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## The Power to “Try” “Cases of Impeachment”: Some Reflections on the Finality, Transparency and Integrity of Senate Adjudications of Presidential Impeachments (Including that of Donald J. Trump)

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THE POWER TO “TRY” “CASES OF IMPEACHMENT”: SOME REFLECTIONS ON THE FINALITY, TRANSPARENCY AND INTEGRITY OF SENATE ADJUDICATIONS OF PRESIDENTIAL IMPEACHMENTS (INCLUDING THAT OF DONALD J. TRUMP)

BY VIKRAM DAVID AMAR\* AND JASON MAZZONE\*\*

INTRODUCTION

The Senate’s role in conducting impeachment trials is no doubt a complicated one. It is clear (at least we think so) that impeachment proceedings are not criminal cases in which the Fifth and Sixth Amendments’ criminal procedural protections themselves apply. Article I of the Constitution explicitly provides that “[j]udgment in cases of impeachment shall extend no further than to removal from Office [and disqualification from future office] but the Party . . . shall . . . be liable and subject to . . . punishment according to law.”<sup>1</sup> So, an impeachment defendant is never in danger of losing his liberty, or even his bank account. Instead, what is at stake is a public-sector job (not unlike a dismissal process for revoking tenure of a public law school professor). The impeachment-judgment clause makes clear the impeachment trial is not a mechanism for punishment the way the criminal law is; impeachment is primarily a device to enable removal from office of someone who is unfit to continue. For that reason, the protections of the Sixth Amendment’s right of accused persons to confront witnesses against them (which applies only in “criminal prosecutions”) have no direct application to impeachment proceedings.<sup>2</sup>

To be sure, some folks who may invoke these amendments may concede that they do not technically apply, but that we should borrow from the spirit of the amendments to make impeachment proceedings more fair and just. Even if some analogies between impeachment processes and criminal

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1. U.S. CONST. art I, § 3, cl. 7.

2. For this reason, our esteemed friend and (for one of us) co-author Steve Calabresi was surely wrong in suggesting that the House of Representatives had been violating President Trump’s Sixth Amendment rights by not giving him an adequate chance to confront his accusers (including the whistleblower). See, e.g., Steve Calabresi, *House Democrats Violate the Sixth Amendment by Denying Trump a Public Trial*, THE DAILY CALLER (Nov. 8, 2019), <https://dailycaller.com/2019/11/08/calabresi-trump-public-trial/> [<https://perma.cc/6E2X-ZC2F>].

proceedings were apt—and analogies always require judgment to apply—the right to confront would not be relevant to the House’s impeachment phase since that would be akin to a grand jury indictment (not a trial), and accused persons have no Sixth Amendment right to confront in the grand jury process.<sup>3</sup>

Some commentators have focused less on the Sixth Amendment, and more on the Fifth Amendment’s double jeopardy provision.<sup>4</sup> Again, an impeachment trial risks neither “life” nor “limb,” and is not a criminal proceeding at all, making the double jeopardy provision inapplicable. But does the inapplicability of double jeopardy mean, as Neal Katyal has intimated, that now that the current Senate has decided not to convict President Trump, if he is reelected in 2020 he could be subject to (re)impeachment and (re)trial by a new Senate based on the same charges and the same evidence?<sup>5</sup>

### I. SENATE RELITIGATION?

We think not, and indeed are quite skeptical about the constitutional propriety of conducting a redo of presidential impeachment proceedings after an intervening presidential election in which a President is reelected, for two reasons.

First, even though as noted above impeachment trials are not criminal, they are nevertheless, under the words of Article I, “cases” in which the Senate, acting “on Oath or Affirmation” for this purpose, is empowered to “try” such matters and reach “judgment[s]” about the individuals who are being “tried.”<sup>6</sup> Indeed, it is precisely because the Senate is acting as a sort of judicial tribunal in a trial of impeachment that the federal courts (including the Supreme Court) should respect the judicial decisions made by the Senate and treat the results of impeachment trials as “political questions” ordinarily not susceptible to federal judicial review. Just as state and federal courts in the United States would respect adjudications made by courts in other countries under principles of *res judicata*, so too they should respect judgments made by the Senate sitting as a judicial tribunal in impeachment cases. (This *res*

3. This is yet another reason that Calabresi’s Sixth Amendment musings are off the mark. See *supra* note 2 and accompanying text.

4. Amber Phillips, *Can Trump be impeached again?*, WASH. POST (Feb. 6, 2020), <https://www.washingtonpost.com/politics/2020/02/06/can-trump-be-impeached-again/> [<https://perma.cc/3MNK-AQKJ>].

5. See Neal Katyal (@neal\_katyal), Twitter (Dec. 5, 2019, 8:22 AM), [https://twitter.com/neal\\_katyal/status/1202594066942353409](https://twitter.com/neal_katyal/status/1202594066942353409) [<https://perma.cc/R7NN-QKD3>] (“Impt note on future: If the Senate doesn’t vote to convict Trump . . . he could of course be retried in the new Senate should he win re-election. Double jeopardy protections do not apply. And Senators voting on impeachment in the next months know this.”).

6. U.S. CONST. art I, § 3, cl. 6–7. See also *infra* Section III.

judicata explanation for why impeachment trials are “political questions”—which focuses on the distinctively judicial character of the constitutional language empowering the Senate in impeachment proceedings—helps make political question doctrine less subjective and less capacious).<sup>7</sup>

Of course, even the law of *res judicata* has nuances and exceptions.<sup>8</sup> When a court purports to resolve a matter but never really addresses the merits, then nothing has been adjudicated in a way that must be respected by future tribunals.<sup>9</sup> This might explain some of what the Supreme Court said and did in its 1993 decision in *Nixon v. United States*,<sup>10</sup> the most famous Court opinion involving an impeachment case. Judge Walter Nixon was a U.S. District Judge in Mississippi who had been criminally convicted—of making false statements to a federal grand jury—and sentenced to prison. Because, even after his conviction and criminal sentence, he continued to hold office as a federal judge, the House of Representatives adopted articles of impeachment against him and presented them to the Senate. In turn, the Senate, pursuant to its own impeachment rules (specifically, Senate Impeachment Rule XI), appointed a Senate committee to receive testimony and other evidence and to report back to the whole Senate. After the committee had done its work and presented the full Senate with a report and transcript, the entire Senate cast ballots, with more than two-thirds (the constitutional requirement for conviction) of the senators voting to convict Judge Nixon and remove him from judicial office. Thereafter, Nixon filed suit in federal district court, arguing that Senate Rule XI violated the Constitution inasmuch as Article I of the Constitution gives to the entire Senate, and not just a committee, the authority to “try” all impeachment cases. In other words, argued Nixon, because the entire Senate had not participated in the evidentiary hearings, the Senate had not conducted the trial that the impeachment provisions of the Constitution contemplate. After he lost in the lower courts, Nixon sought review in the Supreme Court.

In rejecting Nixon’s challenge, the Court said: “Before we reach the merits of [Nixon’s] claim [that the Senate’s actions violate the Impeachment

7. Indeed, as Justice Byron White pointed out, “the issue in the political question doctrine is *not* whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, e.g., Art. I, § 8, and it is not that disputes implicating these provisions are nonjusticiable. Rather, the issue is whether the Constitution has given one of the political branches *final responsibility for interpreting* the scope and nature of such a power.”—in other words, for adjudicating the limits of the power. *Nixon v. United States*, 506 U.S. 224, 240 (1993) (White, J., concurring). See Vikram D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1115 (1988).

8. RESTATEMENT (SECOND) OF JUDGEMENTS § 17 (AM. LAW INST. 1982).

9. RESTATEMENT (SECOND) OF JUDGEMENTS § 13 (AM. LAW INST. 1982).

10. 506 U.S. 224 (1993).

Trial Clause of Article I], we must decide whether it is ‘justiciable,’ that is, whether it is a claim that may be resolved by the [federal] courts. We conclude that it is not.”<sup>11</sup> This sweeping language in *Nixon*, characterizing impeachment disputes as “[non]justiciable” in the federal courts, has led some observers to conclude that the case holds that judicial review of impeachment is simply never available.

But the *Nixon* Court did not completely live up to its own rhetoric about staying out of the merits of impeachment proceedings. While the Court said it had no power to look at the legality of Senate Rule XI, the Court went on to say that Rule XI is completely consistent with the meaning of the word “try” in Article I of the Constitution: “The word ‘try,’ both in 1787 and later, has considerably broader meanings than those to which [Mr. Nixon] would limit it . . . [W]e cannot say that the Framers used the word ‘try’ as an implied limitation on the method by which the Senate might proceed in trying impeachments.”<sup>12</sup> That language is *not* the Court staying out; it is the Court stepping in and deciding that the Senate has *not* violated the (Court’s understanding of the) text of the Constitution. Saying the Senate has not violated the Constitution is not the same thing as saying the Court has no power to decide whether the Senate has violated the Constitution. The first is a ruling on the merits; only the latter is a true, pure invocation of political question doctrine.

The point was illustrated by a hypothetical posed by Justice Souter in an opinion concurring in the judgment in *Nixon*. He mused: “If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply a ‘bad guy,’ . . . judicial interference might well be appropriate.”<sup>13</sup> Justice Souter’s approach (and that of other justices who concurred in the judgment) is not one in which the Court steadfastly stays out; it is one in which the Court leans in, but presumably gives a great deal of latitude to the Senate (and presumably the House too) on what is constitutionally permissible.<sup>14</sup> Under this view, perhaps we should not think of political question doctrine in the impeachment setting as a yes or no determination of whether federal courts can review, but instead think of it more in terms of how much deference the Court will afford the political branches even if the Court does not stay out of the matter entirely. And even though Chief Justice Rehnquist’s majority opinion in *Nixon* does not

11. *Id.* at 226.

12. *Id.* at 229–30.

13. *Id.* at 253–54 (Souter, J., concurring).

14. *See id.* (Souter, J., concurring).

explicitly embrace Justice Souter's approach—and instead purports to adopt a bright-line rule of no judicial review—the fact that the majority does opine on the meaning of the word “try,” and how the Senate's definition of that word is a permissible one, suggests more agreement with Justice Souter than the majority itself acknowledges.<sup>15</sup> This language and analysis in *Nixon* might be completely consistent with the *res judicata* vision of political question doctrine in the impeachment setting sketched out above. If the court of another country resolved disputes by flipping coins, or by simply characterizing an accused as a bad guy, without ever going through a coherent process to make findings of particular culpability *vel non*, perhaps U.S. courts would not accord *res judicata* respect to those decisions.

But, bringing things back to President Trump's impeachment, given that the senators who voted against conviction determined either that the allegations embodied in the articles of impeachment were not sufficiently grave to warrant removal at this time,<sup>16</sup> or that the allegations (especially as regards impermissible motive by the President) lacked adequate proof, then those determinations—whether or not supported by the weight of the evidence—might have to be respected by a subsequent Senate, sitting as a judicial tribunal itself in a subsequent case of impeachment.<sup>17</sup> Of course, if the Senate had decided never to take up the 2019 articles of impeachment before the 2020 elections, as it could have if it had wanted,<sup>18</sup> then nothing would have been adjudged and no results would be treated as *res judicata*. Or, if new important evidence is uncovered after 2020, that too might affect application of *res judicata*, since significant new evidence can sometimes cause courts to reopen things already adjudicated in non-impeachment cases.<sup>19</sup>

Mention of the 2020 elections brings us to the second reason we have qualms about re-litigation of impeachment allegations after presidential reelection. As the *Nixon* Court noted (and as is obvious from the structure of the Constitution) impeachment powers were lodged in the House and Senate—and not the federal courts—precisely because removal of high-ranking

15. See *id.* at 229–30.

16. See *infra* notes 68–70 and accompanying text (discussing Senator Rubio's stance).

17. We suppose someone could argue that since President Trump did not receive a 2/3 vote in his favor, he was neither acquitted nor convicted, and that his impeachment trial resulted in a “hung” Senate, in which case, the argument would continue, nothing was adjudicated. “But in impeachment, when fewer than [two-thirds of the] Senators vote to convict, we say the impeached person is acquitted—even though 67 did not vote against conviction. This has been true from the beginning of the Republic all the way through William Rehnquist's pronouncement that Bill Clinton was acquitted [to the proclamation by Chief Justice Roberts that President Trump was acquitted]. It takes 67 to convict, but only 34 to acquit.” Vikram David Amar, *The Truth, the Whole Truth and Nothing But the Truth about “High Crimes and Misdemeanors” and the Constitution's Impeachment Process*, 16 CONST. COMMENT. 403, 414 (1999).

18. See *infra* notes 66–67 and accompanying text.

19. RESTATEMENT (SECOND) OF JUDGEMENTS § 27, cmt. c (AM. LAW INST. 1982).

executive or judicial officers is best done by a body with some electoral accountability.<sup>20</sup> Impeachment, and potential removal, of a President is a political as well as a quasi-judicial process. And if the voters of America, when informed of the facts and allegations, decide to reelect a President in spite of the evidence already on the table against him, then that is a judgment that ought to be afforded tremendous respect by a new Senate as well.

## II. PUBLIC OR SECRET VOTES?

A second entailment of the Senate acting in judicial or quasi-judicial capacity when it resolves impeachment cases is how publicly transparent the proceedings need be. In some settings, Congress may prefer to keep its ultimate deliberations shielded from public view. But does the general publicness of judicial proceedings<sup>21</sup> counsel against such secrecy in presidential impeachments? We think so.

In this regard, some commentators have floated that idea that it would be permissible and advisable for the Senate sitting in the matter of President Trump's impeachment to adopt a rule of private (that is, unreported to the public) voting on the question of whether the President ought to be convicted of the articles of impeachment adopted by the House.<sup>22</sup> Part of the commentary may have been prompted by reports that former Senator Jeff Flake (R. Ariz.) said that "at least 35" GOP senators would vote to remove President Trump if the vote were private.<sup>23</sup> Whether such a prediction is remotely accurate is hard to know, although it strikes us as unrealistically high given that conviction and removal of President Trump with a large number of Republican votes might be construed as an admission by the party—in an election year—that its steadfast support of him up until this point has been illegitimate.

20. *Nixon*, 506 U.S. at 234–36.

21. In criminal cases, the Constitution explicitly provides for a "speedy and public" trial, U.S. CONST. amend. VI, but federal judges have also held that federal civil cases in court are, absent exceptional circumstances, public affairs, e.g., *Publicker Industries, Inc. v. Cohen*, 733 F. 2d 1059 (3d Cir. 1984). And, of course, in any judicial case requiring unanimity by a jury, a result in either direction betrays who voted in its favor—namely, all of the jurors. Moreover, as discussed *infra*, the precedent in impeachment cases leaning in the direction of publicness must also be taken into account.

22. See, e.g., Douglas Kmiec, *Trump's Impeachment Trial Could Use a Secret Ballot*, THE HILL (Jan. 29, 2020), <https://thehill.com/opinion/white-house/480294-trumps-impeachment-trial-requires-a-secret-ballot> [<https://perma.cc/B4BU-CF3L>].

23. See Savannah Berhmann, *Jeff Flake: 'At least 35' GOP Senators Would Vote to Remove Trump if Vote was Private*, USA TODAY (Sept. 30, 2019), <https://www.usatoday.com/story/news/politics/2019/09/27/jeff-flake-at-least-35-gop-senators-would-impeach-trump/3792866002/> [<https://perma.cc/QHP2-RQEF>].

But even if Mr. Flake's (reported) numerical assessment were correct, and even if a private vote might reflect the conscience of the Senate more than a public one, does the Constitution allow the Senate to withhold from the people the votes of each individual senator? Let us start with the text, which provides that the Senate "shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."<sup>24</sup> So far, so good—the Senate can decide for itself to keep certain proceedings nonpublic. But Article I goes on to say: "and the Yeas and Nays of the Members of [the Senate] on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."<sup>25</sup> Some commentators apparently have read that provision to mean that one-fifth of the Senate can compel that individual votes of the senators be made public on any particular matter.<sup>26</sup> But that is not what the text says. It provides only that one-fifth of the Senate can require that individual votes be recorded in the Journal, not that the Journal—with the recorded votes—be made public.<sup>27</sup> That question is governed by the first part of this section of Article I, quoted above, that says the Senate (which means a majority thereof) can "in their Judgment" keep whatever "Parts" of the Journal they think "require Secrecy" from public view.<sup>28</sup> So unless the Senate over the years has embraced a different interpretation of Article I's seemingly straightforward words (for example that "entered on" would have been understood by any observer in 1787 as "publicly available in"), we read the text of the Constitution as not necessarily foreclosing secrecy.

But the narrow text of particular provisions is not the only source of bigger constitutional meaning. Structural principles, often reflected in consistent practices by the branches of government, are relevant too. Indeed, where the Senate is acting as or like a court, the concept of precedent has special significance, since judicial precedent is generally regarded as more pervasively used by courts than legislative and executive precedent are by the political branches.<sup>29</sup> And here, as far as we are aware, there is no precedent or tradition of keeping the ultimate votes by senators when sitting in impeachment shielded from public view, even if certain preliminary

24. U.S. CONST. art. I, § 5, cl. 3.

25. *Id.*

26. *E.g.*, Jonathan S. Gould & David Pozen, *The Senate Impeachment Trial Could Use A Little Secrecy*, THE ATLANTIC (Dec. 16, 2019) <https://www.theatlantic.com/ideas/archive/2019/12/senate-impeachment-trial-transparency/603463/> [<https://perma.cc/WPB6-6ESU>].

27. U.S. CONST. art. I, § 5, cl. 3.

28. *Id.*

29. *See generally* Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. Rev. 411 (2010).

impeachment processes prior to the ultimate vote are conducted in private. One rejoinder might be that the sample size for presidential impeachment trials is too small (i.e., just two Presidents, Andrew Johnson and Bill Clinton, had been tried prior to the Trump trial) to draw any meaningful inferences. But we believe that all 15 or so Senate impeachment trials (mostly for federal judges) should count significantly because secrecy of each senator's vote in presidential impeachment is more problematic than for judicial impeachment. So, if the history suggests (and we do not purport to have canvassed all of it thoroughly for purposes of this essay) that the Senate has treated final votes for impeached federal judges as public matters, then a fortiori (that is, with even greater force) the same should be true as to Senate votes on presidential impeachment.

We say a fortiori because impeachment was given to the Congress—rather than any other body—to promote accountability. Not just accountability for the impeached officers, but accountability for those who would judge them. Removing a duly nominated and confirmed federal judge is a big deal, but removing a President elected by scores of millions of American voters is a much bigger deal. The Constitution sends this signal of gravity by requiring that the Chief Justice—our nation's highest judicial officer—preside over presidential impeachment trials even though he does not preside over any other impeachment trial. And if the Constitution lodges conviction and removal power in the Senate because it is an elected, politically accountable body, then making the votes of senators public is essential. This is especially true after the move from legislative to direct Senate election that culminated in the adoption of the Seventeenth Amendment around the turn of the twentieth century. If the Constitution guarantees that the people of each state can be trusted to choose senators, how can the people not be trusted to evaluate senators' actions on perhaps the most important matter ever to come before a Congress?

One set of precedents that we do not think counts for much involves the presidential elections of 1800 and 1824, when the House of Representatives picked the President—because no candidate had garnered a majority of the electoral college—apparently using votes that were not made public. The secrecy here is interesting, but not particularly applicable to impeachment situations. First, under Article II's terms for House selection of the President, the vote in the House “shall be taken by states [not by individual House members], the representation of each state having one vote.”<sup>30</sup> Relatedly, each state's one vote can be cast simply by having “a member” of that state

30. U.S. CONST. art. II, § 1.

present; the state's entire House contingent need not be in the chamber. Third, and importantly, the House is supposed to do its choosing of a President "by ballot."<sup>31</sup> The term "ballot" generally refers to a secret vote. (Webster's first two definitions of "ballot" are "a small ball used in secret voting" and "a sheet of paper used to cast a secret vote.")<sup>32</sup> Throughout history, one reason for requiring secrecy has been the prevention of bribery and coercion, since no bribe or threat can be effective unless the briber or threat-maker can know how the other actor subsequently behaved. Perhaps the Framers were particularly worried about corruption or undue influence in the special case where no candidate was able to win in the electoral college.

On top of this, changes in presidential election practice that have made it more populist might help distinguish modern presidential contests from those in 1800 and 1824. In the early nineteenth century, the people of the United States themselves were not thought to have a significant role in presidential selection, so withholding the votes of individual House members from the public back then would have been much less problematic. Today, given that the same voters who pick House members also pick presidential collegians in all the states, perhaps if the House selected a President the individual votes of each member of every state's House delegation would be made public.

So precedential and structural considerations do not lend much support to secrecy in the impeachment-trial-vote setting, and indeed tend to undermine it.

We close this section by pointing out that maintaining secrecy might, in any event, be difficult logistically, even if secrecy were consistent with constitutional values here (which we question). First, even if a majority of senators today decide to keep secret the Yeas and Nays on President Trump's impeachment trial, there is no barrier to a subsequent Senate making those votes public down the road (assuming the votes were recorded in the Journal, which, as noted above, requires insistence by only twenty or fewer senators). And so, any senators who feel freer to "vote their conscience" because of the secrecy of their vote cannot count on that secrecy being maintained for the foreseeable future.

Indeed, even in the short run, secrecy may be hard to maintain. Let us imagine the ballots are not made public and President Trump is convicted. All the senators who voted to acquit could, if they wanted, publicly attest (under penalty of perjury) that they voted in President Trump's favor. They

31. *Id.*

32. Definition of Ballot, MERRIAM-Webster, <https://www.merriam-webster.com/dictionary/ballot> [<https://perma.cc/3TSR-QM9H>] (last visited Feb. 25, 2020).

could even offer to submit to a lie detector if anyone asks them to, etc. That would generate a very strong inference that those senators who do not make such public pronouncements of having voted in President Trump's favor were, in fact, those who voted to convict. Thus, again, senators looking to be protected by secrecy could not easily rely on such protections.

Interestingly, perhaps the best argument those who want secrecy could make is that it would be good if the vote were kept secret from President Trump (who might exact retribution) but not from the voters of each state. If that were possible, it might be more consistent with the spirit of the Seventeenth Amendment, which sought to reduce the clout political party bosses exercised in favor of more populist decision-making.<sup>33</sup> Freeing senators from party-leader retribution would be nice, but there is simply no way to do that without freeing senators from accountability to the people of the states (who themselves may prefer to be as intensely partisan as their leaders are in today's moment), which is the whole point of popular election of senators.

### III. OATHS

As noted near the outset, one of the aspects of Senate impeachment processes that incline people to think of the matter in judicial terms is the requirement that senators operate "on Oath or Affirmation."<sup>34</sup> Attention to the role of oaths in the Constitution can generally shed light on several issues concerning impeachment proceedings.<sup>35</sup> The Constitution imposes requirements of oath-taking in two instances besides impeachment trials. Under Article VI, members of each branch of federal and state government alike are "bound by Oath or Affirmation, to support this Constitution."<sup>36</sup> Article II separately requires the President, before entering office, to take an oath to "faithfully execute the Office of President" and to "preserve, protect and defend the Constitution of the United States."<sup>37</sup> In addition to these three

33. See Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?*, 35 HASTINGS CONST. L. Q. 727, 741–44 (2008).

34. U.S. CONST. art. I, § 3, cl. 6. See *supra* note 6 and accompanying text.

35. Section 3 of the Fourteenth Amendment echoes the relevance of oath and office-holding in the context of rebuilding the Union after the Civil War. Section 3 barred from holding future office in federal or state government public officials who, bound by Article VI, had rebelled against the Union. Section 3 also empowered Congress to "remove such disability" by a vote of two-thirds of each chamber. In a sense, Section 3 inverts the Constitution's impeachment provisions. In place of an individualized trial with a two-thirds vote required for conviction and removal from office—and the possibility of a bar on future office-holding—in one sweep Section 3 disables treacherous office holders from returning to public office unless Congress by a two-thirds vote grants an individualized exemption. U.S. CONST. amend. XIV, § 2.

36. U.S. CONST. art. VI.

37. U.S. CONST. art. II, § 1.

obligations of oath, Article VI also prohibits the imposition of one kind of oath: it bars making any “religious test” a “qualification” for holding office.<sup>38</sup>

There was regular talk of oaths during the Trump impeachment proceedings. Impeachment itself is an accusation that the President has failed to abide by the obligations the oath provisions of Article I and II impose. Unsurprisingly, then, President Trump’s accusers regularly claimed that he had violated his oath of office.<sup>39</sup> On the other hand, the President himself claimed that by pursuing what he viewed as baseless charges through an unfair process, Democrats in Congress (bound also by the Article VI oath) were the ones in violation of the Constitution’s provisions.<sup>40</sup>

Dueling claims of oath violations do not by themselves get us very far. It is easy to accuse political opponents of infidelity to promises. In order to make sense of the obligations of oath let us begin by focusing on the Article I oath that the Constitution requires of senators when they try impeachments. In contrast to the Article II presidential oath and the Article VI oath that all public officials take, Article I does not itself specify the content of the oath for senators conducting an impeachment trial. Senators must be “on oath,” but on oath to do what? Article I does not say. The lack of specificity is not likely an oversight on the part of those who wrote and ratified the Constitution. State constitutions in place before the Philadelphia Convention contained provisions specifying the terms of the oath in state-level impeachment proceedings.<sup>41</sup> How then to explain a corresponding absence of content in

38. U.S. CONST. art. VI.

39. See, e.g., Press Release, Speaker of the House Nancy Pelosi, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), <https://www.speaker.gov/newsroom/92419-0> [<https://perma.cc/2EUG-BLHR>] (“[T]he actions of the Trump Presidency revealed the dishonorable fact of the President’s betrayal of his oath of office.”); Press Release, Cory Booker, Booker Statement on House Judiciary Committee Vote to Approve Articles of Impeachment (Dec. 13, 2019), [https://www.booker.senate.gov/?p=press\\_release&id=1035](https://www.booker.senate.gov/?p=press_release&id=1035) [<https://perma.cc/W4G6-5MLS>] (“This president violated his oath and eroded the trust of the American people—it’s our moral obligation as jurors in the Senate to proceed in this solemn process in an honorable and deliberate way. No one is above the law and it’s our sworn duty to defend the Constitution.”).

40. See, e.g., Brett Samuels & Morgan Chalfant, *Trump rallies supporters as he becomes third president to be impeached*, THE HILL (Dec. 18, 2019), <https://thehill.com/homenews/administration/475238-trump-rallies-supporters-as-he-becomes-third-president-to-be> [<https://perma.cc/3JMJ-S7VK>] (reporting on statement at rally by President Trump that “With today’s illegal, unconstitutional and partisan impeachment, the do-nothing Democrats are declaring their deep hatred and disdain for the American voter”); Letter from White House Counsel Pat Cippolone to Speaker Nancy Pelosi (Oct. 8, 2019) (“As you know, you have designed and implemented your inquiry in a manner that violates fundamental fairness and constitutionally mandated due process . . . . Your highly partisan and unconstitutional effort threatens grave and lasting damage to our democratic institutions, to our system of free elections, and to the American people.”).

41. See, e.g., MASS. CONST. of 1780 (“Previous to the trial of every impeachment, the members of the senate shall, respectively, be sworn truly and impartially to try and determine the charge in question, according to the evidence.”); N.Y. CONST. of 1777 (“That previous to the trial of every impeachment, the

the Article I oath? Perhaps Article I should be understood to refer simply to the Article VI oath—such that senators, at the outset of an impeachment trial, reaffirm their pre-existing duty to “support this Constitution.”<sup>42</sup> Arguably there is value in this sort of reaffirmation: impeachment trials are rare events and it is useful to remind senators (and the public) of the solemnity of the occasion and the special obligations it incurs. A more likely inference is that the Constitution empowers the Senate itself, through its authority to “determine the Rules of its Proceedings,”<sup>43</sup> to specify the content of the oath for impeachment trials. Indeed, the Senate’s own rules, promulgated under Article I, dictate the precise terms of the oath that senators in fact currently take in impeachment matters. The Senate first approved an oath for its members in 1798, following the impeachment of Senator William Blount.<sup>44</sup> The current version of the oath the senators take in impeachment trials reflects just small changes from the 1798 language and reads: “I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of \_\_\_\_\_, now pending, I will do impartial justice according to the Constitution and laws: So help me God.”<sup>45</sup> The Senate—again exercising its rule-making power—has adopted a separate oath that is administered to witnesses who appear before the Senate at an impeachment trial.<sup>46</sup>

In mandating that the senators swear an oath before “sitting” in trial, the Constitution signals a shift in their status. When senators try impeachments, they are no longer legislators deliberating on bills but rather judges and jurors. The Senate’s own requirement of “impartial justice” underscores the significance of the changed role. Legislators engage in all manner of partisan activity in order to achieve their preferred political outcomes. As impartial judges and jurors, by contrast, senators are meant to set their partisan inclinations aside. The super-majority requirement for conviction on charges of impeachment<sup>47</sup> reinforces the expectation that senators transcend normal

members of the said court shall respectively be sworn truly and impartially to try the charge in question, according to evidence.”); S.C. CONST. of 1778 (“That previous to the trial of every impeachment, the members of the said court shall respectively be sworn truly and impartially to try the charge in question, according to evidence.”).

42. U.S. CONST. art. VI.

43. U.S. CONST. art. I, § 5.

44. S. JOURNAL, 5th Cong., 2d Sess. 438-39 (1798). (“That the oath or affirmation required by the Constitution of the United States to be administered to the Senate, when sitting for the trial of impeachment, shall be in the form following, viz: ‘I, A B, solemnly swear (or affirm, as the case may be,) that in all things appertaining to the trial of the impeachment of \_\_\_\_\_ I will do impartial justice, according to law.’”).

45. S. DOC. NO. 113-1, at 194.3 (2014).

46. See S. DOC. NO. 113-1, at 194 (2014).

47. U.S. CONST. art. I, § 3, cl. 6.

political affiliations. Just as bi-partisanship is needed to override, with a two-thirds vote, a presidential veto,<sup>48</sup> the ultimate check on presidential power—conviction in the Senate and removal from office—requires more than senators gearing up their usual political alliances.

Before the trial of President Trump had even begun, some Republican senators stated that they would vote to acquit at the trial's conclusion.<sup>49</sup> Democratic members of Congress (along with various commentators) asserted that having already made up their minds, these Republican senators could not do “impartial justice” pursuant to their oath and they should therefore not participate in the Senate trial.<sup>50</sup> Similar objections were lodged against Senate Majority Leader Mitch McConnell after he stated in an interview on Fox News that he would be working “in total coordination with the White House counsel's office.”<sup>51</sup> Notably, pre-trial verdicts were not limited to Republicans. Senator Elizabeth Warren, for instance, announced before trial that given the evidence the House had generated, she would be voting to convict and remove President Trump.<sup>52</sup>

There would clearly be a problem if the jurors in a criminal trial announced in advance of the evidentiary phase how they planned to vote. But can the same be said of senators trying an impeachment? As understood by

48. U.S. CONST. art. I, § 7, cl. 2.

49. See Veronica Stracqualursi, *'I'm not trying to pretend to be a fair juror here': Graham predicts Trump impeachment will 'die quickly' in Senate*, CNN (Dec. 14, 2019), <https://www.cnn.com/2019/12/14/politics/lindsey-graham-trump-impeachment-trial/index.html> [<https://perma.cc/6DDD-CS24>] (reporting on statement by Senator Lindsey Graham that “I am trying to give a pretty clear signal I have made up my mind. I'm not trying to pretend to be a fair juror here.”).

50. See, e.g., Marty Johnson, *House Democrat calls on McConnell to recuse himself from impeachment trial*, THE HILL (Dec. 13, 2019), <https://thehill.com/homenews/house/474487-rep-demings-senator-mcconnell-violated-oath-must-recuse-himself> [<https://perma.cc/Y92E-DQ2A>] (reporting on call by Rep. Val Demings (D-Fla.) for Senate Majority Leader Mitch McConnell to recuse himself from the Senate impeachment trial); see also James Walker, *Senator Says There is Increasing Talk that Mitch McConnell Should Recuse Himself from Impeachment Trial*, NEWSWEEK (Dec. 18, 2019), <https://www.newsweek.com/senator-increasing-talk-mitch-mcconnell-recuse-himself-impeachment-trial-1477875> [<https://perma.cc/7ZAU-42BR>] (reporting on statement by Democratic Senator Sherrod Brown that McConnell had “no respect for the institution” of the Senate).

51. See Savannah Behrman, *McConnell: In total coordination with White House for impeachment trial*, USA TODAY (Dec. 12, 2019), <https://www.usatoday.com/story/news/politics/2019/12/12/mcconnell-total-coordination-white-house-impeachment-trial/4416518002/> [<https://perma.cc/6EYQ-W8XS>].

52. See Warren defends saying she's seen enough evidence to convict Trump, CNN, <https://www.cnn.com/videos/politics/2020/01/05/sotu-warren-convict.cnn> [<https://perma.cc/8E2W-R8EA>] (reiterating her position that “evidence enough has been presented” to convict the President). For his part, Democratic Whip, Senator Dick Durbin, invoking the oath to do “impartial justice” criticized Republican and Democratic senators alike for announcing a judgment before trial. See Veronica Stracqualursi, *Durbin: Senators have 'gone too far' in saying how they will vote before impeachment trial has begun*, CNN (Dec. 22, 2019), <https://www.cnn.com/2019/12/22/politics/dick-durbin-senate-impeachment-trial-sotu-cnntv/index.html> [<https://perma.cc/N3NK-RFWJ>] (“How can they hold their hands up and say I swear impartial justice . . . [W]hen it comes to saying I've made up my mind, it is all over . . . that is not what the Constitution envisioned.”).

courts, the Sixth Amendment's requirement of an "impartial jury" in a criminal trial means that individuals who have already made up their minds cannot be seated as jurors.<sup>53</sup> But, as noted earlier,<sup>54</sup> there are hazards in treating a Senate impeachment trial as equivalent to a criminal proceeding and imposing a modern Sixth Amendment notion of impartiality upon senators sworn to do "impartial justice" in deciding upon articles of impeachment. In a courtroom, if one person is disqualified to serve on a jury there is always somebody else to perform the role. By contrast, nobody but a senator may try an impeachment. Modern notions of Sixth Amendment impartiality, such as the requirements that jurors must be drawn from a fair cross section of the community,<sup>55</sup> and must not be influenced by excessive press coverage<sup>56</sup> or personally know or have had dealings with the defendant, would quickly result in no senator being able to serve. One reason it is difficult to apply to the Supreme Court the rules of recusal that govern the lower federal courts is that if an individual justice is recused there is no substitute to hear and decide the case.<sup>57</sup> The same would be true if senators were required to step aside. The obligation of impartiality in the Senate's oath cannot mean the same thing that the Sixth Amendment requires of jurors because if it did the Senate might well be disabled from exercising its "sole Power to try all Impeachments."<sup>58</sup>

Perhaps, though, impartial justice is just a commitment to the more general Sixth Amendment idea that jurors decide cases solely based on the evidence presented to them after the trial begins. Yet even that requirement is not easily exported to the Senate when it tries impeachments. So long as the impeachment process in the House occurs publicly (as it does), senators anticipating the trial already know what the evidence (or much of it) is going to be. Criminal proceedings are very different. The charging body, the grand jury, operates in secret and petit juries have not previewed the case prior to trial. Replicating that process would mean that the House conduct its impeachment hearings behind closed doors and that senators be sequestered

53. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 155, 25 L. Ed. 244 (1878) ("[A] juror who has formed an opinion cannot be impartial.").

54. See *supra* notes 1–5 and accompanying text.

55. See *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.").

56. See *Irvin v. Dowd*, 366 U.S. 717, 725 (1961) (overturning jury guilty verdict given the influence of the "barrage of newspaper headlines, articles, cartoons and pictures . . . unleashed against . . . [the defendant] during the six or seven months preceding his trial.").

57. See John G. Roberts, Jr., *2011 Year-End Report on the Federal Judiciary*, 9 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/CF8WGZS4>].

58. U.S. CONST. art. I, § 3.

until trial begins. But it is hard to imagine that the Constitution requires locking down the Article I branch of government. We should prefer that the House conduct its proceedings in public view. And while there might be good reasons to sequester jurors during courtroom trials, we should want senators to pay close attention to events of national importance as they unfold. A sequestered juror suffers a personal inconvenience. A senator who is out of the political loop for even a few days cannot responsibly perform the duties of office.

Moreover, emphasizing (as critics of Republican senators did) the requirement of impartial justice is to give attention to the oath the Senate has adopted at the expense of close consideration of the oath that Article VI itself imposes. Senate rules (providing for an oath or anything else) must, of course, be consistent with the Constitution. The duty of “impartial justice” under the oath the Senate has adopted cannot therefore require anything of senators that would be inconsistent with the Article VI oath or any other provision of the Constitution. For instance, attention to Article VI suggests that there are at least some circumstances in which it is not improper for senators to decide to acquit even before hearing the evidence—even if such determinations might strike us as inconsistent with notions of impartiality (including from a Sixth Amendment perspective). Consider, for example, if the House, out of religious bias, approves vague articles of impeachment accusing the nation’s first Muslim President of planning terrorist attacks upon the United States in order to install the Christian Vice President to office. The senator who, citing the Constitution’s prohibition on religious tests for holding office,<sup>59</sup> promises before trial to acquit might be accused of acting inconsistent with the oath to do “impartial justice” but that senator surely holds the Article VI oath as a trump card against that accusation.

Broadening the analysis, the Article VI oath may make relevant constitutional provisions besides those dealing specifically with impeachment. Although the requirement that the Senate be “on oath” has no parallel with respect to the House when it exercises its “sole power of impeachment,” representatives, like senators, are still bound by the Article VI oath. The requirement on the part of those who investigate and charge—the representatives—and those who adjudicate guilt or innocence and impose punishment—the senators—to “support this Constitution” may have broader significance than deploying the corrective mechanism the Constitution makes available to address presidential misconduct. To “support this Constitution” means to support the entire document. One implication is that it may be perfectly proper

59. U.S. CONST. art. VI.

for an individual representative or senator to insist upon standards of fairness that comport with constitutional requirements in other settings. Thus, for example, a representative might choose to vote against articles of impeachment on the ground that witness testimony that gave rise to the articles was obtained through torture. Attention on the part of representatives and senators to broader constitutional values might be particularly important given that courts do not supervise impeachment proceedings. As Justice Kennedy observed (in a different context): “The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.”<sup>60</sup>

Besides process, other provisions of the Constitution might also take on relevance through the Article VI oath. For instance, it would seem entirely appropriate for representatives and senators alike to take stock of the fact that to remove a President is to shorten the constitutionally-specified term of the individual elected through the procedures the Constitution supplies and in whom it vests “the executive power.”<sup>61</sup> So, too, the role that the Chief Justice plays might also be informed by the Article VI oath and the broader Constitution for which it stands, as well as by impeachment precedents. Explaining why he would not break a tied vote on the issue of calling witnesses in the Trump impeachment trial, Chief Justice Roberts invoked two considerations. First, he pointed first to an absence of earlier instances of impeachment that were on all fours. The only past examples involved Chief Justice Salmon Chase breaking ties on a motion to adjourn and a motion to close deliberations during the impeachment trial of Andrew Johnson in 1868. Roberts, nuanced consumer of precedent that he is, concluded that “those isolated episodes 150 years” were not “sufficient to support a general authority to break ties.”<sup>62</sup> Second, Roberts invoked the constitutional principle of separation of powers. He stated: “If the members of this body, elected by the people and accountable to them, divide equally on a motion, the normal rule is that the motion fails.”<sup>63</sup> I think it would be inappropriate for me, an unelected official from a different branch of government, to assert the power to

60. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (Kennedy, J., concurring).

61. U.S. CONST. art. II.

62. Dan Berman, *John Roberts, as Senate trial nears end, finally says he won't break ties*, CNN (Jan. 31, 2020), <https://www.cnn.com/2020/01/31/politics/john-roberts-wont-break-tie-senate/index.html> [<https://perma.cc/J2BW-JN96>].

63. *Id.*

change that result so that the motion would succeed.”<sup>64</sup> In specifying that the Chief Justice “shall preside” when the President is tried, Article I does not preclude the Chief Justice from breaking a tied vote. But Article VI and accompanying attention to constitutional structure—including the differentiated roles of the legislative and judicial branches—give support to Roberts’s position.

Article VI also supports the position of the representative who votes against articles of impeachment and the senator who votes to acquit even if the evidence demonstrates that a President engaged in impeachable conduct. Several Republican senators voted to acquit President Trump even as they acknowledged that he had engaged in wrongdoing. That position generated widespread criticism, including on the basis that senators who acquit against the evidence violate the obligations of their oath.<sup>65</sup> One obvious problem with these criticisms is that the Constitution does not require the Senate to issue a guilty verdict anymore than it requires the House to issue articles of impeachment in the first place. Article I gives the House and the Senate the “sole Power” to impeach and to try impeachments, respectively.<sup>66</sup> A power is not a duty. The House is free to ignore impeachable conduct; the Senate could even decide to dismiss articles of impeachment outright and hold no trial at all. In mandating removal of the President “on impeachment for, and conviction of Treason, Bribery, or other high Crimes and misdemeanors” Article II also does not require the Senate to convict whenever charges of those offenses are proven.<sup>67</sup>

Yet there is more to consider than what the Constitution does not say. Again, Article VI provides insight. Among Senate Republicans, Marco Rubio provided the most detailed justification for an acquittal against the evidence. He stated that:

64. *Id.*

65. For example, Hillary Clinton issued a tweet that read: “As the president’s impeachment trial began, Republican senators pledged an oath to defend the Constitution. Today, 52 of them voted to betray that oath—and all of us.” Hillary Clinton (@HillaryClinton), Twitter (Feb. 5, 2020, 3:35 PM), <https://twitter.com/hillaryclinton/status/1225171061769195520?lang=en> [<https://perma.cc/L22X-GVGB>]; see also Kaelan Deese, *Hillary Clinton: 52 GOP senators ‘voted to betray that oath’ to defend the Constitution*, THE HILL (Feb. 5, 2020), <https://thehill.com/homenews/senate/481711-hillary-clinton-52-republican-senators-voted-to-betray-that-oath-to-defend> [<https://perma.cc/5FDF-MZ7Q>]. For a prior member of the Senate this is noticeably imprecise language. The Senate’s oath does not involve a pledge to “defend the Constitution” and that phrase also does not match the Article VI language but instead is part of the President’s Article II oath. Perhaps, though, Clinton’s formulation gets to a more basic idea: that to do “impartial justice” (as the Senate’s oath requires) is to “support [or defend] this Constitution” (as required by Article VI).

66. U.S. CONST. art. I, §§ 2–3.

67. U.S. CONST. art. II, § 4.

[F]or me, the question would not just be whether the President's actions were wrong, but ultimately whether what he did was removable. The two are not the same. Just because actions meet a standard of impeachment does not mean it is in the best interest of the country to remove a President from office. To answer this question, the first step was to ask whether it would serve the public good to remove the President, even if I assumed the President did everything the House alleges. . . . Determining which outcome is in the best interests requires a political judgment — one that takes into account both the severity of the wrongdoing alleged but also the impact removal would have on the nation.<sup>68</sup>

Applying this “best interest” test, Rubio concluded that removal of President Trump was unjustified. He pointed to the availability of other mechanisms to check Trump's conduct, including the upcoming election. He also emphasized that removal of the President, “based on a narrowly voted impeachment, supported by one political party and opposed by another, and without broad public support” would exacerbate “the bitter divisions and deep polarization our country currently faces.”<sup>69</sup> Accordingly, he said: “I will not vote to remove the President because doing so would inflict extraordinary and potentially irreparable damage to our already divided nation.”<sup>70</sup>

Rubio did not refer to the oath he took in the Senate at the outset of the trial or to the Article VI oath but his statement resonates strongly with the Article VI command to “support this Constitution.” For one thing, Rubio understands that an impeachment verdict should not be the product of political business as usual and that senators should exercise judgment in making their final decision. Rubio further recognizes that impeachment is not the only tool the Constitution gives to address presidential misconduct: a first-term president can be denied a second term. Rubio's attention to the nation's best interests, including avoiding further political division, also reflects an understanding of constitutional principles broader than the impeachment instrument. In the Preamble, “form[ing] a more perfect Union,” “insur[ing] domestic tranquility” and “promot[ing] the general Welfare” are among the reasons that “We the People of the United States . . . do ordain and establish this Constitution.”<sup>71</sup> Consideration of those goals, in the context of a presidential impeachment trial, comports with the Article VI obligation to “support *this* Constitution.”<sup>72</sup> Of course, attention to the obligations of oath might

68. Marco Rubio, *My Statement on the President's Impeachment Trial*, MEDIUM (Jan. 31, 2020), <https://medium.com/@SenatorMarcoRubio/my-statement-on-the-presidents-impeachment-trial-9669e82ccb43> [<https://perma.cc/2ZS9-6TCG>].

69. *Id.*

70. *Id.*

71. U.S. CONST. pmbl.

72. U.S. CONST. art. VI (emphasis added).

reasonably generate a different bottom-line conclusion, as it did for Mitt Romney, the sole Republican senator to cast a vote to convict President Trump.<sup>73</sup>

73. In his speech explaining his vote to convict the President on the first article of impeachment, Romney invoked the oath he took at the outset of the trial: “As a Senator-juror, I swore an oath, before God, to exercise ‘impartial justice.’ I am a profoundly religious person. I take an oath before God as enormously consequential . . . . [M]y promise before God to apply impartial justice required that I put my personal feelings and biases aside. Were I to ignore the evidence that has been presented, and disregard what I believe my oath and the Constitution demands of me for the sake of a partisan end, it would, I fear, expose my character to history’s rebuke and the censure of my own conscience . . . . I am aware that there are people in my party and in my state who will strenuously disapprove of my decision, and in some quarters, I will be vehemently denounced. I am sure to hear abuse from the President and his supporters. Does anyone seriously believe I would consent to these consequences other than from an inescapable conviction that my oath before God demanded it of me?” *Sen. Mitt Romney explains why he voted to convict Trump*, CNN (Feb. 5, 2020), <https://www.cnn.com/2020/02/05/politics/mitt-romney-impeachment-vote-remarks/index.html> [<https://perma.cc/B6XF-CBFR>]. Consistent with this personalized understanding of and commitment to the oath, Romney recognized that other senators, having taken the very same oath, could well vote differently: “As it is with each senator, my vote is an act of conviction. We have come to different conclusions, fellow senators, but I trust we have all followed the dictates of our conscience.” *Id.* At the same time, Romney also described the President’s conduct as a violation of his Article II oath: “Corrupting an election to keep oneself in office is perhaps the most abusive and destructive violation of one’s oath of office that I can imagine.” *Id.*