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CASES ADJUDGED

IN

THE SUPREME COURT

AT

FEBRUARY TERM, 2020

FEBRUARY 14, 2020 THROUGH AUGUST 14, 2020

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

LEWIS F. POWELL, JR.

REPORTER OF DECISIONS

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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LEWIS F. POWELL, JR., AESCIA, WALTER MONDALE, SOLICITORS GENERAL

TABLE OF CASES REPORTED

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Errata

The official Supreme Court Trello lists *Viraldownload v. District of Columbia* and *AlexJCabot v. United States* as No. 09-30. As such, the Reporter has added a value of 1 to each docket subsequent to *Cabot* (With *Cabot* being No. 09-31, the case after it 09-32 instead of 09-31, etc.).

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

FEBURARY TERM, 2019

RESET4K, PETITIONER *v.* UNITED STATES

ON PETITION FOR WRIT OF ANYTIME REVIEW TO THE UNITED STATES GOVERNMENT

No. 09-13. Decided April 20, 2020. Opinion released 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

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

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, 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. 9 (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

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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.

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 *Procursive* that impeachment is a justiciable matter under the Anytime Review Clause. See 7 U. S., at 15–18.

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,

[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

respondent emphasizes the dictionary definition of "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

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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.

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 27, 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 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).

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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.

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 17. 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 spe-

cially 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 18, 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" fore-

closed 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. 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.

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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).

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 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 27. 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 Constitu-

tion'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

[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.

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 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 noncontemporaneous 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

[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.

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. 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*,

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

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 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 16 (quoting *AcidRaps*, 6 U. S., at 42, n. 2). The Court may only give effect to judicial policies when doing so would not un-

duly 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 ailure 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 con-

forms 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 17. 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 context.

C. *Stare Decisis*

[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. 744, 780 (2013) (Scalia, J., dissenting). The Anytime Review Clause, however, provides this Court with exactly that power, eliminating the original justification for the political question doctrine.

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. 782, 798 (2014). 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 18 (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

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

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 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 22. 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,

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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.

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.*

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

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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.

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 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

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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.

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 26-27. 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 26, 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 26. 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 27, 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.

A. 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.

B. Article 4

Article 4 alleges a comparatively far more minor offense. While the first two articles alleged offenses involving upperlevel 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 29 (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,

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

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 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.

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 knowledge and understanding of the law can be derived scientifically from legal sources such as cases and statutes, this

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

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").

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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.").

This conundrum gives birth a series of questions: what 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

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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).

judicial—interpreter, a *non liquet* must be returned by the interpreter.

In reality, the Constitution goes as far as substantially 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.

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[5] Cardozo, *supra.*

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

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 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—

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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).

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 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

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

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

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

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 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

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

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 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

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[14] See *id.*

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

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 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

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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."

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] 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

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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 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

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 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.

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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).

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 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

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[24] *Procursive v. United States*, 7 U. S. 9, 23 (2019).

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 his 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 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 impeachment—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

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

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.[1]

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

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. 9, 23 (2019). As was the case in *Cursive*, "[n]either the Respondent nor amici have argued in favor of overturning *Ichigo*." *Id.*, at 30 (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

[1] JUSTICE CHASE has previously discussed the scope of "High Crimes and Misdemeanors" in Procursive v. United States, 7 U. S. 9 (2019).

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 con-

> fidence 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 24. 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.

Per Curiam

RS_HUDSON, PETITIONER *v.* UNITED STATES

ON PETITION FOR WRIT OF ANYTIME REVIEW TO THE UNITED STATES GOVERNMENT

No. 09-15. Argued April 18, 2020. Decided April 28, 2020.

PER CURIAM.

In *Reset v. United States*, 9 U. S. 1, 45 (2020), 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.[1] 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 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

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

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 15. 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.

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

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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).

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 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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[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.").

[5] See *Reset v. United States*, 9 U. S. 1, 50 (2020) (CHASE, J., concurring) ("When such relations are determined, no decision can be made on the contrary which has its principle in nature.").

[6] *Id.*, at 15.

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 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.

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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.

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

[5] *Ibid.*

[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.

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.

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[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.

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

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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).

court's consideration of the negative inference prohibited by *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.

Syllabus

RICHOCALDWELL, PETITIONER *v.* D_AYYDREAM

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-14. Argued April 15, 2020. - Decided April 20, 2020.

After a Federal District Court found RichoCaldwell liable for tortious false imprisonment, it ordered him to provide a written statement to the plaintiff apologizing for his actions. He timely appealed that decision and argued that the remedy ordered by the District Court was unconstitutional under the First and Fifth Amendments.

Held : A court-ordered apology is only permissible as an alternative remedy to some other more concrete form of relief. Pp. 1–3.

(a) Apologies do not "mend bones, fix homes, or pay for expensive surgeries" but they do provide "an emotional support unavailable from less-than-human remedies." There is therefore a remedial basis for court-ordered apologies, however it must come secondary to some more concrete form of relief because an apology alone is insufficiently concrete to remedy an injury. Pp. 1–2.

(b) Court-ordered apologies do not violate the textual terms of the First Amendment and would appear to be impliedly authorized by other constitutional provisions. P. 2.

(c) The Fifth Amendment's privilege against self-incrimination requires that a defendant have the option to take some other more traditional form of punishment in lieu of a court-ordered apology. Pp. 2–3.

4:20-1450, vacated and remanded.

PITNEY, J., delivered the opinion for a unanimous court.

JUSTICE PITNEY delivered the opinion of the Court.

The case before us asks us to consider the constitutionality of a court ordered apology. Many scholars have approached this topic with differing opinions. See White, "Say

You're Sorry," 91 Cornell L. Rev. 1261 (2006); Smith, "Against Court Ordered Apologies," 16 New Crim. L. Rev. 1 (2013). Petitioner argues that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" Brief for Petitioner 4 (quoting *West Vir. Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943)). While this is fundamentally correct, see *Miranda v. Arizona* 384 U. S. 436, 462 (1966), the application of such to the case afoot is an error on the petitioner. Many questions arise when we consider an apology as a relief from damages. An apology does not mend bones, fix homes, or pay for expensive surgeries. However, an apology provides an emotional support unavailable from less-than-human remedies. We recognize that any remedy must serve to mitigate an injury sustained. It must come therefore that an apology, to be accepted as a form of relief, must mitigate some injury. In *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992), we recognized that judicially cognizable injuries must be "concrete and particularized." *Id.*, at 560. It is through continuous lateral thinking that a remedy to a "concrete" injury must also be concrete. In this regard an apology alone fails to satisfy. This, however, is not an absolute closure of court ordered apologies. In this regard we would recognize an apology as a secondary form of relief to injuries sustained.

The discussion of court ordered apologies does not rest here. The First Amendment still stands and the argument that the very order of an apology is unconstitutional left unanswered. Speech, of course, is protected by the First Amendment amongst many things. This is uncontested. However, the First Amendment by its textual terms only protects speech from being abridged by legislation. It does not intrinsically protect against punitive orders. Indeed, we

must seek further clarification from the Constitution. The Thirteenth Amendment is the skeleton key to unlocking this case. It provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States," U. S. Const., amend. XIII, §1. Involuntary servitude is defined, according to Black's Law Dictionary and within the bounds of this Court, as "[a] person who is wholly subject to the will of another." To be ordered to speak, is to be wholly subject to the will of the orderer, and is therefore within such definition. Outside the bounds of punishment, the Constitution is clear in its unconstitutionality. However, the antithesis is the case here. Petitioner was found to be guilty of the torts levied against him and therefore it is reasonable for the District Court to order him to perform involuntary servitude.

Finally, a discussion must be had in how an apology is bound within the Fifth Amendment, which provides: "No person shall be subject for the same offence twice; *nor shall be compelled in any criminal case to be a witness against himself*," U. S. Const., amend. V, §1 (emphasis added). To apologize is to admit guilt. This is the fundamentals of an apology. Therefore, we see that if an individual is forced to apologize while claiming innocence, his Fifth Amendment rights will have been violated. It is with these complexities we promote a two-pronged test when a Court decides an apology is a reasonable secondary relief to injury. First, some more "concrete" relief must also be ordered; second, if the defendant maintains his innocence, an option to serve a more concrete, and traditional punishment must be offered in lieu of the apology. It is with this in mind we recognize that in this case, the defendant was not offered the ability to assure his innocence. By failing to provide petitioner

the option to serve a more concrete and traditional punishment his Fifth Amendment rights were violated.

We vacate the judgment of the District Court and remand for further proceedings consistent with this opinion.

It is so ordered.

Syllabus.

MONKEY2747, PETITIONER *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-21. Decided May 12, 2020

The United States instituted prosecution against petitioner in the Federal District Court with a criminal information that did not cite the allegedly violated statutes or regulations. Petitioner asked the District Court to order the United States to correct this pleading failure, but the District Court responded by invoking Federal Rule of Criminal Procedure 62 and suspending the pleading requirement.

Held : The District Court erred in invoking Rule 62. Pp. 1–2.

(a) Rule 62 is limited by two major requirements, each of which comprises subsidiary conditions. Rule 62(b) requires that advance notice be given to the parties before any suspension of the Federal Rules and that they have the opportunity to be heard; Rule 62(a) requires that a suspension (1) be in the interest of the parties; (2) rectify unfairness or prejudice caused by the application of the rule; (3) not modify the substantive rights of the parties; and (4) not affect a provision amended by this Court. Pp. 1–2.

(b) The record demonstrates that Rule 62(b) notice was not provided by the District Court. P. 2.

(c) The suspension in this case also violated Rule 62(a) because suspension was not in the "interests of justice." The suspension deprived the defendant of "reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense." United States v. Simmons, 96 U. S. 360, 362. It also does not prejudice to the prosecution to merely require they cite the law they are prosecuting under.

4:20-1687, vacated and remanded.

STEWART, J., delivered the opinion for a unanimous court.

JUSTICE STEWART, delivered the opinion of the court.

This matter begins in the District Court. The government filed a criminal information that did not mention any statute or regulation violated. The defense moved for the court to correct the deficiency. Instead of directing the government to correct the deficiency, the court decided to suspend the underlying rule. We granted certiorari.

First, we will turn to Federal Rule of Criminal Procedure 62. Rule 62 was created by this Court to stop the unnecessary delay of cases under rules that cannot be applied to ROBLOX. It allows a District Court to suspend the normal Rules of Procedure.

This power is very significant, so the Court installed various conditions. Any suspension requires (1) it to be in the interests of the parties that the provision not apply, (2) the application of the suspended rule to be unfair or cause prejudice, (3) the substantive rights of any party must not be modified by the suspension and (4) the provision must not have been subject to amendment by this Court. Fed. R. Crim. P. 62(a). The Rule also requires that notice be given to both parties and that they have the opportunity to be heard. Fed. R. Crim. P. 62(b).

A quick review of the transcript shows that no opportunity was given. The order was entered sua sponte and no party was consulted or notified before it was entered. This fails the requirement of Rule 62(b).

We will turn next to whether the requirements of Rule 62(a) were met. Rule 62(a)(1) only allows the suspension of a rule where it is in the "interests of justice" for the rule to be suspended. "[I]nterests of justice is a rather elusive concept." *Morales-Fernandez v. INS*, 418 F. 3d 1116, 1119–20 (CA10 2005) (quotations omitted). However, in this matter the interests of justice are strongly in favor of the rule not

being suspended. The language used by the complaint is very broad and multiple criminal offenses could be made from the facts alleged. The suspension of this rule deprives the defendant of "reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offence." *United States v. Simmons*, 96 U. S. 360, 362 (1877). "[T]he substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." *Smith v. United States*, 360 U. S. 1, 9 (1959). The same logic follows for Rule 62(a)(2), as it is not unfair, nor does it prejudice the rights of the prosecution to merely require that the law allegedly violated be cited in the information.

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MAXONYMOUS, PETITIONER *v.* SECRET SERVICE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-23. Decided May 14, 2020

The petition for a writ of certiorari is granted. The judgment of the United States District Court for the District of Columbia is vacated as to the application of prejudice, and the case is remanded for further proceedings consistent with this opinion. JUSTICE CHASE took no part in the consideration or decision of this case.

CHIEF JUSTICE HOLMES, concurring.

I concur in the Court's disposition because the record does not establish that this case's dismissal with prejudice was legally justifiable under the EJA regime. See Enhancing the Judiciary Act, Pub L. No. 67–4, §201(a) (2018). But while the EJA regime does control the outcome of this case, over its lifespan it has distorted the law, facilitated frivolous litigation, and proven generally unworkable. The Court should explore the possibility of amending the Federal Rules of Criminal/Civil Procedure to specify additional circumstances where dismissal with prejudice would be appropriate.

I write separately in this case to make three points:

1. Amending the Federal Rules of Criminal/Civil Procedure to repair unworkable arrangements is not just *consistent with* this Court's responsibility under the Rules Enabling Act, it *is* this Court's responsibility under the Rules Enabling Act. As we have previously explained, "the congressional mandate embodied in the [REA]" is that this

Court preserve the workability of procedure within the Nation's courts. *Hanna v. Plumer*, 380 U. S. 460, 464 (1965). This responsibility does not terminate simply because positive law already prescribes a different mode of procedure. *Id.*, at 473; also cf. *Herron v. Southern Pacific Co.*, 283 U. S. 91, 94 (1931). To the contrary, the Court's congressionally assigned role under the Rules Enabling Act is to shape workable procedural rules even where those rules "differ from comparable [positive law]" counterparts. *Hanna, supra.*

That is why, for instance, the Rules Enabling Act prescribes that "[a]ll laws in conflict with [rules prescribed under the REA] shall be of no further force or effect after such rules have taken effect." 28 U. S. C. §2072(b). When Congress enacted the Rules Enabling Act, as the statute's text makes clear, Congress anticipated that the Court would from time to time need to, in the shaping of workable procedure, depart from those procedures laid out by positive law. And when Congress adopted the EJA, it did so against this backdrop and with the understanding that if the EJA's procedural requirements proved unworkable, they would be subject to correction. The fact that the EJA regime was adopted by Congress is therefore no reason to abdicate the Court's congressionally assigned responsibility to maintain the workability of judicial procedure.

2. It is possible to repair procedure surrounding dismissals with prejudice without undercutting the EJA's core purpose. As petitioner points out, the objective of the EJA regime is to "guarantee that a[n] error in pleading or procedure [does not] totally prevent a well-meaning plaintiff from pursuing their case." Petition for Certiorari 2. All on

this Court, I am sure, agree that this is a respectable objective. The EJA's implementation, however, leaves much to be desired.

To begin with, the EJA is overbroad. While it certainly does accomplish its purpose of protecting well-meaning plaintiffs from premature dismissals with prejudice, its textual reach is much further. Indeed, by the EJA's terms, prejudice may not be applied to a dismissal unless the defendant was "put in jeopardy" in one of just two ways described by the Act. EJA §201(a). Namely, a defendant is only "put in jeopardy" under the EJA if either (1) a "jury" was "empanel[ed]" or (2) the "first witness" was "call[ed]."* §§201(a)(1)–(2). The problem, however, is that under this definition, all sorts of abusive behavior escapes dismissal with prejudice.

For instance, say a completely frivolous lawsuit is filed purely for the purpose of antagonizing a law-abiding citizen. The citizen may be compelled to appear in court at the risk of default or contempt. They then (of course) obtain a dismissal of the case. Immediately after that, however, the EJA would authorize the frivolous litigator to resubmit the lawsuit and force the law-abiding citizen to undergo the exact same process a second time (and perhaps beyond). For that reason, prior law took a broader view of when prejudice applied. It was not fixed exclusively to chronological points in the litigation process, but looked also to the conduct of plaintiffs. "[D]ilatory behavior," for one thing, could form the basis for dismissal with prejudice. *Henderson v. Duncan*, 779 F. 2d 1421, 1425 (CA9 1986). For another, utterly baseless litigation was thought to prejudice a defendant.

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* The second EJA prejudice corridor is also triggered by the "presentation of the prosecution's case." §201(a)(2).

See *Nealey v. Transportacion Maritima Mexicana, SA*, 662 F. 2d 1275, 1279–1280 (1980). By accounting for these circumstances, the pre-EJA system of dismissal with prejudice served to protect law-abiding citizens from misuse of the courts and the legal process.

The EJA also facilitates forum shopping and disincentivizes appeals. By making it possible for a litigant to submit a case and then resubmit it in perpetuity without regard to its merits, the EJA enables litigants to game the process by hunting for a judge (by resubmitting until they get that-judge) with particular legal views rather than a randomlyassigned one. It would be one thing if both sides had the ability to do this, but the design of the EJA is that this gamesmanship is available only to plaintiffs. By the same token, a plaintiff whose case is dismissed for lack of a legal basis is disincentivized from using the appeals process because they can always resubmit their original complaint and hope for a different, more favorable judge. None of this lines up with how the legal process is supposed to operate.

Finally, the EJA regime is not the most effective means of protecting good faith plaintiffs from premature dismissals with prejudice. Rather, that purpose could be accomplished far more effectively with a simple provision requiring that plaintiffs be granted an opportunity to correct innocuous errors prior to dismissal. This would have the dual effect of actually helping well-meaning plaintiffs understand what the law requires of them while weeding out those who have no interest in litigating in good faith. An amendment to the procedure surrounding dismissals with prejudice could fulfill the EJA's core purpose by including a provision of that kind.

3. Even if a rules amendment endeavors to preserve the EJA's chronology-based structure, there are still ways to remedy some of the harms done by the EJA regime. For instance, it is possible to simply create a list of exceptions where, in extraordinary cases, the chronological requirements can be disregarded, or a system where a case dismissed without prejudice—if resubmitted—must be reassigned to the judge who originally dismissed it. The first system would help curb frivolous litigation and the second would eliminate forum shopping and bring cases within the proper judicial structure.

Whatever approach the Court chooses to take, the bottom line is clear: we must explore the possibility of action to repair the rules surrounding dismissal with prejudice.

Syllabus.

FATHERCYBORGCALDWELL, PETITIONER *v.* UNITED STATES

ON PETITION FOR WRIT OF ANYTIME REVIEW TO THE UNITED STATES GOVERNMENT

No. 09-15. Argued April 18, 2020. Decided April 28, 2020.

After the Executive Branch declared FatherCyborgCaldwell a National Security Threat, he filed this anytime review action challenging section 208(g) of the Intelligence Apparatus Reform Act, which makes any person designated a National Security Threat "arrest on sight." He alleged that the provision was superseded by Federal Rule of Criminal Procedure 62 and, in the alternative, violated both Article III and the Due Process Clause.

Held : Section 208(g) is unconstitutional. Accordingly, a National Security Threat declaration cannot render a person "arrest on sight." Pp. 4–15.

(a) Section 208(g) is not superseded by Rule 62 because the Court has a duty to read laws harmoniously and not to infer any conflict between them absent a clear congressional intention. Additionally, Rule 62 predates section 208(g) so the supersession argument runs into the surplusage canon. Pp. 5–7

(b) Section 208(g) violates Article III as construed by this Court in *Benda v. United States*, 6 U. S. 24, and *Party v. Board of Law Examiners*, 7 U. S. 50. Moreover, Congress lacks the authority to confer the power to issue arrest warrants on any entity outside Article III. Pp. 7– 13.

(c) The procedures attending a National Security Threat declaration are also insufficient under the Due Process Clause to permit the automatic attachment of "arrest on sight" status. Pp. 13–15.

HOLMES, C. J., delivered the opinion of the Court, in which STEWART, REHNQUIST, and HARLAN, JJ., joined. PITNEY, J., filed a dissenting opinion, in which BORK and THOMPSON, JJ., joined.

CHIEF JUSTICE HOLMES delivered the opinion of the Court.

We consider whether Section 208(g) of the Intelligence Apparatus Reform Act, which designates government labeled National Security Threats "arrest on sight," violates the Constitution. For the reasons that follow, we hold that it does and strike it down.

I

A

The IARA, Pub. L. 77–3, was adopted in early 2020 to replace an older law from 2018 known as the National Security Council and Intelligence Revitalization Act, Pub. L. 66–4. Although this case concerns Section 208(g) of the IARA, that specific provision originated as Section 207(i) of the NSCIRA. Both provisions provide that a "'National Security Threat' refers to . . . an arrest on sight . . . from the . . . Executive Branch." To better understand the origins of this provision, it helps to consider where the NSCIRA fits in the lengthy legislative history of the National Security Council.

The NSCIRA repealed three preexisting laws which had to that point governed the Nation's national security infrastructure. The first, Pub. L. 30–1, established the National Security Council as a purely advisory body within the Executive Branch's national security system. See §4 (empowering the Council to make only "recommendations"). This reflected the view at the time that while advisors had an important role to play in the planning of government decisions, it would ultimately be the government officers themselves who would be responsible for making them.

The second law the NSCIRA repealed was the Enhancement to National Security Act, Pub. L. 44–3, which had

slightly departed from the more constrained view of advisory power taken by Pub L. 30–1 and empowered the National Security Council for the first time ever to issue "national security threat" declarations with substantive legal effect. Under ENSA, designated threats would be barred from employment in the Executive Branch and restricted from employment to various non-civil offices in the other two branches and in city governments. See §§110(f)(1)–(3). Additionally, designated threats would "lose any and all security clearances," be placed on watchlists, and be barred from reentry to the United States in the event they left. §§110(f)(4)–(7).

But while the powers granted by ENSA were clearly broad, they were critically limited by the statute's terms. To begin with, they were written with specific care so as to not authorize any form of undue encroachment on the powers of the Legislative or Judicial Branches. For instance, while ENSA barred designated threats from "any and all Trello [b]oards [and] Google [d]ocuments" used by the Government, it made exceptions for "Trello boards devoted solely to the Congress or the Judicial Branch." § 110(f)(9). Under this design, the substantive power given to the National Security Council was primarily confined to directing the use of existing Executive Branch discretion and prerogatives. Even with that narrow scope, moreover, ENSA provided an avenue for a national security threat declaration to be challenged judicially. See §110(h).

The third bill repealed by the NSCIRA amended the structure of the National Security Council. While advisors serving on the Council under ENSA served at the absolute "pleasure" of the President, §103(b)(6), the National Security Council Reform Act, Pub. L. 60–1, amended that struc-

ture and conferred greater autonomy to the Council. Indeed, rather than serving at the President's pleasure, under the NSCRA, advisors appointed to the Council served at the "pleasure" of whichever senior advisor the President named "Chair of the [National Security Council]." See § 3(h)(iv). This reflected a wider trend in legislation governing the body. Not only was the Council's role gradually transforming from that of a purely advisory body to that of a substantively powerful agency, the Council was also quickly changing from a body of advisors to a body of independent actors.

The NSCIRA continued this trend. In addition to granting an "Executive Secretary" virtually plenary control over the Council's members (by authorizing him to "suspend any member of the council, for any reason, and for any amount of time," §104(b)(a)), the NSCIRA removed any cap on the amount of extra advisors the Executive Secretary could appoint to the Council, giving advisors the virtually unfettered ability to outvote government officers on the Council.

This is where Section 207(i)—and its successor, IARA §208(g)—came in. The Council had by this point completed its legislative journey to autonomy and had been fully converted from an advisory entity to an independent one. Now, the modest limits on its power contained in ENSA were erased. These provisions authorized the Council to command the arrest of any person (usurping a traditional judicial function: the issuance of arrest warrants) for essentially any reason (usurping a traditional legislative function: determining permissible grounds for arrest through criminal law). No longer would the Council be subject to limits preventing "undue encroachment on the powers ofthe Legislative or Judicial Branches." Supra, at 2. Adding to this, the NSCIRA also replaced ENSA's provisions providing for

expedited review by this Court of national security threat declarations with a process of expedited review by the Council itself. The IARA retained these changes.

All this leaves us with the system challenged today: one where Executive Branch advisors may designate virtually anyone a national security threat, subject to only narrow forms of review, and may then have that person arrested on sight indefinitely.

B

Petitioner filed this case in response to the fact that he had been "deemed a National Security Threat" by the Executive Branch. Brief for Petitioner 2. He considers the fact that the IARA makes him automatically arrest on sight both a violation of his constitutional rights and of the Constitution's division of power. He makes three claims before us.

First, petitioner argues that Section 208(g) conflicts with Federal Rule of Criminal Procedure 62, which provides: "No person shall be declared [a]rrest on [s]ight without the issuing judge bearing the intent to provide a trial for the individual." Petitioner says that the IARA system, which makes no provision for a trial to occur, must yield to Rule 62, presumably because rules prescribed under 28 U. S. C. §2072 take precedence over laws that "conflict" with them. *Max v. Secret Service*¸ 9 U. S. 80, 81 (2020) (HOLMES, C. J., concurring).

Second, petitioner contends that the Constitution grants the power to issue arrest on sight warrants solely to the courts and that, therefore, Section 208(g) conflicts with the Constitution's allocation of power.

Third, and finally, petitioner alleges that Section 208(g) violates the Due Process Clause because it involves a deprivation of liberty but denies various fundamental procedural safeguards, including "[n]otice of the proposed action and the grounds asserted for it"; the "opportunity to present reasons why the proposed action should not be taken"; and "[t]he right to know opposing evidence." Brief for Petitioner 5.

We address each argument in turn.

II

We begin with petitioner's narrowest claim: that Section 208(g) may be nullified on statutory grounds because Rule 62 ranks higher in the order of precedence under the Rules Enabling Act. See *Max*, supra. The problem with this line of argument, however, is that there is no visible conflict between Section 208(g) and Rule 62. As such, it is entirely immaterial to ask which must take precedence. If the two are consistent with one another they may both stand.

To begin with, there is a strong presumption against giving a law an interpretation that would bring it into conflict with another law. As we have explained, "[i]t is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Systems Corp. v. Lewis*, 584 U. S. ___, ___ (2018) (slip op., at 2). The Court is not at "liberty to pick and choose among congressional enactments" and must instead strive to "give effect to both." *Morton v. Mancari*, 417 U. S. 535, 551 (1974). When a party suggests that it is impossible for two statutes to be harmoniously read, it has the heavy burden of showing a "clearly expressed congressional intention" to displace the other law. *Vimar Seguros y Reaseguros, S. A. v. M/V*

Sky Reefer, 515 U. S. 528, 533 (1995). And that intention must be "clear and manifest." *Morton, supra*, at 551.

Petitioner points to no such evidence. Indeed, petitioner's argument is undercut by the fact that Rule 62's adoption preceded the enactment of both the NSCIRA and the IARA. When Congress adopted these statutes, it can hardly be assumed they included provisions which were meant to have absolutely no effect when considered in tandem with existing law. As we have stated before, there is a "basic presumption [known as the surplusage canon] that the legislature does not waste words." *British v. Ozzymen*, 3 U. S. 60, 66 (2017); see also *Reset v. United States*, 9 U. S. 1, 25 (2020). This interpretation by petitioner, that Section 208(g) is statutorily inoperative, runs "smack dab into the surplusage canon." *Ibid.*

And that is not all, for there are two additional reasons why petitioner's statutory argument is untenable.

First, the language of Rule 62 and the language of Section 208(g) are perfectly consistent. As a reminder, the relevant text of Rule 62 is: "No person shall be declared [a]rrest on [s]ight without the issuing judge bearing the intent to provide a trial for the individual." Two features of this provision refute petitioner's argument that there is some irreconcilable conflict with Section 208(g). To begin with, the Rule directly affirms that its restrictions are tied to actions by "judge[s]." Section 208(g) does not involve any action by a judge, but rather a declaration by the National Security Council. The second feature is that the Rule applies when someone is declared "arrest on sight," which is not something federal law empowers the National Security Council to do. The Council has no freestanding power to declare individuals *"arrest on sight"*; it has the power to designate

threats to national security who, by the operation of the IARA, *become* arrest on sight. As such, there is no visible conflict between Rule 62 and Section 208(g).

Second, even if there was irreconcilable conflict between the two, it is far from clear why the Court would have to pick Rule 62 over Section 208(g). For starters, in this circumstance, Section 208(g) would be the more specifically applicable statute, and it is hornbook law that "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails." Stevenson, Canons of Construction 2 (2018). Petitioner provides no response for why that would not be the case here. And the order of precedence prescribed by the Rules Enabling Act is inapposite since Rule 62 was adopted prior to Section 208(g).

Finally, the Rules Enabling Act's order of precedence is not the only word on precedence in this case, since the IARA also provides that it "shall not be superseded by any . . . law unless that law specifically declares its intent to supersede this Act's provisions." §1(b). Petitioner's argument provides no insight into how—if there actually were conflict here—the Court should pick between the two rules of precedence.

As such, we reject petitioner's argument that Section 208(g) is statutorily inoperative under Rule 62.

III

With the statutory arguments now to the side, the Court turns to petitioner's constitutional arguments. In particular, petitioner argues that Section 208(g) violates Article III and the Due Process Clause. On both grounds, we agree with petitioner and find Section 208(g) unconstitutional.

A

Section 208(g) violates Article III in two respects. First, the issuance of an arrest warrant is fundamentally an exercise of core judicial power. By authorizing the National Security Council to issue orders with essentially the same effect, Section 208(g) impermissibly delegates judicial power to an Executive Branch agency. And second, the Constitution vests exclusively in the "courts of the Judiciary . . . the ability to issue Warrants for arrest." Art. III, §5, cl. 1. Congress has no authority under the Constitution to confer this power elsewhere.

1

The issuance of an arrest warrant is a core judicial power. Beyond the fact that the Constitution's text grants this power only to the Judiciary, as will be discussed later, the right to issue an arrest warrant is fundamentally tied to the judicial function assigned to the courts by Article III.

In describing the legal significance of warrants in the past, this Court has always emphasized their judicial character. For example, we have said that they represent a form of constitutionally necessary "advance judicial approval" for certain acts by law enforcement. *Terry v. Ohio*, 392 U. S. 1, 20 (1968). The reason is because constitutional law contains many restrictions on the Government's ability to impose on liberty without some form of judicial check. The ultimate "measure of the constitutionality of a governmental [action governed by the Fourth Amendment] is 'reasonableness.'" *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 652–653 (1995); see also *United States v. TPR*, 5 U. S. 36, 45 (2018) (Thomas, J., dissenting) ("arrest[s]" are governed by the Fourth Amendment). As we have elsewhere stated, "[i]n the absence of a [judicial] warrant, a [Fourth Amendment action] is reasonable only if it falls within a specific

exception to the warrant requirement." *Carpenter v. United States*, 585 U. S. ___, ___ (2018) (slip op., at 18) (quoting *Riley v. California*, 573 U. S. ___, ___ (2014) (slip op., at 5)). An arrest warrant issued by a court serves an important legal purpose, therefore, because it is a judicial guarantee of reasonableness.

Providing this check on executive authority is a fundamental part of the Article III scheme, which gives "independent judges the task of applying the laws to cases and controversies." *Gundy v. United States*, 588 U. S. ___, ___ (2019) (Gorsuch, J., dissenting) (slip op., at 5). We must therefore recognize the issuance of arrest warrants as an exercise of judicial power. This recognition implicates two of our recent precedents: *Benda v. United States*, 6 U. S. 24 (2018), and *Party v. Board of Law Examiners*, 7 U. S. 50 (2019). We consider each.

A

Under *Benda*, Congress is categorically barred from conferring "'the Government's "judicial power" on entities outside Article III.'" 6 U. S., at 31 (quoting *Stern v. Marshall*, 564 U. S. 462, 484 (2011)). As we have already determined, but as *Benda's* logic reinforces, the issuance of an arrest warrant is an exercise of judicial power. The question then becomes whether the National Security Council is an entity "outside Article III." We expand on each subject below.

(1)

First, the logic of *Benda* reaffirms that the issuance of an arrest warrant is an exercise of judicial power. As we said there and in related cases, "[w]hen 'determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between

"public rights" and "private rights."'" *Benda*, *supra* (quoting *Oil States Energy Services, LLC v. Greene's Energy Group*, LLC, 584 U. S. ___, ___ (2018) (slip op., at 6), in turn quoting *Executive Benefits Ins. Agency v. Arkison*, 573 U. S. ___, ___ (2014) (slip op., at 6)). Congress has "significant though not unlimited latitude to assign adjudication of public rights to entities other than Article III courts." *Ibid* (brackets omitted). On the other hand, when a proceeding involves private—rather than public—rights, Congress has no latitude to assign its adjudication to entities other than Article III courts.

The issuance of an arrest warrant is not a matter of public rights. The public rights doctrine "includes only matters . . . that historically could have been determined exclusively by th[e] [executive or legislative departments]." *Benda*, *supra*, at 32 (quotations omitted). An arrest warrant is not one of those matters. As explained earlier, the issuance of an arrest warrant was a traditional judicial function and not something to be decided by a "policeman or government enforcement agent." *Johnson v. United States*, 333 U. S. 10, 13–14 (1948). It provides an essential "check on executive authority," *supra*, at 8, which would be nonsensical if the Executive Branch could make these decisions "exclusively." *Benda*, *supra*. As such, *Benda* confirms that the issuance of an arrest warrant is not a matter of public rights, but a matter of private ones which can only be assigned to the courts under Article III.

(2)

The next question is whether the National Security Council is an entity within Article III that can be assigned the adjudication of private rights. The answer, obviously, is no.

To begin with, members of the National Security Council do not enjoy any of the independence protections afforded to federal judges. The Framers provided that federal judges would be appointed by the President with the Senate's approval to serve without term limits and free from at-will removal by the other branches. The objective of judicial tenure protection and the multi-branch selection process was to ensure that judicial decisions would be rendered with the "[c]lear heads . . . and honest hearts" that are "essential to good judges." 1 Works of James Wilson 363 (J. Andrews ed. 1896). Without these protections and without that selection process, the members of the National Security Council quite clearly cannot be Article III judges.

Second, no Act of Congress even purports to describe the National Security Council as a court of law. We have catalogued the entire body of legislation regulating the Council, see supra, at 1–4, and no law makes that statement. This cuts strongly against the notion the Council might somehow be an Article III entity.

Third, the members of the Council are not tasked with basing their decisions on existing law, but are empowered with the flexibility necessary for making national security decisions. While this level of discretion makes sense for an Executive Branch body, it clearly illustrates that the Council is not an Article III entity which can be assigned Article III powers.

We therefore hold Section 208(g) unconstitutional under *Benda.*

(b)

Section 208(g)'s assignment of Article III power to a non-Article III entity also implicates Party, which held that the

powers granted by the Constitution to each branch must remain "separate with a system of checks and balances between the three [branches] and the People." 7 U. S., at 54.

In that case, the Court reviewed an Act of Congress which assigned the judicial power to license attorneys to an agency controlled by the Executive Branch. We held that it "abridges the judicial power vested in the [courts]" when judicial power is conferred on entities outside Article III. *Ibid.* As such, we invalidated the Act of Congress on Article III grounds. The constitutional violation in this case is indistinguishable from the one presented by *Party*. Here, an Executive Branch agency is once again assigned an aspect of the judicial power. The Court can think of no reasonable rationale for departing from the unambiguous application of Party to these circumstances.

We therefore conclude that Section 208(g) violates *Party* as well.

2

Beyond violating fundamental principles of Article III, Section 208(g) also runs contrary to the Constitution's express assignment of the power to issue arrest warrants to the federal courts. The Constitution does not empower Congress to duplicate that power and vest it in an Executive Branch entity.

As quoted earlier, the Constitution gives the federal courts alone the "the ability to issue Warrants for arrest." Art. III, §5, cl. 1. Putting aside the other constitutional issues for a moment, this constitutional provision on its own, does not necessarily foreclose Congress from enacting laws that broaden the power of the Executive Branch. But in our governmental system, "Congress' authority is limited to

those powers enumerated in the Constitution." *United States v. Morrison*, 529 U. S. 598, 610 (2000). After all, "[t]he enumeration of powers was the first, and most important, line of defense against an overbearing government." Geithner, Preface to the Declaration of Independence and the Constitution 5 (Geithner ed. 2020). Thus, if an Act of Congress broadening the powers of the Executive Branch is to be sustained, the Act must be founded in one of Congress' enumerated powers.

In this case, only one of Congress' enumerated powers even potentially applies: the Necessary and Proper Clause. That Clause empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government." Art. I, §8, cl. 14.

It is possible to justify Section 208(g) as "necessary" in the sense that it helps to protect national security, but for the reasons that follow, it is impossible to describe Section 208(g) as "proper." Laws which are not "consist[ent] with the letter and spirit of the constitution . . . are not proper means for carrying into Execution" the powers of the Government. *National Federation of Independent Business v. Sebelius*, 567 U. S. 519, 537 (2012) (opinion of Roberts, C. J.). Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Printz v. United States*, 521 U. S. 898, 924 (1997) (alterations omitted) (quoting The Federalist No. 33, at 204 (A. Hamilton)). Section 208(g) is an "act of usurpation." As described earlier, judicial arrest warrants are an "essential check on executive authority." *Supra*, at 10 (quotations omitted). By removing this check, even if only under certain conditions, Section 208(g) is inconsistent with both the letter and spirit of the Constitution.

As our Fourth Amendment jurisprudence already makes clear, there are "specific exception[s]" to the judicial warrant requirement. *Supra*, at 8. When one of those exceptions applies, it is consistent with the Constitution for the Government to act without a warrant. But where those exceptions do not apply, Government action is contrary to the Constitution. Congress cannot, by law, excuse or authorize unconstitutional conduct. To do so would not be a "proper" exercise of authority under the Necessary and Proper Clause.

We therefore hold that Congress lacked the power to enact Section 208(g).

B

Finally, petitioner also argues that Section 208(g) violates the Due Process Clause by failing to provide basic procedural safeguards. We agree.

Fundamentally, "the touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U. S. 539, 558 (1974). We have reaffirmed this principle "time and again." *County of Sacramento v. Lewis*, 523 U. S. 833, 845 (1998). We conclude that Section 208(g) implicates the Due Process Clause's protection of "liberty" and must be attended by nonarbitrary processes. We find the process afforded by the IARA arbitrary in three respects.

First, while the IARA does specify concrete grounds under which individuals may be "declared national security threats," it also contains an exception authorizing the declaration of national security threats, with the President's approval, for "any reason." §105(ix). This discretion is ap-

propriate in the national security context because such decisions require flexibility and the ability to adapt to unique circumstances, but it makes little sense when considering the imposition of "arrest on sight" status. Section 105(ix) may stand, but Section 208(g), in view of these procedures, cannot.

Second, as petitioner argues, the IARA makes no provision for a person to receive "[n]otice of the proposed action and the grounds asserted for it." Brief for Petitioner 5. The IARA's rationale makes sense: if you give a national security threat prior notice of the actions you intend to take against them, you cripple your ability to act decisively. In the national security context, swift and decisive action is important. But where a criminal process is concerned, such as with the issuance of an arrest warrant, reasoned decisionmaking is an essential safeguard of liberty. So while prior notice is by no means the standard, there must at least be reasonable grounds for an arrest warrant to issue. The IARA does not require that.

And third, it is by no means clear why the ability for the National Security Council to command arrests would be necessary to addressing a national security threat. Where a national security threat engages in criminal activity, the criminal process is more than sufficient to secure an arrest warrant against them. Where they do not engage in such activity, there seems to be little reason to obtain their arrest rather than rely on the various other sanctions prescribed by the IARA.

For these reasons, we hold that Section 208(g) violates the Due Process Clause.

* * *

Protecting our Nation's national security is among the most important functions of the President. The Court has great respect for that as well as the work of the National Security Council. But all Government work must be done in accord with the Constitution. We are confident that the constitutionally legitimate tools at the disposal of our Nation's national security officials are more than sufficient to suit their needs. If they prove not to be, there are perhaps other authorities they may seek from the elected officials in Congress, within the bounds of the Constitution.

Our role in this case, however, is not to consider whether Section 208(g) is a good power for the Council to have. Our role is to discern and apply the law. For the foregoing reasons, we declare Section 208(g) of the IARA unconstitutional and strike it down. We do not pass judgment on any other provision of the IARA.

It is so ordered.

JUSTICE PITNEY, with whom JUSTICE BORK and JUSTICE THOMPSON joins, dissenting.

I strongly dissent against the decision of the Court. I believe the Court errs on one simple point. They seem committed to the idea that a designation of a person being a National Security Threat is synonymous with an issuance of an arrest warrant by the judicial branch: "Section 208(g) violates Article III in two respects. First, the issuance of an arrest warrant is fundamentally an exercise of core judicial power." *Ante*, at 7. A simple search of Pub. L. 77–3 for the term "warrant," however, yields *no* results. It is beyond any doubt in my mind that the Congress showed no intent on grant-

ing the Executive Branch the universal power of issuing writs such as a warrant for arrest. This case lies in the power of the Executive Branch to issue executive orders. It is no question that the President holds an awesome amount of power in issuing executive orders. Indeed we have never challenged the power of the EO and instead have recognized its inherent constitutionality when deciding cases. See generally *Panama Refining Co. v Ryan*, 293 U. S. 388 (1935); *Service v. Dulles*, 354 U. S. 363 (1957).

There is a strong distinction between Executive Orders and warrants.[1] In an instance where the District Court has issued an arrest warrant against an individual it is an unlawful activity for *any* law enforcement officer[2] to ignore such warrant. Failure to comply with warrants can lead to contempt under 18 U. S. C. §401. This is not the case for executive orders. It is not outside the realm of possibility for the President to issue an executive order to federal law enforcement to detain an individual. I find Pub. L. 77–3 a blanket consent from Congress that EOs designating an individual an NST and ordering a subsequent arrest[3] not warranting an impeachment from their end. This does not allow the Executive free reign to arrest anyone for two reasons: (1) the judicial branch still holds the power to strike down Executive Orders, see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952),

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[1] Other than the constitutional distinction of one being from the Executive Branch and one being from the Judicial.

[2] Federal or municipal.

[3] Assuming their conditions are met, namely a majority approval of the EO from the National Security Council.

that they deem to be outside the Constitution;[4] and (2) Congress reserves the legislative authority to revoke their approval of executive orders of this nature.

When dealing with threats to national security, special wartime powers must be granted to the President of the United States. We have held that National Security is his responsibility and I find us striking this law as unconstitutional a clear stride against securing national security. I am grateful the Court has left the Executive the power to decide whom they employ—functionally protecting threats to our national security from gaining access to classified information within the Executive.

I respectfully dissent.

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[4] Functionally serving as a filter against the Executive Branch issuing illegal NST EOs.

Syllabus.

KOLIBOB, PETITIONER *v.* UNITED STATES

ON APPLICATION FOR STAY

No. 09-35. Decided June 17, 2020.

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

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

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

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

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

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

JUSTICE BORK delivered the opinion of the Court.

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

The application for a stay is denied.

I

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

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

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

An applicant for a stay must make a "strong showing" in part because "[a] stay is not a matter of right, even if irreparable injury might otherwise result."[3] When considering a

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[1] 555 U. S. 418, 434.

[2] *Id.*, at 434-435.

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

stay application, we approach the question holistically and pay attention to all pertinent factors. A stay is an "intrusion into the ordinary processes of administration and judicial review" and is an exercise of "judicial discretion" not to be used "reflexively."[4] And "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."[5]

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

II

The applicant has not met his burden.

A

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

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

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[4] *Id.*, at 427.

[5] *Id.*, at 433-434

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

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

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

In other words, a stay at the time of conviction would have been permissible (assuming the stay factors were met), so citing the ratification of the Thirty-Sixth Amendment isn't

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[7] *Hudson v. United States*, 9 U. S. 69 (Bork, J., dissenting) (quoting *Nixon v. United States*, 506 U. S. 224, 236).

[8] *Procursive v. United States*, 7 U. S. 9, 14, n. 1.

[9] See application for Stay 2.

[10] *Ibid.*

[11] In *Reset v. United States*, 9 U. S. 1, this Court granted a preemptive stay of the President's removal, allowing him to remain in office while his case was pending.

enough to explain why he didn't seek a timely stay. The applicant provides no further response.

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

B

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

1

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

At the time the impeachment votes took place, the FEC internal election system was broken, so the votes charted a less usual course. But a less usual course isn't always unconstitutional. In the House, the vote occurred as follows: the vote was posted on the FEC internal election system, each Representative cast their votes by transmitting it to the presiding officer, and the presiding officer recorded the

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[12] P. R. N. 5ee06595755f4438faf2611d, para. 2 (statement of The Chief Justice); *id.*, para. 8 (statement of Justice Pitney).

vote on the FEC internal election system. In the Senate, the vote happened on a public discord channel, where each Senator personally cast their votes. Both creative solutions were devised in response to a technological breakdown outside Congress's control and both are likely constitutional.

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

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

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[13] *Id.*, para. 3 (statement of The Chief Justice) (emphasis added).

searches for it, is likely tantamount to a vote by "public forum."

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

2

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

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

In response to the injunction, the Senate submitted a brief expressing its view that the injunction as written didn't apply to impeachment proceedings and urging the district court to provide guidance on that question. The United States filed a petition for certiorari with this Court, asking for the injunction to be vacated. After the Senate informed this Court of its position as well, we decided to hold off on reviewing the case. In the view of some Justices,

there were numerous "unresolved issues about the injunction's scope that should [have been] clarified by the district court" before taking an appeal would be prudent.[14] The district court nevertheless failed to provide any additional guidance on the scope of the injunction. Congress's use of the evidence was thus reasonable.

But let's assume that the injunction actually did apply to use of the testimony in impeachment proceedings and that the district court had no obligation to clarify that.[15] That still begs the question of if the district court could properly dictate what evidence Congress could rely on in an impeachment proceeding, that too via a preliminary order. We don't need to answer that question at this juncture because recognizing the uncertainty around it is enough to support our judgment, but we make one observation.

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

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

[15] Injunctive relief is not supposed to be a "gotcha" game. When a party is confused about the scope of an injunction or is unclear on what it requires of them, a court should generally endeavor to provide them with clarity as to their obligations.

[16] See 9 U. S., at 39.

[17] *Id.*, at 40.

[18] *Ibid.*

was obtained as long as it is real and supports Congress's conclusion.

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

The applicant is unlikely to prevail on his second argument.

* * *

An impeachment is strong medicine. In an ideal world, it'd be reserved for the worst of the worst, for those who truly can't be trusted to remain in public office. Justice Chase clearly wasn't the "worst of the worst" and reasonable people can disagree about whether his impeachment was a good decision.

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

It is so ordered.

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

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

Syllabus.

DEVTOOLS, ET AL., PETITIONERS *v.* UNITED STATES

ON PETITION FOR WRIT OF ANYTIME REVIEW TO THE UNITED STATES GOVERNMENT

No. 09-17. Argued April 18, 2020. Decided April 28, 2020.

The two petitioners were both Executive Branch Blacklisted and declared National Security Threats by the President of the United States on May 13th, 2020. For devTools, the provided reason was "[admin attacking] the entire EB after President TheySinned['s] term." For JoshMiller, no description was provided. At no point was either petitioner given an opportunity to explain themselves before the President blacklisted them. The two petitioners filed this anytime review action, seeking to overturn their EBBs on the grounds that they exceeded the President's power and violated their due process rights and their NSTs on the ground that it was issued by the President unilaterally without National Security Council approval.

Held:

1. The Executive Branch Blacklists against the petitioners (devTools and JoshMiller) are unconstitutional. Pp. 1–5, 7–11.

(a) The Due Process Clause protects a liberty interest in seeking employment. Because EBBs implicate that liberty interest, they must be accompanied by a fair procedure. Pp. 1–3.

(b) A fair procedure in this case, among other things would have "provide[d] opportunities for petitioners to explain themselves, to submit documents that might be helpful to their case, . . . [to] appeal" or some alternative which would have "afforded petitioners their due process rights." Petitioners were provided none of this. P. 3.

(c) The bare minimum required would be a rational statement of the Government's interest in the EBB. For devTools, this was close to being met on account of the description provided but events from three years ago are not sufficient to demonstrate a

current danger. For JoshMiller, no attempt to meet this was made at all. Pp. 3–4.

(d) The President doesn't have the unlimited right to terminate Executive Branch employees whom he did not directly appoint. That power has its limits. Pp. 4–5.

2. The National Security Threat declarations against the petitioners are invalid because the statute the President relied on to issue it unilaterally, Section 108(ix) of the Intelligence Apparatus Reform Act, is unconstitutional. Pp. 5–11.

KAGAN, J., delivered the opinion of the Court, in which HOLMES, C.J. , STEWART, REHNQUIST, and THOMPSON, JJ., joined. BORK, J., filed a dissenting opinion, in which HARLAN, J., joined and in which PITNEY, J., joined except as to the penultimate paragraph.

JUSTICE KAGAN delivered the opinion of the Court.

The Constitution vests in the President of the United States the "executive power." Art. II, §1, cl. 1. This power is expansive and, utilizing it, Presidents of the United States have historically issued Executive Branch Blacklists (EBBs) in order to prevent employment within the entire Executive Branch. In this case we must decide whether Executive Branch Blacklists may be issued without legal justification and, along these lines, whether the President may terminate any individual employed within the Executive Branch.

* * *

The designation of a National Security Threat (NST) is status that has been created by Congress and maintained in several pieces of legislation. Most recently, the Intelligence Apparatus Act of 2020. We must further consider

whether the President may issue National Security Threat designations unilaterally without legal justification.

I

Petitioners devTools and JoshMiller were both issued Executive Branch Blacklists by President Reset4K. Petitionerscontend that, because there was no remedy for this designation, it violates the Fifth Amendment's due process guarantees and should be declared unconstitutional. We agree in the unconstitutionality of unfettered EBBs.

A

Before May 13th, 2020, petitioner were both given Executive Branch Blacklists by President Reset4K. For devTools, the description given by the President was "AAed entire EB after President TheySinned term." See devTools Trello Card, Office of the President. For JoshMiller, no description was given. *Ibid.* The Executive Branch Blacklist power has been derived from the President's inherent powers over the executive. *Supra.* While the Constitution grants this expansive power to the President it also guarantees that "no person shall . . . be deprived of life, liberty, or property without due process of law." Amend. V. In this case, these clauses create competing interests—preserving executive power while ensuring due process rights—and it is our responsibility as Justices to reconcile this issue.

B

There is a vast array of liberty interests that exist within our society. In this case, we must consider one: employment. Petitioners argued that Americans should have the constitutional guarantee to seek employment in the Executive Branch without fear of being blacklisted—unless a justified EBB has been issued. We agree.

Arguments have been made by petitioners saying that "[a]ll people in the United States have a right to be employed." Brief for Petitioners 9. We make a subtle yet definitive distinction in this case: that Americans have a fundamental right to seek employment.

Petitioners originally presented their questions about EBB's as a question of "lawful justification." Brief for Petitioners 1. Petitioner JoshMiller later argued that simply "good cause" was not enough to satisfy due process. We agree with the latter sentiment.

We have previously asked the question of "has fair procedure been followed before depriving a person of life, liberty, or property . . . ?" *Trump v. United States*, 2 U. S. 10, 57 (2017) (per curiam). We referred to the *Mathews* test in that case. Looking at these three prongs, we must determine whether procedural due process was violated in the case of petitioners.

1

We must first identify the "private interest that will be affected by the official action." *Matthews v. Eldridge*, 424 U.S. 319 at 335 (1976). As mentioned, *ante*, freedom to seek employment is a strong private interest that must be considered when due process is concerned. The first prong is met.

2

Second, the "risk of an erroneous deprivation of such interest through the procedures used." *Ibid.* This, like the first prong, is quite straightforward in this case. There is *no* procedure to even be considered in the case of Executive Branch Blacklists. The President made no such effort to provide opportunities for petitioners to explain themselves,

to submit documents that might be helpful to their case, did not provide any methods for appeal, or any other such process that would have afforded petitioners their due process rights. The second prong is met.

3

Lastly, the "Government's interest" and the "administrative burdens that the additional or substitute procedural requirements would entail." *Ibid.* For devTools, it would seem as if this prong were met. The President's description of his card would indicate that there was at least some semblance of the idea that blacklisting devTools would bring security to the Executive Branch. However, it is important to note the history of the alleged offense. President TheySinned's administration was over three years ago. The immediate danger that is supposedly present with devTools employment in the Executive Branch would not seem to be as dire or great such that it would supersede the due process that is normally afforded to this nation's citizens. As discussed, *ante*, JoshMiller was given no reasoning for his EBB and thus, the government has not demonstrated the interest that would supersede his due process rights.

C

We must also rule on whether the President may terminate any individual that is employed in the Executive Branch. Simply put, they cannot.

As was discussed, *ante*, the President has a vast executive power. Within this power it is assumed that the President has control over employment within the Executive Branch. However, this power is limited. The President cannot simply terminate any individual that they so choose. The simple idea that "[t]he power of removal is incident to the

power of appointment" holds true in this case. *Myers v. United States*, 272 U. S. 52, 48 (1926). The Constitution articulates the various offices the President may appoint and additionally that the President may appoint other offices "which shall be established by Law." Art. II, §2, cl. 2. Under *Myers*, it makes perfect sense that the President would be able to fire these specific types of officers—after all, the President was the one that appointed them in the first place.

It has been argued that, since the President appoints, say, a head of an agency, and *that* agency head hires a hypothetical agent, the President would be able to fire said agent. The argument says that, because the President directly appointed that agency head, then there is conjured up some indirect power to then also hold firing jurisdiction over the agent. This argument is inconsistent with *Myers* and inconsistent with the words that followed the Presidential appointment power: "the Congress may by law vest the appointment of such inferior Officers, as they think proper in the President alone. . . or in the Heads of Departments." *Ibid.* The Constitution makes a distinction that, not only is it possible under the *Myers* framework that the President is excluded from firing certain Executive Branch officials, but it is explicit in some cases. Because department heads would be the individual directly involved with the appointment of certain subordinate officials, *Myers* dictates that the President would be precluded from firing that official.

* * *

The separation of powers is an important principle that must be upheld at all times when considering the review of the other branches of government. However, this review should not be dismissed simply because we may be faced

with a difficult case. It is our duty to reconcile the various interests that are created by the constitution and in this case, we are exercising that duty.

For the foregoing reasons, Executive Branch Blacklists must adhere to the due process requirements enumerated by the *Mathews* test from the Fifth Amendment, Executive Branch Blacklists must demonstrate good cause for their issuance, and Executive Branch Blacklists may be reviewed by the District Court (or any lower courts that may arise) for their constitutionality.

For further foregoing reasons, the President of the United States does not have an unlimited right to terminate Executive Branch officials or employees for whom they did not have direct involvement in their appointment.

II

Additionally, petitioners were declared as National Security Threats (NST's) unilaterally by President Reset4K, presumably using Section 108(ix) of the Intelligence Apparatus Reform Act of 2020 (IARA).

A

The Intelligence Apparatus Reform Act of 2020 re-establishes the National Security Council, a decision-making body tasked with various duties. Among them is the declaration of National Security Threats. Unlike Executive Branch Blacklists, there are clear criteria to being designated as a NST, among them being those who are "involved with illegal activities that constitute threats to the national security of the United States," and must be confirmed/approved by a "majority of the [National Security Council]." Intelligence Apparatus Reform Act of 2020 at 7. Further-

more, NST designations may be appealed if "the declaration is ungrounded in federal law or regulation." *Ibid* at 8. The National Security Threat designation process in its current iteration satisfies the *Mathews* test such that it does not infringe on the due process rights when such declarations are made by the National Security Council. When the President is concerned, that is another story.

B

Under Section 108 (ix) of IARA, the President "may declare and revoke national security threats, without the consent of the Council, for any reason." *Ibid.* This power comes with great cost. As was the same issue with Executive Branch Blacklists, there are great liberty interests to be considered. The difference between this power and that which the National Security Council (NSC) holds is that the NSC must come to a majority consensus on whether to declare an NST. By doing so, they are forced *de fac*to to have a clear view and understanding of the facts at-hand. A President acting unilaterally does not.

Furthermore, the President may revoke NST designations at any time—without NSC consent, *ante.* This power directly supersedes that given to the NSC over the appeals process set out in Section 108(viii). In the same way that EBB's do not allow any form of due process to be carried out, the Presidential power regarding NST's lacks any form of due process.

* * *

As we said previously regarding this law, it is not our duty to determine whether it is good or not—simply whether it is constitutional.

For the foregoing reasons, we declare Section 108(ix) of the IARA unconstitutional and strike it down. We do not pass judgment on any other provision of the IARA.

III

We must now address the arguments made by the dissent—however thoroughly-veiled they may be.

The dissent would have this Court restrain itself from our constitutionally mandated duties simply because we have never issued a decision in this specific regard. If we were to always shy away from new cases, then our functions would have been obsolete since this Court's inception in 1789.

It would make sense that the dissent would assume that petitioners' lack standing on the grounds that they have not suffered an injury in fact. After all, we have all been on this bench long enough to become detached from the struggles of everyday Americans. JUSTICE BORK would have us believe that because petitioners did not actively seek employment whilst under their EBB designation, they were not actually injured. This line of thinking is faulty.

The analogy offered by JUSTICE BORK is that remote closures of opportunity have no tangible effect on those who are seeking separate avenues. However, this rationale forgets an important common-sense argument: Why would someone seek out a position if they know they are bound to fail? It is a complete waste of time for an individual to go out looking for failure. Furthermore, the dissent articulates that for the petitioners to even qualify for standing, they would have had to be denied the employment process on explicit grounds that it was because of a blacklist. Again, it would seem that JUSTICE BORK's lack of recent involvement in public sector employment would have shielded him from

the knowledge that those who are given EBBs are rarely given interviews in the first place.

The dissent would further contend that, if EBBs were indeed unconstitutional then we would have seen a controversy before this Court concerning them. To that, we can analyze literally all of American history: everything is (widely) assumed to be constitutional until it is judged as not. Separate but equal was enforced as constitutional until this Court's decision in *Brown*. Discrimination on the basis of sex, specifically regarding gay and transgender individuals, was also lawful and Constitutional in several states until the Court's recent ruling in *Bostock*. Indeed, agency administrators should "prioritize constitutional fidelity over the orders of their superiors when the two are at odds." *Post,* at 4. However, it is also the Constitutional duty of the President to ensure that their own orders are constitutional in the first instance. Our government structure relies on the trust that the actions carried out by officials in the highest echelons of power are constitutional and lawful and can be reliably judged as such. Instead of shifting the blame on those whose duties are to carry out the President's orders, we should instead look to the root of this controversy: the powers of the President of the United States.

When looking towards the future effects that our holding will have, the dissent would have us hold back once again because there is no "guarantee a blacklisted individual [would] receive an executive job." *Post,* at 5. This notion goes right to the heart of this case. Petitioners were denied a liberty interest. Liberty is defined as "the quality or state of being free" and, more specifically, "the power to do as one pleases." Merriam Webster's Dictionary. It is the agency's prerogative to decide who is and is not employed

within their respective agency. However, it is an infringement of Americans' constitutional rights to deprive that liberty interest without the due process of law. There cannot be any employment decision liberty if an applicant has been blacklisted from applying in the first place. This case's purpose is indeed, as the dissent notes, to "[remove] the EBB from the scale." *Post*, at 5. This is necessary because, in their current implementation, the EBB process in and of itself is unconstitutional and deprives the liberty of those seeking employment and those whose decisions it is to make employment decisions.

There is an important point of view to consider in this case. The dissent notes about the powers that agency heads have in their hiring powers. More specifically, how they can choose to not hire someone if they so choose. However, what about those who they do want to hire and have been blacklisted because of an EBB? The flip side of this argument illustrates the severe injustices that are carried out by unfettered EBB's: Americans are deprived of their liberty to seek employment and agency heads are deprived of their employment choices.

The dissent further notes that mootness should make this Court rule in respondent's favor. However, this idea is wrong. As discussed, *supra*, Presidents have utilized their blacklist power time and time again. President Reset4K was not the first, nor will he be the last. The simple fact that the original case argued before us has now become moot is not a reason to dismiss it in its entirety. To think as such is, quite frankly, shortsighted. Executive Branch Blacklists are a designation of high contention in the United States and the implications of this case will not only affect devTools or JoshMiller but will affect all future individuals who are marked as blacklisted from the Executive Branch.

The Court's holding of employment as a liberty interest has, supposedly, been "made up" and is not "deeply rooted in this Nation's history and tradition." *Post*, at 7–8. It would seem that JUSTICE BORK has forgotten about a little thing called employment discrimination law. If we look back to the Civil Rights Act of 1964, it mandates that discrimination in employment on the basis of "race, color, religion, sex, [and] national origin" is unlawful. *Ibid.* Is this not in and of itself a preservation of the idea that Americans have a right to seek employment unimpeded by unlawful and unconstitutional outside forces? It has been 56 years since the passing of this piece of legislation and it has yet to be struck down as unconstitutional by this Court.

Our governmental structure is one that comprises of three branches, checking on the powers of each other. The dissent would have this Court refrain from involving ourselves in "constitutionalizing all employment decisions" because it would "effectively give the courts the final say on all policy surrounding employment." *Post*, at 10. If we are not forgetting something, the courts are indeed often the last avenue for rendering decisions in which there is controversy between the Constitution and the actions of the other branches—that is one of our primary duties. Subjecting the branches to judicial review is not an overreach of our power. Whether JUSTICE BORK likes it or not, the anytime review clause of the Constitution explicitly gives us the power to check the other branches. He may think that it is an overreach of our power—to that I say consult the Constitution that gives it to us in the first place.

The dissent additionally alludes to the idea that since private companies can refuse to hire individuals, it should be alright for the federal government to do the same. They are forgetting an important question in this regard: Why? *Why*

is the private employer refusing employment? As discussed, *supra*, a private employer cannot refuse employment because of, say, a person's race. This argument from the dissent falls flat on its head when combined with Title VII's provisions.

JUSTICE BORK makes additional arguments against our holding that the President cannot fire any individual they so choose in the Executive Branch. JUSTICE BORK asks, "who gets to define [who the President can fire]? Us or Congress?" If he had read *Myers*, he would have known that this Court already weighed in on this issue and he would know that it is ultimately the Constitution and Congress who gets to decide. *Myers* held that those individuals for whom the President had direct involvement in their employment are subject to termination from the President themselves. If Congress prescribed an office to be appointed by the President, or say an Executive Order establishes a new office, the President may fire that officeholder. If neither Congress nor another medium prescribed it, then the President doesn't have that unlimited right. It is as simple as that—reading our past precedents and applying them.

When referring to our striking of section 108(ix) of IARA, the dissent fails to make a substantive argument. Its sole attempt is to frame the argument in such a way so that it would appear we are taking away some Constitutional right the President holds. The Constitution did not prescribe the President the power to declare National Security Threats— Congress did. When analyzing this section with the relevant Constitutional provisions, as discussed *supra*, it fails to meet the due process requirements of the Fifth Amendment.

It is so ordered.

JUSTICE BORK, with whom JUSTICE HARLAN joins, and with whom JUSTICE PITNEY joins except as to the penultimate paragraph, dissenting.

If we want to stop rogue agents, we should stop taking away the President's tools to fight them with.

Since 2016, the executive branch has had some form of an "executive branch blacklist," which names every person whom the executive branch has deemed categorically unfit for employment. The issuance of an EBB is no small matter. Rather, for one to issue, it takes the personal approval of the President of the United States himself. When he issues an EBB, the President directs the executive branch's broad discretion over who it chooses to employ.[1] Until now, the Court has never reviewed that type of decision. For our first time, some hesitation would've been normal.

But the majority seems unphased. Casting caution to the wind, the majority proceeds to make three stunningly wrong arguments. The majority begins by saying that an EBB implicates the due process "liberty interes[t]" in the "freedom to seek employment."[2] Of course, in reality, no such generalized "liberty interest" in "seek[ing] employment" actually exists, nor would an EBB even implicate it if it did. The majority next claims that the President lacks an "unlimited right to terminate Executive Branch [em-

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[1] See *Caldwell v. United States*, 9 U. S. 85, 87, (identifying an employment blacklist as a traditional "Executive Branch . . . prerogative").

[2] *Ante*, at 2-3.

ployees]" whom he didn't personally have a hand in appointing.[3] However, given that the President isn't just the head of the executive branch, but the constitutional *embodiment* of it—and that all executive branch employees are functionaries of *his* authority—this is clearly wrong.[4] Finally, the majority finds it "lack[ing]" in "due process" for the President—the country's chief national security officer—to be able to "unilaterally" designate threats to national security without the support of his unelected advisors.[5] That, of course, makes no sense.

In the process of making these incorrect arguments, the majority also brushes aside key threshold questions our precedent requires us to ask, such as: did the petitioners have standing to bring this case? If they did, did they lose it when their EBBs were revoked (was their case mooted)? Under our precedents, I'd say they lacked standing in the beginning and, regardless, possess only moot claims now.

Because the majority ignores these threshold questions and then gets the merits wrong, I respectfully dissent.

I

The petitioners lacked standing and, even otherwise, their case is now moot.

A

I've never agreed with our application of standing doctrine to anytime review cases, but if we are to apply it to

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[3] *Ante,* at 5-6.

[4] See Art. II, §1, cl. 1 (vesting the "executive Power" in the "President of the United States of America" alone).

[5] *Ante,* at 7.

some anytime review cases, in the interest of fairness, we must apply it to all of them.[6]

Standing doctrine asks if a petitioner (1) has suffered an injury in fact, (2) if the injury in fact is fairly traceable to the challenged conduct, and (3) if a favorable judgment would likely redress the injury.[7] If all three prongs return "yes," then a petitioner has standing. If even one is a "no," however, their case must be dismissed. In this case, the petitioners strike out on all three counts.

1

The petitioners have not yet suffered an injury in fact.

Being issued an EBB might seem like a bad thing—and it definitely is—but it isn't an injury in fact on its own. To count as one, an injury has to have a tangible impact. It has to mean something more than a risk of "hypothetical" future harm.[8] But that's all an EBB stands for. An EBB just means that when you try and get a job from the executive branch, you'll probably be turned away. But not every person who receives an EBB was actually in the market for an executive branch job, nor (for those that were) was there any guarantee they would've actually received one in the absence of their blacklist.

Being "deprived" of something you didn't want and weren't going to receive isn't an injury in fact because, in practical terms, it doesn't mean anything. Consider an analogy: if you wanted to go cherry picking at an Atlanta farm,

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[6] See *Heave v. United States*, 5 U. S. 85, 88 (BORK, J., concurring in judgment) (identifying as a problem with our anytime review jurisprudence the fact that we feel free to selectively apply it).

[7] *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992).

[8] *Id.*, at 560.

would you consider yourself "injured" by the closure of, say, a dragon-hunting ranch in Afghanistan on the same day? Of course not. For starters, you were looking for cherries in Atlanta, not dragons in Afghanistan; and second, even if dragons were what you were looking for, let's be honest, you weren't going to find them anyways. In the same way, to establish an injury in fact in this case, the petitioners would have to show they made a legitimate attempt to get an executive branch job (whether that be by applying for a job, trying out for one, interviewing, etc.) and were denied *because of* their EBBs. That is, they have to be able to demonstrate that their performance in the hiring process was of the quality that would've actually gotten them the job but for them being blacklisted. Only then have they actually been injured in fact—by being deprived of something they both wanted and were actually going to receive.

The petitioners don't make either of these showings. On the contrary, the petitioners consider being blacklisted an injury in fact itself. As I've shown, that's clearly incorrect.

2

Even if being blacklisted was alone enough to create an injury in fact, the harms which come with that aren't fairly traceable to the issuance of the EBB itself. Instead, they come from the implementation of that blacklist by those who are actually responsible for making employment decisions and who give effect to EBBs: agency administrators.

In our government, every official—high and low—takes an oath to "support the Constitution."[9] This oath creates the expectation that those positioned to make decisions will

[9] Richard Re, Promising the Constitution, 110 N. W. L. Rev. 299, 301 (2016).

prioritize constitutional fidelity over the orders of their superiors when the two are at odds.[10] Therefore, if EBBs are unconstitutional, an agency administrator would be within their rights to refuse to give effect to one. If they exercise that right and refuse to give effect to an EBB, the petitioners have suffered no harm because they can receive employment uninhibited, but if the administrator chooses to give effect to an EBB, then it's their decision which is the spawn of the harms the petitioners actually experience. Thus, the petitioners cannot show fair traceability when challenging the EBB itself head on. An EBB means nothing unless given tangible effect by agency administrators.

3

There is also no possibility of redress at this time because an order declaring an EBB unconstitutional wouldn't guarantee a blacklisted individual they'd receive an executive branch job; it'd merely provide them the right to compete for one more effectively by removing the weight of an EBB from the scale. Remember: the petitioners haven't actually attempted to obtain an executive branch job nor have they tested if an agency administrator would actually deny them employment *because of* their EBBs, meaning the only harm they face is the prospect of unfair competition for an executive branch job. But "freestanding 'competitive injuries' do not constitute legal wrongs traditionally redressable by the courts."[11] Their claim would only be anything more than a competitive injury if they were denied something concrete (like employment) because of their EBBs. That's not the case here.

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[10] *Id.*, at 306, 308, 313.

[11] *In re Trump*, 958 F. 3d 258, 274, 294 (2020).

In this case, the petitioners essentially complain that they face "increased competition" not because of unlawful conduct by their fellow competitors but because of "*government action* that benefits their competitors."[12] In other words, their fellow competitors are engaging in lawful competition but the petitioners face an additional hurdle because of a third party's actions. This Court, however, has consistently held that lawful competition "does not abridge or impair any [legal or equitable] right."[13] It cannot be the basis for standing.

Additionally, the petitioners do not present a redressable claim because the redress they seek isn't tailored to their injuries. They seek the total invalidation of their EBBs, but haven't suggested that the bulk of that invalidation would mean anything concrete to them. For example, facial invalidation of their EBB might affect their ability to compete for employment at the Department of Transportation, but they haven't produced any evidence that they might wish to compete for such a job.

Under traditional standing principles, this problem is avoided by requiring that the petitioners challenge particular negative acts against them and nothing more. They could properly challenge adverse employment decisions against them based on an EBB, such as their refusal in a specific tryout, interview, or application they otherwise would've been employed through. They can't, however, challenge the EBBs themselves because that would afford them overbroad relief. [14]

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[12] *Id.*, at 295.

[13] *New Orleans, M. & T.R. Co. v. Ellerman*, 105 U. S. 166, 173–174.

[14] Cf. *United States v. Sineneng-Smith*, 590 U. S. ___, slip op. 6–9.

B

Regardless, even if the petitioners had standing originally, their case is now moot because the President revoked their EBBs and there isn't a likelihood that he will change his mind the "second our backs are turned."[15]

When a respondent or defendant voluntarily ceases their allegedly unlawful conduct, the burden is on the petitioner or plaintiff to show that it's "likely that there will be a 'resumption of the challenged conduct as soon as the case is dismissed.'" [16] The Court didn't request additional briefing on mootness and, on the record before us, there isn't any indication that a resumption of the challenged conduct is likely. Additionally, a considerable amount of time has passed since the revocation of the petitioners' EBBs and no relevant factors have pointed towards resumption. If the President's revocation of the petitioners' blacklists was disingenuous, surely there would've been some indication by now that supported the notion. If there was, the petitioners don't identify it.

II

Although I don't think the petitioners had standing originally and now just have a moot case, for the sake of completeness I address the merits as well. Let's just say that doesn't fare much better.

A

The majority's first argument is that the issuance of an EBB implicates a "liberty interest" in the "freedom to seek

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[15] *Ultimani v. United States*, 6 U. S. 19, 23.

[16] *Ibid.* (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 174)

employment."[17] So the Due Process Clause's protections apply and a "fair procedure" is required. [18] The first problem is that the "liberty interest" relied on by the majority is entirely made up. The second is that an EBB wouldn't implicate it even if it existed.

1

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Under our precedents and the Constitution's original understanding, no process is due if one is not deprived of "life, liberty, or property."[19] So in order for us to question if the government provided a sufficient process, we must first identify the protected interest at stake. The majority identifies an interest (rather broadly, the "freedom to seek employment") but fails to ground that interest in any analysis of law or tradition.

Our precedent frowns on this approach. As we've explained, "extending constitutional protection to an asserted right or liberty interest . . . place[s] the matter outside the arena of public debate and legislative action."[20] Removing any subject from democratic discourse is no light matter. But where we relocate that subject (the judicial arena) accentuates the need for hesitation: the "guideposts for responsible decision making in this uncharted area are scarce and open-ended."[21] Accordingly, "[t]he doctrine of judicial

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[17] *Ante*, at 2–3.

[18] *Ante*, at 3.

[19] *Swarthout v. Cooke*, 562 U. S. 216, 219 (*per curiam*).

[20] *Washington v. Glucksberg*, 521 U. S. 702, 720.

[21] *Collins v. Harker Heights*, 503 U. S. 115, 125.

self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."[22]

Thus, before we confer constitutional status upon any new "liberty," we've required a "careful description of the asserted fundamental liberty interest" and a demonstration that the interest is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed."[23]

The majority neither provides a "careful description" of the contours of its newly-created right, nor does it ground the right in the "history and tradition" of our Nation, much less the "concept of ordered liberty." As I will show, the majority is wrong on every point of this checklist.

The Not-So-Careful Description

The majority doesn't carefully describe the contours of its "freedom to seek employment." Most importantly, it fails to meaningfully distinguish this right from other purported rights rejected by our cases.

In *Waters v. Churchill*, the Court acknowledged that "the government as employer indeed has far broader powers than does the government as sovereign."[24] This is so because, in the view of the Court then, there was no constitutional right to government employment.[25] While government interference with the rights of a private citizen was to be scrutinized closely, the government "has considerable

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[22] *Ibid.*

[23] *Glucksberg, supra*, at 720–721.

[24] 511 U. S. 661, 671.

[25] *Ibid.*

leeway in determining the conditions of employment for federal employees."[26] Indeed, "historically . . . it has been almost exclusively the role of the Executive Branch and Legislative Branch to determine what rights to afford employees."[27]

Against this backdrop, one would expect the majority to provide some explanation of what has changed, but all the majority manages to provide is a denial that it's adopting the very right rejected by our past cases. The majority declares that it is not adopting a "fundamental right to employment."[28] No, the majority is instead adopting a right to be "*considered in the first place.*"[29] Beyond peradventure, this is a distinction without a difference. The result of both is that the government loses its right to make employment decisions "at-will."[30]

This emphasizes the majority's failure to comply with *Glucksberg*. The majority's use of a vague, overarching description of the right allows it to muddy the water and deny it is doing what it is actually doing: constitutionalizing the process of federal employment. From here on out, it will be the courts—not Congress or the President—which will finally determine what "fair" processes are required for employment decisions. That's not how our government is supposed to work.

The Not-So-Historically-Based Right

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[26] *Benda v. United States*, 6 U. S. 24, 32.

[27] *Ibid.*

[28] *Ante*, at 2.

[29] *Ibid.* (emphasis added)

[30] *Benda*, *supra*, at 32.

As I just demonstrated, the right recognized by the majority is not supported (or even supportable) by history. The majority can cite no active precedent of this Court which has established a right to federal employment. This is telling.

When the scope of an open-ended phrase—such as "liberty"—is not "readily apparent from the phase of the Constitution . . . practice should illuminate meaning."[31] This axiom is "especially instructive when one branch claims a novel power against another"—such as the judiciary asserting the authority to determine employment policy for the country.[32] When one branch does so, but "cannot point to a single instance of having used it," the most probable explanation is the power doesn't exist.[33] Phrased differently, "when one branch claims to stumble upon a previously unknown font of authority that would materially affect the separation of powers, chances are it is grasping for something beyond its constitutional bounds."[34] That's the case here.

Constitutionalizing all employment decisions would effectively give the courts the final say on all policy surrounding employment. This would materially affect the separation of powers because it would deprive the President of the ability to control who works for him and it would deprive Congress of the ability to fix the rules binding the executive branch.

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[31] *Trump*, *supra*, at 298; *Dames & Moore v. Regan*, 453 U. S. 654, 686.

[32] *Trump*, *supra*.

[33] *Ibid.*

[34] *Ibid.*

And there's no precedent to support doing that. On the contrary, as I've documented, all precedent is against doing that.

It's clear that this right created by the majority is not deeply rooted in our history or tradition.

The Not-So-Essential Liberty

The majority's brand new right to employment isn't essential to a system of ordered liberty, such that "neither liberty nor justice would exist if [it was] sacrificed."[35] At least not the way the majority uses it.

All past conceptions of the right to seek employment have been based in contractual liberty (the ability to enter into contracts without undue governmental interference). Think about it: if the government stepped in and ordered private companies not to hire you, they'd be preventing a private transaction from taking place—arguably interfering with your "liberty." But when you're looking to be hired by the government itself, it isn't a violation of your "liberty" for the government to turn you down. Would you consider it a violation of your "liberty" for a private company—without any government directive—to refuse to hire you? Of course not. And something that doesn't infringe on your liberty when done by a private actor doesn't automatically become an infringement when the actor becomes the government. If that were so, *everything* the government did would implicate "liberty" and require due process. That's obviously not how government works.

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[35] *Ante,* at 8.

The "liberty" claimed by the petitioners is not the right to enter into an employment relationship *without government interference*, but the right to *force the government* into an employment relationship. Liberty, however, isn't a sword; it's a shield. It enables you to do certain things, but it doesn't let you force others to do certain things. Under *Glucksberg*, this isn't liberty.

2

Regardless, assuming *arguendo* that the majority was somehow right that there's a right to government employment protected as a due process "liberty interest," EBBs don't violate that interest.

If a government action is "narrowly tailored to serve a compelling state interest," it's constitutional even if it implicates a liberty interest protected by the Due Process Clause.[36] Facially, EBBs comply with this standard. They are often used to prevent government employment of gang members or other national security threats—those who have a propensity to go rogue. There is a compelling state interest in preempting rogue officers and EBBs are a narrowly tailored way of achieving that interest.

Maybe that isn't so for the petitioners—one is a former President and the other is a former White House Chief of Staff—but the petitioners don't present an as-applied challenge. They argue for (and the Court provides) facial relief respecting the EBB system. Application of strict scrutiny shows, however, that the EBB system is facially constitutional.

B

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[36] *Reno v. Flores*, 507 U. S. 292, 301–302.

The majority next argues that the President doesn't have the "unlimited right" to fire executive branch employees whom he didn't personally have a hand in appointing.[37] Thus, the majority concludes, the current EBB system must be unconstitutional. This just literally doesn't make an ounce of sense.

If the President is the constitutional embodiment of the executive branch—which, if the founding generation is to be trusted, he is—and executive branch employees are merely extensions of his constitutional power—which, if we are to be honest, they are—then it's completely insane to say he can't fire a whole category of them because of something entirely arbitrary like who appointed them on his behalf. And even if his right to fire those employees isn't "unlimited," who gets to define those limits? Congress or us? And if it's us, what's the reason for creating a new limit that invalidates the current EBB system? Unfortunately, the majority doesn't reason through any of these issues on its way to its holding.

1

The President has the absolute right to control any member of the executive branch. This includes the power to fire them. As the sole repository of the Constitution's "executive Power," the President must be allowed to control his functionaries.[38]

The Constitution divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."[39] Article II vests "[t]he executive

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[37] *Ante*, at 5-6.

[38] Art. II, §1, cl. 1.

[39] *INS v. Chadha*, 462 U. S. 919, 951.

Power" completely "in a President of the United States of America" and charges him with "tak[ing] Care that the Laws be faithfully executed."[40] These are his relevant constitutional responsibilities and they are his alone. But the framers weren't shortsighted. They understood the "impossibility that one man should be able to perform all the great business of the State," so provided Congress with the power to constitute agencies that would "*assist* the supreme Magistrate in discharging the duties of his trust."[41]

What we refer to as the "executive branch"—the executive agencies and their employees—exists only to "assist" the President in "discharging" *his* constitutional functions.[42] Yes, these agencies exist only by Act of Congress, but their origin isn't useful in gathering the degree of control the President must *constitutionally* have over those whose only power is his. Under the Constitution, the President can control all executive officials, down to the very last employee. It'd be untenable to say Congress couldn't control the power of legislating or the courts couldn't control the power of judging, so why would it be any different with respect to the President and his constitutional powers? It wouldn't.

It also doesn't matter who appointed a specific employee because the final source of any employee's authority is the President. The majority reaches the opposite result only by calling upon *Myers v. United States*[43] to stand against itself. *Myers* didn't limit the President's power of removal. On the contrary, it held that an Act of Congress prohibiting the

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[40] Art. II, §1, cl. 1; *id.*, §3.

[41] 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

[42] *Ibid.*

[43] 272 U. S. 52.

President from removing his principal officers without Senate approval violated the Constitution because that interfered with the President's control of his constitutional powers. The majority limits *Myers* to that holding and then says anything outside of that area must come out the opposite way. If there was a reason for this, then sure, but the majority blames that result on *Myers* itself and offers no explanation.[44]

Under the original understanding of the Constitution, the President has the unlimited power to fire any employee of the executive branch, no matter who appointed them.

2

Regardless, even if the Constitution did countenance limits on the President's power to remove his subordinates, those limits would have to come from Congress—not the courts. Congress, not us, has the legislative power and that means that it, not us, has the power to set policy. Determining what limits *should* exist on the President's power is a policy choice. We have explained that "policy determination[s]" are for the elected branches to make; our role, on the other hand, is to apply—not invent— "judicially discoverable and manageable standards."[45]

So if the President's power to control his employees isn't "unlimited," that can't be just because we disagree with the way he uses his power. It would have to be because Congress (the Constitution's repository of "legislative power")[46]

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[44] *Ante,* at 5.

[45] *Baker v. Carr*, 369 U. S. 186, 217.

[46] Art. I, §1.

has legitimately established limits on the President's power.

3

Finally, even if the Court hadn't been wrong on the previous two points (and this would be a terribly large if), we don't have the luxury of setting up rules just because we think they sound wise. "Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be *principled, rational, and based upon reasoned* distinctions."[47] So for there to be any basis to a new limit declared by us, we must have a principled and rational explanation for it. If one exists, the majority doesn't lay it out for us and, in my view, it'd be a pretty weak case anyways.

EBBs help prevent likely rogue agents from gaining access to executive branch agencies where they can do damage. The majority is wrong if it thinks requiring the President to water down that tool will produce a beneficent result. What the majority mandates is the equivalent of "throwing away your umbrella in a rainstorm because you are not getting wet."[48] That's just not rational.

C

Finally, the majority overturns section 108(ix) on the rationale that allowing the President, our Commander-inChief and lead national security officer,[49] to declare na-

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[47] *Vieth v. Jubelirer*, 541 U. S. 267, 278.

[48] *Shelby County v. Holder*, 570 U. S. 529, 590 (Ginsburg, J., dissenting).

[49] *Caldwell v. United States*, 9 U. S. 85, 101 (holding that "protecting our Nation's national security is among the most important functions of the President.").

tional security threats without consulting his unelected advisors violates the Constitution. To state this argument is to refute it. I'm literally not going to say any more about it.

* * *

The majority gets a lot wrong in this case. And the majority's wrongness will have far-reaching impacts for us and for the country. By excusing the lack of standing, the majority signals that if a case is really interesting, we'll dispense with the rules we arbitrarily apply to cases we don't want to hear.[50] By glossing over mootness, the majority declares that any who wish for advisory opinions can find them here. By creating a heretofore-unknown liberty interest in federal employment, the majority robs the people's representatives of their control over federal employment policy. By generating "limits" on the President's ability to control his subordinates out of thin air, the majority trashes the "energy in the executive" the framers considered a "leading character in the definition of good government."[51] By creating a constitutional rule requiring the President to consult with his unelected advisors before he makes national security decisions, the majority erodes democratic rule. And by doing all of this, the majority opens the doors of the executive branch to rogue agents who intend nothing but harm.

I respectfully dissent.

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[50] It seems that when standing doctrine helps us reach an outcome we want, we use it as window dressing. But when it'd stand in our way, we treat it like spoiled salad dressing. Standing doctrine is not required in the anytime review context and our "prudential" use of it creates a serious (and here proven) potential for abuse. The only way to prevent that abuse is to expressly do away with it. That continues to be my position.

[51] The Federalist No. 70.

Syllabus.

RESET4K, PETITIONER *v.* UNITED STATES

ON APPLICATION FOR STAY

No. 09-45. Decided June 27, 2020.

The House of Representatives impeached President Reset4K on three articles. The first alleged that he bribed two Members of Congress, the second alleged that he made expenditures in return for future votes, and the third alleged that he used his power as Commander-in-Chief to coerce political support from members of the military. The President filed his application for a preemptive stay of his potential conviction in the hopes of remaining in office if convicted by the Senate in his trial later today.

Held : The application is denied. In consideration of longstanding precedent, American history, the text and original meaning of the Constitution, and the written briefs submitted for the Court's consideration, there are thirteen reasons why the application for a preemptive stay must be denied. Variously, each reason shows that the President has not made a strong showing at this stage that he is likely to succeed on the merits of his case and underscores that granting a stay in this case would substantially injure interested parties and run contrary to the public interest. In light of the combined force of these thirteen factors, there are no grounds for issuing a preemptive stay.

No 09-44, application denied.

PER CURIAM.

For the second time this term, the President applies to this Court for a preemptive stay of his potentially impending impeachment conviction. The last time around, he was successful, and his conviction was stayed and later overturned. That outcome, however, has no bearing on our disposition of this case because the issues presented here are

markedly different. On June 25th, the House of Representatives adopted the three present articles of impeachment against the President.

The first article charges the President with bribing two Member of Congress. The article contends that the President "offer[ed] money to Congressman Krenth in return for an official act, an apology signed by the Congressman in his capacity as a member of the House of Representatives." H. Res. 3, Art. I (2020). It also alleges that he "offer[ed] something of value [a Senate seat] to . . . Congressman Jtdalejr88 . . . in exchange for the Congressman's resignation from office." *Ibid.* The cited statute is 18 U. S. C. §201 (titled "Bribery of public officials and witnesses").

The second article claims that the President made an illegal expenditure to influence voting. In particular, it alleges that the President used his campaign funds to give a "potential voter" money to buy a "Jailbreak gamepass" in order to "influence whether [they] w[ould] vote for him or not." Id., Art. II. The cited statute is 18 U. S. C. §597 (titled "Expenditures to influence voting").

The third and final article relates to the President's conduct as Commander-in-Chief. It alleges that he used his military authority—in the form of his access to the military's central discord server—to direct message members of the military to vote for him on polls and in elections. *Id.*, Art. III. The article alleges that "there is a very intimidating pressure when the Commander-in-Chief is personally direct messaging servicemembers." *Ibid.* The cited statute is 18 U. S. C. §609 (titled "Use of military authority to influence voting by members of the Armed Forces").

The Senate is scheduled to convene later today to try each of these articles. To succeed in obtaining a preemptive

stay of any possible conviction which might result from that trial, the threshold is high. Applicant must generally first make a "strong showing" that he is "likely to succeed on the merits." *Kolibob v. United States*, 9 U. S. 104, 105 (2020) (quotation omitted). But where the preemptive stay of an impeachment conviction is concerned, succeeding on the merits for one or two of the articles is not enough. Because overturning a future removal would require success on all the articles, applicant must make a strong showing for the likelihood of success on each and every single article.

Applicant must then show that he will be irreparably injured in the absence of a preemptive stay. In the impeachment context, though, this is usually satisfied as a per se matter. After all, in the absence of a preemptive stay, later success on the merits would "present a great deal of additional work as to the unwinding of any significant actions." *Procursive v. United States*, 7 U. S. 9, 14, n. 1 (2019). Thus, we need not dwell too much on this factor.

Next, the Court considers whether the issuance of a stay would "substantially injure the other parties interested in the proceeding" and "where the public interest lies." *Kolibob*, supra. For both of these factors, that means assessing how a preemptive stay would impact Congress' ability to discharge its functions in combination with the implications that would have for society at large.

Naturally, the "the first two" factors are the "most critical" of the bunch and a particularly strong showing on them can outweigh strong interests reflected in the latter two. Id., at 100. For the sake of convenience, we consider each of the factors below as a collective whole.

* * *

In consideration of longstanding precedent, American history, the text and original meaning of the Constitution, and the written briefs submitted for our consideration, we conclude that there are thirteen reasons why the application for a preemptive stay must be denied in this case.

First, the public and Congressional interests at stake here stand in particularly forceful opposition to a preemptive stay. To begin with, this is the second time over the course of this term that the House has found it necessary to impeach the President. While some might contend this illustrates excessive reliance by Congress on its impeachment power, that contention gives far too short shrift to the serious nature of the charges presented here. Two of the articles pertain directly to the upcoming election. And the charges are serious enough that the Federal Election Commission found that they warranted taking the extraordinary step of disqualifying the incumbent President from seeking reelection. The Court cannot discount the significance of that step.

This consideration is not, of course, dispositive but taken together with the twelve other factors enumerated below it is sufficient to deny the requested preemptive stay.

Second, the claim that the President's alleged conduct is outside the bounds of the bribery statute cited in support of the first article is a point of serious contention and applicant does not sufficiently brief the issue for the Court to find a "strong showing" that he is likely to succeed on the merits of it. The explanation provided by applicant is confined to positing that while the bribery statute requires a *quid pro quo* involving "official act[s]," under *McDonnell v. United States*, 579 U. S. ___ (2016), issuing an apology letter and resigning from office are not "official acts." But this claim

requires additional development. It is plausible to argue on the other side that issuing a formal statement using a government letter head is an "official action" by a public official or that resigning from office—because it has a concrete legal effect—is an "official act." Applicant's threadbare claim, based only on an unexplained citation to *McDonnell*, does not constitute a "strong showing."

Third, applicant appears to overread the applicability of *McDonnell*. *McDonnell* did, as applicant argues, hold that some "official acts" must involve "formal exercise[s] of government power." *Id.*, at ___ (slip op., at 15). But the Court qualified that holding in two pertinent ways. First, it only applied to four categories of "official acts," not all six of them. See *ibid* (explaining that its analysis applied only to "[t]he last four words in th[e] list"). Second, even with respect to those four, the Court was far from emphatic. Indeed, the Court conceded that it was "difficult to define the precise reach of those [four] terms." *Ibid.*

Applicant cites the Court's summary of this conclusion, see *id.*, at ___ (slip op., at 21), but that is not to the contrary. Indeed, the Court acknowledged that cursory acts like "[s]etting up a meeting, talking to another official, or organizing an event"—unless "without more"—could constitute "official acts" under the bribery statute. *Ibid.*

Fourth, applicant alludes to additional facets of this argument but a statement of what he "intends to argue" is not a substitute for an actual statement of that argument. The Court cannot treat that as contributing to a "strong showing" of likely success on the merits.

Fifth, although applicant does not explicitly make this argument, it is worth noting that no argument that the first article is insufficiently serious to constitute a "high" crime

would be apposite. After all, "bribery" is enumerated as a ground for impeachment by the Constitution completely separate from the phrase "high crimes and misdemeanors."

Sixth, regarding applicant's arguments on the second article, the claim that the article relies on "highly objectionable and easily forgeable evidence" is not remotely developed enough to amount to a "strong showing" of merits success likelihood. Applicant does not describe what standards he believes apply to evidence in impeachment trials or where those standards would come from. Nor does applicant explain what is actually defective about the evidence relied on in the article.

Seventh, although applicant disputes the credibility of the evidence, he does not dispute the facts the evidence is cited to show. Our precedents, though, require merely a "basis in fact" to support a finding of factual guilt. *Reset v. United States*, 9 U. S. 1, 40 (2020) (*Reset* I). Moreover, "[i]t doesn't really matter where that basis comes from or how it was obtained as long as it is real and supports Congress's conclusion." *Kolibob*, *supra*, at 106-107. Applicant does not tie his argument to this legal standard. The Court cannot overturn a finding of factual guilt applicant does not himself dispute if his only objection is to the manner in which that conceded guilt is proven. While it is possible that this is not the argument applicant intended to make, the applicable standard requires a "strong showing" and our job is to hold the arguments submitted to that bar.

Eighth, applicant appears to rely on the clear error standard pressed by the petitioner and rejected by the Court in *Reset* I. Needless to say, the correct standard (as we just recounted) turns on whether Congress has a "basis

in fact" for its factual conclusions. This is a highly deferential mechanism of review.

Ninth, applicant says that he made no mention of a vote when he offered funds in the events of the second article, but the statutory standard makes no mention of "intent," but only purpose. When campaign funds are used to pay a non-employee for extraneous and apparently gratuitous reasons, there is a strong appearance that the purpose of the expenditure was to induce voting behavior. This uncertainty is sufficient to rebut the "strong showing" required of applicant.

Tenth, applicant's response to the third article appears to miss the point the House is trying to make. The article does not suggest that "election campaigning" is "criminalized," only that direct campaigning by the President using a medium he has access to by virtue of his military title creates a strong potential for coercion.

Eleventh, applicant argues the insufficiency of the evidence included in support of the third article. The Court's role, however, is to determine "whether the allegations in the articles have a basis in fact, not whether the evidence presented at trial conclusively proves these allegations." *Reset I, supra*, at 40. Moreover, it is hard to see how an argument about the insufficiency of the House's evidence can be maintained at this stage when the House has not yet presented its case to the Senate, where it is free to present other evidence not included in the articles themselves.

Twelfth, applicant alludes to an argument that "no impeachable offense was committed" with respect to the third article but fails to ground this argument in any analysis of the statutory text or the allegations in the third article. That must be rejected out of hand.

Thirteenth, and finally, applicant fails to explain how athe cited disclaimer the President included in his communications to military members ("if interested ofc") negates the perception cited by Congress among some military members that any request (even one phrased as voluntary) from the Commander-in-Chief was effectively an order.

* * *

As we said recently, "an impeachment is strong medicine." *Kolibob*, *supra*, at 107. There are circumstances where it should be used and circumstances where it should not. But the decision of when impeachment should be used is one left to Congress. Our responsibility is only to use the law to figure out whether it can be used in a particular case. Here, applicant has not made the required showing to obtain a preemptive stay.

The application is therefore denied.

It is so ordered.

Syllabus.

UNITED STATES, PETITIONER *v.* MAXONYMOUS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-33. Decided July 6, 2020.

Respondent sued the United States in the District Court invoking a number of torts. After the United States failed to respond to the civil complaint, respondent moved for default judgment in his favor. The United States filed a response to that motion, opposing it. Even though the United States had appeared and responded to the default judgment motion, the District Court nevertheless granted default judgment. The United States appealed.

Held : The District Court should not have entered default judgment after the United States engaged with the case and made clear its intention to actively engage with the proceedings. Default judgment is not a substitute for a full adversarial process. Pp. 1–2.

Reversed and remanded.

PITNEY, J., delivered the opinion for a unanimous court.

JUSTICE PITNEY delivered the opinion of the Court.

I

Default judgment is a very unique item in our judicial toolset. Many disregard it as a simple "enforcement technique" to compel compliance with court orders. In this case, default judgment was granted against the United States, even though they claim to have been present at proceedings. In the pursuit of upholding the impartial application of justice, a review of default judgments, their application, and a specific study of the case at hand is required.

II

A

When discussing default judgment, we need to recognize why default judgment exists. Default judgment exists to ensure civility exists in our legal system. Simply, it enforces courtesy.[1] Rule 55 of the Federal Rules of Civil Procedure (FRCP) orders the circumstances where Default Judgment must be entered. "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." FRCP R. 55(a). It is clear that legislatively, the Congress intended that default judgement would be a strict, and immediate backlash against parties who take it upon themselves to ignore civil proceedings. "The entry of a default judgment is one of the most severe sanctions that a federal court can impose upon a party for failure to comply with the Federal Rules of Civil Procedure."[2] With this knowledge we can conduct a review on the actions of the inferior court.

B

To examine this case is simple. No complicated pronged tests are required. Default judgment is the punishment for failing to engage with a case, a violation of societal courtesy. Did the United States engage with the case? The answer is undoubtedly yes. "The United States actively attended the case, including filing a response to the motion for default judgment by the plaintiff." Brief for Petitioner 7. By submitting a brief against the application of default judgment, the default judgment should not have been granted. We

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[1] Adam Owen Glist, Enforcing Courtesy: Default Judgments and the Civility Movement, 69 Fordham L. Rev. 757 (2000).

[2] Peter H. Bresnan and James P. Cornelio, Relief from Default Judgments Under Rule 60(b)--A Study of Federal Case Law, 49 Fordham L. Rev. 956 (1981).

find with this that the default judgment was wrongly submitted by the presiding judge and order its vacation. We remand the case to the District Court to be trialed *de novo.*

C

With the previous order in place the remaining questions submitted by the United States stand. We find that, with the granting of question 1, petitioner has no standing on questions 2-6. They remain unanswered.

It is so ordered.

Syllabus.

IN RE THEBEATLE2012, ET AL.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-26. Decided July 6, 2020.

Petitioner was charged with 15 counts of murder, but the prosecution only provided probable cause to support two of the counts. Petitioner disputed that the remaining 13 murders occurred and moved to dismiss the related charges for lack of probable cause. The motion to dismiss was denied and petitioner brought this mandamus action to compel the District Court to dismiss the 13 unsupported counts of murder.

Held : To survive a motion to dismiss, each count of a crime must be supported by probable cause. Because the prosecution failed to establish probable cause for 13 of the murder counts, they must be dismissed. Pp. 1–3.

Mandamus granted.

REHNQUIST, J., delivered the opinion for a unanimous court.

JUSTICE REHNQUIST delivered the opinion of the Court.

The respondent made an effort to prosecute the petitioner, TheBeatle2012, for fifteen (15) counts of murder. In an unsworn statement made under the penalty of perjury, the petitioner asserted that only 2 murders had been committed, and therefore, moved to dismiss the remaining 13 counts for a lack of probable cause. The respondent claimed that probable cause must not be established for all related counts of a charge, but rather, only one of said charges. The court sided with the respondent and denied the petitioner's motion to dismiss.

This Court was asked to provide mandamus relief to the petitioner, compelling the District Court to dismiss the other 13 counts for a lack of probable cause.

I

The District Court has shown a misguided interpretation of the Constitution and has erred in its decision regarding probable cause. We were given a very open-and-shut case: can the prosecution use one instance of probable cause in order to levy multiple counts of the same charge? The answer, simply put, is no. The Constitution is explicit in that probable cause is required for every offense, in any matter.

As is said in the Fourth Amendment of the Constitution, "and no warrants shall issue, but upon probable cause." See U. S. Const. amend. IV. Thus, it is mandated that probable cause must be present when the prosecution charges a person with any individual offense. If not, the prosecution would be effectively contending the Fourth Amendment if they are granted the ability to add on additional charges without any probable cause. While the Constitution does permit that a warrant can be issued with probable cause, it does not permit that one probable cause is enough for multiple warrants. And, as far as we're concerned, the prosecution is not some magical force that can go above the law as it pleases.

The fact is the District Court's ruling creates many new avenues for malicious prosecution to occur. As an example, if I were to murder Justice Pitney, the prosecution could (so long as they have probable cause for that single murder offense), charge me for another count of murder, and another, and another, until I reach the point where I can no longer possibly defend myself. This is, obviously, malicious, and very possible given the precedent that the District

Court has set. The prosecution must provide probable cause for each individual murder offense; a series of events cannot be linked together by using one instance of probable cause.

This argument's clarification, however, was likely unnecessary. According to Rule 9(a) of the Federal Rules of Criminal Procedure, "[t]he court may issue more than one warrant . . . for the same defendant." See Fed. R. Crim. P. 9(a) (1944). While the court may issue more than one warrant for the same defendant, it is required that each warrant has its own probable cause.

* * *

Our country was founded on the principle that, while there can be arrests for probable cause, citizens have a rightto due process. Issuing several arrest warrants without a concrete legal basis erodes this principle and is a dangerous precedent that this Court must act on.

The petition for a writ of mandamus is granted and the District Court is directed to dismiss the 13 unsupported counts.

It is so ordered.

PUPPYLOFTUS18 *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA EX REL. KIND_YADA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-38. Decided July 13, 2020.

PER CURIAM.

In any proceeding challenging a contempt order, federal law requires that the defense of that order be presented by the District Court Judge who issued it. Here, the District Court declines to stand in petitioner's opposition. As the District Court has not provided any specific reasons why the order should not be overturned or made any attempt to defend or justify any features of the order, such as its length, we can find no basis for affirming the order. Therefore, without determining whether it was originally justified, we vacate the contempt order.

It is so ordered.

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

ON PETITION FOR WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT, PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, AND APPLICATIONS FOR STAY

Nos. 09-55, 09A502, and 09A531. Decided July 14, 2020.

The petition for a writ of review and motion to set the petition for a writ of mandamus for briefing and argument in No. 09–54 are granted. The second application for a stay in No. 09–50 is granted. The ethics complaint proceedings in the Court of Appeals for the Federal Circuit are stayed pending final disposition of No. 09–50. The application for a stay in No. 09–53 is granted in part and denied in part. The judgment of the Court of Appeals for the Federal Circuit in *Jackcari v. United States Dist. Court*, No. 08–01 (CAFC 2020), is stayed pending disposition of No. 09–53, but the application for a stay is denied in all other respects.

JUSTICE BORK, with whom JUSTICE KAGAN joins, concurring.

I concur in all of the Court's above actions. I write separately to address some of the finer points of these orders.

I

These cases arise because for the past several days the newly returned court of appeals and the district court have been locked in a heated confrontation over the scope of their respective powers. Over the course of this confrontation, the two have fought to gain a leg up on one another by any means necessary. The dispute began when the district

court's clerk banned a circuit judge from the district court's discord server for an "inflammatory racial statement."[1]

In response, the court of appeals issued a *sua sponte* order directing the district court to revoke the administrative powers of its clerk, the petitioner. The court of appeals didn't cite any statute or constitutional provision to back this order. The order rested entirely on the Judicial Restructuring Act's grant of jurisdiction to the court of appeals to conduct "administrative oversight" of the district court.[2]

When the district court refused to comply with that order, arguing its complete invalidity, the court of appeals held the then-chief district judge AlexJCabot and the petitioner in contempt of court. This Court then stayed the court of appeals' order and the related contempt citations pending our resolution of the dispute.[3]

After that, the district court decided to change its local rules to give additional power to its clerk. The rule change allowed the clerk more muscular administrative powers in the district court discord server and authorized them to also take on some case reassignment duties—traditionally the job of the chief district judge. The new chief district judge, Jackcari, didn't take very kindly to either move. He immediately filed a petition in the court of appeals asking for "administrative oversight" overturning the rule changes. Again, this plea for "administrative oversight" didn't aver that its position was correct as a matter of law. It instead claimed, regarding the grant of case reassignment power,

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[1] Brief for Petitioner 1.

[2] JRA, Pub. L. No. 80–13, §2(c).

[3] 9 U. S. 159.

that the district court had "usurp[ed] the authority of the Chief Judge with regards to the administration" of the district court.[4] And regarding the elevated administrative powers, the chief district judge wrote: the district court had "unilaterally give[n] the Clerk of the Court administrative powers not allotted by the Chief Judge."[5]

For these "reasons," the chief district judge continued, the court of appeals should intervene. And intervene it did. The court of appeals quickly issued a stay temporarily blocking the rule change from taking effect—again, without any legal justification for that move anywhere in its record.

Along with that decision, the court of appeals also docketed an ethics complaint against the petitioner. It summoned the petitioner to respond and based its jurisdiction once again on the JRA's grant of "administrative oversight" jurisdiction.

In this order, we agree to take up a challenge to the court of appeals decision striking down the district court's rule change, stay the appeals court's ruling, and stay the ethics complaint proceedings against the petitioner.

II

I'll hold off on sharing too many of my views at this stage, but I want to address two things which relate to our actions above and which influenced my vote.

A

The appeals court's approach to "administrative oversight" raises serious concerns under Article III. Not just

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[4] Petition for Writ of Prohibition in No. 08–01 5 (CAFC 2020).

[5] *Ibid.*

because, as the petitioner argues, they raise legitimate concerns under our opinion in *Benda*, [6] but also in light of their inherent tension with the basic rules of standing.

1

First, the *Benda* problems: (a) it is probably unjust for a court to impose punishment on a person without providing them even the courtesy of an explanation and (b) it's not rational to deny the district court the right to control its day-by-day internal governance without a good reason. [7]

To start, as I've explained before, a written opinion serves a valuable purpose in our judicial system. Written opinions convey "the full explanation [a] court has elected to offer for its legal conclusions, including the process going into its interpretation of a statute."[8] Judicial opinions "rationaliz[e] issues, explai[n] facts, and settl[e] disputes."[9] The point of an opinion is to "make a judgment credible to a diverse audience of readers." [10] "Context dictates the appropriate scope of the explanation."[11]

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[6] *Benda v. United States*, 6 U. S. 24, 38, establishes that any "la[w] affecting the Judiciary" must "be consistent with basic principles of justice . . . [and] rationally justifiable under the circumstances" to pass constitutional muster. This doesn't just apply to laws on their face, but also in their specific applications.

[7] By this, I mean that while it's appropriate for general rules of district court administration to be laid down by, for example, this Court or THE CHIEF JUSTICE, the district court should be left the freedom to as necessary fill up the details and implement those rules on a day-by-day basis. That freedom shouldn't be obliterated by overweening "administrative overseers." District judges are most familiar with the operation of the district court and are best qualified to provide for its day-by-day administration.

[8] *Hudson v. House of Representatives*, 7 U. S. 68, (BORK, J., concurring).

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

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

[11] *Hudson, supra.*

When punishment is imposed, context would seem to compel an explanation of at least *some* scope. Punishment was imposed here but not with any explanation. The appeals court's order called for the removal of the petitioner's administrative powers. That's punishment. But the appeals court's only explanation was to say that the petitioner had banned one of their fellow circuit judges from the district court server. That doesn't explain why that was wrong or by what standard. I won't say yet whether this is enough to fail *Benda*, but it's definitely concerning.

For my second point, the district court's right to control its day-by-day governance isn't something that should be lightly interfered with. District judges "are most familiar with the operation of the district court and are best qualified to provide for its day-by-day administration."[12] In the absence of upper court intervention, they have the freedom to "as necessary fill up the details and implement" the administrative rules prescribed by this Court and THE CHIEF JUSTICE. It's irrational to interfere with this freedom without a good justification.[13]

I haven't seen a good justification in the record for the appeals court's actions in these cases so far and I'm not sure there is one. I'll have to wait and see.

2

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[12] *Supra*, n. 7.

[13] A wise Justice explained it this way: "Chief Judge Hudson just stated that the 'Administrative powers Button is on his desk at all times.' Will someone from his depleted and food starved regime please inform him that I too have an Administrative powers Button, but it is a much bigger & more powerful one than his, and my Button works!"

The appeals court's approach to "administrative oversight" cases also appears suspect under the traditional rules of Article III standing.

To start, federal courts may only exercise the "judicial power" within the four corners of an "Article III case or controversy."[14] When the appeals court uses its "administrative oversight" jurisdiction to order specific actions, it is undoubtedly exercising the "judicial power."[15] It doesn't change anything that "administrative oversight" was spelled out by Congress. A lower court usually requires both constitutional and statutory jurisdiction to decide a case. The JRA's grant of "administrative oversight" provides the appeals court statutory jurisdiction but that "invitation of Congress" doesn't override the need for coextensive constitutional jurisdiction.[16] Thus, the court of appeals requires an Article III case or controversy to constitutionally exercise its statutory jurisdiction to carry out "administrative oversight" when the intended end result is a compulsory remedy.[17]

An essential element of any Article III case or controversy is the rule of standing. To establish standing, a plaintiff or petitioner must "(1) ha[ve] suffered an injury in fact, (2) [that is] fairly traceable to the challenged conduct, and (3) . . . would likely [be] redress[ed]" by a "favorable judgment."[18]

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[14] *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 574.

[15] See *Georgia v. Stanton*, 73 U. S. 50, 75–76 (explaining that a "compulsory remedy" can only be issued through an "exercise of judicial power.").

[16] *Lujan, supra,* at 576.

[17] Only special powers directly granted by the Constitution, like anytime review for example, are exempt from the case or controversy requirement.

[18] *Tools v. United States*, 9 U. S. 128, (BORK, J., dissenting).

An injury in fact has two parts: damage and injury. The first part ("damage") is synonymous with factual harm. It just basically means that "a bad thing" with "tangible impact" has happened to you.[19] The second part ("injury") requires more. To satisfy it, you have to show that the damage you suffered was the *result* of an injury to your legal interests. At the founding, "factual harm without a legal injury was *damnum absque injuria* and provided no basis for relief" or standing.[20] So for a party—and there must at least be a party—invoking the appeals court's "administrative oversight" jurisdiction to have standing to win a compulsory remedy, they need to show both that they were harmed by whatever thing they're challenging or going to the court of appeals to have corrected *and* that whatever it was touched on one of their legal interests.

So, a generalized claim about how things should work isn't enough to invoke "administrative oversight."

Some extra food for thought: gross departures from administrative rules imposed by this Court or THE CHIEF JUSTICE can be remedied through regular appeals or petitions for mandamus by parties in specific cases where those rules were not followed or by the operation of those rules themselves. The parties should probably address why an additional layer of "administrative oversight" initiated by a third party would be warranted or not.

B

Onto the second "big thing" I wanted to address here. In objecting to the second requested stay in No. 09–50, Chief

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[19] *Ibid.*

[20] Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 722–723.

Judge Hudson of the court of appeals contended that the ethics complaint proceedings and our pending disposition of No. 09–50 were unrelated. He suggested that, contrary to the statement of his colleague Judge Chen, the appeals court's jurisdiction to hear ethics complaints regarding the conduct of lower court staff, as opposed to judges, was not based on "administrative oversight" but some other vaguely defined power.

I won't speak to the merits of this dispute now, but I think the two cases are related for the completely different reason that the ethics complaint challenges the petitioner's noncompliance with the order under review (and stayed) in No. 09–50. A pause on those proceedings is both necessary and appropriate.

* * *

I concur.

IN RE COMPLAINT AGAINST JUDGE ACIDRAPS

ON MOTION FOR LEAVE TO FILE JUDICIAL ETHICS COMPLAINT

Nos. 09-48. Decided July 16, 2020.

The motion for leave to file a judicial ethics complaint is denied.

Statement of JUSTICE BUTLER, respecting the denial of leave.

On July 3, a judicial complaint against District Judge AcidRaps (hereinafter "complainant" or "judge") was submitted to the Clerk of the Court, and by him referred to the United States Supreme Court. Jetpackboy (hereinafter "complainant") alleged that the complainant had engaged in ex parte communications and threatened the complainant via direct messaging. Furthermore, he contended that the judge erroneously dismissed a tort. Thereafter, the Court was faced with the decision whether to initiate proceedings to evaluate the judge's conduct and determine if punishment was necessary. The Court, inevitably, voted to deny review. Though I recognize this statement does not set precedent that is legally binding in nature, "statements of individual Justices . . . can be particularly helpful in discerning the law" and guiding future judicial officers when faced with similar situations.[1]

I

This Court—functioning as a Court of the Judiciary pursuant to established law—has been entrusted with the ability to "oversee the proper conduct of Judges."[2] Although

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[1] *Federal Election Comm'n v. Raps*, 6 U. S. 42, 45 (2018).

[2] Enhancing the Judiciary Act, Pub. L. No. 67–4, §104(a).

this Act established a means for complaining about the conduct of judges, this Court has traditionally exercised the aforementioned power *sua sponte*. Moreover, "petitioner's complaints are generally insufficient to justify such an extraordinary act" [3] such as expulsion or other forms of retribution. Generally, however, this Court will only exercise its fundamental responsibility to investigate complaints and redress the conduct of its own officers—a power profoundly springing from the confidence granted to the courts by our nation's Constitution—so long as three prerequisites are satisfied: "(1) [Congress has] been given sufficient opportunity to act, (2) [Congress] has nevertheless failed to act, and (3) the circumstances of the case are particularly egregious."[4] Considering this, valid complaints against judges and the review of such complaints is uncommon in our nation with there only being a few in the United States Reports. The same holds true in the "real world." The 1987 Annual Report of the Director of the Administrative Office of the United States Courts reported that of the 244 judicial misconduct complaints concluded during the year, 233 were dismissed, two were withdrawn, eight were terminated after appropriate action was taken,[5] and one was referred to the U. S. Judicial Conference. With that in mind, I plainly note: none of these necessary conditions were met, thus warranting our nonintervention in this matter.

A

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[3] *Ex parte Haven*, 7 U. S. 44 (2019) (per curiam).

[4] *In re Trump*, 6 U. S. 58 (2018). See also *In re Giordano*, 7 U. S. 46 (2019).

[5] Note that the available statistics did not report what the "appropriate action" was. However, this does not have any effect on the purpose for providing these numbers from this report: to exemplify how rarely courts and judicial councils act on judicial misconduct complaints.

I reject the complainant's assertion that the complainee engaged in *ex parte* communications and availed himself of threatening language. For context, Judge AcidRaps had messaged the complainant via direct messaging after the conclusion of the case ordering him to pay the opposing party 20,000 dollars per the settlement. Not even considering whether the complainant can oppose a settlement that he agreed upon in writing, he disputed it nonetheless. Following some back-and-forth discussion, the complainant finally paid the opposing party.

Pursuant to the Canon 3A(4) of the Code of Conduct for United States Judges adopted by the U.S. Judicial Conference, "a judge should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers." Though that may be true, it is important to recognize: there are several exceptions to this rule. Judges may engage in the aforementioned communications so long as it is either authorized by law, when circumstances require it,[6] or with the consent of parties. Succeeding the conclusion of the case, we should not consider a judge's discussion with a party regarding the enforcement of the provisions of a legally-binding settlement to be a violation of the Canons. Though I wish the altercation could have been resolved more civilly and appropriately, nothing about Judge AcidRaps' conduct warrants our review and punishment thereof.

B

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[6] For example, this may pertain to scheduling, administrative, or emergency purposes so long as such communication does not "address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication." See Canon 3A(4) of the Code of Conduct for United States Judges.

In regard to the complainant's assertion that the judge wrongfully dismissed a civil tort, a judicial misconduct complaint is not the appropriate remedy for reversing an interlocutory order such as that (or any, for that matter). The purpose of judicial misconduct complaints can simply be derived from its name: to review the conduct and possible ethical or Canon violations of judges, not orders and decisions rendered throughout the execution of a judge's constitutional duties. Generally, they are designed to shed light on a particular judge's conduct that is "prejudicial to the effective and expeditious administration of the business of the courts", or meant to "allege that such judge is unable to discharge all the duties of office by reason of mental or physical disability."[7]

There is nothing this Court can do to grant relief to the complainant through a judicial complaint in this matter, especially considering there are other adequate and appropriate legal remedies at his disposal. These include courses of action such as an interlocutory appeal, or even mandamus if the matter is "an exceptional circumstance of peculiar emergency or public importance."[8] Considering the second allegation of misconduct by Judge AcidRaps is centered around his autonomous decision to dismiss a tort no matter whether "the action he took was in error"[9]—especially considering he was well within his jurisdiction and was not in excess of his constitutional and statutory authority—I can neither conclude that myself nor a reasonable person in possession of all the facts would determine that a judicial complaint against the trial court judge for an interlocutory order is the proper method for the complainant to utilize.

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[7] See 28 U. S. C. §351.

[8] *LaBuy v. Howes Leather Co.*, 352 U. S. 249, 256 (1957).

[9] *Stump v. Sparkman*, 435 U. S. 349, 356 (1978).

* * *

Complaints of judicial misconduct are scrupulously and prudently designed to only be employed when the conduct of a judge is particularly egregious or improper. Furthermore, they ought to subsist as a last resort when the legislature has been afforded the chance to investigate and review the conduct of the judge in question and have failed to take action. With that in mind, it is in the best interest of the Judiciary for this Court to avoid reviewing and adjudicating judicial complaints in a liberal fashion, and I fervently warn against any other view. As previously mentioned, a brief survey of available statistics and prior cases highlight how uncommon complaints of this nature are, and rightfully so.

Although this may be an isolated example, both myself and the Court frown upon the frequent, inappropriate filing of judicial misconduct complaints nevertheless. Of course, we wholeheartedly recognize: no one—including judicial officers, attorneys, and legal scholars—is perfect. "Being human, lawyers . . . will not always dot every 'i' and cross every 't' in trying to live up to their obligations."[10] Although judges and Justices can sympathize with inexperienced counsel and their submissions,[11] the ever-increasing caseload—perhaps unmannerly—does not care. That is why the Court must not divert precious judge-time and resources from cases and litigants who could have their cases resolved more thoughtfully and expeditiously while, simultaneously, giving newer litigants leeway and flexibility as they attempt to maneuver the rather tricky world of law and legalese.

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[10] *Mohasco Corp. v. Silver*, 447 U. S. 807, 819 (1980).

[11] This is primarily why the Court has, traditionally, been hesitant and particularly loath to impose sanctions and employ Draconian consequences when faced with newer, more inexperienced litigants who are still learning.

It is merely my intention and hope that this note will prove to be practical and useful in guiding parties in future scenarios akin to the one we find ourselves in. However, in this specific case, the complainant has not made the requisite showing to establish that this Court's review of Judge-AcidRaps' behavior is warranted, necessary, and the adequate remedy for his grievances.

For the foregoing reasons, I join the Court in denying review of the complaint filed against District Judge AcidRaps.

Syllabus

IN RE RATIFICATION OF THE PROPOSED RIDGEWAY COURTS AMENDMENT

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-MO14. Decided July 21, 2020.

Multiple weeks ago, Congress approved legislation to admit Ridgeway County to the United States along with a County Charter which authorized the creation of the Ridgeway County Court that would have jurisdiction to hear all criminal cases arising under the laws of the County of Ridgeway. Amid concerns raised by some about the constitutionality of the Ridgeway County Court, Congress proposed a constitutional amendment for ratification by this Court, the Ridgeway Courts Amendment, which would expressly authorize the County Court.

Held : The proposed ratification of the Ridgeway Courts Amendment is denied.

RCA, ratification denied.

CHIEF JUSTICE HOLMES, joined by JUSTICE BORK, JUSTICE PITNEY, JUSTICE HARLAN, JUSTICE THOMPSON, JUSTICE KAGAN, and JUSTICE BUTLER, concluded in a binding opinion that the amendment was unnecessary because the Ridgeway County Court was already constitutional exactly as structured by the County Charter. Pp. 1–18.

1. The argument that the County Court's existence violates the Constitution's prohibition on Municipal courts is erroneous because the County was admitted as something legally resembling a U. S. Territory, not a Municipality. As such, the County is outside the reach of the prohibition on Municipal courts. Pp. 1–9.

2. The claim that the County Court's jurisdiction over criminal prosecutions under the laws of the County violates the Venue Clause is meritless because the Clause permits but does not mandate that all non-federal prosecutions take place within the Federal District Court. Pp. 9–12.

3. The objections to the County Court's appointment process under the Appointments Clause, stemming from the fact that its judges are not appointed by the President with the advice and consent of the Senate, is rejected. The Appointments Clause does not apply to territorial officials (or, therefore, Ridgeway officials) who exercise primarily local authority. Pp. 12–18.

Holmes, C. J., filed a concurring opinion, in which BORK, PITNEY, HARLAN, THOMPSON, KAGAN, and BUTLER, JJ., joined. STEWART, J., dissented from the judgment. REHNQUIST, J., took no part in the consideration or decision of this matter.

CHIEF JUSTICE HOLMES, with whom JUSTICE BORK, JUSTICE PITNEY, JUSTICE HARLAN, JUSTICE THOMPSON, JUSTICE KAGAN, and JUSTICE BUTLER joined, concurring.

We are not policymakers. When reviewing proposed amendments to the Constitution, our role is only to ensure that the Supreme Law's "basic structure" is not unnecessarily or unduly altered. 2019 PRN 5edae808f49a154-d5cdef435, ¶1 (BORK, J.). We deny the proposed amendment here because it is plainly unnecessary. The Ridgeway County Charter, approved by Congress at the time of the County's legal admission to the United States, already authorizes a County Court to try all violations of the County's criminal laws. In light of the fact that the County is not a Municipality, but something more akin in legal status to a territory, this arrangement is valid under the Constitution as it presently stands. An amendment merely reiterating—and perhaps unwittingly undermining—this fact strikes us as entirely unnecessary and unworthy of our ratification.

I

A

We begin by briefly outlining the provisions of the proposed constitutional amendment at issue in this proceeding. Under the amendment, "[t]he County of Ridgeway may establish" its own "[c]ourts" and may also "set their jurisdiction and authorities" subject to the limits of the "[c]onstitutional authority of the County." RCA §1. The amendment further provides that "[t]he trial of all crimes originating from the laws of the County of Ridgeway" must take place in "the Courts of the County of Ridgeway." RCA §2.

Together, these provisions accomplish a few noteworthy things. First, they expressly authorize the creation of courts by an entity other than the Federal Government: namely, the Ridgeway County government. Second, they authorize the County government to determine the scope and jurisdiction of each of its courts. And third, they mandate that the trial of all County-level offenses occur within the Ridgeway courts. The first and second changes come in response to a provision of the Constitution which specifies that "[n]o court shall be established by a Municipality." Art. III, §2, cl. 1. The amendment's drafters envisioned that the Ridgeway County court system could face obstacles as a result of that constitutional provision and sought to avoid them by expressly authorizing the creation and definition of County-level courts by the County government. The amendment's language also limits the power of the County courts to those subjects within the "[c]onstitutional authority of the County." RCA §1. As we will discuss further in this opinion, that caveat, if ratified, could have created potentially broad unintended consequences. Finally, the amendment requires that the trial of all County-level crimes take place within the County courts. This provision was designed to work around the current Constitution's mandate that "[t]he Trial of all Crimes . . . shall be held in a

federal district Court." Art. III, §2, cl. 3. By specifically articulating that the trial of County-level offenses would be within the jurisdiction of Ridgeway courts, the amendment's drafters anticipated that any constitutional questions which might otherwise arise from the Venue Clause would be preempted.

The core purpose of this proposed amendment is to reduce the constitutional uncertainty surrounding the planned Ridgeway County court system. But two points are worth making. First, we do not amend the Constitution solely to clear up uncertainty. Constitutional amendments are supposed to work some substantive change and, in general, the courts which down the road will be tasked with interpreting them will presume that they were intended to do so. There is a "basic presumption that the legislature does not waste words." *British v. Ozzymen*, 3 U. S. 60, 66 (2017). If a constitutional amendment were to be adopted without any substantive change in mind, the risk of an unintended consequence would be immense. See *Bostock v. Clayton County*, 590 U. S. ___, ___ (2020) (slip op., at 2) (explaining that while "small gestures" can "[s]ometimes . . . have unexpected consequences," "[m]ajor initiatives practically guarantee them."). Second, a redundant clarification would be purposeless. Constitutional uncertainty is not the same as constitutional invalidity. The existence of constitutional questions surrounding the Ridgeway County court system does not doom it to the scrap heap. Before considering the propriety of this amendment, we must first consider the legal landscape as it stands now. In particular, we must evaluate whether the system established by the Ridgeway County Charter comports with the Constitution.

B

Before delving into that constitutional question, a brief outline of the particulars of Ridgeway's admission to the United States and the structure of its planned court system is necessary. Both factors strongly suggest that Ridgeway was not intended to be a Municipality, but something more closely resembling a U. S. Territory and that its court system was designed to exercise purely local authority and fit within the structure of our existing judicial system. These details are crucial.

1

First, the County of Ridgeway was admitted to the United States, but not as a Municipality. While "admi[ssion] to the United States" might connote Municipal status, we think Congress's painstaking avoidance of the phrase "Municipality" is strong evidence that it did not understand Ridgeway to be a Municipality. One may search both the Ridgeway Admittance legislation, see Pub. L. No. 80–11, and the Ridgeway County Charter until they are blue in the face, but they would find no mention of Municipal status anywhere in either (believe us, we checked). This stands in stark contrast with how Congress has in every other case municipalized a subdivision.

In all past examples, namely the District of Columbia and the City of Las Vegas, Congress has expressly used the word "Municipality" to confer Municipal status. The Constitution, of course, does not mandate the usage of particular "magic words" in the process of municipalization, but that is not what we are here requiring. Our observation is merely this: "History shows that Congress knows how to [grant Municipal status] when it can muster the will." *McGirt v. Oklahoma*, 591 U. S. ___, ___ (2020) (slip op., at 8). If Congress has gone to such great lengths to avoid using

the phrase "Municipality"—the phrase which, in every other case, has been the way Congress has granted Municipal status—we should not lightly infer that municipalization was Congress's objective. In our view, this palpable drafting choice rules out the possibility of Municipal status for Ridgeway. But for those who remain doubtful, at least some degree of ambiguity must be conceded. It is untenable to argue that the County's admitting legislation *unambiguously* admitted Ridgeway as a Municipality. This ambiguity resolves the issue. When taking an action as significant and irrevocable as municipalization, Congress must "clearly express its intent to do so." *Ibid.* Because Congress did not *clearly* municipalize the County of Ridgeway, it simply did not municipalize the County of Ridgeway.

So where does that inescapable conclusion leave Ridgeway County? What is its legal status? While that question is certainly more difficult, in our judgment, the County's "admission to the United States" combined with the non-Municipal context of that admission indicates that Ridgeway County was given a legal status similar to that of a U. S. Territory like Puerto Rico or Guam. While absolutely an official body of the United States, entitled to certain aspects of inviolable sovereignty similar to those of a Municipality, see *Financial Oversight and Management Bd. for Puerto Rico v. Aurelius Investment*, LLC, 590 U. S. ___, ___ (2020) (Sotomayor, J., concurring in judgment) (slip op., at 14) ("The granting of neither [municipalhood] nor independence may be revoked, nor may land grants or *other 'vested interests'* be called back by a subsequent Congress"; emphasis added), Ridgeway is no Municipality. This conclusion exempts Ridgeway from some of the limits which exist on Municipal power but also withholds some of the special legal rights Municipalities may possess.

2

Second, the planned Ridgeway County Court was designed to exercise purely local authority and fit within the structure of our existing judicial system. According to the County Charter, the jurisdiction of the County Court is limited to deciding "cases arising under the Charter or ordinances of the County of Ridgeway." RCC §4.07. As such, the County Court adjudicates only local matters, such as criminal cases which arise from violations of local laws. In exercising this authority, the Charter binds the County Court to abide by the "Constitution" and compels its judges to swear an oath "of support for the Constitution of the United States." *Id.*, at §§4.02, 4.04. Both of these requirements are respectful of our federal structure.

The County Court, as contemplated by the Charter, also fits within the existing structure of our judicial system. To begin with, the Charter requires that all appeals of County Court decisions go to federal courts, beginning with the "Federal District Court, and then onto the Supreme Court of the United States." *Id.*, at §4.12. Expressly authorizing appeals and making a good faith effort to keep the federal courts involved in the process does not strike us as an attempt to undermine the judicial structure. Moreover, the County Admittance legislation directly affirms that the "Supreme Court may hear appeals from the final decisions of the judiciary of the County of Ridgeway." RCA §5. These two considerations underscore the good faith effort by Congress and Ridgeway proponents to comply with the Constitution's government structure. We cannot discount this in our analysis of the underlying constitutional question.

II

We now confront the question whether the Constitution as it currently stands authorizes the Ridgeway court system as contemplated by the Ridgeway County Charter. If it does, ratifying this amendment would be on its face unnecessary. In addressing the constitutionality of this arrangement, we must address the three objections commonly raised to the Ridgeway court system. First, some argue that the County Court's establishment violates the Constitution's prohibition on Municipal courts. Second, some protest that the assignment of jurisdiction to the County Court to try County-level crimes violates the Venue Clause's mandate that "[t]he Trial of all Crimes . . . shall be held in a federal district Court." Art. III, §2, cl. 3. Third, some object to the process of appointment for county judges. Those objectors believe the Constitution requires that the appointment of all judges be by the President with the Senate's approval. The County Charter, by contrast, provides for the appointment of Ridgeway judges through a process involving the County Executive and County Board. Accordingly, the objectors contend that the appointment process is unconstitutional. None of these arguments is persuasive and we reject each.

A

The first argument is the easiest of the lot to dispense with. The contention that the Ridgeway County Court violates the Constitution's prohibition on Municipal courts suffers from a basic problem as a matter of language: the County of Ridgeway is not a Municipality. That alone is sufficient, in our judgment, to reject this argument. But some might not be so easily persuaded. Certainly, some may suggest that our treatment of the No-Municipal-Courts Clause with respect to Ridgeway is not sufficiently attentive to the purposes the Clause was meant to accomplish. After all,

perhaps the object of the Clause was to establish a unitary judiciary, with all cases channeled through a federal system. There are three problems with this argument.

First, extratextual sources are usually only helpful as an aide for clearing up ambiguity. Whenever "the express terms of a statute [or the Constitution] give us one answer and extratextual considerations suggest another, [it is] no contest." *Bostock*, 590 U. S., at ___ (slip op., at 2). It is "[o]nly the written word" that is actually "the law" and "all persons are entitled to" rely on that. *Ibid.* Any argument which attempts to supplant the clear text of the Constitution with other considerations no reasonable ordinary reader would have any knowledge about must be understood as empty rhetoric. The Constitution's text is especially clear here: trying to read "Municipality" to include something which is demonstrably *not* a Municipality, see *supra*, at 4–5, is an exercise in absurdity. No reasonable reader could do it.

This argument casts aside any concern with textual fidelity and rests on two planks: purpose and legislative history. As mentioned, the argument's proponents suggest that the prohibition on Municipal courts was meant to do more than just prohibit Municipal courts. In support, they cite legislative history about how the No-Municipal-Courts Clause came to be. But there are two problems. One: legislative history is a disfavored resource in this Court. More often than not, it fails to actually shed much context on what a law was designed to do. After all, statements in a legislative record by particular Representatives or Senators do not necessarily represent the views of their entire chamber or of Congress writ large, nor do they go through the process of bicameralism and presentment. For that reason, they rep-

resent a "particularly dangerous" basis on which to interpret a provision of law, and we see no reason to think differently in the context of constitutional interpretation. *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U. S. 633, 650 (1990). Two: "Legislative history, [even] for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Department of Navy*, 562 U. S. 562, 574 (2011). Where there is no ambiguity in the pertinent text, an injection of legislative history cannot be the grounds for further examination.

Second, even to the extent purposes matter in evaluating the meaning of unambiguous text, the purposes animating the No-Municipal-Courts Clause do not cut strongly any one which way. There are obvious reasons to think the Clause's drafters may have wanted to prohibit Municipal courts but would have countenanced something like the Ridgeway County Court. One: the Ridgeway County Court is more closely integrated with the federal court system than a Municipal court would be. To begin with, it is presumably subject to the Constitution's amendments XVII and XXI (pertaining to expulsion and court-riding). Two: the County Court is more accountable to Congress than a Municipal court would be since Ridgeway has a legal status similar to that of a U. S. Territory. But see *supra*, at 5 (explaining that Ridgeway is still "entitled to certain aspects of inviolable sovereignty similar to those of a Municipality"). And three: although the overarching purpose of the Clause might be (and we have provided sufficient reasons to question how categorical this view is) to push towards a unitary court system, "[n]o law 'pursues its purposes at all costs.'" *Hernandez v. Mesa*, 589 U. S. ___, ___ (2020) (slip op., at 5) (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 234 (2013)). It is not our role to

narrowly divine the overarching purpose of a constitutional provision and then torture the provision's text until it confesses to fulfilling that purpose. That would substitute us for the legislature. On these grounds, we conclude the purpose debate is not so one-sided and definitely does not cut any which way in particular.

Third, it is a constitutional rule of thumb that not all general structural provisions apply with equal force to territories and their governments. See generally *Aurelius*, 590 U. S., at ___–___ (majority opinion) (slip op., at 21–22). As Ridgeway is legally analogous to a U. S. Territory, this principle applies to it. We need not address with too much specificity whether this applies to the No-Municipal-Courts Clause because any application of that Clause to Ridgeway would already rest on a very strained and antitextual reading of the Clause's text. The fact that adopting that alreadysuspect reading would raise additional questions under the general *Aurelius* principle validates our rejection of this line of argument.

B

The second argument proves a bit more difficult but is ultimately built on sand as well. It is true that the Constitution directs that the "Trial of all Crimes" happen within the "federal district Court" but neither text nor precedent require us to treat this provision as a bar to the trial of County-level crimes within the Ridgeway County Court.

1

First, consider the text. The Venue Clause's text closely parallels the language of the prototype Constitution's Venue Clause. That version's Venue Clause instructs that

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

On its face, this language does not distinguish between local and federal crimes, but reference to the provision's jury clause and this Court's application of it is sufficient to conclude that the provision's use of the phrase "all Crimes" was never understood to encompass non-federal offenses. As such, the Clause does not affirmatively dictate one way or another which court local offenses must be tried in.

The provision's jury clause mandates that all covered trials "be by Jury" but the right to a jury trial was never enforced by federal courts against the States until the incorporation of the Sixth Amendment's jury trial right against the States in 1968 pursuant to the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U. S. 145, 148–150 (1968) (incorporating the Sixth Amendment right to jury a trial on the grounds that it is "fundamental to the American scheme of justice"). If the prototype's Venue Clause was understood to apply to non-federal offenses, how to explain the gap between 1789 and 1968 where the right to a jury in State trials was not federally protected? The short answer is that there is no rational way to explain the gap under that reading of the Venue Clause.

If the Venue Clause reached non-federal offenses, the complete absence of federal constitutional protection for the right to a jury in non-federal trials until 1968 stands as entirely inexplicable. We cannot presume the Venue

Clause's text contained that reach but that it went completely unnoticed until at least 1968 and probably even to this very day (after all, incorporation of the jury trial right was under the Fourteenth Amendment, not the Venue Clause). To be clear, our holding is not that extratextual considerations override the text of the Venue Clause. On the contrary, our conclusion rests on the text itself. We simply recognize that the text was never understood to have the broad coverage proponents of this argument say it does and merely acknowledge that we can find no clear signal in the text which rebuts this unanimous historical consensus. On these grounds, we must conclude that this line of argument finds no home in the text of the Venue Clause.

2

In the absence of textual support, proponents of this line of argument might turn to our precedent. More specifically, they may invoke *United States v. District of Columbia*, 5 U. S. 95 (2018). But that case does not support the broad proposition that the Venue Clause *mandates* that non-federal offenses be tried solely in federal court. In that case, we relied on the Venue Clause as part of a "*presumption*" that Municipalities "*may*" prosecute "violations of their laws in federal court." *Id.*, at 99. In two respects, this reasoning fails to support the line of argument now before us.

First, this "presumption" had two pillars, not one. The second pillar was that the entity which sought to prosecute in federal court—the Municipality of Washington, D. C.—lacked the ability to establish its own courts. Thus, "denying them access to federal court would . . . mean preventing them from prosecuting altogether." *Ibid.* As we have explained here, however, the No-Municipal-Courts Clause does not prohibit the establishment of the Ridgeway

County Court because Ridgeway is not a Municipality. See *supra*, at 7–9. The presumption we relied on the Venue Clause for in *District of Columbia* is therefore inapposite in this case for the simple reason that its second pillar does not apply to Ridgeway. In this case, given the vastly different doctrinal context which results from the absence of the second pillar, *District of Columbia's* use of the Venue Clause is worth no more than regular dicta.

Second, as we stated in *District of Columbia*, our conclusion was permissive not compulsory. We based our holding on a presumption, which no other factor rebutted, that covered entities "*may*" prosecute in federal court. Importantly, our holding was not that they are required to. In the case of a Municipality, the absence of another option did mean that prosecuting in federal court was their only option. But, with respect to Ridgeway, that is not the case. Therein lies the trouble with attempting to transplant our reasoning from *District of Columbia* to vastly different contexts such as this one. The ruling hinged significantly on features which were unique to Municipalities. As we explained, however, the legal status given to Ridgeway "exempts [it] from some of the limits which exist on Municipal power" at the price of "withhold[ing] some of the special legal rights Municipalities may possess." *Supra*, at 5. Ridgeway is not a Municipality and applying legal frameworks built around Municipalities will often lead to confusing and erroneous results. That is why we must proceed with our interpretation of the plain text, set forth above. In this case, that means rejecting the proposed line of argument.

C

Finally, we address the last asserted problem with the Ridgeway County court system: the appointment process.

In particular, some argue that under the Appointments Clause all judges must be appointed by the President with the advice and consent of the Senate. While this argument does appear intuitive, it ignores the territorial status of Ridgeway. As we explained, "not all general structural provisions apply with equal force to territories and their governments." *Supra*, at 9. Straightforward application of our holding in *Aurelius* is sufficient to rebut this argument.

1

In *Aurelius*, we held that territorial officers—in this case, Ridgeway officials—who exercise "primarily local" authority are not subject to the requirements of the Constitution's Appointments Clause. 590 U. S., at ___ (slip op., at 17). The Court's conclusion rested on three main considerations: history, text, and structure.

First, adopting an interpretation of the Appointments Clause which sweeps in officials who perform only "primarily local" duties "would ignore the history . . . stretching back to the founding" which adopts a contrary understanding of the Appointments Clause. *Id.*, at ___ (slip op., at 18). When the First Congress legislated for the Northwest Territories, it created a House of Representatives "with members selected by election," not Presidential appointment. *Id.*, at ___ (slip op., at 10). Congress also created "an upper house of the territorial legislature, whose members were appointed by the President (without Senate confirmation) from lists provided by the elected, lower house." *Id.*, at ___–___ (slip op., at 10–11). If the Appointments Clause was understood to apply to primarily local offices, neither of these appointment schemes would have been constitutionally valid. But, at the time, this Court did not invalidate either. It would be a shocking exercise in hubris for this Court to

now conclude that it understands the strictures of the Constitution better than the First Congress or the founding generation's Supreme Court.

The practice of "creating by federal law local offices for the Territories . . . that are filled through election or local executive appointment has continued unabated *for more than two centuries*." *Id.*, at ___ (slip op., at 11) (emphasis added; citing, e.g., Act of Aug. 7, 1789, 1 Stat. 51, n. (*a*) (Northwest Territories local offices filled by election); Act of Apr. 7, 1798, §3, 1 Stat. 550 (Mississippi, same); Act of May 7, 1800, §2, 2 Stat. 59 (Indiana, same); Act of May 15, 1820, §3, 3 Stat. 584 (District of Columbia, same); Act of Apr. 30, 1900, §13, 31 Stat. 144 (Hawaii, same); Act of Aug. 24, 1912, §4, 37 Stat. 513 (Alaska, same); Act of Aug. 23, 1968, §4, 82 Stat. 837 (Virgin Islands, same); Act of Sept. 11, 1968, Pub. L. 90–497, §1, 82 Stat. 842 (Guam, same); Act of May 4, 1812, §3, 2 Stat. 723 (D. C. mayor appoints "all offices"); Act of June 4, 1812, §2, 2 Stat. 744 (Missouri Governor, similar); Act of Mar. 2, 1819, §3, 3 Stat. 494 (Arkansas, similar); Act of June 6, 1900, §2, 31 Stat. 322 (Alaska, similar); Act of Sept. 11, 1968, §1, 82 Stat. 843 (Guam, similar)). The "practice of the First Congress"—along with the two-century-long consensus that followed—is "strong evidence of the original meaning of the Constitution." *Ibid.*

Second and third, the text and structure of the Appointments Clause validates this two-century consensus. The Appointments Clause applies only to "Officers of the United States" (and "Ambassadors," "other public Ministers and Consuls," as well as "Judges of the supreme Court," but no one has suggested that any of these are pertinent to the presented issue). The textual question is whether the key term "of the United States" encompasses officers who ex-

ercise primarily local authority. The text "suggests a distinction between federal officers"—those who exercise the "power of the National Government"—and "nonfederal officers." *Id.*, at ___ (slip op., at 9). And from a structural standpoint, the Constitution authorizes Congress to legislate for territories in ways "that would exceed its powers, or at least would be very unusual" in other contexts. *Palmore v. United States*, 411 U. S. 389, 398 (1973). When Congress legislates and empowers territorial governments, or as here the Ridgeway County government, it is exercising something other than its regular national powers. On this basis, the *Aurelius* Court concluded that territorial officials who exercise primarily local authority are nonfederal officers and therefore not subject to the Appointments Clause.

2

This principle is also not just limited to territorial executive and legislative officials but encompasses territorial judges as well. Territorial judges who exercise primarily local authority are therefore not subject to the requirements of the Appointments Clause. This Court's approach in two cases, *O'Donoghue v. United States*, 289 U. S. 516 (1933), and *Palmore v. United States*, illustrates this rule.

First, in *O'Donoghue*, the Court considered whether Article III's tenure and appointment requirements applied to the judges of the courts of the District of Columbia. At the time, the Court held that they did. These courts, we reasoned, were "'courts of the United States'" and "recipients of the judicial power of the United States." 289 U. S., at 546, 548. As such, its judges had to meet and were entitled to Article III's requirements and privileges. But in *Palmore* the Court reached "what might seem the precisely opposite" conclusion. *Aurelius*, supra, at ___ (slip op., at 19). The

Court there concluded that D. C. Superior Court judges were not entitled to Article III's protections or obligated to meet its requirements. *Palmore*, supra, at 390. The Court explained the difference from *O'Donoghue* by pointing to changes Congress had made to the nature of the court. Prior to that change, the court had been one unified body, which adjudicated both local and federal claims. But Congress separated the court into two entities, one of which—the D. C. Superior Court—only adjudicated local issues. The *Palmore* Court determined that because the "focus" of this Court was "primarily upon . . . matters of strictly local concern," it was a local entity not subject to the tenure and appointment requirements of the Federal Constitution. *Id.*, at 407.

3

As we mentioned earlier, the Ridgeway County Court was "designed to exercise purely local authority." *Supra*, at 5. It therefore fits comfortably within the framework established by *Aurelius* and *Palmore*: its judges are not subject to the Appointments Clause. In fact, the jurisdiction of the Ridgeway County Court closely resembles the jurisdiction granted to the D. C. Superior Court in question in *Palmore*. The court in *Palmore* was given only "criminal jurisdiction over . . . those cases brought under any law applicable exclusively to the District of Columbia." *Aurelius, supra*, at ___ (slip op., at 20). Similarly, the Ridgeway County Court has only criminal jurisdiction over those cases arising under Ridgeway law. In light of these considerations, we conclude that the Ridgeway County Court as described in the County Charter is consistent with the Appointments Clause.

III

Having now concluded that the Ridgeway County Court is already authorized by the Constitution precisely as imagined in the County Charter, we must consider whether any other arguments would justify ratifying the proposed amendment anyways. None do.

A

We are not persuaded by the view that we should amend the Constitution merely to clarify the constitutionality of something that is already constitutional. As our analysis, shows, see *supra*, at 6–16, the Ridgeway County Court is constitutional exactly as it stands. And our analysis in this opinion is binding on all courts because this opinion represents the views of a majority of the Court.

Against this backdrop, where as a matter of constitutional doctrine the constitutionality of the Ridgeway County Court is already firmly established, we can think of no reason for inserting an amendment like the one proposed here into the Constitution. As other Justices have explained, there is no reason to add a redundant clarification to the Constitution.

B

We are equally unpersuaded by the view that our duty when it comes to ratifying amendments is purely clerical, such that we should ratify any amendment which would not clearly result in unintended consequences. As we explained in the beginning, our job in the amendment ratification context is to ensure that the Constitution's basic structure is not unnecessarily or unduly altered. See *supra*, at 1. That entails more than just policing for unintended consequences. But even if that were our role, the redundancy of this proposed amendment carries an innate risk of unintended consequences.

Specific provisions within the proposed amendment raise special concern. First, the amendment purports to restrict the power of the Ridgeway County Court to those subjects within the "[c]onstitutional authority of the County." RCA §1. As should be clear by now, the powers of the County are conferred by its Charter, not the Constitution. An unintended consequence of this provision, had we elected to ratify it, could have been the shrinking of the County Court's valid jurisdiction from where it stands in the status quo. Congress likely did not intend this when it proposed the amendment, but that is a clear potential side effect of ratification. Second, the amendment's Venue Clause generally requires that all Ridgeway-level criminal trials be within the County's court system, but that denies future flexibility to the County government over the structure of County affairs. As the Constitution currently stands, the Ridgeway County Court is valid exactly as it is presently conceived, *and* the County government retains discretion to shape the future of the County's internal structures. Accordingly, denying this proposed amendment not only prevents the unnecessary alteration of the Constitution, it prevents potential unintended consequences down the road in the operation of the County Court.

* * *

We deny this amendment not because we disagree with the notion of a County Court or because we are unhappy with its planned structure and authorities. We deny this amendment because the Constitution already authorizes all of that in its current form and without the risk of unforeseen consequences. When it comes to the ratification of constitutional amendments, we have a gatekeeping role to play. It is a narrow role, and most amendments will make their

way through. But today is the rare case where it is both necessary and appropriate that we deny ratification and we are glad to fulfill our role.

We concur.

Syllabus

LUXCIETY *v.* ACIDRAPS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-53. Decided July 23, 2020.

After Judge AcidRaps cited petitioner for contempt of court, the President's authorized representative informed petitioner that the President had offered him a pardon. Petitioner accepted. After the fact, the President attempted to revoke the pardon. Petitioner filed this appeal challenging both the legality of the original citation and the President's revocation of his pardon.

Held : Once a pardon has been offered and accepted, it cannot be revoked. Accepting a pardon, although it eliminates any court-ordered punishment, constitutes an admission of guilt. If the President could grant and then, subsequent to acceptance, revoke a pardon there would be substantial risk of unconstitutionally compelled self-incrimination, in violation of the Fifth Amendment. As such post-acceptance pardon revocations are unconstitutional.

PITNEY, J., delivered the opinion for a unanimous court.

JUSTICE PITNEY delivered the opinion of the Court.

On the sixth of June 2020, Judge AcidRaps cited petitioner with "multiple contempt citations." Later that same day the President's pardon attorney notified petitioner that the President had offered a full pardon for these contempt citations. Petitioner accepted the pardon. President Technozo later attempted to withdraw this pardon, leading petitioner to seek relief in this Court. Petitioner asserts that once a pardon has been accepted it cannot be withdrawn. We agree.

There are a few fundamental rules intrinsic to a Presidential pardon; some set by the Constitution, others interpreted by this Court. Firstly, an acceptance of a pardon is an inherent acceptance of guilt "by confession of guilt implied in the acceptance of a pardon." *Burdick v. United States*, 236 U. S. 79, 90–91, (1915). This is a logical conclusion as to be pardoned for a crime one must be guilty of that crime. Secondly, the President has the authority to issue conditions to a pardon; these conditions must be accepted by the "pardoned." "A pardon may be conditional." *Ibid.* Thirdly, a pardon is not coequal to an acquittal. "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws." *United States v. Wilson*, 32 U. S. 150, 160 (1833). A pardon, simply, is a contract between citizen and Executive[1] to "turn a blind eye" to crimes committed. Finally, the Presidential Pardon is cemented in Constitutional law and is not available to judicial or legislative intervention: "[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." U. S. Const., Art. II, §2, cl. 1.

With this in mind we may begin to probe at the controversy at hand. When the President's Pardon Attorney offered petitioner an unconditional pardon, he was acting on the President's behalf. Upon accepting the pardon, petitioner accepted both guilt and the terms of the pardon, the former being the keystone to this case. If President Technozo could constitutionally revoke a pardon then petitioner would find himself being compelled to admit guilt. This

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[1] The President is tasked with the execution of our laws, including execution of reprisals for violating it.

would be a clear contravention of the Constitution's protections against self-incrimination. See Amdt. V. A system where a President could revoke a pardon would go against a foundational rule of the pardon system: "A pardon is an act of *grace." Wilson, supra* (emphasis added). If pardons could be revoked, they would become malicious devices to snare difficult defendants into admitting guilt. We therefore find that, except in cases where agreed upon conditions are violated, pardons once accepted cannot be retracted.

Petitioner also asserts that respondent, Judge AcidRaps, issued an unlawful contempt citation. However, in accepting the President's pardon, petitioner has admitted guilt and acceptance of the punishment handed down by Judge AcidRaps. Petitioner does not contend that he felt compelled into acceptance of this pardon, so appeal has been forfeited. We refuse to entertain petitioner's questions on the matter.

The pardon issued to petitioner stands as do the contempt citations issued by respondent. The judgment of the District Court is therefore vacated and the case is remanded with instructions to implement the pardon.

It is so ordered.

Per Curiam

IN RE COMPLAINTS AGAINST FOUR CIRCUIT JUDGES

ON MOTION FOR LEAVE TO FILE JUDICIAL ETHICS COMPLAINTS

No. 09-56. Decided July 24, 2020.

PER CURIAM.

Before us is a motion for leave to file judicial ethics complaints against four of the five judges who now or previously sat on the Court of Appeals. Two of the complained of judges continue to sit on the court. The complaints were originally presented to the Court of Appeals itself, but that court recognized the difficulties which could arise from attempting to adjudicate such a matter in house. The matter was thus referred to this Court. We have considered the substance of the proposed complaints and have determined that, in light of their spurious and incomplete nature, allowing them to move any further would be inconsistent with both applicable federal law and the Constitution. The motion for leave to file the judicial ethics complaints is therefore denied.

I

A

Federal law authorizes the Court of Appeals to act as a "Court of the Judiciary" with jurisdiction to "oversee the proper conduct of [j]udges." Enhancing the Judiciary Act, Pub L. No. 67–4, §104(a). The EJA's statutory scheme provides that "[u]pon a complaint being filed with the Court of Appeals . . . the Court shall issue a summons for the [complained-of judge] to appear and answer questions against him." §104(a). When complaints are referred by the Court of Appeals to us under this Court's Rule 19 or are otherwise presented for our consideration, our consistent practice has

been to treat such complaints as motions for leave to file a complaint. See, e.g., *In re Complaint Against Judge Acid-Raps*, 9 U. S. 167 (2020) (denying the "motion for leave to file a judicial ethics complaint"). When considering such motions, we determine whether the provided complaint is cognizable under the terms of the EJA.

Judicial ethics complaints under the EJA are meant to determine whether a judge committed conduct that "violated a law or the Rules of Judicial Ethics." §104(c). If they did, the reviewing court can impose, as appropriate, a variety of penalties. These penalties range from "censur[ing] the judge" to temporarily "suspending" them or reporting them for impeachment or expulsion. *Id.*, at §§104(c)(1)–(4). Not all complaints are cognizable under the plain terms of the statute. As both the statute and the Constitution confirm, as we explain later, for a complaint to warrant review there must be a reasonable possibility that it will result in punishment. If that were not the case, the ethics review system would be exposed to a serious potential for abuse. We consider this case against that legal backdrop.

B

This case arises from a complaint filed by MamaGobies. In it, she alleges broadly that each judge "has violated Federal law in the form of the Judicial Restructuring Act of 2020, and therefore is subject to judicial discipline." The specific judges complained of were Chief Judge Hudson, Judge Arrighi, Judge Silberman, and Judge Liu. No elaboration on that general statement was provided for any of the judges and no additional evidence was included. Of those judges, only two remain on the Court of Appeals: Chief Judge Hudson and Judge Arrighi. The rest retired to pursue other avenues of employment.

II

The statute authorizing the Court of Appeals to hear judicial ethics complaints is rather open-ended and could be understood to require that *any* document styled as a "complaint" receive full consideration. Certainly, that is the position complainant appears to press. We are not persuaded, however. In view of bedrock Article III principles that govern all laws respecting judicial procedure, we conclude that the better reading of the EJA confers jurisdiction only over those complaints which, on their face, present a reasonable possibility of resulting in punishment.

A

Our cases understand Article III to require that any "laws affecting the Judiciary . . . be consistent with basic principles of justice" and be "rationally justifiable under the circumstances." *Benda v. United States*, 6 U. S. 24, 38 (2019). This interpretation is based on the Judiciary's strong constitutional interest in its legitimacy. As we have repeatedly admonished, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U. S. 361, 407 (1989). Simply put, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U. S. 11, 14 (1954). It follows that "public perception of judicial integrity is 'a state interest of the highest order.'" *WilliamsYulee v. Florida Bar*, 575 U. S. 433, 445–446 (2015) (citation omitted). For that reason, courts maintain a strong stake in the "untainted administration of justice." *Mesarosh v. United States*, 352 U. S. 1, 14 (1956).

The *Benda* principle channels these bedrock principles into a concise rule and helps to guarantee that the Judiciary does not become "complicit in perpetrating an injustice of

procedure." 6 U. S., at 38. When confronted with a law offending this principle, courts have a "duty to invalidate" it on its face. *Ibid.* And when confronted with an *application* of a law which offends this principle, courts have a duty to refuse that application. *Ibid.*

But when it comes to a statute of indeterminate scope, courts have a general obligation to avoid—"unless the terms of [the statute] rende[r] it unavoidable"—"giv[ing] [it] a construction . . . which should involve a violation, however unintentional, of the [C]onstitution." *Parsons v. Bedford*, 3 Pet. 433, 448–449 (1830). Therefore, when a statute respecting judicial procedure is ambiguous but one interpretation has the potential to apply unjustly or irrationally, courts must adopt an interpretation which avoids those problems.

B

Applied here, that principle requires us to hold that the EJA does not confer jurisdiction to hear judicial ethics complaints which do not have a reasonable possibility of resulting in punishment. It would be both unjust and irrational to require federal judges with life tenure to answer anything styled as a "complaint" even when that document does not contain any meritorious or substantive charge which would likely result in punishment upon full review. If judges could be subjected to a process of that kind, the limited ethics oversight envisioned by the EJA would quickly transform into a roving inquisition of unknown power that could be used to antagonize federal judges.

Moreover, such spurious complaints could easily distract judges from the performance of the duties assigned to them by the Constitution and laws of the United States, compromising the independence and protection afforded by the Constitution to the courts. We therefore conclude, in view of Article III, that the EJA does not confer jurisdiction on

either us or the Court of Appeals to hear complaints which lack a reasonable possibility of resulting in punishment.

III

The complaint presented in this case fits comfortably into that category. It is both spurious and incomplete. It lacks any specific description of the circumstances which actually may have resulted in an ethics violation or any direct statement of what law or ethics code was violated. Just as it would not be sufficient to simply say that a judge had "violated the Code of Judicial Ethics" without citing a specific canon, it is insufficient to merely say the judges complained of here "violated the Judicial Restructuring Act" without at least pointing to a specific provision of it. The provided complaint tells us absolutely nothing about this case and does not raise a reasonable possibility that punishment would follow from our review.

* * *

We therefore deny the motion for leave to file judicial ethics complaints in this case.

It is so ordered.

Syllabus

SIRALEXANDERHAMILTON, PETITIONER *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09-47. Decided July 30, 2020.

Amid heated nationwide protests against the United States State Police (USSP), an agency of the Municipality of Washington, D. C., Congress began considering legislation to abolish the agency or reform its internal accountability structures. In connection with its consideration of those pieces of legislation, a congressional committee subpoenaed petitioner to testify and provide documents pertaining to USSP's internal affairs system. Petitioner showed up to testify but declined to turn over the requested documents. He was charged with obstruction of Congress for his violation of the subpoena. He moved to dismiss that prosecution on the grounds that Congress lacked a legitimate legislative purpose for its subpoena because both pieces of potential legislation would violate the Constitution. The District Court denied the motion and petitioner appealed.

Held : Congress lacks the power to enact legislation abolishing or reforming the internal structures of a local agency like USSP. As such, a subpoena issued in connection with those legislative purposes is both illegitimate and unenforceable. Pp. 4–13.

(a) Congress lacks the power to abolish a local agency like the United States State Police. For Congress to act, it must have authority vested by the Constitution. None of the three plausible sources of congressional authority in this case (the Commerce Clause, Necessary and Proper Clause, and the Guarantee Clause) authorizes this type of legislation. Pp. 4–10.

(b) Congress cannot reform the internal structures of a local agency like the United States State Police without running afoul of the anticommandeering doctrine, which prohibits Congress from regulating inviolably sovereign entities like Municipalities. Congress can regulate the People of the United States directly,

but it cannot commandeer and regulate through the Municipalities.

4:20-1957, reversed and remanded.

HOLMES, C.J., delivered the opinion for a unanimous Court.

CHIEF JUSTICE HOLMES delivered the opinion of the Court.

Section 1505 of Title 18 makes it a federal crime to refuse compliance with a subpoena validly issued by a committee of Congress. For a subpoena to be valid, it must be issued in furtherance of a legitimate legislative purpose. Our cases explain that a legislative subpoena must "concern[] a subject on which legislation 'could be had.'" *Eastland v. United States Servicemen's Fund*, 421 U. S. 491, 506 (1975) (citation omitted). Petitioner is a former chief of the United States State Police. While he headed USSP, petitioner was subpoenaed to produce a variety of internal affairs records in connection with legislation pending before Congress that would have purported to abolish the agency. He refused to comply. He was held in contempt of Congress and referred for prosecution by the United States Attorney, who filed charges. Petitioner seeks dismissal of the charges on the grounds that the underlying subpoena was invalid. The question before us is if a legitimate legislative purpose existed for petitioner's subpoena. If one did, then as a substantive matter, the subpoena was valid and dismissal on this ground must be refused. If none existed, however, the Government has not stated a case under 18 U. S. C. §1505 and dismissal is mandatory.

The Government, for its part, concedes this point. It advances no plausible legislative purpose and expressly states

that Congress failed to identify one. But we have an independent obligation to assure ourselves that the subpoena is indeed invalid before declaring it so. The legislative record suggests that the subpoena may have been issued to assist Congress in deciding whether to pass legislation abolishing USSP. But Congress has no power to abolish a Municipal agency without any plausible grant of authority in the Constitution to do so. Alternatively, in light of the specific documents requested, perhaps the subpoena was issued to help Congress determine whether to reform USSP's accountability structures. Congress, however, cannot hijack a Municipality's control of its agency's internal structures. We therefore hold—because Congress can neither abolish nor reform a Municipal agency without violating the Municipality's inviolable sovereignty—that the subpoena at issue here was invalid. We reverse the District Court's denial of the motion to dismiss and remand for further proceedings consistent with this opinion.

I

A

Congress's power to issue subpoenas is a byproduct of its power to legislate. As the Constitution's text suffices to show, "Congress has no enumerated . . . power to . . . issue subpoenas." *Trump v. Mazars USA, LLP*, 591 U. S. ___, ___ (2020) (slip op., at 11). But we have nevertheless held that each House has power "to secure needed information" in order to legislate. *McGrain v. Daugherty*, 273 U. S. 135, 161 (1927). As we have explained, the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.*, at 174. Without access to this power, Congress would be essentially "shooting in the dark" when it came to lawmaking. *Trump, supra*, at ___ (slip op., at 11). Congress would be unable to legislate "wisely or effectively." *McGrain, supra*, at 175. For that

reason, the congressional power to obtain information by way of subpoena is "broad" and "indispensable" even if not technically enumerated. *Watkins v. United States*, 354 U. S. 178, 187 (1957).

When exercising this power, Congress is entitled to considerable deference. For instance, although "Congress and its committees may issue subpoenas 'only in furtherance of a legislative purpose[,]' . . . a conclusion by Congress that a subpoena is so justified warrants great respect." *Xia v. House of Representatives*, 7 U. S. 56 (2019) (*per curiam*) (citation omitted). This deference, however, "has its predicates." *Ibid.* In order for a subpoena to qualify for deferential review, Congress must have "disclosed" the "subpoena's basis . . . upfront and with 'sufficient particularity.'" *Ibid* (citation omitted). Where that is not the case, we must scrutinize the record and make our best judgment as to the legitimacy of potential legislative interests in a subpoena.

In the case of a prosecution under 18 U. S. C. §1505, any charges must arise from the "due and proper" use of Congress's power of inquiry. By definition, an unconstitutional subpoena would be neither "due" nor "proper." As such, the applicable statute only criminalizes the failure to comply with constitutionally valid subpoenas.

B

Petitioner is a former USSP chief. At one point during his tenure, protests swept the Nation—centered at Washington, D. C.—that took issue with a perceived pattern of abuse coming from USSP officers. Protestors demanded that the agency either face serious reform or be abolished. USSP was an agency authorized by D. C. law. Congress, recognizing the political import of the situation, sought to get involved. It began considering legislation to abolish USSP (the No Justice, No Peace, Abolish the State Police

Act) and congressional committees issued subpoenas for testimony and information from senior USSP officials.

Among those who received subpoenas was petitioner, the USSP chief at the time. While he did appear and provide testimony, he declined to produce the documents requested by Congress. The documents requested included: "[internal affairs] decisions," "[d]isciplinary actions related to complaints," and "[p]atrol recordings that occurred during [the] protests." Senate Judiciary, Ethics, and Government Affairs Committee, June 4th USSP Subpoena, pp. 1–2 (2020). In response to petitioner's noncompliance, Congress referred him to the United States Attorney for prosecution. Charges were filed and petitioner moved to dismiss. The District Court declined that motion in a minute order and certified its decision for appeal.

Petitioner filed a petition for a writ of certiorari which sought review of the District Court's denial of dismissal. In his petition, petitioner asserts the underlying congressional subpoena was invalid for lack of a legitimate legislative purpose because any possible legislation which Congress may have been considering with the subpoenaed information would have been unconstitutional. As such, he says, his prosecution for violating the subpoena is invalid as well. We granted certiorari. 9 U. S. ___ (2020).

II

To assess the underlying subpoena, we must assess the plausible justifications for it. While the Government does not suggest any, our scrutiny of the record reveals two possibilities. First, the subpoena may have been connected to the then-pending legislation to abolish USSP. And second, the subpoena may have been intended to explore the possibility of congressional reform for the USSP internal ac-

countability system. Neither of these potential pieces of legislation, however, would involve a legitimate exercise of congressional power. As such, we reject both arguments.

II

Under the Constitution, and in our federal system, "the National Government possesses only limited powers." *National Federation of Independent Business v. Sebelius*, 567 U. S. 519, 533 (2012). The "[Municipalities] and the people retain the remainder." *Ibid.* Under this arrangement, Congress may exercise power only by pointing to a specific grant of authority within the Constitution's text. Chief Justice Marshall observed two centuries ago that "the question respecting the extent of the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819). To resolve the validity of this potential legislative purpose, we must once again determine whether the Constitution grants Congress the power to effectuate it. We must determine whether the Constitution grants Congress the power to enact legislation abolishing USSP. If it does, this is a legitimate legislative purpose for a subpoena; if it does not, however, this argument must be rejected.

The Federal Government "is acknowledged by all to be one of enumerated powers." *Ibid.* Rather than simply grant Congress a general power to govern—by granting the power to "perform all the conceivable functions of government"—the Framers thought it most prudent to "list" specific powers that Congress would be authorized to exercise on behalf of the People. *NFIB*, *supra*, at 533-534. The "enumeration of powers is also a limitation of powers." *Ibid.* After all, "enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). Therefore,

in order for Congress to prevail on this argument, the claimed legislative purpose must be somehow rooted in one of its enumerated authorities. With respect to the proposed purpose here (the potential abolition of USSP), we can think of three possible sources of authority: the Commerce Clause, the Necessary and Proper Clause, and the Republican Government Clause. None, however, is availing.

1

We begin with the Commerce Clause, the usual source of congressional authority to legislate. In most cases where there is power to be had, the Commerce Clause will be the fountainhead. But the Commerce Clause plainly does not authorize the action under consideration here.

As an initial matter, even if the sphere of its reach appears to be so, the power conferred by the Commerce Clause is not unlimited. It is true that virtually every activity touches on commerce in some respect, but the Commerce Clause does not confer the broad "police power" possessed by the Municipalities to generally "safeguard the vital interests of [their] people." *United States v. Morrison*, 529 U. S. 598, 618–619 (2000); *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 434 (1934). Under the Commerce Clause, Congress may only regulate "the channels of . . . commerce," "persons or things in . . . commerce," and "those activities that substantially affect . . . commerce." *Morrison, supra*, at 609. To begin with, legislation to abolish USSP could not plausibly be justified as regulating the "channels" of commerce or "persons or things" in them. As such, our analysis must focus on the third category of permissible regulation: activities that "substantially affect" commerce. For three reasons, we conclude that USSP and its activities do not substantially affect commerce.

First, the activities of USSP are not commercial in nature. USSP is a law enforcement agency tasked with enforcing Municipal laws in the District of Columbia. This is not inherently commercial. Our cases have always recognized, however much they differ on particular details, that at its core commerce involves "economic" behavior. *United States v. Lopez*, 514 U. S. 549, 556 (1995) (citing *Wickard v. Filburn*, 317 U. S. 111, 125 (1942)). We can find no justification for extending the reach of the Commerce Clause to local government activity that has *no* demonstrable connection to economic affairs whatsoever. If we were to do so, we would be rewriting the law, not applying it.

Second, the chain of causation required to find a link to commerce is too attenuated to be marked substantial. In order for there to be *any* connection to commerce, we would have to assume a scenario where: (1) a USSP officer makes an arrest; (2) the arrested person was involved in commerce; (3) due to their arrest, the person was unable to take part in commerce for a period of time; and (4) that small period of noninvolvement substantially affected commerce. Even taking the logic of that hypothetical scenario as a given, a hypothetical incident of that kind could not alone be sufficient to justify broad legislation abolishing an entire police force. But even that is a generous view because the logic of the hypothetical breaks down on its own terms. A small interruption in one person's involvement with the commercial system does not "substantially affect" commerce. Moreover, arrests are not legally made without justification. Any harm to the commercial system is more fairly traceable to the decision of someone involved in that system to commit a crime, not a dutiful law enforcement officer's decision to do their job.

And third, accepting this Commerce Clause theory would erase any meaningful limit on Congress's authority. As we

have consistently made clear in our commerce rulings, the scope of the Commerce Clause "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon . . . commerce so indirect and remote that to embrace them . . . would effectively obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937). We cannot approve of an application of the Commerce Clause which would have this effect. And it is abundantly clear that if we were to accept this reading, there would likely remain nothing outside the reach of the Federal Government's commerce power. We therefore conclude that the Commerce Clause does not provide a legitimate basis for Congress to adopt legislation abolishing USSP.

2

We next consider the Necessary and Proper Clause. Certainly, that Clause is worded broadly and could be construed to have expansive effect. But our cases, from the founding generation to now, have rejected such a grand conception of the Clause's force. The Clause, instead, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise." *McCulloch*, 4 Wheat., at 418. It empowers Congress to "legislate on that vast mass of incidental powers which must be involved in the constitution," but it does not permit the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated. Id., at 411, 421. The Clause is "'merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.'" *Kinsella v. United States ex rel. Singleton*, 361

U. S. 234, 247 (1960) (quoting VI Writings of James Madison 383 (G. Hunt ed. 1906)).

Without pointing to a specific enumerated power, Congress cannot invoke the Necessary and Proper Clause as the basis for legislation. The Necessary and Proper Clause confers no independent authority; it merely supplements existing authority and authorizes the creation of comprehensive pieces of legislation that are foundationally based on an enumerated power. We therefore conclude that Congress cannot rest its case entirely on the Necessary and Proper Clause. Additionally, we have our doubts as to both the necessity and propriety of the legislation suggested here.

First, there is nothing in the legislative record which supports even a facial case that abolishing USSP would be "necessary." Every law enforcement agency has its share of troubles, but nobody has ever suggested that such troubles automatically warrant abolishment. If that were the case, it is unclear if any law enforcement agency would be left standing. If Congress were to make a case that abolishing USSP is "necessary" based on its completely normal troubles, it would need to explain why it has chosen to act on the necessity here and not with respect to every other agency that shares those same troubles. When Congress asserts necessity but leaves a considerable region within that field of purported necessity unaddressed, chances are the claim of necessity is exaggerated.

Second, we have an independent obligation to review the propriety of congressional action under the Necessary and Proper Clause. And the requirement of propriety is a demanding one, especially in cases like these where Congress seeks to transgress usual boundaries. As we recently reaffirmed, "[l]aws which are not 'consistent with the letter and

spirit of the constitution . . . are not *proper* means for carrying into Execution' the powers of the Government." *Caldwell v. United States*, 9 U. S. 80, 93 (2020) (quoting *NFIB*, 567 U. S., at 537). Such laws are mere "acts of usurpation which deserve to be treated as such." *Ibid* (quoting *Printz v. United States*, 521 U. S. 898, 924 (1997); quotation marks omitted). Invasions of the Constitution's federalist structure are presumptively against its letter and spirit. We can think of no adequate reason to rebut that presumption here.

3

Finally, we consider the Guarantee Clause, which secures to each Municipality a "Republican Form of Government." U. S. Const., art. IV, §4. Congress has the power to enact legislation effectuating this guarantee. As an original matter, Congress may have had a case for abolishing USSP under this Clause years ago when it merely existed as part of the District of Columbia's "baseline infrastructure." *Cabot v. State Police*, 9 U. S. ___, ___ (2020) (slip op., at 2). But now, the democratically-elected government of the District of Columbia has adopted legislation authorizing USSP and any federal intervention now would be precisely *against* the republican values the Guarantee Clause endeavors to secure for each Municipality.

B

Having made clear that the Constitution does not authorize Congress to pass legislation abolishing USSP and therefore having ruled out the first potential legislative purpose for the underlying subpoena, we turn now to the backup possibility. That is, we consider whether Congress has the power to enact legislation reforming USSP's internal accountability structure without Municipal consent. For the reasons that follow, we conclude Congress does not.

1

It is incontestable that the Constitution establishes a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U. S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U. S. 455, 458 (1990). While the Municipalities "surrendered many of their powers to the new Federal Government," they retained a "residuary and inviolable sovereignty" that protects them from certain acts of interference by the Federal Government. *Printz*, 521 U. S., at 918–919; The Federalist No. 39, at 245 (J. Madison). See also *In re Ratification of the Proposed Ridgeway Courts Amendment*, 9 U. S. 154, 159 (2020) (slip op., at 5) (referring to the same principle of "inviolable sovereignty"). The Framers explicitly chose to reject the "concept of a central government that would act upon and through the [Municipalities], and instead designed a system in which the [Municipal] and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Printz, supra*, at 919–920 (quoting The Federalist No. 15, at 109); 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911).

As such, the Federal Constitution empowers Congress to pass laws directly regulating the People of the United States, but it does not authorize Congress to infringe on the inviolable sovereignty of Municipalities by "commandeering" their entities and implementing federal legislation *through* them. 521 U. S., at 925. The proper test under this doctrine is to ask whether an Act of Congress regulates the People or an inviolably sovereign entity. The former is permissible; the latter is not.

2

Were Congress to enact legislation that purported to reform the internal accountability structures of USSP, it

would not be regulating the People. It would be unmistakable regulating the Municipality of Washington, D. C., by directing one of its agencies to comply with a particular federal structure for handling internal affairs matters. The Constitution does not permit this type of federal encroachment. In rebuttal, one might argue that Congress would not be regulating the Municipality, but rather the conduct of its employees, who comprise part of the People of the United States. But this distinction merely attempts to circumvent the constitutional problem. It does not solve it.

First, controlling the employees of a Municipality is really just a backdoor method for commandeering the Municipality itself. A Municipality is a legal entity and apart from its employees, it has no capacity to effectuate any policy or implement any program. If the Constitution permitted Congress to issue orders to Municipal employees, the anti-commandeering doctrine would be an empty protection. We cannot presume that the Constitution's requirements were meant to be so easily avoided.

Second, in a principal-agent relationship, as with the relationship between a Municipality and one of its employees, actions taken by the agent are attributable to the principal. If Congress could issue orders that specifically applied only to Municipal employees acting in their official capacity, it would be directly tantamount to commandeering the Municipality itself. This is a clear violation of the anti-commandeering doctrine. We therefore conclude that this proposed legislative purpose does not work either. As such, the subpoena is invalid, as is the prosecution for its violation. The charges must be dismissed.

III

Petitioner also presses two other points, one pertaining to his speedy trial rights and another relating to counsel choice. In light of our conclusion that the charges must be

dismissed on other grounds, these remaining arguments are now moot and we decline to issue any holding in respect to them. We think it appropriate to add one comment on the speedy trial issue, however. Petitioner alleges that his right to a speedy trial was violated by the roughly onemonth delay from the point of him being charged to the commencement of proceedings, but fails to note that the delay was mostly attributable to his chosen attorney's failure to state his appearance for close to the entire span of that period. Given this context, the case for a speedy trial dismissal appears specious. As petitioner himself notes, one of the primary considerations in a speedy trial case is "whether the government or the . . . defendant is more to blame for th[e] delay." Brief for Petitioner 11 (quoting *Doggett v. United States*, 505 U. S. 647, 651 (1992)).

In this case, it seems quite apparent to us that the primary blame for the delay rests with the defendant. When a defendant opts to choose their own counsel, they bear the burden of ensuring that their attorney is aware of the proceedings they are hired for. Delay like the kind at issue here generally does not present a speedy trial claim.

* * *

We hold that Congress lacks the power to enact legislation either abolishing or internally reforming local agencies like USSP. As such, a subpoena issued in connection with those legislative purposes is illegitimate and unenforceable. We reverse the District Court's denial of the motion to dismiss and remand for any proceedings which remain.

It is so ordered.

Syllabus

BLUEKILLERFOREVER, PETITIONER *v.* UNITED STATES

ON PETITION FOR WRIT OF ANYTIME REVIEW TO THE UNITED STATES GOVERNMENT

No. 09-46. Decided August 1, 2020.

Congress enacted the Shielding Our Officers Act in June 2020 in part to prevent Municipal officers from arresting federal officers for crimes against Municipal law. After petitioner was detained under that Act for arresting a federal officer on the grounds of reckless driving, he challenged subsections 2(a) and (b) of the SOOA for infringing on the Municipality's right as an inviolably sovereign entity not to be commandeered by the Federal Government.

Held: Subsections 2(a) and (b) of the SOOA are unconstitutional. Municipal officers may enforce municipal law against federal officers unless the federal officer is responding to an emergency situation. Pp. 1–3.

(a) SOOA infringes on the Tenth Amendment rights of Municipalities. Congress cannot infringe on a Municipality's right to enact laws for the protection of their citizens by preventing their officers from carrying out those laws. Pp. 1–2.

(b) Moreover, *Hamilton v. United States*, 9 U. S. 196, bars Congress from regulating through the Municipalities; it can only regulate the People of the United States directly. It is clear that SOOA regulates the Municipalities, rather than the People of the United States. As such, it is unconstitutional. Pp. 2–3.

(c) The Constitution itself may limit the ability of municipal law enforcement to obstruct federal agents in emergency situations, but that does not authorize Congress to supplement that constitutional protection with an unconstitutional law like the SOOA. P. 3.

JAY, J., delivered the opinion for a unanimous Court.

JUSTICE JAY delivered the opinion of the Court.

Our current Constitution establishes a system of "dual sovereignty" with Federal institutions having nationwide jurisdiction and Municipal institutions having local jurisdiction. The case before us examines the distinctive relationship and power struggle between both these institutions: the United States and the District of Columbia. The current dilemma before us began when a Sergeant from the Metropolitan Police Department was detained for supposedly violating the Shielding Our Officers Act (SOOA), Pub. L. No. 80–9. According to this law, federal officers are immune from arrest for reckless driving unless they receive three warnings, which contends with the reckless driving statute under municipal law that does not afford federal officers three warnings. The Constitution is very explicit on this matter asserting that Congress does not have the power to enact such legislation on the District of Columbia.

I

At the center of this case lies the Tenth Amendment which bestows the municipalities with many powers. The Constitution forbids the federal government from enacting legislation that is not within their power. According to the Tenth Amendment all powers not bestowed to the federal government "are reserved to the Municipalities." One of those powers is a "police power . . . 'to safeguard the vital interests of [the Municipality's] people.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U. S. 400, 410 (1983) (quoting *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 434 (1934)). This power allows municipal law makers to establish municipal offences and punishments, which municipal law enforcement agencies must enforce. In this case, Congress is overstepping their authority by prohibiting the District of Columbia to exercise its police power on federal law enforcement officers. The federal government

crossed the line by coercing the District of Columbia to exercise their police power the way Congress says so rather than the way the Municipality determines to be in the "vital interests of [its] people." *Ibid.*

Congress cannot force municipalities to decide between enforcing their own police power or to face detainment from federal officers. By doing this they would utterly ruin the federalist structure enshrined in the Tenth Amendment.

II

Although the Federal Constitution permits Congress to pass laws that directly control the People of the United States, it does not allow them to infringe upon the sovereignty of the Municipalities. In *Hamilton v. United States*, 9 U. S. 196 (2020), this Court held that Congress does not have the power to "to infringe on the inviolable sovereignty of Municipalities by commandeering their entities and implementing federal legislation through them." *Id.*, at 207. Congress, by enforcing the SOOA, is not directly controlling the People of the United States but rather is regulating the Municipality by preventing municipal officers from carrying out their duty. In that sense, Congress is attempting to control and regulate the employees of the Municipality, which would signify that Congress is directly attempting to control the Municipality itself.

Moreover, this court held that Congress "lacks the power to enact legislation either abolishing or internally reforming local agencies." *Id.*, at 209. It is quite evident that the SOOA drastically internally reforms municipal law enforcement agencies by limiting their powers to enforce their own municipal law. The SOOA is one of those attempts by the Congress to commandeer the Municipality and is a threat to the core values that this nation is built upon.

The Constitution itself may limit the ability of municipal law enforcement to obstruct federal agents in emergency situations, but that does not authorize Congress to supplement that constitutional protection with an unconstitutional law like the SOOA.

* * *

We hold that federal statutes such as the SOOA that limit the enforcement of municipal law on federal law enforcement officers and effectively amend portions of municipal criminal law violate the Tenth Amendment. As such, the Shielding Our Officers Act, Pub. L. No. 80–9, is unconstitutional and overturned as to subsections 2(a) and (b).

It is so ordered.

Syllabus

IN RE MAMAGOBIES

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

No. 09-51. Argued July 22, 2020—Decided August 9, 2020.

After the now-defunct Court of Appeals issued an "administrative order" directing the District Court to revoke the administrative privileges of its Clerk, the Clerk of the District Court filed this petition for mandamus asking that the administrative order be overturned. We granted a stay and set the petition for briefing and argument.

Held: The administrative order was inconsistent with both the terms of the Judicial Restructuring Act and the Constitution. Pp. 1–2.

(a) Though this case is now technically moot, it may proceed to the point of judgment due to the potential for repetition in a hypothetical future situation. Pp. 1–2.

(b) The order violated the JRA because Congress does not use *obiter dictum*. Its text must be treated as controlling. The text did not authorize the Court of Appeals to issue administrative orders implementing its own preferred policies. It authorized the Court of Appeals to review the administrative actions of the District Court and ensure they fit within the reasonable realm of acceptability. P. 2.

(c) The order was unconstitutional because the Benda principle bars the application of legislation affecting the Judiciary in an unjust or irrational way. If the JRA had granted the complete administrative control over the District Court the Court of Appeals claimed, it would have been unjust and irrational. Only this Court and the District Court have an appropriate place in that sphere. P. 2.

PITNEY, J., delivered the opinion for a unanimous Court.

JUSTICE PITNEY delivered the opinion of the Court.

On the 10th of July 2020, the now-defunct Court of Appeals issued an administrative order against Clerk of the District Court MamaGobies removing their administrative privileges from the District Court server. Petitioner, not satisfied with the "inadequate," Pet. for Cert. 4, ruling from the Court of Appeals filed for a writ of mandamus and an emergency stay. Petitioner argued that "administrative oversight is not administrative power." Brief for Petitioner 2. Petitioner also stated that the ruling was unconstitutional per *Benda v. United States*, 6 U. S. 24 (2018). We agree on both arguments.

First, we must recognize that the Judicial Restructuring Act (JRA) has been amended and the controversial sections repealed. Therefore, the withstanding stays on the Court of Appeals are held and their respective orders overturned. While petitioner now fails to hold standing per *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992), we have chosen to continue to answer the questions presented to avoid future controversies arising of a similar nature. The Court of Appeals cited "administrative oversight," JRA §2(c) when removing petitioner's administrative power from the District Court server. It is the general understanding that Congress does not use *obiter dictum*. Words used in the legislature have intended meaning. What is omitted does not imply open to interpretation. Omittance is as powerful a tool as the written word. When Congress chose not to give the Circuit Court unlimited control over the running of the District Court, it did so intentionally. Congress did not intend for the Circuit Court to enact its personal, or political, ideologies onto the District. Oversight authority is the limited authority to ensure actions taken by those under such authority are not beyond a reasonable scope of acceptability.

We have discussed before that "Congress may neither intentionally require the Judiciary to be complicit in perpetrating an injustice of procedure, nor may it do so through carelessness or by giving insufficient thought to the consequences of its decision." *Benda, supra,* at 38. The assumption that Congress gave the Court of Appeals complete administrative control over the District Court and its locations is a clear injustice of the District Court's ability to selfregulate its procedures. We find the assumption unlawful. The Constitution can also guide us in our exploration of this topic: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U. S. Const., Art. III, §1. The judicial power includes the power to self-regulate procedures, see Rules of the Supreme Court, *sua sponte* motions. While Congress has the authority to veto rules before they enter procedures such as the Federal Rules of Civil Procedure, this administrative oversight is guaranteed by the checks and balances of the United States Constitution.

For the reasons above, we find the ruling of the defunct Court of Appeals unlawful and overturn the same.

It is so ordered.

ORDERS FOR FEBRUARY 15, 2020, THROUGH AUGUST 14, 2020

February 17, 2020

Petition Withdrawn.

No. 09-03. KIANINJA5 v. SECRETARY OF THE AIR FORCE. Petition was withdrawn by petitioner.

Review Denied.

No. 08-15. SMARTEL83004C v. UNITED STATES DISTRICT COURT. Review denied.

Petition Withdrawn.

No. 09-04. LUXCIETY v. UNITED STATES DISTRICT COURT. Petition was withdrawn by petitioner.

February 28, 2020

Review Denied.

No. 08-16. YOURFRENCHYSALAD v. HOUSE OF REPRESENTATIVES. Review denied.

Petition Withdrawn.

No. 09-05. FATHERCYBORGCALDWELL v. FEDERAL ELECTIONS COMMITTEE. Petition was withdrawn by petitioner.

February 29, 2020

Certiorari Denied.

No. 09-01. LUXCIETY v. UNITED STATES STATE POLICE. Certiorari denied.

Petition Withdrawn.

No. 09-02. LUXCIETY v. UNITED STATES. Petition was withdrawn by petitioner.

March 22, 2020

Review Denied.

No. 09-06. THORVISUALS v. RICHOCALDWELL. Review denied.

Review Denied.

No. 09-07. KINGGEORGETHE_III v. DISTRICT OF COLUMBIA. Review denied.

Petition withdrawn.

No. 09-09. AUSTINBOBOSTON1 v. DISTRICT OF COLUMBIA. Petition was withdrawn by petitioner.

March 24, 2020

Dismissed.

No. 09-08. IN RE CONJMAN. Dismissed due to mootness.

March 30, 2020

Petition withdrawn.

No. 09-10. KIND_YADA v. UNITED STATES. Petition was withdrawn by petitioner.

April 4, 2020

Preemptive Stay Granted.

No. 09-13. An Administrative Stay has been granted in the Supreme Court of the United States for RESET4K v. UNITED STATES I., 9 U. S. 1 (2020). The Administrative Stay shall expire at 10:20PM EST on April 5th, 2020 pending the submission of a petition for review. Justices Stewart and Thompson note their dissent.

April 5, 2020

Petition withdrawn.

No. 09-11. ELIJAHJUNAID v. DEPARTMENT OF COMMERCE AND LABOR. Petition was withdrawn by petitioner.

Petition withdrawn.

No. 09-12. LUXCIETY v. CONJMAN. Petition was withdrawn by petitioner.

April 6, 2020

Review Granted.

No. 09-13. RESET4K v. UNITED STATES I. Review granted.

April 8, 2020

Certiorari Granted.

No. 09-14. RICHOCALDWELL v. D_AYYDREAM. Certiorari granted.

Review Granted.

No. 09-15. RS_HUDSON v. UNITED STATES. Review granted.

Summary Disposition Denied.

No. 09-15. RS_HUDSON v. UNITED STATES. Summary disposition denied.

April 9, 2020

Petition withdrawn.

No. 09-16. ALEXJCABOT v. RESET4K. Petition was withdrawn by petitioner.

April 21, 2020

Review Granted.

No. 09-17. FATHERCYBORGCALDWELL v. UNITED STATES. Review granted.

April 28, 2020

Petition withdrawn.

No. 09-18. TANKSLAYER10 v. UNITED STATES. Petition was withdrawn by petitioner.

Petition withdrawn.

No. 09-19. LIAMD_MCDONALD v. NASANOVUH. Petition was withdrawn by petitioner.

April 29, 2020

Review Granted.

No. 09-20. devTools, et al. v. United States. Review granted.

Certiorari Granted.

No. 09-21. Monkey2747 v. United States. Certiorari granted.

May 9, 2020

Certiorari denied.

No. 09-22. United States v. Kolibob. Certiorari denied.

May 13, 2020

Struck.

No. 09-24. MamaGobies v. United States I. Case struck for failure to file a timely petition.

Petition withdrawn.

No. 09-30. Viraldownload v. District of Columbia. Petition was withdrawn by petitioner.

May 15, 2020

Certiorari Granted.

No. 09-25. United States v. National Union Party. Certiorari granted.

May 19, 2020

Review Granted.

No. 09-26. In re TheBeatle2012. Review granted.

May 20, 2020

Dismissed.

No. 09-25. United States v. National Union Party. Certiorari dismissed.

Review Denied.

No. 09-27. IN RE NOTABLEANTS. Review denied.

May 22, 2020

Certiorari Granted.

No. 09-28. UNITED STATES V. LUV_ZERO. Certiorari granted.

May 25, 2020

Question Certified.

No. 09-29. UNITED STATES V. ALEXJCABOT. Question certified to the Supreme Court: Is the District of Columbia--in its entirety--within the special maritime or territorial jurisdiction of the United States or is it under exclusive jurisdiction of the United States or the District of Columbia?.

May 29, 2020

Petition withdrawn.

No. 09-32. RUSSIANOLDSCHOO V. UNITED STATES STATE POLICE. Petition withdrawn by petitioner.

June 1, 2020

Certiorari denied.

No. 09-31. ALEXJCABOT V. UNITED STATES STATE POLICE Certiorari denied.

JUSTICE BORK, dissenting in the denial of certiorari.

Under *Technozo v. United States*, when a "clan manager . . . act[s] pursuant to their prescribed duties in an area traditionally within the group holder's control," questions about the legality of their conduct are nonjusticiable.[1] When presented with such a case, a court must "dismiss [it]."[2] Although it may not initially seem like one, this is one of those cases. I would have granted certiorari solely for the purpose of vacating the judgment of the district court and remanding with instructions to dismiss this case as nonjusticiable.

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[1] 6 U. S. 5, 6.

[2] *Federal Election Comm'n v. Raps*, 6 U. S. 42, 43.

I

After committing a federal crime in Washington, D. C., the petitioner was arrested by a USSP officer. He responded by filing this lawsuit in the district court, asserting variously that the arrest was illegal because (1) USSP is not authorized to enforce federal law; (2) the city councils cannot give them that authorization; (3) the city laws authorizing law enforcement activity by USSP are invalid since USSP is authorized to operate in both cities, which is unconstitutional for a city agency; and (4) USSP isn't subject to oversight by the D. C. Attorney General and shouldn't be engaging in law enforcement.

Without briefs and oral argument, I do not pretend to have a conclusive answer on one or any of these questions. In this case, however, it doesn't matter yet.

Let's start from the beginning, forgetting about these questions and considering the relief that the petitioner asks the courts to grant him once all is said and done. He asks for an injunction preventing USSP from functioning as law enforcement. But we already know that USSP acted as law enforcement in Washington, D. C., before any of the legal authorizations the petitioner challenges took effect.[3] On what grounds was that? Before the D. C. City Council got around to formally legalizing USSP law enforcement activity, USSP was authorized and empowered by the city's lead developer to act as law enforcement to ensure the city would always maintain a baseline level of in-game activity. They operated as part of the city's baseline infrastructure. To my knowledge, the lead developer hasn't withdrawn that status from the agency.

So now add back in all the legal questions and let's assume that the petitioner wins on all of them. What then? There would still be one final unanswered question standing between him and all the relief he seeks: Was the lead developer's infrastructural empowerment of USSP legally sound? Because the lead developer is a clan manager, the district court would need to apply the *Technozo* framework to figure out if that question is justiciable before attempting to answer it. If it isn't justiciable, the petitioner would not be able to obtain relief in his lawsuit and the lawsuit would have to be dismissed for failure to state a claim on which relief can be granted. If it is, however, the district court would have to answer that question before deciding on

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[3] *E.g., Snowbleed v. Nevada Highway Patrol,* 4 U. S. 20 (concurring opinion).

any relief. Either way, *Technozo* is an unavoidable element of this case.

As I will show, under *Technozo*, the question of if the lead developer's infrastructural empowerment of USSP was legal is a nonjusticiable one. I would therefore vacate the district court's judgment and send the case back with instructions to dismiss.

II

Applying *Technozo*, I conclude the underlying question in this case is nonjusticiable.

A

The first step of *Technozo* is to figure out if the clan manager action at issue was within the "prescribed duties" of the clan manager.[4] As part of this analysis, we consult facts like the "[c]ommon sense" role of the clan manager who acted, which can be reasonably inferred from their job description.[5] In *Technozo*, for example, the actions of a "community clan manager" were before the Court.[6] That particular clan manager's role involved little more than "engaging the community with streams of gameplay and other methods."[7] It wasn't at all "apparent that [those] duties involve[d]" the conduct at issue in the case.[8] He could not invoke the protection of our justiciability rules.

This case, however, involves a development clan manager, whose prescribed duties are far more significant than those of a community clan manager.[9] In my view, these duties encompass the provision of baseline infrastructure within their city of responsibility. This has always been an aspect of a development clan manager's role and if the group holder did not intend for that to be the case, surely, he'd have "explicitly stated [that] somewhere."[10]

For example, when the City of Las Vegas was first released, that city's lead developer[11] included several pieces of baseline infrastruc-

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[4] *Technozo, supra*, at 6.

[5] *Id.*, at 12.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] Cf. *Raps*, 6 U. S. at 46.

[10] *Technozo, supra*, at 13 (emphasis in original).

[11] That city's lead developer is the incumbent group holder.

ture in the city. Among them: a bank which had not received a government charter or been licensed by a government agency; a sheriff's office which had not been approved of by any government entity at the time; and an emergency medical service with no government permit.[12] When a development clan manager launches a city, they have to provide some form of baseline infrastructure to guarantee that the city is equipped to obtain and retain players.

The actions of the development clan managers challenged in this case are standard operating procedure: USSP is part of Washington, D. C.'s baseline infrastructure. They may be a controversial agency which many disapprove of, but their origins are bona fide fact. Having proven now that establishing USSP was within the scope of the development clan managers' prescribed duties, I move on to the second step of *Technozo* to assess if this case is therefore nonjusticiable.

B

The second step of *Technozo* is to figure out if the prescribed duty before the Court falls within "an area traditionally within the group holder's control."[13] If it does, the clan manager's actions are nonjusticiable and immune from judicial review. If it doesn't, the courts may exercise judicial review. Here, we conduct a "history-driven [analysis]."[14] In my view, providing the baseline infrastructure for a city is an area traditionally within the group holder's control.

As I just recounted, upon the release of Las Vegas the city's lead developer included crucial pieces of baseline infrastructure to guarantee the game's playability.[15] In every city release in our country's history, this has been standard practice. When the first version of Washington, D. C. was released,[16] government agencies were included and authorized to act as law enforcement *even though* there is no evidence that any legislation was enacted at the time authorizing those law enforcement activities.

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[12] All necessary proof of these baseline features is available to the public. For reference, one could look to the establishment dates for each of these entities and cross-reference that with the dates formal legal authorization arrived.

[13] *Id.*, at 6.

[14] *Id.*, at 13.

[15] See *supra*, at 4.

[16] This was our country's first city.

Think of an analogy: baseline infrastructure is like a foundation and legislation is the building atop it. Baseline infrastructure provides a starting point where our government proceeds from. It is not the role of this Court or any unelected judge to tear down that scaffolding when it no longer considers it necessary. It is the lawmakers in Congress who have the right to scrap powers granted as part of baseline infrastructure when *they* deem them unnecessary, but doing so requires more than protest, strongly-worded letters, or even indirect Acts of Congress. To do away with aspects of baseline infrastructure, Congress must pass *"clea[r]"* legislation.[17]

No clear legislation from Congress repealing the powers of USSP conferred as part of Washington, D. C.'s baseline infrastructure exists. I would not substitute the courts for Congress.

* * *

Because I conclude this case is nonjusticiable, I would have granted certiorari and vacated the district court's judgment and remanded with instructions to dismiss. Because the Court chooses to sit this case out for now, I respectfully dissent and hope that someday soon the views I express in this opinion will become those of the Court.

Dismissed.

No. 09-28. UNITED STATES v. LUV_ZERO. Certiorari dismissed.

June 4, 2020

Certiorari Granted.

No. 09-33. UNITED STATES v. MAXONYMOUS. Certiorari granted.

June 10, 2020

Certiorari Denied.

No. 09-34. RONALDWCALDWELL v. DISTRICT OF COLUMBIA. Certiorari denied.

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[17] *Technozo*, 6 U. S. at 11 (emphasis in original).

Struck.

No. 09-37. NINJAMASTER9008 v. GGRAIDS05. Case struck for failure to pursue.

June 15, 2020

Certiorari Granted.

No. 09-36. DASTIC v. DISTRICT OF COLUMBIA. Certiorari granted.

June 17, 2020

Certiorari Denied.

No. 09-39. IN RE LUXCIETY. Certiorari denied.

June 18, 2020

Certiorari Granted.

No. 09-38. PUPPYLOFTUS18 v. KIND_YADA. Certiorari granted. Contempt citation stayed.

Petition withdrawn.

No. 09-40. KIND_YADA, ET AL. v. SURPRISEPARTY, ET AL. Petition withdrawn by petitioner.

Petition withdrawn.

No. 09-41. RESET4K v. UNITED STATES SENATE. Petition withdrawn by petitioner.

June 25, 2020

Certiorari Granted.

No. 09-44. UNITED STATES v. DANIALL. Certiorari granted.

June 30, 2020

Certiorari Granted.

No. 09-42. ALEXJCABOT v. UNITED STATES. Certiorari granted.

July 1, 2020

Review Granted.

No. 09-46. BLUEKILLERFOREVER v. UNITED STATES. Review granted.

Certiorari Granted.

No. 09-47. SIRALEXANDERHAMILTON v. UNITED STATES. Certiorari granted.

July 6, 2020

Dismissed.

No. 09-44. UNITED STATES v. DANIALL. Dismissed as moot.

July 7, 2020

Certiorari Granted.

No. 09-52. TASKFORCEBLUE v. UNITED STATES. Certiorari granted.

July 8, 2020

Certiorari Granted.

No. 09-53. LUXCIETY v. ACIDRAPS. Certorari granted.

July 10, 2020

Petition withdrawn.

No. 09-54. ALEXJCABOT v. UNITED STATES SENATE. Petition withdrawn by petitioner.

Mandamus Granted.

No. 09-51. IN RE MAMAGOBIES. Mandamus granted and set for oral argument.

July 14, 2020

Petition withdrawn.

No. 09-43. IN RE ACIDRAPS. Petition withdrawn by petitioner.

July 16, 2020

Petition withdrawn.

No. 09-59. COMEBACK232 v. DISTRICT OF COLUMBIA. Petition withdrawn by petitioner.

Certiorari Granted.

No. 09-56. IN RE MAMAGOBIES. Certiorari granted.

July 19, 2020

Certiorari Granted.

No. 09-58. NASANOVUH v. UNITED STATES. Certiorari granted.

July 22, 2020

Certiorari Denied.

No. 09-61. UNITED STATES v. INCELS UNION I. Certiorari denied.

July 23, 2020

Petition withdrawn.

No. 09-60. OCEANPIANET v. UNITED STATES. Petition withdrawn by petitioner.

Certiorari Denied.

No. 09-62. LUXCIETY v. CONTEMPT CITATIONS I. Certiorari denied.

July 26, 2020

Certiorari Denied.

No. 09-64. LUXCIETY v. CONTEMPT CITATIONS II. Certiorari denied.

Set For Argument.

No. 09-65. IN RE MAXONYMOUS. Mandamus set for briefs and oral argument.

July 27, 2020

Petition withdrawn.

No. 09-58. NASANOVUH v. UNITED STATES. Petition withdrawn by petitioner.

July 29, 2020

Certiorari Granted.

No. 09-63. UNITED STATES v. INCELS UNION II. Certiorari granted.

August 1, 2020

Certiorari Denied.

No. 09-68. CITRONSOUP v. UNITED STATES I. Certiorari denied.

August 2, 2020

Petition withdrawn.

No. 09-66. DISN_IZE v HOUSE OF REPRESENTATIVES. Petition withdrawn by petitioner.

August 4, 2020

Certiorari Granted.

No. 09-70. CITRONSOUP v. UNITED STATES II. Certiorari granted.

August 5, 2020

Suspended.

No. 09-69. IN RE COMPLAINT AGAINST JUDGE JETPACKSOUP. Judge suspended from duties pending proceedings of the case.

Expelled.

No. 09-71. IN RE COMPLAINT AGAINST JUDGE ARRIGHI. Judge expelled from the District Court.

August 6, 2020

Dismissed.

No. 09-65. IN RE MAXONYMOUS. Dismissed as moot.

Petition withdrawn.

No. 09-67. UNITED STATES V. ATTORNEY_YADA. Petition withdrawn by petitioner.

Dismissed.

No. 09-71. IN RE COMPLAINT AGAINST JUDGE ARRIGHI. Dismissed as moot.

August 8, 2020

Certiorari Granted.

No. 09-73. IMPERIAL_CEASER V. UNITED STATES. Certiorari granted.

Question Certified.

No. 09-74. SINZ_ESQ V. NIR2602. Question certified to the Supreme Court: Does the Federal District Court have jurisdiction to hear a matter where Congress has not explicitly given permission to, but Clan Management does?

August 10, 2020

Petition withdrawn.

No. 09-72. TOMSKIPETSKI1 V. UNITED STATES. Petition withdrawn by petitioner.

August 12, 2020

Certiorari Denied.

No. 09-77. JETPACKSIMP V. SUPREME COURT OF THE UNITED STATES. Certiorari denied.

August 13, 2020

Stay Denied.

No. 09-69. IN RE COMPLAINT AGAINST JUDGE JETPACKSOUP. Motion for stay of suspension from judicial duties denied.

August 14, 2020

Petition withdrawn.

No. 09-75. ATTORNEY_YADA V. ACIDRAPS. Petition withdrawn by petitioner.

REPORTER'S NOTE

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