Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 09–15

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

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[April 28, 2020]

PER CURIAM.

In *Reset* v. *United States*, 9 U. S. ___, ___ (2020) (*per curiam*) (slip op., at 42), the Court recognized that impeachment was not an "unlimited power." The Constitution lays out the conditions and procedures which govern its exercise. One such requirement is that the House's vote to impeach and the Senate's vote to convict must take place "outside of sessio[n]." U. S. Const., amend. XXX. Congress has permissibly directed that such votes take place using the Federal Election Commission internal voting system. In virtually every case, this requirement is unfailingly followed.

This case, however, appears to be the one exception. Petitioner provides substantial evidence that the House vote to impeach him took place during a regular session rather than through the FEC internal voting system.* In response, the United States does not claim that the FEC internal voting system was used or that the vote was otherwise conducted out of session, but rather that the in-session vote was "secure" and therefore permissible. Brief for

*Petitioner references Congress' backup voting records and an affidavit from the Speaker at the time affirming that the impeachment vote took place in session.

United States 2. The Constitution, however, does not simply require that votes to impeach be conducted securely: it requires that they be conducted out of session. A securely conducted vote is no substitute for a constitutionally valid one.

The dissent does not dispute the Court's conclusion that the vote was conducted unconstitutionally. *Post*, at 2, n. 6. Instead, the dissent protests that the Court should subject the conceded violation to a harmless-error inquiry and pursuantly uphold petitioner's sentence in full. But accepting the dissent's reasoning would effectively repeal the Constitution's requirement that the House's vote to impeach take place "outside of session." The dissent responds that it supports a "case-by-case inquiry" into harmlessness, *post*, at 3, but it is unclear if the dissent believes there would ever actually be a case where such an error could not be deemed "harmless." Even otherwise, it is not the Court's role to decide "on a case-by-case basis whether the [Constitution's requirements] [are] *really worth* insisting upon." *District of Columbia* v. *Heller*, 554 U. S. 570, 634 (2008) (emphasis in original). And the Court has explained that when addressing "a matter as important to the constitutional fabric as impeachment . . . it becomes all the more imperative that the Court's actions be strictly rooted" in consistent "legal principles." *Reset*, 9 U. S., at ___ (slip op., at 14). Contrary to the dissent's assertions, moreover, the applicability of the harmless-error inquiry to this particular constitutional violation is far from clear. The dissent contends that it is "impossible to say that the error (the House voting in session instead of through the FEC internal election system) contributed to the petitioner's eventual conviction," *post*, at 4, but it is equally impossible to say that it did not. A harmless-error inquiry in this context would be an exercise in counterfactuals. Additionally, there are other harms which may potentially result from this type of constitutional error besides just a change in outcome, such as a diminished

opportunity to make a considered decision. While in-session votes require an immediate judgment call, out-of-session votes allow time for private reflection. The point is that the result of a harmless-error inquiry in this context is largely contingent on the values the Court chooses to emphasize. It is far too subjective an endeavor to undertake when considering this type of error.

The Court holds that the vote to impeach petitioner was conducted unconstitutionally and thus overturns petitioner's disqualification from holding office.

It is so ordered.

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JUSTICE CHASE, concurring.

I write separately to note my complete disagreement with JUSTICE BORK's prescribed application of an easily manipulated jurisprudence of labels to determine whether a constitutional error is amenable to harmless-error analysis. The application of these labels—a "burdensome obligation [that] we are hardly qualified to discharge"[1]—may, often times, "work very unfair and mischievous results,"[2] essentially "destroying or diluting constitutional guarantees"[3] through their nature of being indiscriminate and unpredictable factual traps. Because of the mischievous nature that this procedural doctrine carries, a petitioner will often find themselves unable to argue the inapplicability of a harmless-error analysis without first implicitly conceding that the inquiry is justified in the first place. The mischievous idea that the government can violate a basic constitutional restriction placed upon itself in and, through our Court, tell its citizens, beneficiary of these restrictions, "no harm-no foul,"[4] is distasteful to the relations that emerge from the body of immutable rules that the Constitution provides for

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[1] *Chapman* v. *California*, 386 U. S. 18, 45 (1967) (Stewart, J., concurring).

[2] *Id.*, at 22 (opinion of the Court).

[3] *Id.*, at 50 (Harlan, J., dissenting).

[4] See The Federalist No. 80 (Hamilton) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.").

us to employ in our decisions.[5]

There indeed is a justification for the Court's refusal to engage in harmless-error analysis. It is the Court's regard for rule-of-law values, and the Court's fulfillment of its function with respect to the Constitution. While I acknowledge that the courts should not be impregnable citadels of technicality, the Court must not erode a "matter as important to the constitutional fabric as impeachment."[6] The harmless constitutional error doctrine, as articulated by JUSTICE BORK, shares neither history nor logic with the harmless error doctrine attached to *Chapman*—as to constitutional obligations there should be no harmless errors.

An improper removal of a judicial officer, by trampling the officer's constitutional guarantee to a constitutional impeachment—often protected solely by the courts—is not tantamount to the failure of a prosecutor to provide a comma in a defendant's charging papers.

Because I find the Court's opinion to be complementary to my analysis, I concur in the former.

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[5] See *Reset* v. *United States*, 9 U. S. ___, ___ (2020) (CHASE, J., concurring) (slip op., at 6) ("When such relations are determined, no decision can be made on the contrary which has its principle in nature.").

[6] *Id.*, at ___ (*per curiam*) (slip op., at 14).

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JUSTICE BORK, with whom JUSTICE STEWART joins, dissenting.

The majority today strikes down an impeachment conviction based on nothing but an error in the way the House originally voted to kick off its prosecution. I respectfully dissent.

This case involves an issue of procedure, not substance, and when reviewing a conviction for procedural error, the Court's touchstone has always been to ask if the error "was harmless" or not.[1] If it was, the conviction should stand. Without a harmless-error consideration, it would be far too easy for petitioners to pick out insubstantial and meaningless issues with which to pursue unlimited appeals. No judgments would ever be final. This would be especially problematic where impeachments are concerned because there is a strong interest in "finality."[2] The Court's observation that "[a] secure vote is no substitute for a constitutionally valid one" is no response either.[3] Our precedent is unmistakable: "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the

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[1] *Chapman* v. *California*, 386 U. S. 18, 20 (1967).
[2] *Nixon* v. *United States*, 506 U. S. 224, 236 (1993).
[3] *Ante*, at 2.

automatic reversal of the conviction."[4]

Finding that there was a constitutional violation is not grounds for "automatic reversal" as the majority's decision presumes.[5] It is merely the beginning of a deeper analysis.[6] Having found a constitutional violation, the analysis must now turn to whether that violation was harmless.

In the grand scheme of the impeachment process, especially in this case, the House voting in session instead of through the FEC internal election system does not appear to have been harmful. The petitioner does not say that an insufficient number of favorable votes were cast,[7] that the House would not have passed the articles but for the in-session vote,[8] or that the House-at-large attempted to change course due to its views being misrepresented by the segment assembled in session.[9] The petitioner does not even cite one timely objection by a Representative to the voting procedure then used. These concessions should make it pretty easy for the Court to conclude that the error was harmless, but the majority does not do so.

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[4] *Chapman*, *supra*, at 22.

[5] *Ibid*.

[6] Like the United States, I do not dispute the majority's holding that the House's vote in this case was conducted unconstitutionally. That does not automatically mean, however, that the Senate conviction and sentence must be thrown out.

[7] The Constitution requires the support of a simple majority of the House of Representatives to approve an article of impeachment. The petitioner does not argue that, due to the vote being in session, the required number of votes was not met. Without that, the Court should assume the required number of votes was obtained.

[8] It is relevant that the petitioner does not even claim this. Whether such a claim could be proven would be a different story. The important fact is that the petitioner does not even claim that the in-session vote changed the outcome.

[9] If this were the situation—that the House-at-large wanted to correct course in the immediate aftermath of the session vote and was for some reason *unable to*—the petitioner would have a strong case that the error was not harmless.

A brief survey of the Court's prior holdings on harmless error should help illustrate why the majority's decision today is so out of place.

In *Fahy* v. *Connecticut*,[10] the Court faced the question of whether the admission of unconstitutionally obtained evidence at trial could ever be harmless error. Rather than adopting a categorical rule, the Court explained that the relevant inquiry was to ask whether in a given case the use of such evidence was "prejudicial."[11] This case-by-case inquiry would allow the Court to evaluate whether there was a "reasonable possibility" things would have turned out different if not for the procedural error.[12] Rather than apply a case-focused inquiry here, however, the majority simply announces the constitutional violation and overturns the entire conviction. Had the majority looked into the details of this case through the lens of a harmless-error inquiry, it would have found that the procedural error here did not affect the outcome in the slightest.

In *Chapman*, the Court confronted a state conviction where the state had entered as evidence of guilt at trial the fact that the defendant had refused to testify denying his guilt. The state constitution at the time had specifically provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented on by the court and by counsel, and may be considered by the court or the jury."[13] The Court, however, had by the time of *Chapman* already struck down that part of the state constitution in *Griffin* v. *California*.[14] The question before the Court in *Chapman* was whether the trial court's consideration of the negative inference prohibited by

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[10] 375 U. S. 85 (1963).
[11] *Id.*, at 86.
[12] *Id.*, at 86–87.
[13] Cal. Const., Art. I, §13 (1967).
[14] 380 U. S. 609 (1965).

Griffin was harmless error or not. The Court held that the use of such statements as evidence was not harmless because the Court could not conclude that the error "did not contribute to . . . [the] convictio[n]."[15]

In the case at bar, however, it is nearly impossible to say that the error (the House voting in session instead of through the FEC internal election system) contributed to the petitioner's eventual conviction. Not even the petitioner argues that the House would have voted any differently on the question of impeachment if a different medium were used. The majority avoids these inconvenient details by refusing to engage in any harmless-error analysis whatsoever. There is no justification for that refusal.

* * *

I do not know whether the petitioner's impeachment was substantively valid. He did not brief us on that issue. Nor do I believe that the petitioner deserves to remain barred from office. He seems a good man. But I would not overturn an impeachment conviction based on nothing but a procedural hiccup which was demonstrably harmless in the grand scheme of an entire impeachment process. By refusing to engage in harmless-error analysis, the majority in effect adopts a standard of review for procedural issues in impeachment cases that is even stronger than the standard of review we apply to procedural issues in ordinary criminal cases. This is erroneous. But unlike the House's error challenged in this case, ours may not prove to be so harmless.

I respectfully dissent.

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[15] *Chapman*, *supra*, at 26.