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

KOLIBOB *v.* UNITED STATES

APPLICATION FOR A STAY

No. 09–34. Decided June 17, 2020

On May 18th, applicant was convicted by the Senate for two articles of impeachment. He did not challenge the conviction at the time. Close to a month later, he filed this application for a stay asking that the current vacancy on the Court be kept unfilled while he challenged his impeachment's constitutionality.

Held: The application for a stay is denied. Pp. 1–8.

(a) An application for a stay is reviewed under *Nken* v. *Holder*, 555 U. S. 418, which asks "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.*, at 434. Pp. 1–2.

(b) Applicant fails to satisfy the latter three *Nken* factors because he did not show "reasonable diligence" in seeking a stay—he was convicted close to a month ago but waited until now to request relief—and it would be contrary to the "public interest" for the Court to take such an action with respect to a seat on this Court based only on "hypertechnical" arguments. Pp. 2–4.

(c) Applicant is also unlikely to "succeed on the merits" because the votes on his impeachment were likely conducted constitutionally and the claim that his impeachment was tainted by the use of allegedly unconstitutional evidence is likely wrong. Pp. 4–8.

BORK, J., delivered the opinion of the Court, in which all other Members joined, except STEWART, THOMPSON, and KAGAN, JJ., who took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 09–34

KOLIBOB, APPLICANT *v.* UNITED STATES

ON APPLICATION FOR STAY

[June 17, 2020]

JUSTICE BORK delivered the opinion of the Court.

On May 18, 2020, Justice Chase was found guilty of two articles of impeachment and was removed from office as a result. At the time that happened, Justice Chase accepted Congress's verdict. Nearly a full month later, on June 7, 2020, however, he filed the instant application for a stay. Even though the relevant facts have not changed, he now argues that his impeachment was carried out unconstitutionally and asks that the currently vacant seat on the Court be held open pending resolution of his case.

The application for a stay is denied.

I

We decide whether to issue a stay by considering the four factors reiterated in *Nken* v. *Holder*:[1]

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

[1] 556 U. S. 418, 434.

Of those factors, the first two are the "most critical" but a stay may not issue unless the balance of equities tips in favor of issuance.[2]

An applicant for a stay must make a "strong showing" in part because "[a] stay is not a matter of right, even if irreparable injury might otherwise result."[3] When considering a stay application, we approach the question holistically and pay attention to all pertinent factors. A stay is an "intrusion into the ordinary processes of administration and judicial review" and is an exercise of "judicial discretion" not to be used "reflexively."[4] And "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."[5]

We thus consider whether the applicant has carried his burden to obtain a stay.

II

The applicant has not met his burden.

A

Even if we assume—contrary to our findings later in this opinion—that the applicant was likely to succeed on the merits of his claims, each of the remaining factors tilts against his request for a stay.

First, a party requesting a stay or any form of preliminary relief must generally show "reasonable diligence" in bringing their claim to court.[6] In this case, the applicant did not apply for a stay until nearly a month after he was removed from office. No pertinent facts have changed in the time

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[2] *Id.*, at 434–35.

[3] *Id.*, at 433 (quoting *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672).

[4] *Id.*, at 427.

[5] *Id.*, at 433–434.

[6] See *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396; *Lucas* v. *Townsend*, 486 U. S. 1301, 1305 (Kennedy, J., in chambers). Accord *Benisek* v. *Lamone*, 585 U. S. ___, slip op. 3.

from then to now. In an ordinary case, this delay would have been bad; here, it is inexcusable.

In the impeachment context, there is a uniquely "strong interest in 'finality.'"[7] We've stressed on occasion the difficulties which can come with neglecting to seek a timely stay.[8] It is perplexing—to say the least—that the applicant chose to wait nearly a month to seek any type of preliminary relief whatsoever. The applicant's one-paragraph stay application provides no answer, except to cite a recent constitutional amendment restoring the Court's nine-member composition and the fact that only one vacancy remains.[9] The applicant reasons that to "preserve the status quo and avoid complications in the future," a stay is needed.[10] The implication is that prior to the ratification of the Thirty-Sixth Amendment, he couldn't have obtained a stay because the Court was already full with seven members. This isn't a reasonable explanation for his lack of diligence.

When the applicant was removed from office, he was the eighth member of a seven-member Court, allowed to serve because he had been appointed before the Court was shrunk and was accordingly grandfathered in. If a stay were appropriate, he could have requested one immediately after his removal or prior to his conviction.[11] The issuance of a stay would have merely preserved the status quo.

In other words, a stay at the time of conviction would have been permissible (assuming the stay factors were met), so citing the ratification of the Thirty-Sixth Amendment isn't enough to explain why he didn't seek a timely

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[7] *Hudson* v. *United States*, 9 U. S. ___, slip op. 1 (BORK, J., dissenting) (quoting *Nixon* v. *United States*, 506 U. S. 224, 236).

[8] *Procursive* v. *United States*, 7 U. S. ___, slip op. 4, n. 1.

[9] See Application for Stay 2.

[10] *Ibid.*

[11] In *Reset* v. *United States*, 9 U. S. ___, this Court granted a preemptive stay of the President's removal, allowing him to remain in office while his case was pending.

stay. The applicant provides no further response.

Second, as many Justices pointed out, "[t]he public interest would be disserved by us reinstating one of our impeached colleagues on hypertechnical grounds."[12] But the applicant doesn't supply any grounds for his merits case *except* extremely technical ones. He makes only two arguments. He first asserts that his impeachment votes weren't done through the right venue and second, based on a fruit of the poisonous tree theory, asserts that Congress improperly relied on evidence that *might* have been under injunction at the time of his conviction. A preliminary stay cannot be justified on these "hypertechnical grounds" when the intended beneficiary is one of our colleagues who was impeached and convicted.

B

Regardless, the applicant is also unlikely to succeed on the merits of his claims.

1

The argument that his impeachment votes weren't conducted constitutionally is likely wrong.

At the time the impeachment votes took place, the FEC internal election system was broken, so the votes charted a less usual course. But a less usual course isn't always unconstitutional. In the House, the vote occurred as follows: the vote was posted on the FEC internal election system, each Representative cast their votes by transmitting it to the presiding officer, and the presiding officer recorded the vote on the FEC internal election system. In the Senate, the vote happened on a public discord channel, where each Senator personally cast their votes. Both creative solutions were devised in response to a technological breakdown outside Congress's control and both are likely constitutional.

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[12] P. R. N. 5ee06595755f4438faf2611d, para. 2 (statement of THE CHIEF JUSTICE); *id.*, para. 8 (statement of JUSTICE PITNEY).

The House's voting method in this case likely constituted use of the FEC internal election system even if the exact voting process deviated from the usual user interaction. The vote was posted on the system and the results were tabulated on it as well. The only salient difference was that instead of each Representative personally joining a game and inputting their vote to be automatically added to the FEC internal election system's records, the vote was communicated to the presiding officer who manually committed it to the FEC internal election system's records. There isn't anything about this which seems unreasonable, especially in light of the technological issues Congress was forced to deal with. Additionally, the joint resolution which adopted the FEC internal election system didn't lay out step by step how voting through the system would work. The method employed by the House is likely consistent with that resolution.

The Senate's voting method didn't include the FEC internal election system in any respect but that system isn't the only constitutional way to carry out an impeachment vote. On the contrary, the FEC internal election system is a constitutionally-approved "*alternative*" to the constitutional default, which is vote by "public forum."[13] A vote conducted by a public discord channel, accessible by any person who searches for it, is likely tantamount to a vote by "public forum."

Thus, the impeachment votes in both the House and Senate were likely constitutionally legitimate.

2

Likewise, the argument that the applicant's entire impeachment is unconstitutional because it relied in part on evidence which may have been under injunction sounds more in wishful thinking than law.

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[13] *Id.*, para. 3 (statement of THE CHIEF JUSTICE) (emphasis added).

Let's start from the beginning. Prior to his impeachment and conviction, the applicant appeared before a Senate committee in response to a subpoena. He did not object to the subpoena prior to attending or in any way imply that he would not have shown up but for the subpoena. On the contrary, he publicly declared his intent to cooperate with the committee's inquiry. After appearing, however, he was blindsided by questions which he did not anticipate would be asked. In response, he filed a lawsuit in the district court asking that his testimony be quashed on the grounds that the subpoena was invalid and that other procedures followed by the committee denied him due process. The district court issued a preliminary injunction generally prohibiting usage of his testimony while the case was pending.

In response to the injunction, the Senate submitted a brief expressing its view that the injunction as written didn't apply to impeachment proceedings and urging the district court to provide guidance on that question. The United States filed a petition for certiorari with this Court, asking for the injunction to be vacated. After the Senate informed this Court of its position as well, we decided to hold off on reviewing the case. In the view of some Justices, there were numerous "unresolved issues about the injunction's scope that should [have been] clarified by the district court" before taking an appeal would be prudent.[14] The district court nevertheless failed to provide any additional guidance on the scope of the injunction. Congress's use of the evidence was thus reasonable.

But let's assume that the injunction actually did apply to use of the testimony in impeachment proceedings and that the district court had no obligation to clarify that.[15] That

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[14] P. R. N. 5ebb6f2a440d3442fcd8a388, para. 1 (statement of JUSTICE BORK).

[15] Injunctive relief is not supposed to be a "gotcha" game. When a party is confused about the scope of an injunction or is unclear on what it

still begs the question of if the district court could properly dictate what evidence Congress could rely on in an impeachment proceeding, that too via a preliminary order. We don't need to answer that question at this juncture because recognizing the uncertainty around it is enough to support our judgment, but we make one observation.

In *Reset*, we held that Congress has the primary say when it comes to questions of fact in impeachment cases.[16] Our review doesn't look at whether the "evidence presented at trial conclusively proves" the case for impeachment.[17] Instead, we judge whether the allegations in the articles of impeachment "have a basis in fact."[18] If they do, we are bound to accept Congress's conclusion of factual guilt. It doesn't really matter where that basis comes from or how it was obtained as long as it is real and supports Congress's conclusion.

Regardless, even if the injunction did *and could* apply and the applicant's testimony had to be thrown out, that still wouldn't provide a basis for overturning his entire conviction. There were numerous "other pieces of evidence as well and our cases only require 'some basis in fact,' not a perfect case."[19]

The applicant is unlikely to prevail on his second argument.

* * *

An impeachment is strong medicine. In an ideal world, it'd be reserved for the worst of the worst, for those who truly can't be trusted to remain in public office. Justice

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requires of them, a court should generally endeavor to provide them with clarity as to their obligations.

[16] See 9 U. S., at slip op. 36.

[17] *Id.*, at slip op. 37.

[18] *Ibid.*

[19] P. R. N. 5ee06595755f4438faf2611d, para. 5 (statement of THE CHIEF JUSTICE).

Chase clearly wasn't the "worst of the worst" and reasonable people can disagree about whether his impeachment was a good decision.

But even if it was a bad decision, we have no commission to impose our own view of good government on the people of this country by judicial fiat. Our duty is to the law and the law is clear as day in this case: the application for a stay must be and so is denied.

It is so ordered.

JUSTICE STEWART, JUSTICE THOMPSON, and JUSTICE KAGAN took no part in the consideration or decision of this case.