Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 09–13

RESET4K, PETITIONER *v.* UNITED STATES, ET AL.

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[April 26, 2020]

PER CURIAM.

This case presents the question whether the impeachment and subsequent conviction of President Reset4K were constitutionally valid. In any impeachment, the Constitution requires the presence of an impeachable offense. To fulfill that requirement, Congress identified three grounds for impeachment: (1) witness tampering, (2) obstruction of Congressional committee proceedings, and (3) conspiracy to impede a law enforcement officer. The House approved the articles and the Senate conducted a trial. The President was then convicted.

Petitioner, however, alleges that the impeachment process was legally defective on four grounds.[1] First, petitioner argues that the Senate trial failed to meet the standard of "due process" purportedly required in the impeachment context. Second, petitioner alleges that the impeachment articles were a mere pretext for an unconstitutional motive. Third, petitioner argues that the Senate's finding of factual guilt was clearly erroneous. And fourth, petitioner argues that, even if factual guilt was correctly found,

[1]The Court uses "petitioner" to refer to both the actual petitioner and the participating *amici* who supported him.

the particular facts alleged in the articles of impeachment—the facts the Senate concluded were true—do not describe an impeachable offense under the Constitution. Respondent, in opposition, claims that this case presents a nonjusticiable matter that is unfit for consideration by the Court.[2]

For the reader's convenience, this opinion begins with the broadest issues and moves towards the narrowest ones. The Court starts by considering and ultimately rejecting the respondent's arguments against justiciability. In particular, the Court refuses to overrule *Procursive* v. *United States*, 7 U. S. ___ (2019). Next, the Court considers and rejects those arguments by petitioner which allege Due Process Clause violations, and those which contend that the impeachment should be invalidated based on unconstitutional motive. Third, the Court affirms the Senate's role as the primary trier of fact in impeachment cases and refuses to engage in clear error analysis of the Senate's finding of factual guilt. Finally, the Court agrees with the petitioner's argument that none of the articles of impeachment for which he was found guilty alleged impeachable offenses. Based on the final holding, the Court overturns the President's removal from office.

I. Justiciability

Respondent's argument primarily rests on the claim that this case is nonjusticiable. In support, respondent first references the Constitution's provision that the Senate shall have the "sole Power to try all Impeachments." Art. I, §3, cl. 6. Second, respondent argues more generally that impeachments present a "political matter" beyond the scope of judicial competence. Accepting either argument would require the Court to overrule its conclusion in

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[2] For the sake of readability, the Court uses "respondent" to refer only to the *amicus* representing the 23 current and former Members of Congress.

Procursive that impeachment is a justiciable matter under the Anytime Review Clause. See 7 U. S., at ___–___ (slip op., at 5–8).

The Court rejects respondent's arguments for three independent reasons: (1) the original meaning of the word "sole" in the Impeachment Trial Clause did not encompass a prohibition on any and all judicial review in the impeachment context, nor does any precedent of this Court require the use of a non-original meaning; (2) the plain text and original meaning of the Anytime Review Clause permit review in the impeachment context; and (3) in any event, *stare decisis* strongly counsels against overruling *Procursive*.

A. The "Sole" Power

The primary argument before this Court against justiciability is that the Constitution's assignment of the "*sole* Power to try all Impeachments" to the Senate reflected the Framers' wish to keep the Judiciary out of the impeachment process altogether. As the argument goes, that means that *any* type of judicial review—no matter what the circumstance may be—is impermissible.[3] To support this argument, respondent emphasizes the dictionary definition of

[3]To his credit, respondent does not advocate such a heavy-handed position. Instead, respondent says that in some circumstances review by the Court might be permissible. As an example, he gives a situation where a "*clear* constitutional issue [is] at hand," rather than one that might be debatable. Response of *Amicus Curiae* Current and Former Members of Congress 11 (hereinafter Respondent Response). This is certainly a diplomatic response but respondent does not explain how the word "sole" in the Impeachment Trial Clause incorporates this requirement, nor does he provide any reason why the Court should use nothing more than what must be termed its own sense of "good policy" to decide a case of such serious constitutional magnitude.

Respondent also does not provide a standard for the Court to distinguish between *clear* constitutional issues and *unclear* ones. It is far from clear why respondent believes that the issues presented in this case fall into the latter camp.

"sole" and cites comments by a Framer in the Federalist Papers.

The Court is not persuaded. The evidence presented by respondent does paint a certain picture, but not quite the one that respondent argues it does. Furthermore, the evidence cited by respondent is not the only evidence in the historical record. And considering the balance of the evidence, it is clear to the Court that the original meaning of "sole" in the Impeachment Trial Clause did not proscribe all judicial review in the impeachment context. The Court is also not aware of any precedent requiring the use of a different interpretation.

1. Respondent's Evidence

Respondent places great weight on two primary pieces of evidence. The first is a modern dictionary and the second is Federalist No. 65. With respect to both pieces of evidence, however, the weight proves too much to bear.

The dictionary cited by respondent defines "sole" to mean "only" or "unique." Brief for *Amicus Curiae* Current and Former Members of Congress 5 (hereinafter Respondent Brief). Respondent says that this means that the only power to try an impeachment belongs to the Senate and that therefore review by this Court—because it would be in effect a second trial *de novo*—is impermissible. Unfortunately, however, the minor premise of respondent's logic (that review by this Court would effectively be a second trial) is critically defective.

At the time of the founding, the definition of the word "try," as used in the context of the Impeachment Trial Clause, entailed the consideration of factual guilt or innocence. See, *e.g.*, Ash, 2 The New and Complete Dictionary of the English Language 378 (1795); accord, Webster's Third New International Dictionary 2457 (1971). The upshot of this is that judicial review focused not on whether Congress simply got the facts right or wrong but

on whether Congress acted in accord with the Constitution. None of this constitutes a second "trial" within the meaning of the Impeachment Trial Clause.

During the Court's deliberations, JUSTICE PITNEY put it concisely: "[A] review is not inherently a trial." Unfortunately, respondent fails to confront this issue. The Court, however, is aware of—but not persuaded by—two possible counterarguments. First, some argue that regardless of the fact that review is not *inherently* a trial, it may still constructively be one because review consists of the Court second guessing the judgment of Congress. This argument fails to recognize that judicial review does not consist of the Court simply asking itself whether the Senate got the facts right. The Court has already explicitly ruled out "*de novo* review," calling it "inappropriate in [the impeachment] context." *Procursive*, *supra*, at ___, n. 7 (slip op., at 16, n. 7). The Court's review, as in *Procursive*, focuses instead on whether the facts alleged by the House and found true by the Senate together establish a constitutional basis for impeachment.[4]

Instead, judicial review in impeachment cases is no different from judicial review in other contexts; it is based on the Court's evaluation of *constitutional* limitations. It is possible for an impeachment to be both ethically wrong and constitutionally valid or ethically right and constitutionally invalid. Performing this function does not require that the Court "retry" an impeachment. Questions of morality and those of constitutionality evaluate entirely different things.

Second, some argue that the emphatic nature of the word "sole" means that any review is automatically a second trial. This argument is easily refuted, however, with mere reference to the definition of "sole" provided by respondent. It

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[4] The House possesses the "sole Power of Impeachment" and the Senate has the "sole Power to *try* all Impeachments." It follows that the Senate may only convict based on facts alleged by the House.

simply means "only" or "unique" and neither of those definitions alters what it means to "try" something.

Respondent also relies on, but never quotes, Federalist No. 65. According to respondent, that article's discussion of impeachment stands for the proposition that there is no room for "[constitutional] interpretation by the Court" in the impeachment context. Respondent Brief 6. Additionally, respondent says that the article rules out "judicial intervention in its entirety." *Ibid.* The Court, however, cannot find any of this in the referenced article.

To be sure, the article discusses why the Framers settled on the Senate as the body to *try* impeachments, but it does not say one whit about the propriety or impropriety of "judicial review" of impeachments. *Nixon* v. *United States*, 506 U. S. 224, 243 (1993) (White, J., concurring in the judgment). The Court also already considered this exact evidence in *Procursive* and respondent does not refute the conclusions reached in that case.

First, *Procursive* held that when viewed in their proper "context," the comments made by the Framers do not speak about judicial review whatsoever. *Id.*, at ___ (slip op., at 7). Instead, the Federalist Paper article cited by respondent merely explained why the Framers at the time felt the Senate was best suited to *try* impeachments in the first instance. The article was not written as a screed against the idea of judicial review of impeachment decisions. Contrary to respondent's apparent belief, the Framers were not fundamentally opposed to the notion of judicial involvement. Indeed, during the Constitutional Convention, that was one of the most difficult questions the Framers wrestled with.

Far from having an obvious answer, the subject "greatly vexed the Framers." *Nixon*, *supra*. Indeed, records from the Convention reveal that prominent Framers like James Madison, both during and before the Convention, believed that the trial of impeachments should be left *entirely* to the

Judiciary. See P. Hoffer & N. Hull, Impeachment in America, 1635–1805, pp. 74, 98, 100 (1984). Other ideas that were considered (proposed by James Madison and Thomas Jefferson) involved the participation of multiple branches. *Id.*, at 71–72, 74–75. Even Alexander Hamilton, whose Federalist Paper article respondent relies on, admitted that his defense of the Senate trial layout was based on a "pragmatic decision to further the cause of ratification rather than a strong belief in the superiority of a scheme vesting the Senate with the . . . power to try impeachments." *Nixon*, *supra*, at 244. During the Convention, Hamilton had argued for a system where impeachment trials were conducted by a specially constituted court of judges. See 1 Records of the Federal Convention of 1787, pp. 292–293 (M. Farrand ed. 1966). And just months after writing Federalist No. 65, while the ratification process was still ongoing, Hamilton recommended an amendment that would have impeachments tried in the first instance by a unified panel of Senators and Supreme Court justices. See 5 The Papers of Alexander Hamilton 167–168 (H. Syrett ed. 1962).

The evidence shows that at the time of the Constitution's adoption, contrary to respondent's description, the Framers did not view impeachment as a matter completely outside the realm of judicial competence, nor did they consider judicial involvement a threat to democracy. Respondent, however, asks the Court to impute these exact beliefs into the Framers' words within the Constitution. To do so would be entirely illogical.

Second, *Procursive* also addressed the specific reasons put forward in Federalist No. 65 and demonstrated that they did not cast doubt on the Judiciary's ability to carry out *judicial review*—they addressed trial in the first instance. Indeed, the role of the Senate ("trying impeachment in the first instance") is a markedly different task from judicial review. 7 U. S., at ___, n. 2 (slip op., at 7, n. 2). The

former entails "both factual . . . and *political* considerations" while the latter is based "solely on the import of the law." *Ibid*. Nothing in Federalist No. 65 suggested that the Framers doubted the ability of the courts to carry out the latter function.

2. The Balance of Evidence

The evidence discussed above is not the only evidence on the matter either. Indeed, the balance of evidence further undermines respondent's claim that the word "sole" foreclosed all forms of judicial review. No party to this case disputes that accepting respondent's view of the meaning of "sole" would require the Court to place considerable weight on that one word.

By respondent's own account, he believes that single word means that impeachments must be unreviewable and that any "contradicting clauses" should be denied effect in the impeachment context as a result. Respondent Response 16. Taken at face value, this argument is hard to stomach. To ascribe such significant weight to a single word, there must be clear and compelling evidence in the historical record that the word was understood to have that significant effect at the time of adoption. After all, laws—in particular, the Constitution—do not ordinarily "hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (opinion of the Court by Scalia, J.) (citing *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994)).

Respondent's monumental expectations for the word "sole," however, are not borne out by the historical record.

Petitioner provides considerable evidence from the Constitutional Convention that the Framers did not anticipate that by including the word "sole" they were doing anything transformative. Response of *Amicus Curiae* House of Representatives 4–5. To begin with, the word was inserted only during the Committee of Style phase of

the Constitutional Convention. And the Committee of Style was not authorized to make any substantive changes to the Constitution's meaning—its only purpose was to polish its appearance. 2 Farrand, p. 553. When the Constitutional Convention accepted the Committee of Style's recommendations, it "had no belief that any important change was, in fact, made" by the Committee of Style. *Powell* v. *McCormack*, 395 U. S. 486, 539 (1969) (citing C. Warren, The Making of the Constitution 422, n. 1 (1928)).

In effect, in light of this evidence, respondent's argument is that the Court should place extraordinary weight on the word "sole" despite the fact that the Framers and (logically) by extension the founding generation had no reason to suspect that the word had any major substantive effect.

Some, of course, may view this evidence differently. One could plausibly argue that if the word "sole" was merely intended to shed further context on the meaning of the Impeachment Trial Clause, perhaps the Framers thought it important to clarify for future generations the exclusivity of the power to convict in impeachments. The Court, however, is not persuaded. To begin with, this argument suggests a far narrower scope for "sole" than does respondent's argument. Respondent asks that this Court conclude not just that "sole" guarantees the Senate the exclusive right to convict, but to infer also that it entirely insulates any such conviction from judicial review. None of this accords with the plain meaning of "sole" or the Framers' understanding that the word had no transformative effect. Additionally, respondent can point to no other textual support in the Impeachment Trial Clause to support the theory of review preclusion. If the Framers' clarification was meant to directly affirm what was already tacitly conveyed, it makes little sense that respondent can find no other indication in the structure or language of the Impeachment Trial Clause that the review preclusion argument is correct.

Petitioner, on the order hand, provides historical

evidence suggesting that the word "sole" was included for an entirely different reason altogether. Namely, petitioner argues that the provision was meant to textualize "the bicameral separation of the impeachment process" already contained in the Constitution's structure. Response of *Amicus Curiae* House of Representatives 5. That is, it was meant to reaffirm that each House of Congress was to perform its assigned impeachment function independent of the other.[5] If this interpretation is correct, "sole" had nothing to do with regulating the extent of judicial review that would apply to impeachment proceedings at all. It was to confirm that each House held only *part* of the impeachment power and that they were to remain separate.

In sum, the balance of evidence shows that the original meaning of "sole" in the Impeachment Trial Clause had nothing to do with limiting judicial review.

3. Precedent

Determining the original meaning, however, is not the final step. After all, the Court typically does not write on a blank slate. The Court must also consider whether any precedent exists which requires departure from the original meaning in this case. Respondent suggests that *Nixon* v. *United States* may be such a precedent. The Court disagrees.

Respondent cites *Nixon* as "impl[ying] that impeachment continues to be solely political due to how the word 'try' lacks 'sufficient precision to afford any judicially manageable standards of review.'" Respondent Response 4 (quoting *Nixon*, 506 U. S., at 224). This, however, is not an accurate description of what *Nixon* held.

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[5]The Court does not hold that this view of the word "sole" imposes an enforceable requirement on Congress. Additionally, the Court does not necessarily adopt this proposition. The only reason it is referenced is because petitioner references substantial evidence for it, which helps the Court rule out respondent's excessive interpretation of the word.

The Court's holding was not that *all* impeachment cases are "solely political" and beyond the scope of any judicial review. Rather, the Court held that the word "try" did not create an enforceable standard and therefore could not be enforced. The Court did not claim that the enforcement of any other impeachment-related provision was beyond judicial capabilities or that impeachment generally was outside the scope of judicial review.

Those questions were not before the Court in *Nixon*. Much of respondent's rhetoric suggests a reference to *Nixon*'s statement that the Judiciary was "not chosen to have any role in impeachments." *Id.*, at 234. This statement, however, does not rule out judicial review. Indeed, it was made in the context of a discussion about the Framers' decisions relating to the assignment of the impeachment powers. In context, the statement is simply saying that the Framers ultimately did not include the Judiciary in the original impeachment process itself, not that the Constitution prohibits judicial review of impeachments. *Nixon* simply states that the Framers did not explicitly write in judicial involvement—they also did not explicitly write it out.

None of the Court's precedent, therefore, poses an obstacle to the adoption of the original meaning of "sole" in the Impeachment Trial Clause. Just the opposite, in fact. The bulk of the Court's precedent actually *supports* application of the original meaning.

Procursive and the *Ichigo* cases, for instance, necessarily rejected the argument advanced by respondent. By the very act of exercising review in the impeachment context, those cases concluded that the word "sole" in the Impeachment Trial Clause presented no obstacle to review. For his part, respondent does not even contend the validity of *Ichigo*. Indeed, respondent explicitly states that he does "not object to" *Ichigo* and says that overruling *Ichigo* "would not be beneficial . . . for the nation as a whole." Respondent

Response 3, 9. It is impossible, however, to maintain simultaneously that the Constitution totally proscribes judicial review in impeachment cases but then assert that *Ichigo* is constitutionally legitimate. If the Constitution does not permit such review, the necessary logical next step is to say *Ichigo* was wrongly decided. But respondent does not say this and offers no principled basis for exempting *Ichigo* from the non-justiciability holding he seeks. By conceding *Ichigo*'s correctness, respondent effectively concedes the argument.

Besides this Court's various impeachment cases that necessarily reject respondent's argument, the Court has on several occasions emphasized the importance of, whenever possible, adhering to original meaning.[6] These precedents support the Court's decision today.

In sum, precedent not only does not preclude the Court's adoption of the original meaning of "sole" in the Impeachment Trial Clause, it entirely confirms it.

B. The Anytime Review Clause

Respondent next argues that, irrespective of the original meaning of "sole," judicial review is still unwarranted because either (a) impeachment is outside the scope of the Anytime Review Clause or (b) impeachment presents a "political matter," *i.e.*, a political question, beyond the scope of judicial competence. The Court rejects both arguments.

1. Original Meaning

The first argument by respondent as to the Anytime Review Clause is that under its original meaning, it does not extend to review of impeachment. This is a remarkable

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[6]See, *e.g.*, *RoExplo* v. *United States*, 5 U. S. 7, 7–8 (2018) (failing to abide by original meaning leads to "ineffectual and incoherent" lines of precedent); *Collins* v. *Youngblood*, 497 U. S. 37, 43 (1990); *Kyllo* v. *United States*, 533 U. S. 27, 40 (2001); see also *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Mfg.*, 545 U. S. 308, 320–321 (2005) (Thomas, J., concurring) (collecting cases).

assertion in light of the fact that the Anytime Review Clause, which has been included as a provision of the last three iterations of the Constitution, was from its earliest days used to review impeachments.

Indeed, one of the core original purposes of including the Anytime Review Clause in the Constitution was to add an additional check to the then-frequently misused power of impeachment. In that vein, cases throughout the Court's history, invoking the Court's jurisdiction under the Anytime Review Clause, have reviewed the validity of impeachments. Perhaps the most significant case of this was more than five years ago when the Court overturned the impeachment and bar of then-Vice President Zeyad567, who went on to become a President of the United States. See *Zeyad* v. *United States*, ___ U. S. ___ (2015) (holding that Zeyad567 had been "illegally removed from office" through an unconstitutional impeachment). In that case—from the early history of the Anytime Review Clause—only one Justice dissented and even that Justice did not consider it a *possibility* that impeachments were outside the scope of Anytime Review.

This uncontested early application and public understanding of the Anytime Review Clause stands in stark contrast with respondent's assertion that exercising review in this case requires the "implying of power." Respondent Response 10. In the Clause's early history, no person suggested that review of an impeachment was anything other than an explicit exercise of authority under the Anytime Review Clause. To suggest that such a review would be the mere exercise of "implied" authority is counterfactual.

Respondent next argues that the Anytime Review Clause is "very dangerous" and that it poses the risk of "undermin[ing]" democracy. *Ibid*. This argument, however, does not reference the Constitution or any constitutional principle whatsoever. Instead, respondent merely asserts his

view of how the Government *should* work and asks the Court to in effect read that view into the Anytime Review Clause without any textual or historical anchor. The Court declines to do this. In a matter as important to the constitutional fabric as impeachment is, it becomes all the more imperative that the Court's actions be strictly rooted in legal principles rather than aspirational ideas about how the government should be structured. In any event, the Constitution already makes that value judgment through its adopted text and it is this Court's responsibility to discern what that text means, not project its preferred values onto it.

Searching for a new foothold, respondent then claims that the Clause can only be used in one of two ways: "to offensively *harm* the other branches, and to place [the] Court on top . . . or as a *protection* from the other branches." *Ibid* (emphasis in original). Respondent suggests that the Court choose the latter and says the only way to do that is by refusing to review impeachments. This line of argument is confounding in three respects. First, respondent's premise that these are the only two ways to conceive of Anytime Review misunderstands the Constitution's structure. While it is true that the system of checks and balances does depend on an interlocking arrangement of authorities and limitations, and while that system might occasionally produce confrontation between two branches, respondent appears to view the branches as in a state of perpetual war with one another, and their respective powers as weapons to be wielded on that battlefield. That is not the object of government. The People of the United States established a government "in order to form a more perfect Union." U. S. Const., pmbl. They did not establish a government for the branches to exist in perpetual conflict. As such, the Court rejects respondent's offensive-defensive dichotomy of the Anytime Review power.

Second, when the Court exercises the power of Anytime

Review, it does not simply strike down those actions it disagrees with and uphold those that it supports. One need look no further than *Procursive* to realize this. Despite acknowledging that the impeachment in that case was a "grave miscarriage of justice," the Court allowed it to stand because it was "unable to conclude . . . that [it was] unconstitutional." 7 U. S., at ___ (slip op., at 16). The Court's review is limited by the Constitution to analyzing the *legal validity* of challenged actions, not their policy wisdom. It is untenable to maintain that performing this function somehow places *the Court* on top: it places *the rule of law* on top.

Third, even assuming for a moment respondent's flawed premise that the branches are in a state of perpetual war with one another, respondent does not explain why that would provide a reason for the Court to abdicate its textual responsibility under the Anytime Review Clause. Respondent's belief that no branch should have an "ace in the hole" so to speak is belied by the fact that accepting respondent's argument would permit Congress to exercise impeachment unbounded by the Constitution whatsoever. That is not balance. Moreover, the powers committed to each branch are also limited by the text that defines them. Respondent's view about how the branches *should* be structured is not useful evidence about how they *are* structured. Review by this Court is directed at enforcing textual limits, not imposing new ones. As such, within the scheme of the Constitution's structure, so long as this Court exercises its constitutional function faithfully, respondent has no reason to fear that this Court's power will be aggrandized at the expense of the others. In any event, this Court may not impose prophylactic limits on the exercise of legitimate constitutional authority based on nothing more than the potential that such legitimate authority may be misused.

Respondent finally argues that the original meaning of

the Anytime Review Clause does not encompass impeachment review by citing the recent words of the current Constitution's principal framer, Justice Scalia. But respondent paraphrases Justice Scalia to make this claim: "The Framer of the Constitution included the Anytime Review Clause in order for the [Court] to *protect itself* from the other branches from attempts to disrupt the balance of power." Respondent Response 11 (emphasis in original). As such, respondent says the Anytime Review Clause—as originally understood—does not extend to cases of impeachment. The Court is not persuaded for five reasons.

First, respondent's paraphrasing of Justice Scalia's statement inaccurately represents the argument being made there. Justice Scalia did not argue that impeachment was outside the scope of the Anytime Review Clause's text or original meaning. Rather, Justice Scalia's point was that the Anytime Review Clause "is not about [ensuring] good government." Scalia, "[Justice Scalia's] Opinion on this Hoopla of an Impeachment," ¶8 (2020). This ties in with the broader theme of Justice Scalia's statement that the Constitution permits the People to choose representatives who may act in bad faith. See *id.*, at ¶2. As he put it: "voters get to choose what quality of government they want." *Ibid*. Thus, it is not the role of this Court to ensure, whether through the exercise of Anytime Review or otherwise, that the Government behaves *properly*, only that it behaves *lawfully*. All on this Court agree with that sentiment. Indeed, in this opinion itself, the Court reiterated that it is possible for an impeachment to be both "morally wrong and constitutionally right or morally right and constitutionally wrong." *Supra*, at 5. The Court, like Justice Scalia, believes that any use of the Anytime Review Clause must be focused on ascertaining constitutionality rather than ensuring "good government."

Respondent treats Justice Scalia's argument, however, as a refutation of jurisdiction under the Anytime Review

Clause in impeachment cases. That is simply not the argument that Justice Scalia made. In fact, the paragraph of Justice Scalia's statement relied on by respondent does not mention jurisdiction at all. It is true that Justice Scalia says that he supported retaining the Anytime Review Clause in this Constitution to enable the Court to "protect *itself* from the other branches," Scalia, *supra*, at ¶8 (emphasis in original), but it is equally true that a provision of the Constitution applies to more than just the circumstance which was the "immediate purpose" of its inclusion. *Baker* v. *Carr*, 369 U. S. 186, 223 (1962); see also *McCulloch* v. *Maryland*, 4 Wheat. 159, 200 (1819) ("[W]e must never forget that it is a constitution we are expounding."). Contrary to respondent's argument, Justice Scalia did not dispute this legal principle.

Second, although Justice Scalia's statement is a valuable resource,[7] respondent vastly overstates the weight his own misinterpretation of that statement is owed. The Court's role with respect to this issue is to ascertain the original meaning of the Anytime Review Clause, as it applies to this case. In general, statements made significantly after the ratification of a constitutional text are not especially probative as to their original meaning. See *District of Columbia* v. *Heller*, 554 U. S. 570, 614 (2008) (late-arising commentary does not "provide . . . much insight into . . . original meaning"); *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U. S. 269, 312 (2008) (Roberts, C. J., concurring) (same). Respondent does not explain his theory that this statement is an exception.

The Court treats the statement as valuable not because

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[7]The Court has observed in the past that the "[s]tatements of individual Justices, though not binding, can be particularly helpful [to the Court] in discerning the law." *Federal Election Comm'n* v. *AcidRaps*, 6 U. S. 42, 45 (2018). This continues to be true even after their retirement and is especially true of a statement by the Constitution's principal framer.

it considers the statement dispositive as to original meaning, but rather because Justice Scalia is a well-respected member of the legal community whose views are entitled to thoughtful consideration.[8] The Court, however, disagrees with respondent's misinterpretation of Justice Scalia's point.

Third, pretending for a moment that respondent's characterization of Justice Scalia's position were correct, and assuming that this Court was required—as respondent argues—to treat the framer of a constitutional provision's non-contemporaneous interpretation of that provision as dispositive, respondent's argument still would suffer from a critical flaw: as mentioned before, the Anytime Review Clause has been a part of our Constitution for the "last three iterations." *Supra*, at 12. Though the language of the Clause between each iteration may differ slightly in detail, it has never been understood to differ in substance. So, while Justice Scalia is in fact the principal framer of our current Constitution, he was not the originator of the Anytime Review Clause itself. Respondent's argument here fails on its own terms.

Fourth, the plain text of the Anytime Review Clause contains no exception for impeachment. Instead, rather broadly, the Clause authorizes review by this Court of "*any* . . . action" by Congress.[9] U. S. Const., Art. III, § 4.

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[8]It is also worth emphasizing that Justice Scalia's statement specifically cautions that it is not a legal argument. Indeed, Justice Scalia acknowledges that his points were already foreclosed by precedent. See Scalia, *supra*, at ¶5. While his statement could be taken to mean that he would have dissented from *Procursive*, it is not an endorsement of respondent's position in this case.

[9]Some may argue that it is inconsistent to ascribe such great weight to the word "any" in the Anytime Review Clause but such moderate weight to the word "sole" in the Impeachment Trial Clause. See, *e.g.*, *supra*, at 8. The difference, however, is that the historical record directly refutes the notion that the word "sole" has any tremendous effect, while consistent historical practice illustrates that impeachment review was

Respondent does not seriously dispute this. Instead, he protests that the Court should disregard the textual breadth of the Anytime Review Clause based on his view that it is "fictional and unrealistic." Respondent Response 3. This is a stunning argument. In fact, respondent's position harkens back to the now-discredited reasoning put forward in *MythicOne* v. *National Security Agency*, 3 U. S. 28, 31–32 (2017), that the "different circumstances in ROBLOX compared to real life necessitate changing applications of constitutional principles."

Respondent's argument appears to be that, in light of the platform we operate on, the Court should depart from basic principles that place the meaning of constitutional text first in the interest of "realism." The Court, however, has explained that *MythicOne*'s approach was "unreasoned and conclusory, lacks any basis in history, and provides no guidance where the Court [has not] already explicated the effect of its application." *Technozo* v. *United States*, 6 U. S. 5, 14 (2018). As Justice Scalia argued at the time of *MythicOne*, the Court's decision had "recklessly move[d] [the Court's] jurisprudence" from one that focused on "historical practice" to one that relied on the Court's own assessment of good policy. 3 U. S., at 32, 48 (dissenting opinion). To avoid this type of unprincipled decisionmaking, the Court's practice has been to "refus[e] . . . to extend [*MythicOne*]" outside the Second Amendment context. *Technozo*, *supra*. The Court follows that practice today and declines petitioner's invitation for a *MythicOne*-esque interpretation of the Anytime Review Clause.

Fifth, and finally, the overwhelming body of historical evidence discussed earlier is far more probative as to the original meaning of the Anytime Review Clause. That evidence shows that the Anytime Review Clause was

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thought to be included within the Anytime Review Clause's scope. See *ibid*.; *supra*, at 15–16.

understood to extend to impeachment cases. Justice Scalia's statement does not dispute that evidence and the respondent's misinterpretation of Justice Scalia's statement is insufficient to disturb the otherwise clear consensus within the historical record.

As such, the Court holds that the scope of the Anytime Review Clause, under its original meaning, extends to the impeachment context.

2. Political Question

Respondent finally argues that the Court lacks authority to exercise review in impeachment cases because impeachment is a "solely political matter" and reviewing the product of a political matter is beyond judicial capabilities. Respondent Response 7. The Court, however, concludes that this argument suffers from a number of fatal defects.

To begin with, respondent offers no explanation of what characterizes a political matter. There are various ways one could interpret that claim. For instance, taken literally, the phrase "political matter" could be applied to a range of actions. To name two possibilities: enacting legislation and voting in an election. Both factor political considerations and are of interest to political actors. Courts, however, have never hesitated to exercise review in either of those contexts and in neither of them has it ever been suggested that review is totally precluded on account of the matters being associated with politics

The arrival of politics does not require the departure of the Constitution. The Court does not avoid enforcing constitutional provisions simply because they may have been violated in a politically charged context. In the Anytime Review context, the Court's role has always been to determine whether there is a way to actually discern constitutionality under a constitutional provision and if there is such a way, to make use of it. In that sense, the Court exercises Anytime Review to enforce concrete constitutional

limitations. While the political question doctrine is fully applicable to Article III's ordinary processes, it is foreign to the Anytime Review context.

Respondent's argument that the full force of the political question doctrine should apply in the Anytime Review context is also squarely foreclosed by precedent. Whether one looks to *Procursive*, *Zeyad*, or the *Ichigo* cases, in each of them the Court has necessarily found itself unencumbered by the political question doctrine. In *Procursive*, the Court explicitly addressed why the doctrine does not fully apply in Anytime Review cases.

First, the political question doctrine is a "judicial policy," not a constitutional principle. See *Procursive*, *supra*, at ___ (slip op., at 6) (quoting *AcidRaps*, 6 U. S., at 42, n. 2). The Court may only give effect to judicial policies when doing so would not unduly interfere with the exercise of our assigned constitutional responsibilities. As *Baker* (the case from which the political question doctrine was born) itself explained, the "the 'political question' label" tends "to obscure the need for case-by-case inquiry." *Id.*, at 210–211. The Court cannot allow its interest in judicial policy to get in the way of its responsibility to the Constitution.

Respondent argues that the Court should do precisely that. He points to the fact that while the Constitution does not explicitly say "'the Court cannot decide political questions'" it also does not explicitly say the Court *can*. Respondent Response 4. Thus, respondent says that the Court should find in this ostensible "vagueness" room to apply the political question doctrine. *Ibid*. Respondent, however, fails to address the fact that "the scope of the Anytime Review Clause, under its original meaning, extends to the impeachment context." *Supra*, at 18. The fact that the Constitution does not explicitly address the notion of the "political question doctrine" is not enough textual space for the Court to abdicate from its established responsibility under the Constitution's text. In fact, the Constitution's

failure to address the political question doctrine by name has less to do with implicitly allowing it than it does with there being no point to addressing a mere judicial policy in constitutional text. In any event, respondent does not explain why, even if the Court *could* interpose such a policy in the Anytime Review Clause context, it *should* do so.

Petitioner, on the other hand, has provided various reasons why the Court should not. To begin with, petitioner points out that it was "'We the People' who adopted the Constitution and the Anytime Review Clause in the first place" and that "[w]hen the Court ensures the government conforms to the Constitution's requirements, it is doing precisely as the American people directed." Response of *Amicus Curiae* United States Senate 4. Additionally, petitioner argues that at the time it was adopted, the full scope of the Anytime Review Clause was considered a "necessary check" within the governmental structure. Response of Petitioner 2. Respondent cannot explain why, in light of these considerations, the Court should nevertheless decline to perform the duty entrusted to it by the People of the United States.

Second, 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." *Procursive*, *supra*, at ___ (slip op., at 7). Importing the political question doctrine would directly undermine that objective as it would erase any "additional chec[k]" on the political branches because the only effect of the Anytime Review Clause under that view would be to channel constitutional cases to be decided by this Court in the first instance. A change to the judicial order of operations is not an added check on the political branches.

Additionally, if that was all the Anytime Review Clause was meant to accomplish, it is inexplicable why the architects of the Clause did not simply alter the Constitution's

existing original jurisdiction clause to put constitutional cases in this Court's original jurisdiction. Rather than making that simple change, which would require no more than perhaps three words, the provision's framers included an entirely new Clause of much greater length and textual breadth. In this way, respondent's view runs smack dab into the surplusage canon—the "basic presumption that the legislature does not waste words." *British* v. *Ozzymen*, 3 U. S. 60, 66 (2017).[10]

Respondent provides no explanation for any of this and fails to address the substance of *Procursive*'s points about justiciability. And that is simply the beginning, because although *Procursive* ruled out the applicability of the political question doctrine in the Anytime Review context, it did not address what would happen if it *did* apply. In fact, none of the Court's holdings to this point have done so. It bears emphasizing, therefore, that even if the Court did accept respondent's argument about the political question doctrine's applicability—it does not—it is far from clear that the political question doctrine would foreclose review in this case given that *Ichigo* and *Procursive* identify certain judicially manageable standards for enforcement of *at least some* of the Constitution's limitations on the impeachment power.

The Court nevertheless holds that the political question doctrine continues to be inapplicable in the Anytime Review

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[10]The entire notion of the political question doctrine was predicated on the fact that the judicial role was principally to decide cases and controversies. Thus, the courts were to avoid cases that were not "'of a Judiciary Nature.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342 (2006) (quoting 2 Farrand, p. 430). This was informed by the fact that the Judiciary, when the doctrine arose, did not have a *freestanding* power to "determin[e] the constitutionality of" government actions that could be "exercised in contexts other than a lawsuit." *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 3) (Scalia, J., dissenting). The Anytime Review Clause, however, provides this Court with *exactly that power*, eliminating the original justification for the political question doctrine.

context.

C. *Stare Decisis*

Finally, even if the Court today had not reaffirmed *Procursive*'s justiciability holding on the merits, the doctrine of *stare decisis* would have strongly counseled against overruling it.

As this Court has previously explained, "[o]verruling precedent is never a small matter." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___ (2015) (slip op., at 7). *Stare decisis* is a "foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (slip op., at 15). And although "not an inexorable command," *stare decisis* is easily "the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991). Adhering to precedent is "the means by which [the Court] ensure[s] that the law will not change erratically, but will develop in a principled and intelligible fashion." *Technozo*, 6 U. S., at 15. There is therefore immense value in following *stare decisis*.

Under *stare decisis*, the Court "ordinarily adheres to precedent, but *sometimes* overrules precedent." *Ramos* v. *Louisiana*, 590 U. S. ___, ___ (2020) (slip op., at 4) (Kavanaugh, J., concurring in part). The difficult question is "when to overrule an erroneous precedent." *Ibid*. Luckily, the Court does not write on a blank slate with this issue either. Indeed, over the course of the Court's history, a number of factors have developed which play into the Court's *stare decisis* analysis. While no single factor is dispositive, the cumulative consideration of them is a useful guidepost for whether to stick by a precedent. The factors include:

- the quality of the precedent's reasoning;

- the precedent's consistency and coherence with previous or subsequent decisions;
- changed law since the prior decision;
- changed facts since the prior decision;
- the workability of the precedent;
- the reliance interests of those who have relied on the precedent; and
- the age of the precedent.

See *id*., at ___ (slip op., at 7).

The total of those factors largely collapses into three main considerations: (1) whether the prior decision was "not just wrong, but grievously or egregiously wrong," *ibid*., (2) whether the prior decision "caused significant negative jurisprudential or real-world consequences," *id*., at ___ (slip op., at 8), and (3) whether the prior decision would "unduly upset reliance interests," *ibid*. These factors confirm that there is no basis for overruling *Procursive*.

1. Grievous Error

There is little room for debate on this point: *Procursive*'s justiciability holding was not grievously wrong. Whatever else may be said about it, it is impossible to argue that the reasons put forward lacked a credible basis in law. As discussed earlier, the holding reached in *Procursive* on justiciability was consistent with the original meaning of both the Anytime Review Clause and the Impeachment Trial Clause.

Respondent does not make a meaningful case that the decision lacked proper reasoning. Instead, respondent rests entirely on two similar yet erroneous claims. First, that the *Procursive* Court "impliedly overruled *Nixon*" and, second, that the Court engaged in the very "judicial revisionism" it sought to avoid. Respondent Response 3, 4. Both arguments are clearly wrong.

First, it is entirely false to say that *Procursive* impliedly

overruled *Nixon*. As explained in *Procursive*, the sole holding of *Nixon* was 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." *Procursive*, *supra*, at ___ (slip op., at 8) (quoting *Nixon*, *supra*, at 238). That case involved a claim that the Senate, by using an abbreviated format for an impeachment trial which consisted of simply a hearing before a select committee and the preparation of a written report for the full Senate to consider, had failed to fulfill its responsibility to "try" the impeached official. The petitioner in *Nixon* argued that the Senate's responsibility to "try" him required the use of a full-fledged trial with conventional trial procedures.[11] He did not think that a hearing before a select committee and Senator review of the committee's paper record was sufficient.

The Court did not conclude that he was wrong or right. Instead, it merely said that based on the claim that he made in that case, judicially manageable standards did not exist for figuring out whether the Constitution was followed or not. 506 U. S., at 237–238. As such, it held that cases alleging that the Senate did not perform its function to "try" an impeachment under the Impeachment Trial Clause were nonjusticiable. Importantly, the Court did not hold that claims under any other constitutional provision were nonjusticiable. It did not even hold that all claims of insufficient trial procedure were barred; it simply turned away such claims when they are made *under the Impeachment Trial Clause*.

Second, respondent's argument that the Court engaged in "judicial revisionism" by refusing to import the political question doctrine into the Anytime Review context is unfounded. The Court has already recounted at length in this opinion the long history of impeachment reviews under the

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[11] *Nixon* did not involve a Due Process Clause claim.

Anytime Review Clause. If the Court were to have held in *Procursive*, notwithstanding that lengthy history, that the political question doctrine applied the entire time and the Court had simply not noticed, *that* would have been judicial revisionism. It is not revisionism to acknowledge such an obvious fact.

Respondent apparently believes, however, that the Court's revisionism was its treatment of *Nixon*, but *Nixon* did not hold what respondent claims it did. See *supra*, at 23–24. *Nixon*'s holding was narrow and limited there by the issues presented for the Court's consideration. The *Procursive* Court fully adhered to and accepted that holding by *Nixon* and did not then, nor does it now, cast doubt on its correctness. *Nixon* is fully consistent with *Procursive* and remains good law on the issue that it actually addressed.

As such, there is no case—even if the Court had agreed with respondent on his claim that *Procursive* was wrongly decided—that *Procursive* was grievously erroneous.

2. Consequences

As to the question of jurisprudential and real-world consequences, respondent does not make a convincing case either. Respondent's argument seems to largely be that the negative consequence of the Court's decision in *Procursive* is that Congress' impeachment discretion is hindered, threatening the possibility that Congress will be unable to exercise impeachment when perhaps necessary.

This concern, however, is vastly overstated. To begin with, *Procursive* did not identify any new limitations on the authority of Congress to impeach. Rather, *Procursive* merely reaffirmed the existing limitations identified in *Ichigo*, which has been in place for years. The Court is not aware of any disaster scenario that has taken place as a result of *Ichigo* where Congress was unable to remove an extremely dangerous President. As with most things, the solution to this perceived problem lies at the ballot box.

America has not realized such a disaster scenario because voters exercise their judgment when they choose who to elect. Americans have the freedom to determine the quality of their government. See Scalia, *supra*, at ¶10. Respondent's concern is unfounded.

The Court's ruling in *Procursive*, additionally, rather than standing as an outlier in impeachment jurisprudence, is entirely consistent with the Court's other rulings on the subject. See, *e.g.*, *Zeyad*, ___ U. S., at ___. In particular, it is not inconsistent with *Nixon*. See *supra*, at 25. It is therefore untenable to maintain that *Procursive* caused jurisprudential damage. It broke no new ground and simply reaffirmed the longstanding view of this Court with respect to limitations on the impeachment power and the scope of this Court's review.

3. Reliance Interests

Although *Procursive* has not led anyone to "sig[n] a contract, ente[r] a marriage, purchas[e] a home, or ope[n] a business," *Ramos*, *supra*, at ___ (slip op., at 22), it has nevertheless inspired serious reliance considerations. Every public official may rely on *Procursive*'s reaffirmation of the *Ichigo* rule that non-criminal acts are categorically not impeachable offenses.

By steering clear of criminal behavior, impeachable officials trust that they are able to avoid impeachment. This allows them, within the realm of lawful behavior, to put their best judgment forward and act in the way they deem most appropriate, rather than the way they deem to be the most politically favorable. In this way, too, *Procursive* protects and reinforces the separation of powers. The threat of impeachment cannot force law-abiding government officials to bend to potentially unethical requests from Members of Congress.

These reliance interests, though unconventional, are substantial. Ensuring a safe harbor for permissible activity

benefits federal employees and therefore protects the Constitution's structural division of power. The reliance interests are substantial enough to warrant serious consideration in any *stare decisis* analysis and to counsel heavily against a decision to overrule. Further accentuating the import of these reliance interests is the fact that the *Ichigo* rule reaffirmed by *Procursive* is now a longstanding principle of constitutional law; it dates back years. There is plenty reason to suspect that, as a result of its antiquity, it has inspired greater reliance and has become an integral part of the Constitution's fabric. There would be no justification for changing course at this point. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000).

The Court therefore reaffirms its prior holding that impeachment is a justiciable matter under the Anytime Review Clause. As such, the Court now addresses each merits argument in turn.

II. Due Process Clause

Petitioner first argues that the impeachment trial conducted by the Senate was insufficient to pass muster under the Due Process Clause. This necessarily breaks down into two more specific questions. First, to what extent does the Due Process Clause apply in the impeachment context? Second, were the Clause's requirements met?

As to the first question, the Court has already provided some commentary on the subject. In order for the Clause's protections to attach, the Constitution requires that "life, liberty, or property" be at stake. In *Procursive*, the Court held that "any such connection [in impeachment cases] is tenuous at best." *Id.*, at ___ (slip op., at 11). Thus, to make the case for application of the Due Process Clause, petitioner faces a high burden. The Court is ultimately convinced that, in a minimal degree, that burden is met.

The scope of protection offered by the Due Process Clause

corresponds with the depth of the interest at stake. In impeachment cases, as mentioned, no substantial interest is affected. That is not to say, however, that *no* interest is affected whatsoever. In *Procursive*, the Court acknowledged that "some relevant interests may be implicated" in a "narrow" sense. *Ibid*. In this case, the Court identifies one: the property interest in retaining acquired public employment on the original terms of hire. See *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 538 (1985); *Perry* v. *Sindermann*, 408 U. S. 593, 602–603 (1972). Given, however, that the President is an *elected*, rather than "hired," official, and given that the "terms of hire" are the conditions laid out in the Constitution, this property interest does not operate at full strength where the Presidency is concerned.[12] Thus, only narrow procedural guarantees are afforded by the Due Process Clause in this particular case. At bottom, the Court is unable to say they offer much more than the basic guarantee of an "opportunity to present [a] case." *Procursive*, *supra*.

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[12] The Court acknowledges that both *Cleveland* and *Perry* involved state-level employment and that the property interest identified there stemmed in part from underlying agreements guaranteeing particular terms of employment. In that way, those cases reflect the principle that due process interests "are created and their dimension are defined by existing rules or understandings that stem from an independent source such as state law." *Bishop* v. *Wood*, 426 U. S. 341, 344, n. 7 (1976). It is therefore easy to see why the Court emphasizes the Presidency's uncomfortable fit within the Due Process Clause analysis.

Other factors, however, explain why the Court deems the fit suitable enough to confer a minimal degree of protection. First, the fact that the offices at issue in *Cleveland* and *Perry* were at the state-level is not dispositive. Those cases relied on state law as the source of their property interest, which is why the fact that the offices were at the state level was relevant. Second, state law is not the *only* source of due process interests. Indeed, due process interests can arise from most "positive-law sources." *Smith* v. *Organization of Foster Families For Equality & Reform*, 431 U. S. 816, 845 (1977). In this case, that source is the constitutionally prescribed conditions on which the President is chosen.

That brings the Court to the second included question: whether petitioner was denied that opportunity in this case. Petitioner offers various reasons to question the process provided in the Senate. For instance, petitioner says that the Senate "effectively merged with the prosecution by unilaterally adding additional prosecution witnesses, refusing to recuse openly-biased Senators, approving additional in-trial prosecution preparation time . . . and limiting evidentiary presentations by the defense." Brief for *Amicus Curiae* United States Senate 11.

Each of the actions referenced by petitioner certainly suggests that the Senate did not take its duty of impartiality seriously but the Due Process Clause does not require total impartiality in the context of a Senate trial. Rather, the Clause's protections are as narrow as the property interest implicated. Petitioner's claims, taken as true, do not show a violation of the Due Process Clause's narrow protection.

First, while the Senate coordinating with the House impeachment managers to upset pretrial commitments and add additional witnesses mid-trial is inappropriate, it did not deny the defense its opportunity to present a case. Petitioner argues that the Senate's machinations constructively did so by interfering with defense trial preparation, see Brief of *Amicus Curiae* House of Representatives 12, but that would only be the case if the Senate's actions could not reasonably have been anticipated. The record does not show that it was outside the realm of plausibility at any point during the trial process that the Senate would attempt to call additional witnesses to testify. Defense preparations could easily have accounted for that possibility.

Second, the refusal to recuse potentially biased Senators does not violate the Due Process Clause in the impeachment context whatsoever. It is questionable whether such a forced recusal would be constitutional in the first place, but it is abundantly clear that the Senate's refusal to test that

legally uncharted water was valid. In the Senate, Senators cannot be expected to be free of political motives. Indeed, so long as they act within constitutional boundaries, the design of the impeachment system specifically permits Members of Congress to take politics into consideration.

As mentioned earlier, the Framers assigned the power to try impeachments in the first instance to the Senate, in part, *because* of its members' capacity to take "political considerations," *supra*, at 7, into account. It would be entirely backwards for this Court to require, through the mechanism of the Due Process Clause, that Senators forgo all political considerations. Additionally, as the Court has discussed, the narrow protections offered by the Due Process Clause in the impeachment context do not "require total impartiality." *Supra*, at 29.

Third, giving the prosecution additional preparation time does not prejudice the defense's ability to present its case. While such Senate maneuvering can skew the trial in the prosecution's favor, the Due Process Clause does not mandate total balance in impeachment proceedings. The very nature of the process is that the party facing impeachment may not receive a completely fair opportunity to persuade each Senator of innocence.[13] Senators are political creatures who will enter the process with their own preconceptions. The Due Process Clause does not require complete balance.

Fourth, the defense was not denied an opportunity to make evidentiary presentations *by the Senate*, but rather by the pretrial stipulation entered into between the defense and the House impeachment managers. The fact that the

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[13] Federalist No. 65 explains that the Framers did not think it feasible for an impeachment trial to be "tied down by strict [procedural] rules," as conventional criminal trials are. The nature of an impeachment trial is fundamentally different from a conventional criminal trial and subjecting it to the same set of rules, the Framers knew, would undercut its purposes.

Senate aided the managers in breaking that stipulation does not mean that the Senate actively denied the defense the opportunity to present its case. Indeed, the record does not show that the defense made any attempt to ameliorate the harm caused by the managers' decision to discard the stipulation, for instance by requesting a continuance to secure the presence of witnesses. In light of this, the Due Process Clause was not violated.

The Court recognizes that the Senate did not conduct a politically fair process. That does not mean, however, that they violated the Constitution. The Court holds that petitioner was provided an opportunity to present his case in the Senate, satisfying the narrow impeachment-context requirements of the Due Process Clause.

III. Unconstitutional Motive

Petitioner next argues that Congress was motivated by an unconstitutional motive when it impeached the President and that this Court should invalidate the process on that ground. In particular, petitioner argues that the reasons put forward by the House impeachment articles were a pretext either for impeachment based on (a) Presidential maladministration, or (b) political revenge prohibited by the First Amendment. The Court rejects both arguments.

As a background, the Court in *Procursive* held that in certain cases it is appropriate to inquire into the motives inspiring impeachment. More specifically, the Court said that when there is "evidence to suggest that [the impeachment articles] [are] being used as a pretext for impeachment on constitutionally prohibited grounds, closer scrutiny of Congress' motives may be in order." 7 U. S., at ___ (slip op., at 15). One such potential constitutionally prohibited ground is "Presidential maladministration," which was expressly considered by the Framers and rejected as a potential basis for impeachment. *Id.*, at ___, n. 6

(slip op., at 15, n. 6). As petitioner explains, that more or less refers to Congress' bare belief that it "[does not] like the way a President is doing his job." Brief for *Amicus Curiae* United States Senate 10. Congress may not use the impeachment power as cover to "subordinate the other branches in a manner inconsistent with the Framers' separation of powers." *Procursive*, *supra*.

That being said, however, such an inquiry into legislative motive is not always in order. There must at least be a threshold evidentiary showing of pretext, coupled with another indicative factor. In *Procursive*, the Court identified the use of "past conduct," *i.e.*, conduct that occurred before the impeached official took office, as the basis for impeachment as one possible indicative factor. *Id.*, at ___ (slip op., at 15). This case does not involve the use of past conduct.

Petitioner is also unable to point to any other potential indicative factor in this case. Petitioner *does* reference the fact that Congress had, for the first time ever, designated the office of President-elect a civil office to make it subject to impeachment, but that is not an indicative factor: that is part of the threshold evidentiary showing, a completely separate aspect of the Court's analysis. An indicative factor must highlight something irregular or unusual about the charged offenses themselves. The fact that there is significant evidence of pretext does not outweigh the absence of an indicative factor.

Even if there had been an indicative factor, however, petitioner's First Amendment claim would still be entirely meritless. While the First Amendment does "prohibi[t] [government actors] from subjecting an individual to retaliatory actions" for engaging in protected speech, an individual claiming such retaliation must establish a "causal connection" between the government actor's "retaliatory animus" and the individual's "subsequent injury." *Hartman* v. *Moore*, 547 U. S. 250, 256, 259 (2006). In particular, they must prove that the animus was the "but-for" cause of the

injury—that no injury would have occurred if not for the retaliatory motive. *Id*., at 260.

To do this, a petitioner claiming First Amendment retaliation must prove that the government actor lacked a legitimate legal basis for their actions. See, *e.g.*, *Nieves* v. *Bartlett*, 587 U. S. ___, ___ (2019) (slip op., at 8) (requiring plaintiffs arguing retaliatory false arrest "plead and prove the absence of probable cause."). In other words, the only way a First Amendment retaliation claim would work in the impeachment context was if there was no impeachable offense in the first place. Thus, such a First Amendment argument could not work within the context of a pretext claim.

As petitioner can point to no indicative factor in this case, and because the First Amendment claim would be meritless either way, the Court declines to exercise "closer scrutiny" of Congress' motives. Petitioner's unconstitutional motive argument accordingly fails.

IV. Clear Error

Petitioner next argues that the Court should invalidate two of the articles of impeachment because, in his view, the Senate clearly erred in its finding of factual guilt. This argument is perhaps the most contentious of those presented by petitioner. Petitioner, however, places considerable weight on it.

He begins by citing *Procursive* to argue that clear-error review is appropriate in the impeachment context. More specifically, the Court in that case declined the petitioner's invitation to "review the facts of [an impeachment article] de novo." 7 U. S., at ___, n. 7 (slip op., at 16, n. 7). It then proceeded to "assum[e that] clear error is the appropriate standard" and conclude that the Senate had not clearly erred. *Ibid*. The Court did not, however, necessarily conclude that clear error was actually the appropriate standard. The Court merely found that the clear error standard

was sufficient to allow the article to stand and therefore found it unnecessary to inquire whether an even more deferential standard applied.

The threshold question before the Court therefore is whether the clear-error standard applies in impeachment cases.

The Court considers the clear-error standard insufficiently deferential to apply within the impeachment context. As the Court has reiterated repeatedly, the Senate's original responsibility under the Constitution in impeachment cases—to "try" them—"entail[s] the consideration of factual guilt or innocence." *Supra*, at 4. For the Court to impose a standard of review that would give the Court the final say on factual issues would appear to be inconsistent with the Constitution's commitment of authority to the Senate with respect to the determination of facts.

Additionally, the Court's role in reviewing impeachment decisions is solely to discern the constitutionality of the actions taken by Congress. To apply the clear error standard would in effect transform the Court's role from that of *review* to that of a *participant* in the process tasked with double-checking the work of the Senate. This is not the Court's place. The Court must simply ensure that the requirements set in the Constitution are obeyed.

One such requirement, however, is the presence of an impeachable offense. The Court may only second guess a determination of factual guilt in an impeachment case when it appears Congress had *absolutely no basis in fact* for determining guilt. After all, if Congress were to rely on an entirely contrived article of impeachment without any factual foundation, the Court would not be obligated to pretend that an impeachable offense occurred, and without such an offense, impeachment is not permitted. Deferential review does not mean a court must "exhibit a naiveté from which ordinary citizens are free." *Department of Commerce* v. *New York*, 588 U. S. ___, ___ (2019) (slip op., at 28) (quoting

United States v. *Stanchich*, 550 F. 2d 1294, 1300 (CA2 1977) (Friendly, J.)). As in other contexts, the Court is not required to be "methodically ignor[ant to] what everyone knows to be true." *Ramos*, *supra*, at ___ (slip op., at 20) (opinion of the Court) (citing R. Cross & J. Harris, Precedent in English Law 1 (4th ed. 1991)). The appropriate standard of review for the Senate's determination of factual guilt is therefore whether there is any basis in fact to support it.

Petitioner's arguments alleging technical problems with the House's allegations do not come close to showing that there was no basis in fact for them. And petitioner's argument that the evidence *at trial* did not meet this standard (the impeachment managers did not present evidence during the case in chief portion of the trial) is contradicted by the record. The record shows that the impeachment managers exhibited the articles of impeachment containing the evidence. Furthermore, the question is whether the allegations in the articles have a basis in fact, not whether the evidence presented at trial conclusively proves those allegations.

The extent of the Court's factual inquiry is simply to ask whether there is a plausible basis in fact that the allegations by Congress are true. Having concluded that, in this case, there is such a basis, the arguments against factual guilt must be rejected.

V. Impeachable Offense

Petitioner's final argument is that the articles of impeachment on which he was convicted (Articles 2, 3, and 4) do not allege impeachable offenses. Having reviewed the allegations made in each article, the Court agrees that none states an impeachable offense. Articles 2 and 3 do not allege a criminal offense, therefore failing to pass muster under *Ichigo*, and Article 4, even if it did allege a criminal offense—it does not—does not allege a "high" criminal

offense and is therefore unconstitutional as well.

For the reasons that follow, the Court strikes down all three.

1. Articles 2 and 3

Articles 2 and 3 arise from largely the same facts. In essence, Article 2 alleges that the President tampered with a Congressional witness and Article 3 alleges the President obstructed Congressional proceedings (through his alleged act of witness tampering). Both articles cite a United States Code provision.

The trouble, however, is that even if every allegation contained in each article was found true by the Senate—as the finding of factual guilt entailed—the conduct the allegations describes would not constitute an offense under the statutory standard prescribed by the cited United States Code provisions. The Court has already concluded that the Senate's role is limited by the facts alleged by the House in the approved articles of impeachment. See *supra*, at 5, n. 4 (concluding that "the Senate may only convict based on facts alleged by the House"). Thus, the extent of the Court's inquiry as to the presence of an impeachable offense is to assess whether the facts alleged by the House and found true by the Senate (through a finding of factual guilt) describe an impeachable offense under the Constitution. Respondent, however, asserts that simply pointing to a United States Code provision is sufficient to pass muster under *Ichigo*. The Court disagrees.

There is no requirement in the Constitution that a United States Code provision be cited in an impeachment. The Constitution, rather, requires that an impeachable offense be alleged. Accord, Brief for Petitioner 4. It necessarily follows that the way this Court must determine the presence or absence of an impeachable offense is by evaluating whether the conduct alleged in the article actually describes a criminal offense. It is clear in this case that the

conduct alleged in Articles 2 and 3 does not amount to a criminal offense.

While the titles of Articles 2 and 3 suggest significant interference by the President with a witness before Congress, the allegations within them paint a far more innocent picture. Indeed, the articles merely accuse the President of communicating with a witness while he was testifying. They do not, importantly, accuse him of intimidating the witness, threatening the witness, or coercing him in any way, shape, or form, to make a false statement.

As alleged, this is not a criminal offense. It is not criminal to merely have contact with a witness who is testifying. American laws on the subject of witness tampering make clear that there must be at least some form of inducement involved. The mere allegation that otherwise-innocuous communication "rattled" a witness is not sufficient to convert mere communication into a criminal offense. Viewed in context, this communication is even less irregular. The witness who was testifying was an employee of the President's and that is plenty reason to believe that there could be perfectly legitimate reasons for the two to be in contact.

In any event, the critical question is whether the allegations made by the House (and of which the President was found factually guilty by the Senate) described events that were criminal. The answer is, quite plainly, no. For the purposes of this inquiry, facts not contained within the articles of impeachment or considered by the Senate are immaterial. Those two bodies are responsible for impeachment and the role of this Court is merely to judge the consistency of their work product with the Constitution.

The dissent is quite wrong on several points. First, the dissent contends that Article 2 alleges "intimidation" and therefore states a criminal offense. The articles of impeachment, while they do mention intimidation, do not satisfy the statutory standard. Indeed, the relevant criminal statute expressly contains an intent prong requiring a

showing that any intimidation was *aimed* at inducing a witness to refrain from testifying or to withhold documents. Instead of alleging that this was the President's aim, the article points to the fact that the *result* of the President's communication was that the witness became non cooperative. A result, however, can be unintended and the statute plainly requires an allegation of intent. No such allegation was provided. Second, the dissent refers to evidentiary materials attached to the articles of impeachment to support inferences not alleged by the articles themselves. As the Court has explained, the House has the sole power of impeachment, meaning that only the particular allegations made by the House can form the basis for an impeachment conviction by the Senate, not unstated inferences. See *supra*, at 5, n. 4. Third, the dissent claims that Article 3 is valid because the President's communication with the witness ostensibly did not "encourage the witness to assert a lawful privilege or anything of that nature." *Post*, at 3 (opinion of STEWART, J.). The Court does not see how this is relevant. A communication with a witness is not presumptively criminal simply because it does not urge them to invoke a legal privilege. The relevant statute requires "corrupt" conduct or some form of threat. 18 U.S.C. § 1505. The articles of impeachment do not allege either of these things.

The Court holds that both Articles 2 and 3 fail to allege an impeachable offense and are therefore unconstitutional.

2. Article 4

Article 4 alleges a comparatively far more minor offense. While the first two articles alleged offenses involving upper-level government operation, the last is a common case of obstructing a law enforcement officer.

The allegations in this article are as follows: The Mayor of the Municipality of Washington, D. C., announced that the President would be "blacklisted" from entering any city

property;[14] the President and his Secret Service detail entered a city building anyways; a city officer arrested the President for violating the blacklist order; the President directed his detail to arrest the city officer; and the detail refused to carry out the President's order.

The impeachment article claims that this series of events constituted conspiracy to impede or injure an officer. This article suffers from two major flaws.

First, even assuming that this was a criminal offense, it is clear that it was not of a "high" caliber. The Court routinely distinguishes between common crime and more serious crimes. The alleged criminal offense here fits comfortably into the first category. As Justices have elsewhere argued and as petitioner argues here: only offenses which cause "injuries immediately to the society itself" qualify as "high." *Procursive*, *supra*, at ___ (slip op., at 2) (BORK, J., concurring) (quoting Federalist No. 65). The "evidence from the founding era indicates that the Framers did not understand the High Crimes and Misdemeanors Clause to encompass small-time offenses." *Ibid*. In light of this, mere common crimes cannot provide the basis for impeachment.

This article alleges a common crime because it is an offense that takes place in our cities on a daily basis. Common criminals perpetrate it on a regular basis and there is no possibility that such acts are injurious to the Nation as a whole. They are criminal and punishable as criminal acts, but they are not severe or unusual enough to be considered "high" crimes.

Second, Article 4 does not even allege a criminal offense in the first place. The actual facts alleged by the article makes clear that there is no criminal offense. Because while the criminal statute the article relies

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[14] It is unclear whether this was within the legal authority of the Mayor to do.

on, 18 U. S. C. §372, applies only to injuries or interference with an "officer *of the United States*," Article 4 alleges injury or interference directed at a city officer. Brief for Petitioner 4. The allegations supporting this article plainly do not match the statute ostensibly supplying the impeachable offense.

The necessary consequence of these two considerations is that Article 4 must be held unconstitutional. The Court holds as much.

* * *

The Framers of the Constitution established a system of checks and balances in order to ensure that the branches would remain separate and that liberty would remain secure. This system consists not just of the separation of powers, but the limitation of them. And these limitations are just as important to liberty as any provision of the Bill of Rights. The Framers championed democratic ideals and as a result they entrusted a great deal of power to the People's elected representatives. But not unlimited power, for "[a]n elective despotism was not the government [they] fought for." The Federalist No. 48, p. 311 (C. Rossiter ed. 1961). The Court enforces the Constitution's limits to avoid precisely that.

The Court holds each and every article of impeachment on which the President was convicted unconstitutional and strikes them down. Pursuantly, the Court overturns the President's removal from office.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 09–13

RESET4K, PETITIONER *v.* UNITED STATES, ET AL.

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[April 26, 2020]

JUSTICE CHASE and JUSTICE PITNEY, with whom JUSTICE THOMPSON joins, concurring in part and dissenting in part.

> "The history of the study of the function of reason in the judicial process is the story of an epistemological inferiority complex. Legal theory surrendered uncritically to the prevailing notions of rationality. The judicial process was successively disguised in a variety of attires to secure the appearance of conformity with respectable forms of analytic and scientific reasoning. Judicial reasoning was equated with deductive thinking comparable in its certainty to Euclidean geometry. It was later adorned with the trappings of scientific reasoning which was said to follow the successful method of physics and chemistry. It was also presented in the shape of pragmatism and was even put forward as an altogether non-rational process.
>
> In all various appearances it was made to assume, judicial reasoning was anything but itself."[1]

The history of jurisprudence confirms that great attempts were made to encapsulate judicial reasoning in one model after another—all of which remained inadequate.

The deductive, mechanical model of judicial reasoning has proved to be inadequate for several reasons. While

[1] Gideon Gottlieb, "The Logic of Choice" (1968).

knowledge and understanding of the law can be derived scientifically from legal sources such as cases and statutes, this kind of legal positivism leaves little room for other disciplines. Though deduction of a conclusion from premises may be all that is required for some judicial decisions using *modus ponens*—after all, law is a practical activity and cases must be resolved quickly—it is plain that more than mere deduction is required when a judge must choose between alternative and competing major premises. Judges try to mask these tensions in the underlying law by *selectively* structuring precedent, statutory language, and historical understandings to somehow *suggest* a single necessary outcome—the idea of these legal sources "is more *figurative* than *literal*, and largely a [social] construct designed to capture the idea of *contingent* human and social choice as the essential feature of lawness."[2]

The complexities of law ought not to be minimized. Ultimately, they may embrace a whole philosophy. Cf. *Cabell* v. *Markham*, 148 F. 2d 737, 739 (2d Cir. 1945) ("Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliably, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning").

This conundrum gives birth a series of questions: what

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[2] Frederick S., Legal Positivism as Legal information (1997) ("If, for example, society were to empower its legal decision-makers to make decisions on the basis of their best all-things-considered moral or policy judgements, then the social decision to so empower its decisions would be relevant social source, even though what emerged from that source was a domain of the legal that was indistinguishable from a larger moral or policy domain.").

sources of (practical) authority should and do provide support for such choice? If there are competing premises, what weight should be assigned to each? If a precedent is applicable, when is it not followed it? If no precedent is applicable for the premises, how does a judge reach the rule that will make a precedent that establishes premises for the future? At what point must such choice be halted by "some discrepant custom, by some consideration of the social welfare, or even by our own or the common standards of justice and morals?"[3]

It has been demonstrated, by thinkers like Hume to present-day analysts, that such questions cannot be answered merely through deductive logic, that reason and logic have an extremely limited function in law—there is no casual connection between facts or ideas, and any such connection is based upon empirical observation—and yet a decision on these matters is necessary before any part of the judicial reasoning can take a syllogistic form.

It is this *non liquet* of law—a lack of explaining moral and political issues—that forces and, indeed, permits judicial creativeness: "the creation of new categories, the stretching and reinterpretation of other categories, the reduction of others,"[4] which results in new versions of rules and new meanings of rules. If our Constitution was truly concerned with "openness" of law—a system permitting or requiring the filling of legal gaps by *constructive*, *living evolution*—it would have declared itself *closed* so that if no rule is provided for the questions that face a legal—and especially a judicial—interpreter, a *non liquet* must be returned by the interpreter.

In reality, the Constitution goes as far as substantially

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[3]Justice Cardozo, in The Nature of the Judicial Process (1921), attempted to articulate what judges do when they decide cases, but recognized that there "[was] little hope of stating a persuasive formula."

[4]Blackstone W. T., Criteria of Adequacy for Judicial Reasoning (1971).

and very much explicitly establishing for the Supreme interpreter, when it confronts an unconstitutional federal action that can only be evaluated through the "logic, and history, and custom, and utility, and the standards of right conduct" that stand behind the sources of law that "dominate" and give "natural meaning" to the Constitution, the power to test, review, and decide all matters pertaining to federal subject matter—and it is this Court's presence, "aloof in the background, but none the less always in reserve, [that] tends to stabilize and rationalize the legislative and executive judgement, to infuse it with the glow of principles, to hold the standard aloft and visible for those who must run the race and keep the faith."[5] And in this way, any citizen, as an equal member of the political community and an equal rights-holder, can participate as an equal in the process of judgement—the judiciary is then to understand the right to voice a grievance and, on this account, to assess the citizen's claims on its merits, "notwithstanding the number of votes that stand behind her, notwithstanding how many dollars she is able to deploy on her behalf, and notwithstanding what influence she has in this community"[6]—and in the exercise of this test, at times, it will impose decisions that undermine people's common will, or invalidate laws passed by elected representatives, or issue a strong orders against the popularly elected people's leaders.

Nor can deduction provide us with the relevant criteria that can be used to circumscribe such judicial creativeness, nor does it assist in applying the minor premise—the fact—to the major premise—the law; mechanical deduction only tells us what each are. And not the least concern with the formal, deductive model is that the mechanical application of rules can, and often does, lead to great injustice, the

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[5] Cardozo, *supra.*

[6] Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice (2004).

very antithesis of the legal reasoning objective—justice.

And it is this object—justice—that cements judicial reasoning.

Law must be acknowledged as being, in its most general signification, as the necessary relations arising from the nature of things[7]—and the nature of things is a body of immutable rules, not produced by convention, but a "dictate of right reason," discoverable through the nature of reason itself, "which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that in consequences such an act is either forbidden or enjoined by nature [itself]."[8] Only to a limited degree can law be considered as the artificial, ink-on-paper, creation of autonomous, experienced human beings, constrained only by a system of self-imposed rules; in addition to "the laws of [our] own making, [we] also have some that [we] have never made."[9] This is confirmed by the certainty that natural law finds its absolute confirmation in the fact that it transcends experience—reason alone is its sanction, and not experience; on the contrary, experience rarely comes up with the demands of law: "no hand of man has ever drawn an absolutely perfect circle—imagination cannot picture one—yet we have many propositions, and laws of relation, about circles which have in them no mixture of error. Nor is the actual velocity of a falling body in any instance directly the mass and inversely the square of the distance. But these very facts become the proof of the laws, for, allowance made for retardations, the theoretical accuracy of the law is vindicated."[10] Still, law as we know it must always aim to understand *practical* truths, through *practical* wisdom. It must be concerned with more than universal truths because "it must

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[7]The essence of every law of nature is its *theoretical necessity*.

[8]Grotius, De Jure ac Belli Pacis (1625).

[9]Montesquieu, The Spirit of the Laws (1748).

[10]Natural Law, The Journal of Speculative Philosophy (1875).

also recognize the particulars; for it is practical, and practice is concerned with particulars."[11] It then follows that these relations determined by the people, through law, are antecedent to their substantiation in legislature, like there are three sides to a triangle before it is drawn.[12] When such relations are determined, no decision can be made on the contrary which has its principle in nature—here, the essence of law becomes a conscious, albeit just as artificial, obligation. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 423 (1819) ("[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.") This is what results in a constitutional architecture of balanced powers and shared sovereignty, it is what dismisses the organicist, archaic tradition of conceptualizing the state as some unified, monistic body, a mysterious ethical entity with its citizens as its integral constituents, and it is what maintains the *trias politica*'s notion that the place of power is in a permanent state of *lieu vide*. If law were to be closed, the actors of the triad (the Executive, the Legislative, and the Judiciary) would have no power to check the other with; the necessity of ongoing deliberation about the *meaning* and *usage* of law facilitates progress and connections throughout the legal discipline.

It is, therefore, the task of the judge to find the positive law, each major premise, through the simplest forms of judgement: deduction—legislation, to a large extent, but always finitely, specifies in advance the principles that must be employed by the interpreter—it may say, and often lays down, what is to be counted or not to be counted as a valid difference justifying a variation of dispositions in respect to

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[11] See Aristotle, The Nicomachean Ethics (350 B. C. E.).

[12] The early Greek philosophers first made this distinction explicit.

judgements. When there is no effective legislative standard at the judge's disposal, he must establish law by adhering to the principles of the directive to which he provides specific substance. In doing so, he does not arrogate a legislative duty to himself and thus breaches the principles of the separation of powers; on the contrary, by fulfilling this supplementary finding of law, he serves the most challenging but also the most noblest task of judicial function, which is to close the holes left by the statute, on the basis of a superior natural norm, and by concretizing the fundamental positive principles produced by legislation. Yet, each time he does so, "he must reckon with the ancient suspicion that [the] creativeness" involved in closing such holes "is a disturbing excess of skill, at odds with circumspection, darkly menacing the stability of the law."[13]

"If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it . . . from *experience* and *study* and *reflection*; in brief, from *life itself*."[14] It through this "tangled life, amid tangled insights" that the judge finds the path through precedent, through policy, through history, as the judge is no more than a "poor fallible creature" subject to the "most difficult of all tasks, the adjudication between man and man, between man and the state" through the unfortunate "reason called law."[15] It is unfortunate because reason cannot prescribe a course of conduct, it can only indicate the best means of achieving a certain end. See Friedmann, Legal Theory (1967); Stone, The Province and Function of Law (1946).

Those who present themselves as "non-consequentialist" interpreters of the law are the ones who often base their decisions on grand theories of justice, equity, and human

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[13] Charles, The Courts and Lawmaking (1959).

[14] See *id.*

[15] Justice Frankfurter, "Chief Justices I Have Known" (1953).

rights—they see themselves as "meta-lawyers," and by systematic deontology, often aiming at principles, not at ends. *There are no grand truths in law*, unlike the applications of deontology in professional theory, because the law is an *always* evolving structure of natural relations—it does not aim at its own contradictions, it does not intend to, nor can it, create a metanarrative of interpretation.

Even the clearest of statutory provisions, such as our Constitution's provisions concerned with internal and institutional structures, are sometimes just as abstract and vague to the public as the tedious prose of Martin Heidegger. No amount of logical or semantic refining can eliminate the unconventional value between different policies; they can, however, eliminate inconsistencies and spotlight legal logic. It is why "courts generally seek . . . to offer low-level rationales on which diverse people may converge"[16]—it is here that the judge properly proceeds cautiously, because he understands that within the process of legal elucidation, outside the "core[s] of settled meaning," there is a "penumbra of debatable cases in which [rationales] are neither applicable nor obviously ruled out"[17]—in this process, the rightness and the wisdom of the rationale, not its objective nature, is what is at stake. Undoubtedly, the consistency of the rationales, through precedent, through time, accounts for the value of a judicial act—in a way, every decision ought to make a universal claim;[18] but make no mistake, this is far from the categorical imperative: the contradictory principles which create philosophical contradictions and the public acceptance of these claims are also at stake, *contra* Kant's moral theory. It must be accepted that for analytical and pragmatic purposes the

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[16] Cass R. Sunstein, From Theory to Practice (1997).

[17] Hart, Positivism and the Separation of Law and Morals (1958).

[18] See Kant, Foundations of Metaphysics of Morals, § 1; see also Singer, Generalization in Ethics: "The Generalization Principle."

courts distinguish the objective aspect of a rationale from its legally material or substantive aspect solely for formal reasons—that is to say, because of the natural aspect of law, we constantly modify *objectivity* by constantly examining its adequacy: is it principled? Is it right? Is it wise? The most creative decisions are circumspect in the extreme, as they indicate the most careful consideration of all the implications for a conventional solution and all the circumstances which now render a solution so impractical as to undermine its usefulness in the future. This is because we are always setting and following precedents for ourselves—it is not, nor will it ever be, a case of objectivity settling everything down to a certain point, and the rationale dealing with everything below that point. Rather, both rationales *and* objectivity interact throughout the whole field of law.[19]

Law is now "distinctively reasoning about past political decisions and their current implications within a set of interpretative conventions that is, in some ways, *peculiar* to the law" itself, and the application of it in this penumbra is not a matter of logical deduction and reasoning, instead, the criterion which makes a decision rationally sound in such cases is some concept of what the law *ought* to be, for all rationality is not encased in the deductive or inductive models. When the application of *ought* is proactive, it relates to the institution of judicial review originating with Plato.[20]

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[19] See generally R.M. Hare, The Language of Morals (1952).

[20] Plato's analogy of the guardians and watchdog gave birth to the "watchdog" concept of judicial review. Plato, The Republic. Alexander Hamilton expresses this view clearly: "The independence of the Judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the People themselves, and which have a tendency to occasion dangerous innovations in the Government, and serious oppressions of the minor party in the community . . . But it is not with a view to infractions of the Constitution only, that the independence of the Judges may be an

Contrary to the common belief, the idea of *marginal* judicial review of the government's (be it the legislative, or the executive) use of discretionary power is unconnected to Montesquieu's account of law—the founding fathers, most especially James Madison, drew upon Montesquieu's philosophical works (particularly *The Spirit of the Laws*)[21] when drafting the Constitution. In the words of Lord Justice Denning: "If you read the great cases . . . you will find that in each of them the judges were divided in opinion—on one side there were the timorous souls who were fearful of allowing a new cause of action, and on the other side there were the bold spirits who were ready to allow it *if justice so required*"—it was fortunate for the common law that the progressive view, discovered through the ever-evolving nature of life, prevailed.[22]

> "The real concern is not the remote possibility of too many creative opinions, but their continuing scarcity. The growth of the law, far from being unduly accelerated by judicial boldness, is unduly hampered by a judicial lethargy that masks itself as judicial dignity with the tacit approval of an equally lethargic bar."[23]

Let us admit at once that there is no dignity in judges not

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essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of private rights of particular classes of citizens, by unjust and partial laws."

[21] Edward N. Zalta, The Stanford Encyclopedia of Philosophy (2018) ("He saw despotism, in particular, as a standing danger for any government not already despotic, and argued that it could best be prevented by a system in which different bodies exercised legislative, executive, and judicial power, and in which all those bodies were bound by the rule of law. This theory of the separation of powers had an enormous impact on liberal political theory, and on the framers of the constitution of the United States of America.").

[22] 2 K.B. 164, 195 (1951).

[23] Charles, The Courts and Lawmaking (1959).

employing the fundamental objects of judicial reasoning.

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Samuel Chase, one of the justices of the Supreme Court, charged a grand jury, sharply criticized the new Congress for abolishing a law passed by the Federalist Congress, and criticized some pending changes to a state's constitution that would have broadened the electoral franchise—acts that can only be reasonably described as being minor. When Jefferson learned of those acts, he was quick to write a letter to one of his party leaders in the House of Representatives.

With this letter, Jefferson set in motion the forces that would represent the first of several challenges to impeachment that have occurred throughout American history. The Constitution provides that civil officers may be impeached for "high crimes and misdemeanors"—by virtue of the "basic canons of interpretation, commonsense grammatical understanding, and even the unambiguous text,"[24] the "high crimes and misdemeanors" must be crimes or misdemeanors. The House of Representatives first investigated possible charges against Chase and then voted to impeach him. The articles of impeachment included not merely Chases' charge to the grand jury, but also charges that he had shown a high degree of partiality in presiding over some trials.

The Vice President of the United States, and presiding officer, was Aaron Burr. And although he was the presiding officer of the impeachment court, he, himself, was a fugitive from justice—he had killed one of the founding fathers of the United States, Alexander Hamilton. At that time, indictments against Burr for murder were outstanding, causing one to comment that while the murderer is arraigned before the judge in court, the judge was arraigned

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[24] *Procursive* v. *United States*, 7 U. S. ___, ___ (2019) (slip op., at 12).

before the murderer in this trial.

Samuel Chase, who stood to lose his office if convicted by the Senate, had a distinguished and prosperous career at the bar, as chief judge of the general court of his state—his legal ability was known by all, but his impetuous, inherently political, nature made him an agitator of the people.

The presentation of evidence before the Senate *took ten full days*, and more than *fifty witnesses appeared*, with the closing arguments running for *several days*. The allegations against Chase in relation to treason trials did not amount to much, and the others were a collection in which minor claims of error were mixed along with serious allegations of prejudice and partisanship.

The significance of the outcome of the Chase trial cannot be overstated. Although the Jeffersonian Republicans had expounded grandiose ideas regarding impeachment as a mechanism by which the other branches could be homogenized with existing political beliefs, the case against Chase was prosecuted on the basis of *concrete charges* of judicial misconduct. Nearly every act levied against him had been done in the discharge of his judicial office. His conduct was even worse than most people seem to realize, and the reluctance of a few Republican senators to vote to convict even on this count surely cannot have been intended to condone Chase's acts.[25]

Instead, it represented a judgement that now sets precedent: an officer's acts, as long as they do not cause "injury to the society itself," by virtue of separating the powers in this state, may not serve as rationales for impeachment. This is where we land in the case afoot. A man accused of misappropriating his office. While the details for the motive may differ, the judicial reasoning must remain the same. Did the President's actions cause "injury

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[25] Chief Justice Rehnquist, Judicial Independence (2001).

to society itself" and therefore warrant his impeachment? We say not. We must look no further than to Mister West Hughes Humphreys; one of the few to face impeachhment—and one of the fewer to be convicted. Hugh was impeached for—essentially—treason. This is one of the few precedents of impeachment that we can use to deduct our reasoning. If treason is one of the few crimes—so high, so heinous—they are an injury to society itself, what common thread can we follow to the case at hand. Scope. The scope of the crime is the only thread followed through all impeachments. The scope of treason is nationwide. The scope of the President's accused crimes are local to a handful of senators. His actions—assuming them to be true high crimes and misdemeanors fail to be an injury to society.[26]

It is therefore that we concur with the Court's decision to overturn the impeachment articles.

[26]JUSTICE CHASE has previously discussed the scope of "High Crimes and Misdemeanors" in *Procursive* v. *United States*, 7 U. S. ___ (2019).

SUPREME COURT OF THE UNITED STATES

No. 09–13

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ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[April 26, 2020]

JUSTICE STEWART, with whom JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

Today this Court, for the first time in its history, overturns an impeachment. Based off our previous decisions, I would hold Article 4 unconstitutional but would uphold Articles 2 and 3.

I

"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." *Cursive* v. *United States*, 7 U. S. ___, ___ (2019) (slip op., at 10). As was the case in *Cursive*, "[n]either the Respondent nor *amici* have argued in favor of overturning *Ichigo*." *Id*., at ___ (slip op, at 2) (STEWART, J., concurring). Indeed, the *amicus* representing the current and former Members of Congress states that *Ichigo* "is one of the few judicially created procedures I would not object to, despite how dangerous judicial creativity is." Response of *Amicus Curiae* of 23 Current and Former Members of Congress 3. "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." *Cursive*, *supra* (quoting *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855 (1996)) (quotation marks omitted). I will now turn to the articles and examine them according to the standard provided in

Ichigo.

II

A

Article 2

Article 2 and Article 3 charge the petitioner of witness intimidation and obstruction of Congress.

I will first turn to Article 2. Article 2 alleges that the petitioner violated 18 U. S. C. § 1512. The section is long, and Congress fails to identify any particular subsection or paragraph violated. I will examine the application of 18 U. S. C. § 1512(b) as it matches the closest description of the allegations. Section 1512(b) provides, in pertinent part:

> "Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both."

The witness testified that their refusal to answer questions was directly because of the petitioner's influence, establishing a "nexus between the 'persua[sion]' to destroy documents and any particular proceeding." *Arthur Andersen LLP* v. *United States*, 544 U. S. 696, 707 (2005). Whether the evidence is enough to convict is not for us to decide, but rather for the Senate.

Not all persuasion is unlawful, "[b]y its terms, § 1512(b) prohibits four specific categories of conduct directed toward witnesses: (1) intimidation, (2) physical force, (3) threats, and (4) corrupt persuasion." *United States* v. *Khatami*, 280 F. 3d 907, 911 (CA9 2002). The Court finds that Articles 2 and 3 fail to allege unlawful persuasion. However, Article 2 does allege that the evidence proves that the "President

intimidated the witness into non-compliance with the Senate Judiciary Committee." H. Res. 2, 79th Cong., 8th Sess. (2020). Intimidation is unlawful under the statute. The evidence accompanying the articles further show the witness implicitly agreeing to the suggestion that he is under duress.

B

Article 3

I will now turn to Article 3. Article 3 relies on the same facts and evidence as Article 2 and alleges violation of 18 U. S. C § 1505, which partially provides:

> "Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress . . . shall be fined under this title, imprisoned not more than 5 years."

For the purposes of the section, corruptly "means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U. S. C. § 1515(b). The Court finds that he did not act corruptly or use threats or force. However, the petitioner did not encourage the witness to assert a lawful privilege or anything of that nature, the petitioner appears to (on evidence presented and facts alleged) coerce the witness with the release of certain information for continued compliance.

III

Article 4 alleges that petitioner engaged in a conspiracy to injure or impede officers in violation of 18 U. S. C § 372. This arises out of an incident at City Hall, where CyborgCaldwell attempts to arrest the petitioner for trespassing on City Hall; the petitioner retaliates by directing the Secret Service to arrest CyborgCaldwell.

The law that the petitioner was impeached for provides:

> "If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined under this title or imprisoned not more than six years, or both." 18 U. S. C § 372.

As can be seen, the law clearly applies to officers of the United States. As is seen by the evidence, CyborgCaldwell is not an officer of the United States but rather of the District of Columbia. This statute simply does not confer protection to CyborgCaldwell.

The Constitution "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." *Cursive*, *supra*, at ___ (slip op, at 16). In this matter, it is not possible because of the inherent requirements of the statute cannot, accepting all the facts alleged as true, be met. It therefore

follows that Article 4 must be set aside under the *Ichigo* standard.

* * *

We are not the Senate. Nor are we here to judge the equity behind an impeachment and, subsequently, a conviction. I am fearful that this Court will, in the nearby future, face an unintended consequence and become the Court of Appeals in all impeachment related activities. The repeated chipping away at congressional authority is risky, and it seriously endangers and undermines the separation of the three branches.

I respectfully dissent from the Court's holding that Article 2 and Article 3 are unconstitutional.