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CASES ADJUDGED

IN

THE SUPREME COURT

AT

FEBRUARY TERM, 2019

FEBRUARY 15, 2019 THROUGH AUGUST 13, 2019

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

LEWIS F. POWELL, JR.

REPORTER OF DECISIONS

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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NEIL GORSUCH (BOB561), ASSOCIATE JUSTICE.
ROBERT BORK (KARLCROVE), ASSOCIATE JUSTICE.
SANDRA D. O'CONNOR (APTERIA), ASSOCIATE JUSTICE.
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JADEN_NH, MADAMEKLAIR,
ATTORNEYS GENERAL.
JADEN_NH, SOLICITOR GENERAL.

TABLE OF CONTENTS

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

FEBURARY TERM, 2019

IN RE FEDERAL GOVERNMENT

ON SUA SPONTE PETITION FOR WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

KIRKMAN, PETITIONER v. STATE OF COLUMBIA, ET AL.

ON PETITION FOR WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

Nos. 07–01 and 07-02. Decided March 3, 2019.

PER CURIAM.

These cases involve challenges to the constitutionality of S. 127, a recently-passed Act of Congress which seeks to drastically reshape the existing American system of government. At issue are the provisions relating to the formation of a so-called "State of Columbia." These provisions claim to join the City of Las Vegas and the City of Washington, D. C. into a single Municipality. The Constitution, however, provides that no "Municipality [may] be formed by the Junction of two or more Municipalities, or Parts of Municipalities, without the Consent of the Legislatures of the Municipalities concerned." Art. IV, §3. Thus, for the reasons set forth more fully below, we must hold and declare §§101–104 of S.

127 unconstitutional and therefore invalid. Those provisions are struck down.

Additionally, as further explained below, we deem §§106–107 of S. 127 inseverable from the provisions declared unconstitutional and therefore strike them down as well.

I

At the foreground of this case is the basic fact, well observed and recognized for a substantial period of time, that the Cities of Las Vegas and Washington, D. C. are proper Municipalities. Cf. United States v. District of Columbia, 5 U. S. 95, 96 (2018). Given that fact, the relevant inquiry in this case is whether the Municipalities consented to their junction. Evidence illustrates that the answer is flatly "no."

Indeed, there appears to be no record whatsoever of any vote by either of the Municipalities even pertaining to the junction imposed by S. 127, much less one clearly, publicly, and unambiguously consenting to it as the Constitution is understood to require. In fact, evidence from the public record actually suggests that the Municipalities were blindsided by the federal move and did not receive any prior notice. If that is the case, S. 127 represents nothing less than an egregiously unconstitutional attempt to subvert the legitimate rights of the Municipalities. Nonetheless, even if prior notice was provided, the absence of clear, public, unambiguous consent to the junction from both Municipalities makes the asserted junction completely invalid.

As the junction is invalid, all the provisions of S. 127 which endeavor to give effect to it are likewise invalid and unconstitutional. Those provisions are §§101–104.

The first, section 101 asserts the merger of two Municipalities, the Cities of Las Vegas and Washington, D. C. The

section attempts to justify the merger by pointing to the "demunicipalization of the City of Las Vegas" by H. R. 179. The legality of H. R. 179 is not before this Court in this case and is assumed for the moment, although the bill, rather than purporting to revoke Las Vegas' status as a Municipality, in fact confirms and solemnizes it. Indeed, the law specifically refers to the "Municipality of the City of Las Vegas." Section 101 of S. 127, therefore, is baseless. The attempt to circumvent the requirement of Municipal consent fails.

Section 102 of S. 127 grants a name and assigns a march and anthem for the so-called "State of Columbia." As the reference to the State of Columbia incorporates the unconstitutional junction provision of §101, it is likewise unconstitutional. Section 103, which proclaims Congress' intent to establish the State of Columbia as a "municipality in a swift manner" is unconstitutional for the same reason. Section 104, finally, provides for the establishment of a provisional government of the illegitimate State of Columbia. It attempts to transfer the sovereign powers of the Municipalities being involuntarily joined to a so-called provisional governor. This provision, §104, is unconstitutional.

II

Having struck down the bulk of S. 127, our inquiry turns now to what remains. When conducting this analysis, the severability analysis, we must be mindful of a few key things. First, a law which contains a severability clause, as is the case here, "express[es] the enacting legislature's preference for a narrow judicial remedy." *Whole Woman's Health v. Hellerstedt*, 579 U. S. ___, ___ (2016) (slip op., at 37). At the same time, however, "a severability clause is an aid merely; not an inexorable command." *Reno v. American Civil Liberties Union*, 521 U. S. 844, 884–885, n. 49

(1997) (internal quotation marks omitted). A severability clause is not grounds for a court to "devise a judicial remedy that . . . entail[s] quintessentially legislative work." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006). Thus, when a valid provision and an invalid provision of a statute are so deeply intertwined that extricating the two would fundamentally alter the operation of the valid provision, the reviewing court must declare the two inseverable and strike down both. Additionally, no matter how capaciously-worded a severability clause may be, courts will not step inside a statutory provision and sever words and phrases from one another: that kind of nitty-gritty work is far too legislative for inclusion in a judicial remedy. Instead, the entire provision will be invalidated and Congress may later pass legislation resurrecting the portions of the provision not deemed unconstitutional in such a legislative scheme as they determine appropriate.

With these consideration in mind, we turn to what remains of S. 127. That includes §1 (the "Effective Date Provision"), §2 (the "Severability Clause"), §105 (the "Disclaimer Provision"), §106 (the "Transfer Provisions"), and §107 (the "Court Provisions"). We consider each separately.

The Effective Date Provision

Except as applied to those provisions declared unconstitutional and those deemed inseverable, the Effective Date Provision may remain in force. It is purely a stylistic matter meant to clarify that the law being passed will take effect and to provide when such will occur. It has no independent effect of its own and we see no reason not to salvage this provision.

The Severability Clause

Much like the Effective Date Provision, this clause is mostly a "stylistic" addition, ante, at 4, with no real independent effect of its own. It merely expresses the desire of Congress for a narrow judicial remedy if the attached law is struck down. This clause may be salvaged to continue to apply to the provisions of the Act deemed severable.

The Disclaimer Provision

This provision primarily confirms that Congress is not asserting control over development. Given that this provision effects no change from the pre-S. 127 status quo, we see no reason not to salvage it. It changes nothing and can be easily extricated from the unconstitutional bulk of the Act.

The Transfer Provisions

This provisions obligates the President to transfer certain "low-functioning agencies" to the control of the provisional governor of the State of Columbia. Without the unconstitutional bulk of S. 127 operational, however, the provision has no meaningful use. The President cannot transfer an agency to a nonexistent provisional governor. Thus, we declare §106 inseverable and strike it down in full.

The Court Provisions

Putting aside for a moment the constitutional issues inherent in the Court Provisions, and focusing purely on severability, it is quite clear that the majority of §107 is inextricable from the portions of S. 127 declared unconstitutional. The provision asserts the creation of a court for the State of Columbia. The appointment process involves the governor and the judges are tasked with enforcing non-existent state law. Finding this provision severable would require us to jettison its requirements on appointment and

strip these officers of their very purpose. Doing so would involve effectively rewriting the law. As mentioned before, we decline to step inside this provision and, in effect, make it severable so that we may uphold it. We are left with no choice but to declare §107 inseverable and strike it down in full.

* * *

This Nation depends greatly on the rule of law. Government officials should not rely on a mistaken belief that this Court or other courts will not enforce the dictates of the Constitution as reason for skirting its requirements. "The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary [will] correct . . . what those officials say or do." *Trump v. Hawaii*, 585 U. S. ___, ___–___ (2018) (Kennedy, J., concurring) (slip op., at 1–2). Officials should not attempt, through "clever" distortion or in any other fashion, to expand their own power beyond constitutional limits. Nor should they go along with the schemes of those known to despise our Constitution.

This Court has, for an extended period of time, restrained its use of the power of Anytime Review. But when officials flout the "imperative for [them] to adhere to the Constitution and to its meaning and its promise," id., at ___ (slip op., at 2), we will vigorously fulfill our own imperative: the defense of the Constitution.

The petitions for writs of review are granted and §§101–104, 106, and 107 of S. 127 are struck down.

It is so ordered.

PSYCHODYNAMIC, PETITIONER *v.* PROCURSIVE

ON PETITION FOR WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

No. 07–04. Decided April 4, 2019.

The petition for a writ of review is denied.

Statement of JUSTICE PITNEY and JUSTICE CHASE, with who JUSTICE STEWART, JUSTICE BRANDEIS, and JUSTICE DOUGLAS, join, respecting the denial of review.

Over the past couple of years, the topic of retracted resignations has repeatedly been questioned before the Supreme Court. In the year of two thousand and nineteen alone, there have been two previous cases regarding this topic petitioned, beginning with Waffles v. Senate, No. 06–23, and followed by Commander v. Profine, No. 07–03. They are now joined by the current case, Dynamic v. Cursive. For the remainder of this statement, we will focus on the issue of resignation withdrawal, as the other two have barely any meaning in fact and have no precedent.

First and foremost, we must examine the process of how the President of the United States may resign his office. Section 20 of Title 3 of the United States Code provides us with a statutory reference on how such an action must occur: "[A] resignation of the office of President . . . shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State." This statutory act provides us with fact. A presidential resignation shall only take effect upon confirmation by the Secretary of State.

Secondly, we must review the text of the resignation, which states: "I hereby resign as President of the United States effective at midnight." This dictated that, in conjunction with the statutory act cited before, President Procursive's exit from office was to take effect at midnight of the same day. This time had not yet arrived before the resignation was retracted and as such falls in line with common sense that resignations may be retracted before they officially take effect.

When dealing with withdrawn resignations, it should be remembered that resignations retracted before taking effect are within the law and common law. However, it may no longer be withdrawn once the resignation is finalized and has had an effect.

Syllabus

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

ON PETITION FOR WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

No. 07–05. 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. 12–25.

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.

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. 23–24.

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. 23-25.

THE CHIEF JUSTICE, joined by JUSTICE GORSUCH, JUSTICE BORK, and JUSTICE STEWART, did not find impeachment Article 1 unconstitutional and accordingly upheld it. Pp. 25-27.

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. 25–26.

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. 26–27.

3. Petitioner did not adduce evidence to warrant application of "closer scrutiny of Congress' motives." Therefore, good faith must be presumed. Pp. 26–27.

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. 15–16.

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.

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 rein statement. 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 polit ical 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 ad journed 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. 65 (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 Anytime 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 con text,[2] are pre-Anytime Review Clause and do not inform ap 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

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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 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.

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 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; 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 ingame 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

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

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. Testi mony 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 insufficient 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 con text, 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,[1] which is not itself a criminal offense. Article 3 alleges violation of an anti-nepotism statute,

[1] Article 2 also raises important questions about executive privilege. The President surely cannot be impeached for the legitimate exercise of his constitu-

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 them obtaining that office.[2]

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tional 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.

[2] 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, *su-*

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,[3] closer scrutiny of

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pra, 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.

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

Congress' motives may be in order and more searching review 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.[4] 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).

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[4] 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.

Contributing to the trivialization of the process is something all involved may come to regret.

* * *

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.

JUSTICE BORK, concurring.

I join THE CHIEF JUSTICE 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 impeach-

ment 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.").

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.

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.

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.

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.

IN RE ANGELICHAVEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF THE JUDICIARY

No. 07–06. Decided May 12, 2019.

PER CURIAM.

On March 1, the Court of Appeals (acting as the Court of the Judiciary) found that petitioner had violated the United States Code of Conduct for Judges by acting inappropriately towards parties. *In Re Complaint Against District Judge AngelicHaven*, 2 F. d ___(C. A 2019) (slip op., at 2). The court suspended him for 14 days. Petitioner appealed, arguing that the court's Chief Judge failed to recuse himself as he alleges was legally required. We granted certiorari and now dismiss for mootness.

I

The Court's inability to review moot cases derives from Article III. See *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964). "[T]he question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). This requirement extends to appellate action. See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973) ("The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated").

"The starting point for analysis is the familiar proposition that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (citing *Rice*, *supra*, at 246) (internal quotation marks omitted).

Such is the case here. The petitioner's rights cannot be adversely affected by the Court of the Judiciary as he is no longer a Judge. The jurisdiction of that court simply cannot be invoked in any way that deprives the petitioner of his rights.

II

We now turn to petitioner's argument. JUSTICE CHASE requested petitioner to brief the Court on the question of mootness. Petitioner responded by stating that: Firstly, the Court could "completely void the suspension off my record as if it has never existed." Secondly, the Court could "punish those responsible."

We reject these arguments. It is not this Court's role to decide matters for the sake of "setting the record straight." To do would be essentially an advisory opinion that is prohibited.

To analyze petitioner's first argument, we turn to *St. Pierre* v. *United States*, 319 U.S. 41 (1943) (*per curiam*). The *St. Pierre* Court recognized two instances where cases were not moot: if the case couldn't possibly be brought before this Court before the expiration of a sentence, or "state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied." *Id.*, at 43. The former isn't the case here—petitioner could've requested the Court to stay his suspension. The latter is simply not applicable; the petitioner suffers no legal consequence, especially considering their resignation. "[M]oral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." *Ibid.*

The Court lacks any jurisdictional basis to entertain the petitioner's second argument. Congress has entrusted the Court of the Judiciary to "oversee the proper conduct of all judges." Enhancing the Judiciary Act, Pub. L. 67–4, §104(a). The Act provides a method for complaining about the conduct of lower-court Judges. This Court's power to expel lower-court Judges is one traditionally exercised *sua sponte*,[8] and, in any event, petitioner's complaints are generally insufficient to justify such an extraordinary act. In addition, the Judge whom petitioner principally complains about has retired.

The petition raises important questions. However, the expiration of the petition and the resignation of the petitioner renders this point moot. Accordingly, the writ is dismissed as moot.

So ordered.

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[8] There are some notable exceptions to this. For example, Congress has provided circumstances where the Court of the Judiciary can report Judges to this Court with a recommendation of expulsion.

Per Curiam

BOARD OF LAW EXAMINERS, PETITIONER *v.* DORKJACOB

ON CERTIFIED QUESTION BY THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 07–11. Decided May 12, 2019.

PER CURIAM.

The Court of Appeals has failed to file a proper certification of the question in due time. The Court has therefore dismissed the case.

It is so ordered.

IN RE TONY_GIORDANO

ON MOTION FOR EXPULSION

No. 07–13. Decided May 13, 2019.

PER CURIAM.

The Court, upon receiving a complaint multiple days ago contending that respondent is constitutionally ineligible to hold office in the United States by consequence of the Fourteenth Amendment,[1] commenced these proceedings to consider the possibility of expulsion. Expulsion, we have noted, is an "extraordinary act." *Ex parte Haven*, 7 U. S. ____, (2019) (slip op., at 3) (*per curiam*). Additionally, the power is "traditionally exercised *sua sponte*," *ibid.* In this case, however, the Court decided to entertain the outside complaint based on the particular subject-matter it alleges. Whether an official is disqualified under the Fourteenth Amendment is assuredly a question of law and it is this Court's responsibility to "say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). We cannot think of another venue or process through or by which this claim may be effectively and appropriately adjudicated.

In other expulsion contexts, where the asserted issue is not ineligibility for office, this Court has by convention applied a three-step test to determine whether Supreme Court action is appropriate: We ordinarily do not act unless Congress has "(1) been given sufficient opportunity to

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[1] The Fourteenth Amendment, in §2, makes ineligible for governmental office any person who, "having previously taken an oath as [a U. S. government official, federal or municipal], to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." The phrase "insurrection or rebellion" is used as a term of art for joining and participating in any significant way in another United States group.

act, (2) has nevertheless failed to act, and (3) [if] the circumstances of the case are particularly egregious." *In re Trump*, 6 U. S. ___ (2018). In the context of the asserted ineligibility of a lower-court judge, however, we will act if the lower-court judge truly is ineligible for office. Making this determination, no less, requires discipline and careful attention to the precise textual limits of constitutional ineligibility provisions.

This case does not present a particularly difficult question. It is claimed that respondent's past membership in Exercist's United States (EUSA) automatically disqualifies him from service in the United States government under the Fourteenth Amendment. But that claim gives short shrift to the several preconditions through which the Fourteenth Amendment cabins its ineligibility dictate. As a threshold matter, disqualification under the Fourteenth Amendment for prior membership in another United States is only possible if a basic prerequisite is met. Namely, the person must have, before joining the other United States, "taken an oath [of office]" in this United States. This requirement makes a lot of sense when considered in light of the purposes which motivated inclusion of the clause in the first place. Its purpose was not to exclude those who mi grate from other United States groups (people leaving those groups in favor of ours is something the clause's Framers would have encouraged); rather, its purpose was to deter people, specifically our government officials, from leaving *this* United States in favor of others by prohibiting their return to government positions. In this case, there is zero evidence to suggest that respondent held any position in our government prior to him joining EUSA. Indeed, even a cursory analysis of our Nation's rank archives confirms as much.

Respondent, rather than being subject to the Fourteenth Amendment's strictures, began in another United States group, recognized its inadequacies, and then commendably migrated to ours. While it is vastly preferable that our United States is chosen first, the Constitution does not mandate that be the case. Its bar is only directed at those who previously held an office here and *then* deserted to another United States.[2]

The motion to expel respondent is therefore denied.

It is so ordered.

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[2] Whether other limits apply to the Fourteenth Amendment's ineligibility provisions is a question not before us and our opinion should not be understood to provide an answer. It would be inappropriate for us, in the course of ruling on an expulsion motion which is susceptible of narrow resolution, to express a view on that wholly unrelated question. We reserve that question for a later day.

ICY_ANTLERS, PETITIONER *v.* JOHNNIELCUCHRAN

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

No. 07–17. Decided July 9, 2019

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

Syllabus

PARTY, PETITIONER *v.* BOARD OF LAW EXAMINERS, ET AL.

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

No. 07–18. Decided July 28, 2019.

After Congress passed the Reviving the Bar Act (old S. 147), which, *inter alia*, transferred control of the Federal Bar to the Executive Branch, Jacob A. Kirkman filed a class action on behalf of the members of the Supreme Court Bar challenging that legislation in Federal District Court. He alleged that the Revival Act violated the *trias politica* doctrine by contravening the separation of powers. After obtaining a favorable judgment in the District Court and an injunction against the Revival Act, Kirkman then worked with the sponsors of the Revival Act on a successor bill, the Private Representation Revitalization Act (new S. 147). This new Act was virtually identical to the Revival Act but addressed some policy concerns particular to Kirkman which led him to file his original case. Once the Revitalization Act became law, Kirkman and the Board of Law Examiners sought to have the injunction dissolved to allow the new Act to take effect. The Court of Appeals vacated the injunction despite no presentation affirmatively challenging it on the merits. SheldonParty, a member of the plaintiff class, filed a motion in this Court to be substituted as class representative to pursue an appeal of the Court of Appeals ruling. This Court granted that motion and SheldonParty argued that the Court of Appeals committed legal error by vacating the injunction without the presentation of any affirmative arguments and that both old and new S. 147 are unconstitutional.

Held:

1. The Court of Appeals erred in vacating the injunction without the presentation of legal arguments. Pp. 1–2.

2. S. 147 is unconstitutional because licensing attorneys is an exercise of judicial power and that power cannot be transferred by Congress to the Executive Branch without violating the separation of powers and *trias politica*. The Due Process Clause argument referenced in *Ultiman* v. *United States*, 5 U. S. 72, however, is rejected because there is no constitutional right to practice law. Pp. 2–5.

8 F. 4d ___, reversed.

PITNEY, J., delivered the opinion of the Court, in which HOLMES, C.J., and GORSUCH, O'CONNOR, STEWART, and DOUGLAS, JJ., joined in full; and in

which BORK and CHASE, JJ., joined in part; BORK, J., filed a concurring opinion in which CHASE, J., joined. BRANDEIS, J., took no part in the decision of this case.

JUSTICE PITNEY delivered the opinion of the Court.

On the 27th of April 2019, President Bakedgoods signed S. 147 ("the law" hereinafter) into law. This law attempted to move the administrative authority to regulate the Bar to the Executive Branch. Originally, counselor Jacob A. Kirkman filed a class action suit against the law, claiming members of the Supreme Court Bar had suffered injury.

The District Court issued an injunction[1] against the law, stating that it violated the *trias politica* doctrine by contravening the separation of powers that exists between the three branches of Government. The existence of such separation has been affirmed repeatedly by this Court: "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U. S. 52, 293 (1926); see also *INS v Chadha*, 462 U. S. 919 (1983). The Court of Appeals vacated the injunction citing that no party wished for the injunction to continue standing.

Looking to the case at hand, petitioner filed a suit claiming that the Court of Appeals erred in its decision to vacate the injunction on the grounds that nobody wanted it. Petitioner claimed that "neither the Board nor Kirkman offered any legal reason for the Court of Appeals to reverse the District Court's denial of the dissolution motion, nor could they." Pet. for Cert. at 5.

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[1] See https://secure.link/RoMGEfgc (Reporter's Note: dead link).

The primary question at hand is whether the Court of Appeals erred in its decision to vacate the injunction with no legal arguments being presented to do so.

In essence, the Court of Appeals vacated the injunction sua sponte. This Court in a previous case declared: "It is not the burden of the petitioner to show that his appeal has merit, . . . It is the burden of the [respondent] . . . to show the appeal lacks merit." *Coppedge v. United States*, 369 U. S. 438, 448 (1962). This means that it would have been the burden of Kirkman to prove the injunction has merit. This, however, is not the situation afoot. Kirkman and the Board of Law Examiners ("the Board" hereinafter) failed to present legal arguments. We would find that the decision to vacate the injunction without legal arguments being presented to be a decision made ultra vires. The Court of Appeals does not have authority to carry out judicial review by its own sword.

This is not the first time this Court has been asked to review the constitutionality of an executive-controlled Bar. Indeed, consider the Consolidated Appropriations and Authorizations Act of August 2018. This law led to *Ultiman v. United States*, 5 U. S. 72 (2018). In this case, the Court was asked to review a very similar topic, however, the Court chose to withhold from addressing the separation of powers argument; they did however note it raised "legitimate concerns." Id., at 21, n. 4. The Court dismissed the case as moot leaving us now to decide the matter they avoided.

Two main arguments exist between the case at hand and *Ultiman*. The first being that the transfer of a Bar from the control of the Judiciary to the control of the Executive places a "substantial burden" on those who practice law, causing them to lose clients and the prospect of money. The

second being that a Bar controlled by the Executive, the primary argument of this case, violates the separation of powers between the Judiciary and the Executive.

To satisfy the first argument we look to *Ultiman*. "There is a clear nexus between §304's placement of the then-new system within Executive Branch control and the injury's petitioner has asserted. If we held invalid §304, those imminent injuries would have been redressed." *Id.*, at 22. The petitioner's injuries are those referred to above as a "substantial burden." One may think that the Court upheld the argument that the Due Process Clause has been violated by adding an undue and substantial burden of the petitioner but that is not the case. *Ultiman* upheld that the claim substantiated an imminent injury therefore giving the petitioner standing under *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992). This was merely a "justiciability issue", *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 92 (1998), rather than an argument that holds water. In fact, further inspection of this argument proves it holds no water. "There are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. The right to admission to practice in the courts of a state is not one of them." *Bradwell v. State*, 83 U. S. 130, 139 (1872). In *Bradwell*, the Court upheld that no right to practice law is protected by the Constitution, therefore rendering the due process argument flawed. The reason for this can be explored in *Ex parte Garland*, 71 U. S. 333 (1866). *Garland* held that "admission or exclusion [from the Bar] is not the exercise of a mere ministerial power. It is the exercise of judicial power," *Id.*, at 378-379. The power of the courts to regulate who can practice within them is a power not only granted by the Constitution, but a power

that ensures the administration of justice is fair, and the rights of those who are seeking such, are upheld. "[Attorneys] are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character." *Ibid.* The separation of powers is a doctrine embedded within the very Constitution of the United States. In Article I, the legislative power is vested in Congress. In Article II, the executive power is vested in the President. And in Article III, the judicial power is invested in this Supreme Court and its inferior courts. Three powers, three branches—all separate with a system of checks and balances between the three and the People. "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." 1 Annals of Congress 581. The Court has, on many occasions, shut down legislation using judicial review,[2] due to the nature of the legislation violating this very belief of the separation of powers. This case shall be no exception. As noted in Garland, supra, attorneys are officers of the court, to be chosen by the courts. The idea that the Executive can choose, regulate, and discipline the officers of the court is as absurd as the Supreme Court picking the President's cabinet, or the Senate's Sergeant-at-Arms. It clearly abridges the judicial power vested in the Supreme Court. Time and time again, this Court has held that the administration of the Federal Bar shalt not be given to the Executive Branch.

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[2] See *Marbury v. Madison*, 5 U.S. 137 (1803).

The notion abridges the separation of powers and therefore is unconstitutional. The Court of Appeals erred in its decision vacating the injunction; this Court reverses the decision below and strikes down S. 147 in its entirety.

It is so ordered.

JUSTICE BORK, with whom JUSTICE CHASE joins, concurring in part.

The Court's conclusion—that Congressional assignment of Federal Bar administration to the Executive Branch "abridges the judicial power vested in the Supreme Court"—is obviously correct.[1] It is also clearly consistent with the original understanding of the Constitution to declare this arrangement unconstitutional.[2] But the historical record is equally clear that Congress, as long as it leaves administration of the Bar to the Judicial Branch, may regulate as to the form and structure the Bar system shall take.[3] I disagree with some of the majority's broader rhetoric suggesting otherwise. I do not think the majority means to foreclose this type of Congressional involvement and I do not read its opinion to do so. To be on the safe side, however, I concur in part only.

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[1] *Ante*, at 4.

[2] E.g., *In re Kirkman*, 7 U. S. ___, ___ (2019) (slip op., at 1) (describing the "long history of judicial management" of the Federal Bar).

[3] See U. S. Const., art. I, §8, cl. 14 (authorizing Congress to make "necessary and proper" laws to carry into effect "all . . . other Powers vested by this Constitution in the Government.").

Syllabus

LYDXIA, ET AL., PETITIONER *v.* HOUSE OF REPRESENTATIVES, ET AL.

ON PETITION FOR WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

No. 07–26. Decided September 13, 2019.

PER CURIAM.

Under the Constitution, Congress and its committees may issue subpoenas "only in furtherance of a legislative purpose." *Watkins v. United States*, 354 U. S. 178, 201 (1957). But a conclusion by Congress that a subpoena is so justified warrants great respect and courts should hesitate to set it aside. This deference has its predicates, however. Relevantly, to enable effective judicial review and provide fair notice to recipients, the Constitution requires that a subpoena's basis be disclosed upfront and with "sufficient particularity." *Ibid*; see *id.*, at 217. The Court granted review in this case to determine whether a subpoena issued against petitioner with only a passing reference to its underlying subject-matter meets that threshold.

After review was granted, however, several events took place that, taken together, moot this dispute. To begin with, petitioner announced they would discontinue active participation in the United States and would "quit" ROBLOX. Standing alone, this by no means requires dismissal. As we have emphasized before, a petitioner who "'quit[s]' ROBLOX . . . does not [necessarily] lack a continuing [legal] interest in th[eir] case's outcome." *Benda v. United States*, 6 U. S. 24, 29 (2018). They remain legally capable of pursuing their case and automatic dismissal would be inappropriate. In this case, though, the detail of petitioner quitting helps to contextualize subsequent developments. For example,

petitioner neglected to attend the hearing they were subpoenaed to even after the Court declined to temporarily injunct the subpoena against them. In response, however, rather than pursue any enforcement action, the House Judiciary Committee chose to terminate its investigation with respect to petitioner.

This choice, viewed in context, reveals there is virtually no likelihood the Committee would reinstate the challenged subpoena following dismissal. Furthermore, it is even less likely they would "resume [their] allegedly unconstitutional conduct," which is what the mootness doctrine's voluntary cessation exception actually targets. *Ultiman v. United States*, 6 U. S. 19, 23 (2018) (emphasis added). After all, this case does not claim that the challenged subpoena is substantively invalid. Instead, it is the purportedly inadequate explanation that petitioner took issue with and which was arguably unconstitutional. There is no reason to think that the Committee would not provide a more concrete explanation the next time around in the extremely unlikely event it chose to reinstate the subpoena. For these reasons, the writ of review is dismissed as moot.

It is so ordered.

JUSTICE BRANDEIS took no part in the decision of this Court.

JUSTICE CHASE, with whom joins, concurring in part.

The petitioner initially portrays their case as if a private citizen was summoned by one of the House's committees, but further investigation reveals that the specialized super-

visory committee of the House is investigating the executive officers of the Department of Justice—the petitioner is an assistant attorney general.

I

On one hand, the Constitution says nothing about the power of Congress to obtain documents or testimony that relate to Executive and on the other hand the Constitution says nothing about the privilege to withhold; the petitioner doesn't bother briefing us on the latter, but is very quick to the former. If this were a case about privilege—made in entirely different circumstances—I would be willing to accept a petition for anytime review, as "privilege" has been ignored by the Executive's competitors and misapplied by the Executive. This case concerns itself with undermining a rare case of legitimate congressional oversight. Oversight which scarcely exists in a political vacuum. It is why all courts at all levels should hesitate to examine what could best be described as political questions. Regardless, Congress has a clear responsibility, by virtue of constitutional authority, and interest in inquiring "[the] Department of Justice and other officials [about] possible violations of Government Employee Rights Act and possible rebellion against the United States." [1] Such inquiry—practically speaking, oversight—translates into detecting civil rights violations, preventing dishonesty and ensuring compliance by the Executive with statutory intent. See generally *Watkins v. United States*, 354 U. S. 178 (1957). While there are two—and, some might argue, several—interpretations of what oversight exactly is, any coherent, balanced definition

[1] The title and concerns of the subpoena.

can be seen as approving the subcommittee's action: whether it's that "oversight, strictly speaking, refers to review after the fact . . . [it is] mostly composed of inquiries about policies that are or have been in effect, investigations about past administrative actions, and the calling of executive officers to account for their actions"[2] or that "oversight is behavior by legislators, which results in an impact, intended or not, on bureaucratic behavior,"[3] it is very much allowed by the Constitution.[4] As such, there is no reason to think that the house judiciary committee has no—or too vague—legislative authority to adopt the avenue of compulsory subpoena: it is the committee's choice if such avenue is used "for the purposes of evaluating operations, programs, and activities or to check, control, and provide leverage over the executive's specific actions, agencies, or officials."[5] The committee has a long history of adopting bills relating to the supervision of the Justice Department and the law enforcement agencies it administers—and, by extension, the executive officers responsible for them.

II

Nevertheless, the Court's primary points of deliberation have moved from strong legal theory—whether the Court should look forward to scrutinizing clerical errors

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[2] Joseph P. Harris, Congressional Control of Administration.

[3] Morris S. Ogul, Congress Oversees the Bureaucracy: Studies in Legislative Supervision.

[4] Whether it be direct or indirect, latent or manifested, official or unofficial, ad hoc, reactive or planned, etc.

[5] F. Kaiser, Congressional Oversight of the Presidency (1988) (talking about evaluation and control through compulsory mechanisms).

and the legislative branch's power to obtain information in order to perform its duties—established by decades of real-life precedent,[6] laws[7] and the historical foundation "of a republican government [in which] the legislative authority necessarily predominates"[8] to the volatile theory, characterized by our ever-changing Supreme Court, of the many different interpretations of the Anytime Review Clause—how should the "necessary exercise" part be interpreted? At the very start of the its opinion—prior to the parts that any reasonable judge would agree with, but after laying waste to everything I am about to speak about—the Court says that Congressional subpoenas "warrant great respect and courts should hesitate to set [them] aside." *Ante,* at 1. It never says why, though: and it tells me something about the depths of its misperceptions.

Thus far it has been by no rule, by no doctrine: willy-nilly cases brought here could also be accepted, and sometimes even decided, by roll of dice, because there have been cases where we explosively denied requests of review based on lack of justiciability[9] and cases where very few Justices said anything about—what should be—mandatory, defined,

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[6] *McGrain v. Daugherty*, 273 U. S. 135 (1927); *Watkins*, 354 U. S., at 178; *Barenblatt v. United States*, 360 U. S. 109 (1959) . . . to name a few.

[7] It is known that the legislative can pass laws that mandate oversight and impose specific obligations, such as reporting or consultation.

[8] The Federalist No. 51, p. 269 (Gideon ed. 2001).

[9] *Woman v. United States*; *Pauljkl v. Sights*, 6 U. S. 59 (2018); *Conjman v. United States*, 6 U. S. 52 (2018); *Killer v. Sights*, 6 U. S. 58 (2018); *Gunlow v. Sights*, 6 U. S. 59 (2018) . . . to name a few.

restrictions on exercising anytime review. Restriction of this power is required by "this Court's constitutional mandate and its own convention and policy":[10] it's true, "judicial policy . . . is not mandated by the Constitution,"[11] however a legal realist is someone who "acknowledges that if there are any restraints on judicial choice they must be self-imposed [by the Court]"[12] —whether "[constraints] never had any basis in the Constitution as originally understood"[13] is irrelevant, we were empowered to determine our own competence[14] and our own right to make policy. Members of the Court have rationalized this plentiful and liberal exercise of anytime review by stating that "this is a major issue which has arisen constantly throughout our Nation's history" or that "the case is not moot and still holds much precedential value." See, e.g., *Waffles v. Senate*, 6 U. S. 23 (2018). The Court's quite absurd, complacent justifications are bound to diminish the extraordinary nature of future interventions. An intervention, through the usage of Anytime Review, is extraordinary because it has traditionally and precedentially transcended all general principles of law—such as the exhaustion of alternative remedies, justiciability, legitimate expectations, etc.

Accordingly, "[v]arious objective factors" [15] account for

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[10] *Stratton v. Technozo*, 2 U. S. 88 (2017) (HOLMES, C. J., dissenting); *Dynamic v. Technozo*, 2 U. S. 77 (2017) (HOLMES, C. J., respecting denial of certiorari).

[11] *Cursive v. United States*, 7 U. S. 9, 16 (2019).

[12] K. Holland, Judicial Activism vs. Restraint (1983).

[13] *Heave v. United States*, 5 U. S. 87, 88 (2018) (BORK, J., concurring).

[14] "[A]t any time [we] deem necessary," Art. III, §4.

[15] *Heave*, supra, at 86 (HOLMES, C. J., concurring).

cases in which a series of complex, egregious actions can cause immediate, irreparable harm to the governmental or ingame structure if they are not blocked. We determined that our right to exercise this magnifying glass ends when some of these factors are not apparent.[16] It's a tool that intrinsically accounts for consequences—whether we like it or not, it's a tool shaped to remedy a mistake before it happens or in the immediate aftermath. Make no mistake, as there is nothing immediate, irreparable, complex[17] or egregious about Congress exercising its power to investigate and inform itself, undeterred by the fact that the reasoning behind this exercise of power is on irregular grounds due to the poor specificity of the Committee.[18] "[W]hen [Congress is] acting within the scope of their authority concerning matters reasonably germane to potential legislation, judicial review is inappropriate" [19] and "if the legislative

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[16] For example, we have determined that we have no jurisdiction to hear cases against the FEC., even through anytime review. See Isner v. FEC; Sawnberg v. Clan Managers; Lincere v. Clan Managers. By claiming that there are no constraints on anytime review, you support a radical level of judicial activism which promotes against standing by even the most predictable and determinable decisions that add to the integrity of the law and judiciary; unchecked and uncheckable judicial rule through the usage of anytime review.

[17] Complexity, if brought up, is a factor solely because some of my colleagues do not trust the court that has original jurisdiction to review any case beyond rubber stamping on the basis of who the parties are.

[18] "We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses," *McGrain v. Daugherty*, 273 U. S. 135, 174–176 (1927) and ". . . weight should be accorded by the courts to a presumption that a legislative investigating committee would not act invalidly or beyond the scope of its power and authority." *State ex rel. Hodde v. Sup. Ct.*, 40 Wn. 2d 502, 507 (Wash. 1952) (italics added).

[19] *Ibid.*

committee is, in fact, effecting some valid legislative purpose and acting within the authority delegated by statute, such a committee is beyond interference by the judiciary." [20]

III

In future cases it should be noted that a "witness may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry": [21] whereas exceeded power is based on the three requirements of a "legally sufficient" [22] subpoena and, perhaps, even the Thompson notion of fruitlessness—which, in this case, is not limited to "personal affairs" but any affairs that are beyond the legislature's power. See *Kilbourn v. Thompson*, 103 U. S. 168, 195 (1880) ("Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By "fruitless" we mean that it could result in no valid legislation on the subject to which the inquiry referred."). Once the petitioner refuses to answer and takes the claim to court, the House is not protected by the Speech and Debate Clause. Let me be clear, the House is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the judiciary may examine and determine the legality of its

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[20] *Jordan v. Hutcheson*, 208 F. Supp. 131, 135 (citing *Eastland v. United States Servicemen's Fund*, 421 U. S. 491 (1975); italics added).

[21] *McGrain v. Daugherty*, 273 U. S. 135 (1927).

[22] *Wilkinson v. United States*, 365 U. S. 399 (1961).

action, as it is the province and duty of the judiciary to examine whether the powers of any branch of government, and even those of the legislature, in the enactment of laws, have been exercised in accordance with the Constitution. See *Burnham v. Morrissey*, 14 Gray, at 226.

* * *

Therefore, it was remarkably improper for us to grant review. Footed by reasons that can only be called terribly imprudent—a tyrannical exercise of this power inspires distrust in anything but us. By allowing this case to be heard, we have only served to weaken an already exhausted legislative which, in recent, modern times, has resorted to using its only sensible check—impeachment—on the other compartments of the internal structure of the government.

ORDERS FOR FEBRUARY 15, 2019, THROUGH AUGUST 13, 2019

March 24, 2019

Review Granted.

No. 07-01. In re Federal Government. Review granted.

Review Granted.

No. 07-02. DorkJacob v. District of Columbia. Review granted. Consolidated into 07-01.

March 24, 2019

Petition Withdrawn.

No. 07-03. FederatedCommander v. Profine. Petition was withdrawn by petitioner.

April 4, 2019

Review Denied.

No. 07-04. Psychodynamic v. Procursive. Review denied.

April 7, 2019

Review Granted.

No. 07-05. Procursive v. United States. Review granted.

April 16, 2019

Certiorari Granted.

No. 07-06. In re AngelicHaven. Certiorari granted.

April 18, 2019

Petition Withdrawn.

No. 07-09. DevinBeauclerk v. United States Military. Petition was withdrawn by petitioner.

April 21, 2019

Review Denied.

No. 07-10. HHPrinceGeorge v. United States. Review denied.

April 22, 2019

Certiorari Denied.

No. 07-08. Trickstere v. United States. Certiorari denied.

May 4, 2019

Review Denied.

No. 07-07. Chief_Vinexy v. United States. Review denied.

May 12, 2019

Dismissed.

No. 07-11. Board of Law Examiners v. DorkJacob. Dismissed.

May 21, 2019

Review Denied.

No. 07-14. reset3634643 v. Washington D.C. Medical Service. Review denied.

June 1, 2019

Review Denied.

No. 07-12. PatrioticCross v. United States. Review denied.

June 12, 2019

Certiorari Denied.

No. 07-15. In re Waffles8890. Certiorari denied.

June 13, 2019

Certiorari Granted.

No. 07-18. SheIdonParty v. Board of Law Examiners. Certiorari granted.

June 15, 2019

Certiorari Granted.

No. 07-17. ICY_ANTLERS v. JOHNNIELCUCHRAN. Certiorari granted.

June 16, 2019

Certiorari Denied.

No. 07-16. Z1A12766 v. MIMESTHEBEST, ET AL. Certiorari denied.

June 21, 2019

Habeas Corpus Denied.

No. 07-19. EX PARTE ST3PDAD. Habeas Corpus denied.

June 25, 2019

Review Denied.

No. 07-20. RS_HUDSON v. HOUSE OF REPRESENTATIVES, ET AL. Review denied.

JUSTICE BORK, with whom JUSTICE CHASE joins, concurring in the denial of certiorari.

I concur in the denial of review in light of the fact that the contested subpoenas have been unilaterally rescinded by the House, making any intervention by this Court unnecessary. See Supp. Record, Doc. 5 (comment of PITNEY, J.), available at https://secure.link/LabTkwzf (Reporter's Note: dead link). I write separately to note that this Court's denial should not be interpreted as endorsing the initial legality of those subpoenas. To the contrary, in my view, those subpoenas were constitutionally problematic. In a future case, this Court may be called on to address the constitutionality of subpoenas issued to judicial officers in response to their rulings. At that time, this opinion may prove helpful in discerning the law.

I

The Constitution does not expressly grant Congress a "subpoena" power; that power has only been implied from the Necessary and

Proper Clause. *McGrain v. Daugherty*, 273 U. S. 135, 161 (1927). To ensure that we do not allow implication to override the core constitutional design "of a government of limited powers," *NFIB v. Sebelius*, 567 U. S. 519, 552 (2012) (opinion of Roberts, C. J.), we must enforce appropriate boundaries on the scope of Congress' ability to issue subpoenas. From that premise, this Court has allowed only subpoenas which are "related to, and in furtherance of, a legitimate task of Congress." *Watkins v. United States*, 354 U. S. 178, 187 (1957). Indeed, a "congressional investigation . . . is invalid if unrelated to any legislative purpose," because it is "beyond the powers conferred upon Congress by the Constitution." *Id.*, at 198. Consideration under this standard suggests to me that rulingresponsive subpoenas similar to those challenged in this case are unconstitutional.

I can think of only three possible legislative justifications for a ruling-responsive subpoena. None ultimately pan out.

A

First, it might be argued that a ruling-responsive subpoena is valid pursuant to Congress' lawmaking role. After all, judicial rulings typically rest on the application of Acts of Congress. Thus, Congress might subpoena a judge to gather insight into how they interpreted an Act of Congress a certain way so that Congress can make an informed decision on how to possibly change that law going forward.

This justification, though it does have its merits, is flawed. A judge's written opinion will usually set forth the full explanation their court has elected to offer for its legal conclusions, including the process going into its interpretation of a statute. The opinion of a court "rationalizes issues, explains facts, and settles disputes."[1] Indeed, the very purpose of an opinion is to "make a judgment credible to a diverse audience of readers."[2] In some situations, a court will choose to provide an extensive explanation of its conclusions; in others, it may not. Context dictates the appropriate scope of the explanation.[3] Making this assessment is a fundamental aspect of the judicial power vested in the various courts of our Nation; "judges command no army

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[1] Curtin, Opinion Writing, 21 Georgetown J. L. E. 237, 237–38 (2008).

[2] Stevenson, Writing Effective Opinions, 59 Judicature 134, 134 (1975).

[3] Lebovits, The Weight of Authority, 76 NYSBA Journal 64, 64, 60–61 (2004).

and control no purse," but certainly have charge of their "words."[4]

Congress lacks a legitimate legislative purpose in insisting a judge explain their interpretive process beyond the explanation they have already chosen to provide in their written opinion. If a judge's interpretation is unsound, the appropriate recourse is for a qualified party to file an appeal. Congress may exercise its power to amend the law, to be sure, but it must do so without questioning a judge as to their interpretive process.

B

Second, it might be argued that Congress' asserted power to issue a ruling-responsive subpoena is an incident of its impeachment power. This argument, unlike the previous one, is entirely meritless. It is well established and incontestable that Congress' impeachment power does not authorize it to act in "retaliation for . . . judicial acts." *Cursive v. United States*, 7 U. S. 9, 26, n. 3 (2019) (quotation marks and citation omitted). It is therefore inconceivable Congress could derive a legitimate legislative purpose from its impeachment function in issuing ruling-responsive subpoenas.

C

Finally, one could attempt to defend a ruling-responsive subpoena under Congress' so-called "informing function." This Court has intimated in the past that this function authorizes Congress to "inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Watkins*, supra, at 200, n. 33. So the argument goes, Congress can subpoena a judge in response to one of their rulings in order to investigate possible motives relating to corruption, maladministration, or inefficiency. But this doctrine is dubious as an original matter: at the time of the founding, Congress was not understood to serve any "informing function." Even accepting the function as a given, however, it has always been cabined to "agencies of the Government." Ibid. Its justifications are simply inapplicable with respect to Article III courts, which were established with independence as a forefront concern.[5]

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[4] Curtin, supra, at 237.

[5] Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 168–194 (1926).

Indeed, as "text and . . . precedent confirm, Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and *protects the independence* of the Judicial Branch.'" *Stern v. Marshall*, 564 U. S. 462, 482–483 (2011) (quoting *Northern Pipeline v. Marathon Pipeline*, 458 U. S. 50, 58 (1982) (plurality opinion)). Extending Congress' informing function beyond its agency-based scope (where its rationale has some force) to include Article III courts (where it has none) would be irresponsible and inconsistent with the Constitution.

II

I have analyzed the three most plausible legislative justifications for ruling-responsive subpoenas and none, in my judgment, are sufficient. While it is possible that another justification I have not considered may arise in full adversarial proceedings, I am skeptical one exists. It may become our duty in a future case to hold this questionable breed of subpoenas unconstitutional.

But for the reasons described earlier, today I concur in the denial of review.

June 28, 2019

Withdrawn.

No. 07-23. GOLEROS v. UNITED STATES. Petition withdrawn by petitioner.

June 30, 2019

Review Denied.

No. 07-21. IN RE ACIDRAPS. Review denied.

Review Denied.

No. 07-22. NINJASTORM2244 v. UNITED STATES. Review denied.

Withdrawn.

No. 07-24. WAFFLES8890 v. DEPARTMENT OF DEFENSE, ET AL. Petition withdrawn by petitioner.

July 13, 2019

Review Denied.

No. 07-25. DEVINBEAUCLERK v. UNITED STATES. Review denied.

Review Granted.

No. 07-26. LYDXIA, ET AL. v. HOUSE OF REPRESENTATIVES. Review granted.

July 14, 2019

Dismissed.

No. 07-27. ARRIGHI v. AZAHID1, ET AL. Dismissed.

August 3, 2019

Withdrawn.

No. 07-28. DORKJACOB v. RS_HUDSON I. Petition withdrawn by petitioner.

Withdrawn.

No. 07-30. EX PARTE DORKJACOB. Petition withdrawn by petitioner.

REPORTER'S NOTE

This Bound Volume is the work of Lewis F. Powell, Jr. Its contents' formatting, pagination, and other revisions were completed by him, based on former Reporters of Decisions David E. Racine, III and Timothy Geithner.
