibid*.

THE CHIEF JUSTICE did explain to me that "the *Nixon* case, limited to its precise legal context, was about whether the Senate had 'tried' someone." However, the word "sole" mentioned by *amici* remains to be unanswered and belittled. The fact that the Supreme Court became a part of the impeachment process infringes upon Congress' "Sole" power and poses a greater threat to our Constitution. The House "shall have the sole Power of Impeachment. . . . [T]he Senate shall have the sole Power to try all Impeachments." See U. S. Const., Art. I, § 3, cls. 4, 6. The Constitution also makes it available to us that we may exercise a "[r]eview of the . . . Legislative branc[h], and through this exercise may overturn any Law . . . or other action if [we] fin[d] it to be unconstitutional or unlawful[.]" See U. S. Const., Art. III, § 4. Although it creates a problem between sole powers and Anytime Review, the only solution would be, indeed, overturning the *Ichigo* cases and abridge our powers to only reviewing in a limited manner, authenticating the proceeding whether if it had been conducted correctly (such as verifying tally votes, oaths, etc.), not its legal scope, and in extraordinary conditions the Supreme Court may make some modifications (such as overturning to recognize the executive privilege and or certain rights being infringed) to protect the people's rights in impeachment proceedings. In sum, I oppose against the Court's majority opinion, in attempting to uphold the interest of the Nations' representatives in impeachment decisions and the separation of powers specifically mentioned in the United States Constitution.

I respectfully dissent.