The Senate met at 1 p.m. and was called to order by the President pro tempore (Mr. LEAHY).

PRAYER
The Chaplain, Dr. Barry C. Black, offered the following prayer:

Eternal God, author of liberty, take control of this impeachment trial.

Lord, permit the words of the New England poet James Russell Lowell to provide our Senate jurors with just one perspective. Lowell wrote:

Once to every man and nation comes the moment to decide, In the strife of Truth with Falsehood, for the good or evil side.

Mighty God, could it really be that simple? Could it really be just truth striving against falsehood and good striving against evil?

Powerful Redeemer, have mercy on our beloved land.

We pray in Your magnificent Name.

Amen.

PLEDGE OF ALLEGIANCE
The President pro tempore led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

CONCLUSION OF MORNING BUSINESS
The President pro tempore. Morning business is closed.

The PRESIDENT pro tempore. The Senate will convene as the Court of Impeachment.

The PRESIDENT pro tempore. I ask Senators to be seated.

The Acting Sergeant at Arms, Jennifer A. Hemingway, made the proclamation as follows:

Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the Article of Impeachment exhibited by the House of Representatives against Donald John Trump, former President of the United States.

The PRESIDENT pro tempore. I note the presence in the Senate Chamber of the managers on the part of the House of Representatives and counsel for the former President of the United States.

RECOGNITION OF THE MAJORITY LEADER
The President pro tempore. The Democratic leader is recognized.

Providing for related procedures concerning the article of impeachment against Donald John Trump, former President of the United States.

Mr. SCHUMER. Mr. President, in a moment, I will call up a resolution to govern the structure of the second impeachment trial of Donald John Trump.

It has been agreed to by the House managers, the former President’s counsel, and is cosponsored by the Republican leader. It is bipartisan.

It is our solemn constitutional duty to conduct a fair and honest impeachment trial on the charges against former President Trump—the gravest charges ever brought against a President of the United States in American history.

This resolution provides for a fair trial, and I urge the Senate to adopt it.

Mr. President, I send a resolution to the desk on my behalf and that of the Republican leader for the organizing of the next phases of this trial.

The PRESIDENT pro tempore. The clerk will report the resolution by title.

The legislative clerk read as follows:

A resolution (S. Res. 47) to provide for related procedures concerning the article of impeachment against Donald John Trump, former President of the United States.

VOTE ON S. RES. 47
The PRESIDENT pro tempore. The question is on agreeing to the adoption of the resolution.

Mr. SCHUMER. I ask for the yeas and nays.

The PRESIDENT pro tempore. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The legislative clerk called the roll.

(Yeas—89)
Baldwin  Burr
Barrasso  Booker
Bennet  Boozman
Blackburn  Braun
Blumenthal  Cardin
Braun  Carper

This “bullet” symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Printed on recycled paper.
You will not be hearing extended lectures from me because our case is based on cold, hard facts. It is all about the facts.

President Trump has sent his lawyers here today to try to stop the Senate from hearing the facts of this case. They want to call the trial over before any evidence is even introduced.

Their argument is that if you commit an impeachable offense in your last few weeks in office, you do it with constitutional impunity; you get away with it. They say that would be a high crime and misdemeanor in your first year as President and your second year as President and for the vast majority of your fourth year as President you can suddenly do in your last few weeks in office without facing any constitutional accountability at all.

This would create a brand new January exception to the Constitution of the United States of America—a January exception. And everyone can see immediately why this is so dangerous. It is an invitation to our Founders' worst nightmare. And if we buy this radical argument that President Trump's lawyers advance, we risk allowing January 6 to become our future.

And what will that mean for America? Think about it. What will the January exception mean to future generations? What will the January exception mean to future generations? And what will that mean for America? Think about it. What will the January exception mean to future generations?

The PRESIDENT pro tempore. On this vote, the yeas are 89, the nays are 11.

The resolution (S. Res. 47) was agreed to.

The resolution is printed in today's Record under "Submitted Resolutions."

ORDER OF BUSINESS

The PRESIDENT pro tempore. Pursuant to the provisions of S. Res. 47, there shall now be 4 hours of argument by the parties, equally divided, on the question of whether Donald John Trump is subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office.

Mr. Manager RASKIN, are you a proponent or an opponent of this question? Mr. Manager RASKIN. I am a proponent.

The PRESIDENT pro tempore. Mr. CASTOR, are you a proponent or an opponent of this question?

Mr. Counsel CASTOR. We are an opponent.

The PRESIDENT pro tempore. Opponent, thank you.

Mr. Manager RASKIN, your party may proceed first. You will be able to reserve rebuttal time, if you wish.

Mr. RASKIN, you are recognized.

MANAGERS' OPENING STATEMENTS

Mr. Manager RASKIN. Thank you very much. Mr. President, distinguished Members of the Senate. Good afternoon.

My name is JAMIE RASKIN. It is my honor to represent the people of Maryland's Eighth Congressional District in the House and also to serve as the lead House manager.

And Mr. President, we will indeed reserve time for rebuttal. Thank you.

Because I have been a professor of constitutional law for three decades, I know there are a lot of people who are dreading endless lectures about the Federalist Papers. Please breathe easy. OK. I remember well W.H. Auden's line that a professor is someone who speaks while other people are sleeping.

Mr. TRUMP. The Constitution says you have to protect our country and you have to protect our Constitution. And you can't vote on fraud. And fraud breaks up everything, doesn't it? When you can't vote on a fraud, you're allowed to go by very different rules.

So I hope Mike has the courage to do what he has the legal authority to do.

Mr. TRUMP. When we fight, we fight like hell. And if you don't fight like hell, you're not going to have a country anymore.

Mr. TRUMP. So we are going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we are going to the Capitol, and we are going to try and give our Republicans—those weak ones who don't need any of our help. We are going to try and give them the kind of pride and boldness that they need to take back our country.

Mr. TRUMP. The Constitution says you have to protect our country and you have to protect our Constitution. And you can't vote on fraud. And fraud breaks up everything, doesn't it? When you can't vote on a fraud, you're allowed to go by very different rules.

So I hope Mike has the courage to do what he has the legal authority to do.

Mr. TRUMP. The Constitution says you have to protect our country and you have to protect our Constitution. And you can't vote on fraud. And fraud breaks up everything, doesn't it? When you can't vote on a fraud, you're allowed to go by very different rules.
We know this because article I, section 3 gives the Senate the sole power to try all impeachments. The Senate has the power, the sole power, to try all impeachments. “All” means all, and there are no exceptions to the rule. Because the Senate has jurisdiction to try all impeachments, it must have jurisdiction to try this one. It is really that simple. The vast majority of constitutional scholars who studied the question and weighed in on the proposition being advanced by the President, this January exception, heretofore unknown, agree with us, and that includes the Nation’s most prominent conservative legal scholars, including former Tenth Circuit Judge Michael McConnell; the cofounder of the Federalist Society, Steven Calabresi; Ronald Reagan’s Solicitor General Charles Fried; luminary Washington lawyer Charles Cooper, among hundreds of other constitutional lawyers and professors.

I commend the people I named—their recent writings to you in the newspapers over the last several days. And all of the key precedents, along with detailed explanation of the constitutional history, appear in the trial brief we filed last week and the reply brief that we filed very early this morning.

I will spare you a replay, but I want to highlight a few points from constitutional history that strike me as compelling in foreclosing President Trump’s argument that there is a secret January exception hidden away in the Constitution.

The first one comes from English history, which matters because, as Hamilton wrote, England provided “the model from which the idea of this institution has been borrowed.” And it would have been immediately obvious to anyone familiar with that history that former officials could be held accountable for their abuses while in office.

Every single impeachment of a government official that occurred during the Framers’ lifetime concerned a former official—a former official. Indeed, the most famous of these impeachments occurred while the Framers gathered in Philadelphia to write the Constitution. It was the impeachment of Warren Hastings, the former Governor-general of the British colony of Bengal and a corrupt guy. The Framers knew all about it, and they strongly supported the impeachment. They faced what they described as being led by name at the convention. It was the only specific impeachment case that they discussed at the convention. It played a key role in their adoption of the high crimes and misdemeanors clause, and everyone—there surely knew that Hastings had left office 2 years before his impeachment trial began, not a single Framersonly—raised a concern when he wrote it into the Constitution. It was the impeachment the Framers knew it. That is why they clearly allowed impeachment of former officials.

And nobody involved in the convention ever said that the Framers meant to reject this widely accepted, deeply rooted understanding of the word “impeachment” when they wrote it into our Constitution. The convention debates instead confirm this interpretation. There, while discussing impeachment, the framers repeatedly returned to the threat of Presidential corruption aimed directly to elections, the heart of self-government.

Almost perfectly anticipating President Trump, William Davy of North Carolina explained what was at stake: “no effort or means whatever to get himself re-elected.”

Hamilton, in Federalist 1, said the good that could be done to replace the liberty of the people comes from political opportunists who begin as demagogues and end as tyrants and the people who are encouraged to follow them.

President Trump may not know a lot about the Framers, but they certainly knew a lot about him.

Given the Framers’ intense focus on danger to elections and the peaceful transfer of power, it is inconceivable that they desired the impeachment to be a dead letter in the President’s final days in office when opportunities to interfere with the peaceful transfer of power would be most tempting and most dangerous, as we just saw. Thus, as a matter of history and constitutional understanding, there is no merit to President Trump’s claim that he can incite an insurrection and then insist weeks later that the Senate lacks the power to even hear evidence at a trial, to even hold a trial.

The true rule was stated by former President John Quincy Adams when he categorically declared:
Mr. NEGUSE of Colorado.

of democratic self-government and the
Trump's argument for the preservation
the fallacies presented by the Presi-
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the time I held any public office.

impeachment case, which actually was
One of them is the Nation's very first
cases. I will go through them quickly.

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Finally, last quote from Professor Turley that “no man in no circumstance, can escape the account, which he owes to the laws of his country.” Not my words, not Lead Manager Raskin’s words—Professor Jonathan Turley wrote it about him because he is exactly right.

Now, a question one might reasonably ask after going through all those quotes from such noted jurists and scholars: Why is there such agreement on this topic? Well, the reason is pretty simple. It is because it is what the Constitution says.

I want to walk you through three provisions of the Constitution that make clear that the Senate must try this case.

First, let’s start with what the Constitution says about Congress’s power in article I. You heard Lead Manager Raskin make this point, but it is worth underscoring. Article I, section 3 gives the House “the sole Power of Impeachment.” Article I, section 3 serves the Senate the “sole Power to try all Impeachments.”

Based on President Trump’s argument, one would think that language includes caveats, exceptions, but it doesn’t. He said it was only “impeachment of current civil officers.” It doesn’t say “impeachment of those still in office.”

The Framers didn’t mince words. They provided express, absolute, unqualified grants of jurisdictional power to the House to impeach and the Senate to try all impeachments—not some, all.

Former Judge McConnell, the judge that we talked about earlier, he provides very effective textual analysis of this provision. You can see it up here on this slide. I will just give you the highlight. He says—and I will quote. This is Judge McConnell:

Given that the impeachment of Mr. Trump was legitimate, the text makes clear that the Senate has power to try that impeachment.

Now, again, here is what—it is pretty interesting to me at least. We presented this argument in our trial brief, which we filed over a week ago, where we laid it out step by step so that you could consider it and so that opposing counsel could consider it as well.

We received President Trump’s response yesterday, and the trial brief offers no rebuttal to this point—none. In fairness, I can’t think of any convincing response. I mean, the Constitution is just exceptionally clear on this point. Now, perhaps they will have something to say today about it, but they did not yesterday.

There is another provision worth mentioning here because there has been a lot of confusion about it. I am going to try to clear this up. This is the provision on removal and disqualification. We all know the Senate imposes a judgment only when it convicts. I mean, the Senate convicts, the judgment “shall not extend further than” removal and disqualification.

That is it. The meaning is clear. The Senate has the power to impose removal, which only applies to current officials. And, separately, it has the power to impose disqualification, which obviously applies to both current and former officers. But it doesn’t have the power to go any further than that.

Now, as I understand President Trump’s argument, they believe that this language somehow says that disqualification can only follow the removal of a current officer, but it doesn’t. That interpretation essentially rewrites the Constitution. It adds words that aren’t there. I mean, after all, the Constitution does not say “removal from office and then disqualification.” It doesn’t say “removal from office followed by disqualification.” It simply says the Senate can’t do more than two possible sentences: removal and disqualification.

This, by the way, is not the first time that this direct question has been debated in this chamber. One hundred forty-six years ago, during the Belknap trial, Senator George Edmunds of Vermont argued that the Senate’s power to impeach and disqualify was limited to former presidents. He sat right where Senator Grassley sits today. He zeroed in on this exact point during the Belknap trial.

This is his quote: A prohibition against doing more than two things cannot be turned into a command to do both or neither.

And just imagine the consequences of such an absurd interpretation of the Constitution. If President Trump were right about that language, then officials could commit the most extraordinary, destructive offenses against the American people—high crimes and misdemeanors. They would have total control over whether they could ever be impeached and, if they are, whether the Senate can try the case. If they want to escape any public inquiry into their misconduct or the risk of disqualification from future office, then it is pretty simple. They could just resign 1 minute before the House impeaches or even 1 minute before the Senate trial or they could resign during the Senate trial if it is not looking so well. That would effectively erase “disqualification” from the Constitution. It would put wrongdoers in charge of whether the Senate can try them.

The third and final reason why President Trump must stand trial: the provision of article I of the Constitution.

You will see here on the screen that the Constitution twice describes the accused in an impeachment trial. Here is what I want you to focus on. The interesting thing is notice the words. It refers to a “person” and a “party” being impeached. Now, again, we know the Framers were a lot more thoughtful to the words that they chose. They even had a style committee during the Constitutional Convention. They could
have written "civil officers" here. They did that elsewhere in the Constitution. That would, ultimately, have limited impeachment trials to current officials, but, instead, they used broader language to describe who could be tried by the Senate.

So who could be put on trial for impeachment other than civil officers? Who else could a "person" or a "party" be? Well, really, there is only one possible answer: former officers. And actually, that language might explain why, during the Belknap trial, Senator Thomas Bayard, of Delaware, who later became the Secretary of State for the United States—he sat right where Senator Carper is sitting now—he found this point so compelling that he felt compelled to speak out on it. During the trial, he concluded that the Constitution must allow the impeachment and trial of people and parties who are not civil officers, and the only other group who could possibly encompass was former officials like Belknap and, of course, here, like President Trump.

Just so we are clear, in full disclosure, this is another argument that was not addressed by President Trump in his rebuttal, and we know why they didn’t: because their argument doesn’t square with the plain text of the Constitution. There is one provision that President Trump relies on almost exclusively, article II, section 4. I am sure you will see it when they present their arguments.

Their argument is that the language you see on the screen thinks you cannot prevent you from holding this trial, by making removal from office an absolute requirement—but, again, where does the language say that? Where does it say anything in that provision about your jurisdiction? In fact, this provision isn’t even in the part of the Constitution that addresses your authority. It is in article II, not article I, and it certainly says nothing about former officials.

President Trump’s interpretation doesn’t square with history, originalism, textualism. In fact, even Chuck Cooper, the famous conservative lawyer I mentioned earlier, with clients like the House minority leader, has concluded that this provision of the Constitution that President Trump relies on “cuts against” his position—his words—and that is because, as Cooper says, article II, section 4 means just what it says. The first half describes what must be impeached—namely, commit high crimes and misdemeanors—and the second half describes what happens when civil officers of the United States, including the sitting President, are convicted and removed from office. That is it.

In Cooper’s words:

It simply establishes what is known in criminal law as a “mandatory minimum” punishment.

It says nothing about former officials, nothing at all.

Given all of that, it is not surprising that, in President Trump’s legal trial brief—a 75-page brief—they struggled to find any professors to support their position. They did cite one professor, though, Professor Kalt, an expert in this field, who they claim agreed with them that the only purpose of impeachment is removal. Professor Kalt’s position, though, is well known because it is in the article that they cite in the brief, is that “removal” is “not the sole end of impeachment.” Actually, in that same article, he describes the view advocated by President Trump’s lawyers as having “deep flaws.”

Again, you do not have to take my word for it. You can take Professor Kalt’s word for it, the professor they cited in their brief, filed yesterday, because he tweeted about it on the screen here. This is what he had to say. I am not going to read through it in great detail. I will just simply give you the highlights.

[President] Trump’s brief cites my 2001 article on impeachment. But in several places, they misrepresent what I wrote quite badly. . . . There are multiple examples of such flat-out misrepresentations. And it didn’t have to be disingenuous and misleading.

This key constitutional scholar, relied on by President Trump, said just it right.

I have explained in great detail the many reasons the argument that President Trump presented here today is wrong. I just want to close with a note about why it is dangerous.

Lead Manager Raskin explained that impeachment exists to protect the American people from officials who abuse their power, who betray them. It exists for a case just like this one. Honestly, it is hard to imagine a clearer example of how a President could abuse his office: inciting violence against a coequal branch of government while seeking to remain in power after losing re-election sitting back and watching it unfold. We all know the consequences.

Like every one of you, I was in the Capitol on January 6. I was on the floor with Lead Manager Raskin. Like every one of you, I was evacuated as this violent mob stormed the Capitol’s gates. What you experienced that day, what we experienced that day, what our country experienced that day was the Framers’ worst nightmare coming to life. Presidents can’t enamel their own rebellion in their final weeks and then walk away like nothing happened. Yet that is the rule that President Trump asks you to adopt.

I urge you, we urge you to decline his request, to vindicate the Constitution, to let us try this case.

Mr. Manager Cicilline. Mr. President, distinguished Senators, my name is David Cicilline. I have the honor of representing the First Congressional District of Rhode Island here today.

As I look now o’er from the arguments of Mr. Raskin and Mr. Neguse, impeachment is not merely about removing someone from office. Fundamentally, impeachment exists to protect our constitutional system, to keep each of us safe, to uphold our freedom, to safeguard our democracy. It achieves that by deterring abuse of the extraordinary power that we entrust to Presidents from the first day in office to the very last day. It also ensures accountability for Presidents who harm us or our government. In the aftermath of a tragedy, it allows us an opportunity to come together and to ensure that what happened and reaffirming our constitutional principles, and it authorizes this body and this body alone to disqualify from our political system anybody whose conduct in office proves that they present a danger to the Republic. But impeachment would fail to achieve these purposes if you created, for the first time ever, despite the words of the Framers and the Constitution, a January 6th loophole—purely fictional—designed to allow the former President to escape all accountability for conduct that is truly indefensible under our Constitution.

You saw the consequences of his actions on the video that we played earlier. I would like to emphasize in still greater detail the extraordinary constitutional offense that the former President did in office, no power whatsoever to adjudicate.

While spreading lies about the election outcome, in a brazen attempt to retain power against the will of the American people, he incited an armed, angry mob to riot—and not just anywhere but here in the seat of our government, in the Capitol, during a joint session of Congress, when the Vice President presided while we carried out a peaceful transfer of power, which was intended for the first time in our history, this was a disaster of historic proportion. It was also an unforgivable betrayal of the oath of office of President Trump, the oath he swore, an oath that he sullied and dishonored to advance his own personal interests.

And make no mistake about it, as you think about that day, things could have been much worse. As one Senator said, they could have killed all of us. It was the bravery and sacrifice of the police, who suffered deaths and injuries as a result of President Trump’s actions, that prevented greater tragedy.

At trial, we will prove with overwhelming evidence that President Trump is singularly and directly responsible for inciting the assault on the Capitol. We will also prove that his dereliction of duty, his desire to seek personal advantage from the mayhem, and his decision to issue tweets, further inciting the mob by attacking the Vice President, all compounded the already enormous damage.
Now, virtually every American who saw those events unfold on television was absolutely horrified by the events of January 6, but we also know how President Trump himself felt about the attack. He told us. Here is what he tweeted as, the Chief of St. was in shambles, and as dozens of police officers and other law enforcement officers lay battered and bruised and bloodied.

Here is what he said:

> These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever.

Every time I read that tweet, it chills me to the core. The President of the United States side with the insurrectionists. He celebrated their cause. He validated their attack. He told them, "Remember this day forever," hours after they marched through these halls looking to assassinate Vice President Pence, the Speaker of the House, and any of us they could find.

Given all that, it is no wonder that President Trump would rather talk about and a supposed January exception rather than talk about what happened on January 6.

Make no mistake, his arguments are dead wrong. They are distractions from what really matters. The Senate can and should require President Trump to stand trial.

My colleagues have already addressed many of President Trump's efforts to escape trial. I would like to cover the remainder and then address the broader issues at stake in this trial.

For starters, in an extension of his mistaken reading of the Constitution, President Trump insists that he cannot face trial in the Senate because he is merely a private citizen. He references here the bill of attainder clause.

But as Mr. NEGUSE just explained, the Constitution refers to the defendant in an impeachment trial as a "Person" and a "Party," and certainly he counts as one of those.

Let's also apply some common sense.

There is a reason that he now insists on being called the "45th President of the United States" rather than "Citizen Trump." He isn't a randomly selected private citizen. He is a former officer of the United States Government. He is a former President of the United States. He is treated differently under a law called the Former Presidents Act.

For 4 years, we trusted him with more power than anyone else on Earth. As a former President, who promised on a Bible to use his power faithfully, he can and should answer for whether he kept that promise while bound by it in office. His insistence otherwise is just wrong, and so is his claim that there is no way to impeach private citizens if you proceed.

The trial of a former official for abuses he committed as an official, arising from an impeachment that occurred while he was an official, poses absolutely no risk whatsoever of subjecting a private citizen to impeachment for their private conduct.

To emphasize the point, President Trump was impeached while in office for conduct in office—period.

The alternative, once again, is this January exception, in which our most powerful officials can commit the most terrible abuses and then resign, leave office, and suddenly claim that they are just private citizens who can't be held accountable at all.

In the same vein, President Trump and his lawyers argue that he shouldn't be impeached because it will set a bad precedent for impeaching others. But that slippery slope argument is also incorrect. For centuries, the prevailing view has been that former officials are subject to impeachment. We just heard a full discussion of that. The House has repeatedly acknowledged that fact.

But in the case of President Trump, the House has rightly recognized that an official's resignation or departure makes the extraordinary step of impeachment unnecessary and maybe even unwarranted.

As Mr. NEGUSE explained in the Belknap case, and I quote:

> There is no likelihood that we shall ever unlimber the clumsy and bulky monster that is a bill of attainder. It is an object from which all danger has gone by.

President Trump's case, though, is different. The danger has not "gone by." His threat to democracy makes any prior abuse by any government official pale in comparison.

Furthermore, allowing his conduct to pass without the most decisive response would itself create an extraordinary danger to the Nation, inviting further abuse of power and signaling that the Congress of the United States is unable or unwilling to respond to an insurrection incited by the President.

Think about that.

To paraphrase Justice Robert Jackson, who said that precedent that I just described would lie about like a loaded weapon, ready for the hand of any future President who decided in his final months to make a play for unlimited power—think of the danger.

Here is the rare case in which love of the Constitution and commitment to our democracy required the House to impeach. It is for the same reason, the Senate can and must try this case.

Next, President Trump will assert that it somehow is significant or it matters that the Chief Justice isn't present to preside over this trial.

Let me state this very plainly: It does not matter. It is not significant. Under article I, section 3, "When the President of the United States is tried, the Chief Justice shall preside."

There is one person who is President of the United States at a time. Right now, Joseph R. Biden, Jr., is the 46th President of the United States. As a result, the requirement that the Chief Justice preside isn't triggered. Instead, the normal rules of any impeachment of anyone other than the sitting President apply, and under those rules, the President Pro Tempore, Senator LEAHY, can preside.

And, of course, this makes perfect sense. The Chief Justice presides because, when the current President is on trial, if the Chief Justice doesn't preside, the Vice President presides, and it would be a conflict for someone to preside over a trial that would become President if there was a conviction. So there isn't that concern when you have a former President on trial, or, for that matter, when you have anyone on trial other than the current President, which is why the Chief Justice presides only in that single case, and why this is exactly the Presiding Officer the Constitution and the Senate rules require.

As a fallback, President Trump and his lawyers may argue today that he is simply a private citizen who did nothing more than agree to a free speech armed insurrection against the United States Government and endangering Congress because, as he would put it, this impeachment is somehow unconstitutional.

So far as I understand it, from reading the pleadings in this case, this defense involves cobbling together a bunch of meritless legal arguments, all of them attempting to focus on substance rather than jurisdiction and insisting that these kitchen-sink objections lead the Senate to not try the case.

Since they may raise these points, at this juncture I feel obliged, really, to address them. He may argue, for example, that he didn't receive enough process in the House, even though the House proceedings are more like a grand jury action, which is followed later by trial in the Senate, with a full presentation of facts, even though he still has opportunities to respond to even though he still has the full and fair opportunity to respond to it before all of you; even though hundreds of others involved in the events of January 6 have already been charged for their role in the attacks that the President incited; and even though we invited him to voluntarily come here as a witness and testify as a request, as you know, that his lawyers immediately refused, presumably because they understood what would happen if he were to testify under oath.

Regardless, President Trump's process arguments are not only wrong on their own terms, but they are also completely irrelevant to the question of whether you should hold this trial. That question is answered by the Constitution, and the answer is yes.

In addition, separate from his due process complaints, President Trump and his counsel—particularly his counsel—have both said on TV that to
counter the undisputed evidence of what actually happened in this case, you will see video clips. They will show video clips of other politicians, including Democratic politicians, using what they consider incendiary language.

Apparently, they think this is evidence of equivalence or that it will show, in contrast, that President Trump's statements at the Save America rally weren't so bad. Like so much of what President Trump's lawyers might say today, that is a gimmick. It is a parlor game, meant to inflame partisan hostility and play on our divisions.

So let me be crystal clear. President Trump was not impeached because the words he used, viewed in isolation, without context, were beyond the pale. Plenty of other politicians have used strong language. But Donald J. Trump was President of the United States. He sought to overturn a Presidential election that had been upheld by every single court that considered it. He spent months insisting to his base that the only way he could lose was a dangerous, wide-ranging conspiracy against them and America itself.

He relentlessly attempted to persuade us that the peaceful transfer of power that was taking place in the Capitol was an abomination that had to be stopped at all costs.

He flirted with groups like the Proud Boys, telling them to “stand back and stand by” and using violence and sparking death threats to his opponents.

He summoned an armed, angry, and dangerous crowd that wanted to keep him in power and was widely reported to be poised on a hair trigger for violence at his direction.

He then made his heated statements in circumstances where it was clear, where it was foreseeable, that those statements would spark extraordinary, immediate, violent reaction.

He failed to defend the Capitol, the Congress, and the Vice President during the insurrection, engaging in extraordinary dereliction of duty and desertion of duty that was only possible because of the high office he held.

He issued a tweet 5 hours after the Capitol was sacked in which he sided with the bad guys.

We all know that context matters, that office and meaning and intent and consequences matter. Simply put, it matters when and where and how we speak. The oaths we have sworn and the power we hold matter.

President Trump was not impeached because he used words that the House decided are forbidden or unpopular. He was impeached for inciting armed violence that sought to embroil the Government of the United States of America.

This leads me to a few final thoughts about why it is so important for you to hear this case, as authorized and as, indeed, required by our history and by the Constitution.

President Trump's lawyers will say, I expect, that you should dismiss his case so that the country can “move on.” They will assert that this impeachment is partisan, and that the spirit of bipartisanship and bipartisan cooperation requires us to drop the case and march forward in unity.

With all due respect, every premise and every conclusion of that argument is wrong.

Just weeks ago—weeks ago—the President of the United States literally incited an armed attack on the Capitol, our seat of government, while seeking to retain power by subverting an election he lost, and then celebrated the attack.

People died. People were brutally injured. President Trump's actions endangered every single Member of Congress, his own Vice President, thousands of congressional staffers, and our own Capitol Police and other law enforcement.

This was a national tragedy, a disaster for America’s standing in the world, and President Trump is singularly responsible for inciting it. As we will prove, the attack on the Capitol was not solely the work of extremists lurking in the shadows. Indeed, does anyone in this Chamber honestly believe that, but for the conduct of President Trump, that charge in the Article of Impeachment, that attack at the Capitol would have occurred? Doesn’t that matter?

And now his lawyers will come before you and insist, even as the Capitol is still surrounded with barbed wire and fences and soldiers, that we should just move on, let bygones be bygones, and allow President Trump to walk away without any accountability, any reckoning, any consequences. That cannot be right. That is not unity. That is the path to fear of what future Presidents could do.

So there is a good reason why this Article of Impeachment passed the House with bipartisan support. The principles at stake belong to all Americans through all walks of life. We have a common interest in making clear that there are lines nobody can cross, especially the President of the United States, and so we share an interest in this trial where the truth can be shown and where President Trump can be called to account.

William Faulkner famously wrote that “the past is never dead.” But this isn’t even the past. This just happened. It is still happening. Look around as we come to the Capitol and come to this courtroom, and realize that our attention span is so short, that our sense of duty so frail, our factional loyalty so all-consuming, that the President can provoke an attack on Congress itself and get away with it just because it occurred near the end of his term.

After a betrayal like this, there cannot be unity without accountability.

And this is exactly what the Constitution calls for. The Framers' original understanding, this Chamber's own precedent, and the very words used in the Constitution all confirm unquestionably, indisputably, that President Trump must stand trial for his high crimes and misdemeanors against the American people.

We must not, we cannot continue down the path of partisanship and division that has turned the Capitol into an armed fortress.

As we will prove, it falls to you to bring our country together by holding this trial and, once all the evidence is before you, by delivering justice.

Mr. Manager RASKIN. Senators, Mr. President, to close, I want to say something personal about the stakes of this decision whether President Trump can stand trial and be held to account for inciting insurrection against us.

This trial is personal indeed for every Senator, for every person in the House, every manager, all of our staff, the Capitol Police, the Washington, DC, Metropolitan Police, the National Guard, the maintenance and custodial crews, the print journalists and TV people who were here, and all of our friends and families.

This trial reminds America how personal democracy is and how personal is the loss of democracy too.

Distinguished Members of the Senate, my youngest daughter, Tabitha, was with me on Wednesday, January 6. It was the day after we buried her brother, our son Tommy, the saddest day of our lives. Also there was my son-in-law Hank, who is married to our oldest daughter, Hannah, and I consider him a son, too, even though he eloped with my daughter and didn’t tell us what they were going to do. But it was in the middle of COVID–19.

The reason they came with me that Wednesday, January 6, was because they wanted to be together with me in the middle of a devastating week for our family, and I told them I had to go back to work because we were counting electoral votes that day on January 6. It was our constitutional duty. And I invited them instead to come with me to witness this historic event, the peaceful transfer of power in America. And they said they heard that President Trump was calling on his followers to come to Washington to protest, and they asked me directly: Would it be safe? Would it be alive? And I told them: Of course it should be safe. This is the Capitol.

STENY HOYER, our majority leader, had kindly offered me the use of his office on the House floor because I was one of the managers that day and we were going through our grief. So Tabitha and Hank were with me in STENY’s office as colleagues dropped by to console us about the loss of our middle child, Tommy, our beloved Tommy.

Mr. NGUERE and Mr. CICILLINE actually came to see me that day. Dozens of Members—lots of Republicans, lots of Democrats—came to see me, and I felt
People died that day. Officers ended up with head damage and brain damage. People’s eyes were gouged. An officer had a heart attack. An officer lost three fingers that day, Two officers have taken their own lives.

This is not about the future. This cannot be the future of America. We cannot have Presidents inciting and mobilizing mob violence against our government and our institutions because they refuse to accept the will of the people. In the Constitution of the United States. Much less can we create a new January exception for 10 minutes.

There being no objection, at 2:41 p.m., the Senate, sitting as a Court of Impeachment, recessed until 3:01 p.m. when the Senate reassembled when called to order by the President pro tempore.

The PRESIDENT pro tempore. Mr. Castor has 2 hours, and Mr. RASKIN has 33 minutes.

Mr. Counsel CASTOR. May I proceed, Mr. President?

The PRESIDENT pro tempore. You may.

COUNSEL’S OPENING STATEMENTS

Mr. Counsel CASTOR. Mr. President and Members of the U.S. Senate, thank you for taking the time to hear from me.

My name is Bruce Castor. I am the lead prosecutor—lead counsel—for the 45th President of the United States. I was an assistant DA for such a long time, I keep saying “prosecutor,” but I do understand the difference, Mr. RASKIN.

Before I begin, I want to comment on the outstanding presentation from our opponents and the emotion that certainly welled up in Congressman RASKIN about his family being here during that terrible day.

You will not hear any member of the team representing former President Trump say anything at all other than what happened on January 6 and the storming and breaching of the Capitol should be denounced in the most vigorous terms, nor that those persons responsible should be prosecuted to the fullest extent that our laws allow.

Indeed, I have followed some of those cases and those prosecutions, and it seems to me that we are doing a pretty good job of identifying and prosecuting those persons who committed those offenses. And I commend the FBI and the District of Columbia police and the other Agencies for their work.

It is natural to recoil. It is an immediate thing. It comes over you without a desire that someone pay because something really had happened. And that is a natural reaction of human beings. It is a natural reaction of human beings because we are generally a social people. We enjoy being around one another, even in DC.

We recognize the people all over the world, and especially Americans who share that special bond with one another, love the freedoms that this country gives us. And we all feel that if somebody is unsafe when they are walking down the street, the next person who is unsafe could be you, your spouse, one of your children, some other person that you love and know personally.

So you will never hear anyone representing former President Trump say anything at all other than what happened on January 6 and the storming and breaching of the Capitol should be denounced in the most vigorous terms, nor that those persons responsible should be prosecuted to the fullest extent that our laws allow.

Certainly, as an FOP member and a member of many police organizations myself, we mourn the loss of the Capitol Police officer, whom I understand is laying not too far away from here.

And, you know, many of you in this room over your careers, before they reached this summit here in the Senate, would have had times where you represented your local communities as assistant district attorneys, assistant Commonwealth attorneys, assistant State attorneys. And you know this to be true that when something happened in your county or in your jurisdiction, if it was a State jurisdiction, you know that there was a terrible outcry, and the public immediately reacts with a desire that someone pay because something really had happened. And that is a natural reaction of human beings. It is a natural reaction of human beings because we are generally a social people. We enjoy being around one another, even in DC.

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It is natural to recoil. It is an immediate thing. It comes over you without your ability to stop it, the desire for retribution. Who caused this awful thing? How do we make them pay?

We recognize in the law—and I know many of you are lawyers. Probably, lawyers—some of you have been a lawyer for 35 years, longer than me—

And we know we have a specific body of law that deals with passion and rage, blinding logic and reason. That is the difference between manslaughter and murder.

The murderer is the killing of a human being upon sudden and intense provocation. But murder is done with cold blood and reflective thought.

We are so understanding of the concept that people’s minds can be overwrought, where logic does not immediately kick in, that we have recognized examples that otherwise would be hearsay, and said that,
no, when you are driving down the street and you look over at your wife and you say: “Hey, you know what, that guy is about to drive through the red light and kill that person,” your wife can testify to what you said because you are technically hearsay, it is an exception because it is the event living through the person. Why? No opportunity for reflective thought.

There are all sorts of examples that we recognize in the law for why people immediately desire retribution, immediately recognize in the law that people can be overcome by events.

And you know, Senators of the United States, they are not ordinary people. They are extraordinary people—in the technical sense, extraordinary people.

When I was growing up in suburban Philadelphia, my parents were big fans of Senator Everett Dirksen from Illinois. Senator Dirksen recorded a series of lectures that my parents had on a record. We still know what records are, right? The thing you put the needle down on and you play it.

And here is little Bruce—6, 9, 10 years old—listening to that back in the 1960s. And I wouldn’t have been able to do that.

If you ever heard Everett Dirksen’s voice, it is the most commanding, gravelly voice that just oozes belief and sincerity. He must have been a phenomenal U.S. Senator. He doesn’t talk about ordinary people, as we do in the law. We apply the ordinary person standard. He talks about extraordinary people. He talks about “Gallant Men,” which was the name of the album, and, now, of course, as a sign of the times, gallant men and women.

I would watch television, and I would watch Senator Goldwater or Senator Byrd or Senator Mansfield or Senator Dole, and I would be fascinated by these great men.

And everybody’s parents say this when they are growing up: You could grow up to be a U.S. Senator. You could do that. They are just men and women like you are.

Well, then, Everett Dirksen tells us that they are not; they are gallant men and women who do extraordinary things when their country needs them to do things.

U.S. Senators really are different. I have been around U.S. Senators before. Two weeks ago, I went from Pennsylvania, I would like to think, are friendly toward me or at least friends of mine when we are not politically adverse. And I have been around their predecessors.

One thing I have discovered, whether it be Democrats or Republicans, U.S. Senators are patriots first—patriots first. They love their country. They love their families. They love the States that they represent.

There isn’t a Member in this room who does not use the term “I represent the great State of”—fill in the blank. Why? Because they are all great? Yeah. But you think yours is greater than others because these are your people. These are the people who sent you here to do their work. They trusted you with the responsibility of representative government.

You know, I feel proud to know my Senator from Pennsylvania, Senator CASEY, up here in the back, and Senator TOOMEY, over to the left.

You know, it is funny. This is an aside, but it is funny. Do you ever notice how when you hear others talking about you, when you are home in your State, they will say, “You know, I talked to my Senator” or “I talked to somebody on the staff of my Senator”? It is always “my Senator.”

Why is it that we say “my Senator”? We say that because the people you represent are proud of their Senators. They absolutely feel that connection of pride because that is not just PAT TOOMEY of Pennsylvania. That is my Senator from Pennsylvania. Or BOB CASEY from Scranton—that is my Senator.

And you like that. People like that. That is the people they represent. The people they help. U.S. Senators have a reputation, and it is deserved. They have a reputation for coolheadedness, being erudite—the men and women who we send from back home to DC to look after our interests. We feel a sense of ownership and a sense of pride in our Senators.

There is plenty of times I have been around in political gatherings where I hear, There is no way Senator TOOMEY is going to allow—that I don’t mean to pick you on. PAT—or There is no way Senator CASEY is going to allow that—because we feel pride.

When something bad is potentially in the wind, we expect our U.S. Senators not reacting to popular will and not reacting to popular emotions. We expect them to do what is right, notwithstanding what is immediately and expedient that the media tells us is the topic of the day.

So Senators are patriots. Senators are family men and women. They are fierce advocates for the great State which they represent. And somewhere far down that list of attributes, way below patriot and way below love of family and country and way below fierce advocates for their States, far down—at least that is what I thought, anyway, and I still think that. Somewhere far down that list, Senators have some obligation to be partisans, to represent some set of beliefs that are similar to beliefs shared by other United States Senators.

I understand that. And, in fact, I have no problem with that system. It helps the debate and decide what is best for America, the robust debate of different points of view. And I dare say that Senator SCHUMER and Senator MCConNELL represent those things in this body and make sure that everything is talked out and robustly debated in the United States. Senators make a decision of extreme importance to the people they represent.

I know you aren’t allowed to talk, but I don’t see either one of them jumping up and saying I am wrong about that because I think that that is what happens. I think United States Senators try to listen to each other’s positions, and United States Senators try to do what is right for the country, and far down is partisanship.

In our system of government, and if you read the Federalist Papers—we are very fortunate because the Federalist Papers were an explanation for why it is the States, the original States, should adopt the Constitution. These were persuasive documents about why the Constitution is a good thing, because if the individual State legislatures didn’t adopt the Constitution, we would not have it.

So Mr. Jay and Mr. Madison and Mr. Hamilton, they had an incentive to explain what they were thinking when they delineate the body in the explaining to other erudite people who represent individual States why it is that they feel that this is the right thing to do. And, in fact, as many of you well know, Madison had to promise that there would be a Bill of Rights immediately upon adoption or we wouldn’t have a Constitution. Even then there was horse trading going on in the legislative body of the United States.

The other day, when I was down here in Washington—I came down earlier in the week to try to figure out how to find my way around. I worked in this building 40 years ago. I got lost then, and I still do.

But in studying the Constitution— In all the years I was a prosecutor, where so many things depend on interpretations of phrases in the Constitution, I learned that this body, which one of my worthy colleagues said is the greatest deliberative body in the entire world—and I agree—that was—that particular aspect of our government was intentionally created, if you read the Federalist Papers.

The last time a body such as the United States Senate sat at the pinnacle of government with the responsibility that it has today, it was happening in Athens and it was happening in Rome.

Republicanism, the form of government republicanism, throughout history has always and without exception fallen because of fights from within, because of partisanship from within, because of bickering from within. And one of those examples that I mentioned—and there are certainly others, probably, that are smaller countries that lasted for less time that I don’t know about off the top of my head.

But each one of them, once there was the vacuum created that the greatest deliberative bodies—the Senate of Greece sitting in Athens, the Senate of Rome—the moment that they devolved into such partisanship, it is not as though they ceased to exist; they ceased to exist as representative democracy, both replaced by totalitarianism.
Paraphrasing the famous quote from Benjamin Franklin, who, as a Philadelphian, I feel as though I can do that because he is my Founding Father too: He who would trade liberty for some temporary security deserves neither liberty nor security. If we restrict liberty to attain security, we will lose both.

And isn’t the way we have enshrined in the Constitution the concepts of liberty that we think are critical, the very concepts of liberty that drove us to seek independence from Great Britain and I can’t believe these fellas are quoting what happened prerevolution as though that is somehow of value to us?

We left the British system. If we are really going to use prerevolutionary history in Great Britain, then the precedent is we have a Parliament and we have a King. Is that the precedent that we are heading for?

Now, it is not an accident that the very first liberty—if you grant me that our liberties are enumerated in the Bill of Rights, it is not an accident that the First Amendment of the Bill of Rights is the First Amendment, which says: “Congress shall make no law . . . abridging freedom of speech,” and et cetera. “Congress shall make no law . . . abridging freedom of speech.” The First Amendment is the most important one, the ability to speak, the ability to make the argument that we have so long fought for. We have sent armies to other parts of the world to convince those governments to implement the freedoms that we enjoy.

This trial is not about trading liberty for security. It is about trading—it is about abridging the Second Amendment. It is about the Second Amendment and the right that we give up those liberties that we have so long fought for. We have sent armies to other parts of the world to convince those governments to implement the freedoms that we enjoy.

And, in fact, I have seen quite a number of the complaints that were filed against the people who breached the Capitol were lawful, constitutional arguments. Not a single one I noticed charged conspiracy with the 45th President of the United States, probably because prosecutors have an ethical requirement that they are not allowed to charge people with criminal offenses without probable cause. You might consider that.

And if we go down the road that my very worthy adversary here, Mr. RASKIN, asks you to go down, the floodgates will open. I was going to say it will—instead of “floodgates,” I was going to say originally it will “release the whirlwind,” which is a Biblical reference, but I subsequently learned, since I got here, that that particular phrase has already been taken, so I figured I had better change it to “floodgates.”

But the political pendulum will shift one day. This Chamber and the Chamber across the way will change one day, and partisan impeachments will become commonplace.

You know, until the impeachment of Bill Clinton, no one alive had ever lived through a Presidential impeachment, not unless some of you are 150 years old. Not a single person alive had ever lived through a Presidential impeachment. Now most of us have lived through three of them.

This is supposed to be the ultimate safety valve, the last thing that happens, the most rare treatment, and a session here. This body is sitting as a Court of Impeachment among the most rare things it does.

So the slippery-slope principle will have taken hold if we continue to go forward with what is happening today and scheduled to happen later this week. And after we are long done here and after there has been a shift in the political winds and after there is a change in the makeup of the United States House of Representatives and maybe a change in the makeup of the United States Senate, the pressure from those folks back home, especially for Members of the House, is going to be tremendous because, remember, the argument that I started with, that political pressure is driven by the need for immediate action because something under contemporary community standards really horrific happened and the people in the United States House of Representatives become incensed.

And what do you do if a Federal issue—you are back in suburban Philadelphia and something happens that makes the people who live there incensed? You call your Congressman. And your Congressman, elected every 2 years, with their pulse on the people of their district, 750,000 people, they respond. And, boy, do they respond. The Member of Congress calls you, says it’s a matter of importance, calls you back, and you get all the information that they have on the issue. Sometimes you even get invited to submit language that would improve whatever the issue is.

And then the pendulum swings, perhaps the next person who gets impeached and is sent here for you to consider is Eric Holder during Fast and Furious, the Attorney General of the United States, or any other person whom the other party considers to be a political danger to them down the road because of their avowed abilities and being articulate and having a resume that shows that they are capable.

I picked Eric simply because I think he has a tremendous—he has had a tremendous career, and he might be somebody whom some Republicans somewhere might be worried about. So maybe the next person they go after is Eric Holder, it. And you know, the Republicans might regain the House in 2 years. History does tend to suggest that the party out of power in the White House does well in the midterm elections. Certainly, the 2020 elections, the House gained—the House majority narrowed, and there was a gain of Republicans.

The Members of the House—they have to worry about these consequences because if they don’t react to whatever the problem of the day is, someday in that jurisdiction there—somebody is going to say: If you make me the Congressman, I react to that. And that means that the sitting Member has to worry about it because their terms are short.

And it is not just Members of the House of Representatives with their short—with their short terms. I saw on television the last couple of days the honorable gentleman from Nebraska, Mr. Sassey—I saw that he faced backlash back home because he voted he might be worried that the political party was complaining about a decision he made as a United States Senator.
You know, it is interesting because I don’t want to steal the thunder from the other lawyers, but Nebraska, you are going to hear, is quite a judicial-thinking place, and just maybe Senator Sasse is onto something, and you will hear about what it is that the Nebraska court said, to say about the issue that you all are deciding this week. There seem to be some pretty smart jurists in Nebraska, and I can’t believe a United States Senator doesn’t know that.

A patriot like the gentleman from Nebraska, whose Supreme Court history is ever present in his mind, and rightfully so, he faces the whirlwind even though he knows what the judiciary in his State thinks.

People back home will demand their House Members continue the cycle as political fortunes rise and fall. The only entity that stands between the bitter in-fighting that led to the downfall of the Greek Republic and the Roman Republic and the American Republic is the Senate of the United States.

Shall the business of the Senate and thus the Nation come to a halt, not just for the current weeks while a new President is trying to fill out his administration, but shall the business of the Senate and the Nation come to a halt because impeachment becomes the rule rather than the rare exception? I know you can see this as a possibility because not a single one of you even thought that you would be doing a second impeachment inside of 13 months, and the pressure will be enormous to respond in kind.

To quote Everett Dirksen, the galant men and women of the Senate will not allow that to happen. And this Republic will endure because the top responsibility of the United States Senator and the top characteristic that you all have in common—and, boy, this is a horse race, but there isn’t a single one of you who, A, doesn’t consider yourself a patriot of the United States, and 2, there isn’t a single one of you who doesn’t consider the other 99 to be patriots of the United States. And that is why this attack on the Constitution will not prevail.

The document that is before you is flawed. The rule of the Senate concerning impeachment documents, Articles of Impeachment, rule XXIII, says that no part of the Constitution can be amended by the Senate, You might have seen that we wrote that in the answer. It might have been a little legalistic or legalese for the newspapers to opine on very much, but there is some significance.

The House managers, clever fellows that they are, they cast a broad net. They need to get 67 of you to agree they are right. And that is a good strategy. I would use the same strategy, except there is a rule that says you cannot be indicted in the Senate. You see, rule XXIII says that the Article of Impeachment is indivisible, and the reason why that is significant is you have to agree that every single aspect of the entire document warrants impeachment because it is an all-or-nothing document. You can’t cut out parts that you agree with that warrant impeachment and parts that don’t, because it is not divisible. It flat-out says in the Senate rules it is indivisible.

Now, panic among the managers, like President Clinton’s, said the President shall be found guilty of high crimes and misdemeanors for engaging in one or more of the following and then gives a list, so all you had to do was win one, but they had to do that. It has to be all or nothing.

Some of these things of which you are asked to consider might be close calls in your mind, but one of them is not. The argument about the 14th Amendment is absolutely ridiculous. The House managers tell you that the President should be impeached because he violated the 14th Amendment. Here is what the 14th Amendment says:

No person shall be a Senator or Representative in Congress, or any other Civil Officer of the United States, if he has formerly holds any Civil Office under the same, or any other State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or [as] a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, and that shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may vote by two-thirds of each House to remove such disability. It doesn’t take a constitutional scholar to recognize that that is written for people who fought for the Confederacy or who were previous military officers or were in the government of the Confederacy, and it doesn’t take a constitutional scholar to require that they be convicted first in a court, with due process of law. So it never—that question can never be ripe until those things have happened.

If you agree with those arguments—and I know you will all get your Constitutions out and you will read it, and if you agree with those arguments, the suggestion that the 14th Amendment applies here is ridiculous. And if you come to that conclusion, then, because the managers have not separated out the counts, any counts within the Article of Impeachment, the whole thing falls.

I didn’t write that. They are married to that. I wrote it out in individual responses because I didn’t know how to respond to the cast-the-wide-net effort. And fortunately Senators sometime in the past realized that you can’t do that because you passed a rule that says: Hey, you can’t do that. So that is why it is flawed. It is flawed in other ways, too, and my colleague will explain that.

I was struck—I thought the House managers who spoke earlier were brilliant speakers, and I made some notes. This is one of the things I think about some of the things they said later when I am closing the case, but I thought they were brilliant speakers, and I loved listening to them. They are smart fellows. But why are the House managers afraid and why is the majority—the House of Representatives afraid of the American people?

I mean, let’s understand why we are really here. We are because the majority in the House of Representatives does not want to face Donald Trump as a political rival in the future. That is the real reason we are here. That is why they have to get over the jurisdictional hurdle. They can’t get over but that is why they have to get over that in order to get to the part of the Constitution that allows removal. So that is the—nobody says it that plainly, but unfortunately I have a way of speaking that way.

And the reason that I am having trouble with the argument is, the American people just spoke, and they just changed administrations. So in the light most favorable to my colleagues on the other side of the aisle here, their argument would still be smart enough—in the light most favorable to them, they are smart enough to pick a new administration if they don’t like the old one, and they just did, and he is down there at Pennsylvania Avenue. The reason why come none of my stuff is happening up at the Capitol?

Why do the Members of the House of Representatives—the majority of the House of Representatives—why are they afraid of the American people? They sent them to do this job, the people they hope will continue to send them back here? Why are they afraid that those same people who were smart enough to pick them as their Congressmen aren’t smart enough to pick somebody who is a candidate for President of the United States? Why fear that the people will all of a sudden forget how to choose an administration in the next few years?

In fact, this happens all the time when there are changes in administrations from one-term Presidents to others. Well, Nixon was sort of ½ term, but Nixon to Ford, Ford to Carter, Carter to Reagan, Bush 41 to Clinton. It happens. The people get tired of an administration they don’t want, and they know how to change it. And they just did.

So why think that they won’t know how to do it in 2024 if they want to, or is that what the fear is? Is the fear that the people in 2024 will want to change and will want to go back to Donald Trump and not the current occupant of the White House, President Biden? Because all of these other times, the people were smart enough to do it, choose who the President should be, and all these other times, they were smart enough to choose who their Members of Congress were—and, by the way, choose you all as well—but they are not smart enough to know how to change the administration, especially since they just did pretty well to evident to me that they do know how. It has worked 100 percent of the time. One hundred percent of the time in the
United States, when the people had been fed up with and had enough of the occupant of the White House, they changed the occupant of the White House.

Now, I know that one of the strengths of this body is its deliberative action. I saw Senator MANCHIN on the TV the other night talking about the filibuster. And the main point was that Senator MANCHIN was explaining to those of us who don’t operate here all the time that this body has an obligation to try to reach consensus across the aisle to legitimize the decisions it makes. Obviously, he is capable of making his own pronouncements on it, but that is what came across on the television. And I think that that is a good way of saying why the Senate of the United States is different than other places.

You know, the Constitution is a document designed to protect the rights of the minority, not the rights of the majority. Congress shall make no law abridging all of these things. That is because those were the things that were of concern at the time. It is easy to be in favor of liberty and equality and free speech when it is popular.

I think that I want to give my colleague Mr. Schoen an opportunity to explain to all of us the legal analysis on jurisdiction. I will be quite frank with you. We changed what we were going to do on account of what I thought that the House managers’ presentation was well done, and I wanted you to know that we have responses to those things.

I thought that what the first part of the case was, which was the equivalent of a motion to dismiss, was going to be about jurisdiction alone, and one of the fellows who spoke for the House managers—who was a formal criminal defense attorney—seemed to suggest that there was something nefarious that we were discussing jurisdiction in trying to get dismissed, but this is where it happens in the case because jurisdiction is the first thing that has to be found.

We have counterarguments to everything that they raised, and you will hear them later on in the case from Mr. van der Veen and from myself.

But on the issue of jurisdiction—the scholarly issue of jurisdiction—I will leave you with this before I invite David to come up and give you the crudest explication. Some of this was shown on the screen, but article I, section 3 says:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold . . . any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

So this idea of a January amnesty is nonsense. If my colleagues on this side of the Chamber actually think that President Trump committed a criminal offense—and let’s understand a high crime is a felony and a misdemeanor is a misdemeanor. The words haven’t changed that much over time. After he is out of office, you go and arrest him.

So there is no opportunity where the President of the United States can run rampant into January, the end of his term, and just go away scot-free. The Department of Justice does know what to do with such people. And so far, I haven’t seen any activity in that direction.

And not only that, the people who stormed this building and breached it were not accused of conspiring with the President. But the section I read—“Judgment”—in other words, the bad thing that can happen—the “Judgment in Cases of Impeachment”—i.e., what we are doing—“shall not extend further than . . . removal from Office.”

What is so hard about that? Which of those words are unclear?

Shall not extend further than removal . . . from Office.

President Trump no longer is in office. The object of the Constitution has been achieved. He was removed by the voters.

Mr. Schoen, are you ready—now that I have taken this relationship.

Thank you, Mr. President.

The PRESIDENT pro tempore. Mr. Schoen.

Mr. Counsel SCHOEN. Mr. President, leaders.

I stand before you in what I always thought as the hallowed ground of democracy. In this room, American lives have been changed so dramatically in just my lifetime through so many of your legislative initiatives from the Civil Rights Act, when I was a child, through, most recently, the FIRST STEP Act—laws that have provided major opportunities for Americans to move forward and upward and more fully enjoy all of the attributes of what has been a position on Earth.

I have seen the changes these laws have made to my clients every day for the past 36 years. These laws have enabled me to fight for their enjoyment of a fair stake in our American project.

I stand before a group of 100 United States Senators who have chosen to serve your country from all corners of this great Nation, giving up all sorts of professions, time with family, and perhaps other more lucrative opportunities to serve your country.

Mr. President, you are a man who so honorably served this Nation in the Senate and in public service before your tenure here. It is an honor to appear in this historic hall of democracy.

Yet today, that honor is tempered by an overriding feeling of grave concern, grave concern for the danger to the institution of the Presidency that I believe even convening these proceedings indicates. The joy I believed I would feel if I were privileged of appearing before this body is replaced by sadness and pain. My overriding emotion is, frankly, wanting to cry for what I believe these proceedings will do to our great, so long-enduring, sacred Constitution and to the American people on both sides of the great divide that now characterizes our Nation.

Esteemed Members of the Senate, going forward with this impeachment and the power of the United States is unconstitutional for reasons we have set out in our brief, some of which we will focus on here. And as a matter of policy, it is wrong as wrong can be for all of us as a nation.

We are told by those who favor having these proceedings that we have to do it for accountability. But anyone truly interested in real accountability for what happened at the Capitol on January 6 would, of course, insist on waiting for a full investigation to be completed. Indeed, one is underway in earnest already, intent on getting to the bottom of what happened.

Anyone interested in ensuring that it is truly the one or ones responsible for what occurred thought would more than willingly wait for the actual evidence, especially with new evidence coming in every day about preplanning, about those who were involved, and about their agenda bearing not relationship to the claims made here.

They say you need this trial before the Nation can heal, that the Nation cannot heal without it. I say our Nation cannot possibly heal with it. With this trial, you will open up new and bigger wounds across the Nation, for a great many Americans see this process for exactly what it is: a chance by a group of partisan politicians seeking to eliminate Donald Trump from the American political scene and seeking to disenfranchise 74 million-plus American voters and those who dare to share their political beliefs and vision of America. They hated the results of the 2016 election and want to use this impeachment process to further their political agenda.

These elitists have mocked them for 4 years. They called their fellow Americans who believe in their country and their Constitution “deplorables.” And the latest talk is that they need to deprogram those who supported Donald Trump and the Grand Old Party. But at the end of the day, this is not just about Donald Trump or any individual. This is about our Constitution and abusing the impeachment power for political gain.

They tell us that we have to have this impeachment trial, such as it is, to bring about unity, but they don’t want unity. And they know this so-called trial will tear the country in half, leaving tens of millions of Americans feeling left out of the Nation’s agenda, as dictated by one political party that now holds the power in the White House and in our national legislature.

But they are proud Americans who never quit getting back up when they are down, and they don’t take dictates from another party based on partisan
force-feeding. This trial will tear this country apart, perhaps like we have only seen once before in our history.

And to help the Nation heal, we now learn that the House managers, in their wisdom, have hired a movie company and a large law firm to make a film, manufactured with the latest in a package designed by experts to chill and horrify you and our fellow Americans. They want to put you through a 16-hour presentation over 2 days, focusing on this as if it were some sort of blood sport. And to what end? For healing? For unity? For accountability? Not for any of those. For, surely, there are much better ways to achieve each. It is, again, for pure, raw, misguided partisan-ship that makes them believe playing to our worst instincts somehow is good.

They don't need to show you movies to show you that the riot happened here. We will stipulate that it happened, and you know all about it.

This impeachment process fueled irresponsibly by base hatred by these House managers and those who gave them their charge, and they are willing to sac-rifice our national character to ad-vance their hatred and their fear that one of not be the party in power. They have a very different view of democracy and freedom.

From Justice Jackson who once wrote:

[But][Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch at the heart of the existing order.]

[They have a very different view of dem-cracy and freedom. This is nothing less than the political weaponization of the impeachment process—pure, raw sport, fueled by the misguided idea of party over country when, in fact, both will surely suffer.]

I can promise you that if these proceed-ings go forward, everyone will look bad. You will see and hear many Mem-bers of our Congress saying and doing things they must surely regret. But, perhaps, far worse than a moment of personal shame in a world in which his-tory passes from our memories in a moment, our great country, a model for all the world, will be far more di-vided and our standing around the world will be badly broken. Our arch enemies who pray each and every day for our division, who watch, glowing in the moment as they see you at your worst and our country in inter-nal divide.

Let's be perfectly clear. If you vote to proceed with this impeachment trial, future Senators will recognize that you bought into a radical, consti-tutional theory that departs clearly from the language of the Constitution itself and holds—and this is in their brief—that any civil officer who ever served in office has ended, subject only to impeachment long after their service in office has ended, subject only to the political and cultural landscape of the day that is in operation at any future time. This is exactly the posi-tion taken by the House managers at page 65 of their brief—unprecedented, radical position. They unabashedly say so.

Imagine the potential consequences for civil officers you know and who you believed served so honorably but who, in the view of a future Congress, might one day be deemed to be impeachment worthy. Imagine it now because your imagination is the only limitation.

The House managers tell you a cor-rect reading of the impeachment power under the Constitution is that it has no temporal limit and can reach back in time without limitation to target any-one who dared to serve our Nation as a civil officer. Now add that to their de-mand that you Members put your im-primatur on the snap impeachment they returned in this case and can do again in the future if you endorse it by going forward with this impeachment. The constitutional theory that literally puts the institution of the Presidency directly at risk, noth-ing less, and it does much more.

Under their unsupportable constitu-tional theory and tortured reading of the text, every civil officer who has served is at risk of impeachment if any given group elected to the House de-cides that what was thought to be an important service to the country when they served now deserves to be can-celled.

They have made clear in public state-ments that what they really want to accomplish here, in the name of the Constitution, is to bar Donald Trump from ever running for political office again, but this is an affront to the Con-stitution no matter who they target today. It means nothing less than the denial of the right to vote and the inde-pendent right for a candidate to run for elective political office, guaranteed by the 15th Amendment to the Constitution, using the guise of impeach-ment as a tool to disenfranchise.

Perhaps my friend put the situation simply and sharply into focus last week on his radio show. My friend is a distinguished lawyer who served as an Ambassador to former President Obama and has friends among you. He described himself to his listeners as a dyed-in-the-wool, lifelong Democrat, but he said the idea of 100 people in 15th Amendment to the Constitution, using the guise of impeach-ment as a tool to disenfranchise.

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On the day following the January 6 riot, the House leadership cynically sensed a political opportunity to score points against the outgoing then-President Trump, and the Speaker demanded that Vice President Pence invoke, A Amendment, which required immediately impeachment for the President if Mr. Pence did not comply with this extraordinary and extraordinarily wrong demand.

Four days later, on January 11, 2021, the eminent Article of Impeachment was introduced in the House. Speaker PELOSI then gave the Vice President another ultimatum, threatening to begin impeachment proceedings within 24 hours if he did not comply. Vice President Pence rejected Speaker PELOSI’s demand, favoring instead adherence to the Constitution and the best interests of the Nation over a politically motivated threat.

On January 12, Speaker PELOSI announced who the nine impeachment managers would be, and on January 13, 2021, just days after holding a press conference to announce the launching of an inquiry, the House adopted the Article of Impeachment, completing the impeachment inquiry in history and, according President Trump, no due process at all over strong opposition, based in large part on the complete lack of due process.

To avoid a rush to judgment by the House would be a grave understatement. It is not as if the House Members who voted to impeach were not mightily warned about the dangers to the institution of the Presidency and to our system of due process. They were warned in the strongest of terms from within their own ranks adamant, clearly, and in no uncertain terms not to take this dangerous snap impeachment course. Those warnings were framed in the context of the constitutional due process that was denied here.

Consider the warnings given by one Member during the House proceedings, pleading with the other Members to accord to decide the due process the Constitution demands.

This is Representative COLE of Oklahoma:

With only 1 week to go in his term, the majority is asking us to consider a resolution impeaching President Trump, and they do so knowing full well that even if the House passes this resolution, the Senate will not be able to begin considering these charges until after President Trump’s term ends.

I can think of no action the House can take that is more likely to further divide the American people than the action we are contemplating today. Emotions are clearly running high and political divisions have never been more apparent in my lifetime.

Said by Representative COLE.

Mr. COLE’s words on the floor emphasizing the care that must be taken with respect to the consideration of the Article of Impeachment echo the concerns by our Founding Fathers on this subject.

Listen to this from Mr. Hamilton in Federalist No. 65:

A well constituted court for the trial of impeachments, is an object not more to be desired than difficult to be obtained in a government wholly elective. . . . The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused. In many cases, it will happen with the pre-existing factions, and will inlist all their animosities, partialities, influence and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.

President thinking by Mr. Hamilton, as we see often.

In what I say to you is a proof of the need for due process, based on the critically serious nature of the singular role the impeachment process has in our government, Mr. Hamilton characterized the consideration of an impeachment in these terms:

The delicacy and magnitude of a trust, which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves.

This, too, is in Federalist No. 65. Now back to the House and the warnings against this rushed judgment in this case.

Mr. COLE of Oklahoma again. In the name of healing, a path forward he said our people so desperately need, he warned that “the House is moving forward erratically with a truncated process that does not comport with the modern practice and that will give members no time to contemplate the serious nature of action before us.”

Mr. COLE emphasized to his colleagues that such care must be taken with the consideration of an Article of Impeachment “in order to ensure that the American people have confidence in the procedures the House is following and because the Presidency itself demands due process in the impeachment proceedings.”

Congressman COLE continued:

Unfortunately, the majority has chosen to race to the floor with a new Article of Impeachment, forgoing any investigation, any committee process or any chance for Members to fully contemplate this course of action before proceeding.

Mr. COLE complained that “the majority is failing to provide the House with an opportunity to review all the facts, which are still coming to light, to discuss all the evidence, to listen to scholars, to examine the witnesses, and to consider precedence.”

He noted further:

This is not the type of robust process we have followed for every modern impeachment. The delay to do so does great disservice to this institution and to this country.

Mr. COLE complained right on the House floor that “rather than following the appropriate processes the House has used in every modern impeachment, the majority is rushing to the floor, tripping all over themselves in their rush to impeach the President a second time.” And in Mr. COLE’s words, it was doing so to “settle scores.” He warned this snap impeachment approach would cause great division as the country looks ahead to the start of a new administration.

He said to them:

In a matter as grave and consequential as impeachment, shouldn’t we follow the same process we have used in every modern impeachment rather than rushing to the floor?

And he implored them:

On behalf of generations of Americans to come, we need to think more clearly about the consequences of our action today.

Mr. COLE then reached across the aisle and credited a Member of this body, Senator MANCHIN, having voiced similar sentiments about how ill-advised this rushed process was, suggesting that the underlying events were a matter for the judicial system to investigate, not one for a rushed political process.

Finally, Mr. COLE admonished his fellow House Members, telling them:

We need to recognize that we are following a flawed process.

The alarm Mr. COLE sounded went unheeded.

Now let us consider the process in the House that actually was due. The House managers assert in their memorandum that “[t]he House serves as a grand jury and prosecutor under the Constitution.” They told you that again today. If this is accurate, then they highlight the complete failure to adhere to due process.

One should not diminish the significance of impeachment’s legal aspects, particularly as they relate to the formalities of the criminal justice process. It is a hybrid of the political and the legal, a political process moderated by legal formalities.

This is a quote, Richard Broughton.

The Fifth Amendment to the United States Constitution provides, in relevant part, that “. . . deprived of life, liberty or property, without due process of law.” The Supreme Court long ago recognized in Matthews v. Eldridge that, at its core, due process is about what we all want, what we all have the right to demand—fundamental fairness. One scholar, Brian Owsley, has written that “the impeachment process should and does include some of the basic safeguards for the accused that are observed in a criminal process such as fairness, due process presumptions, and proportionality”—basic American values. And, of course, we know that the Supreme Court has recognized that due process protections attend congressional investigations. While Congress is empowered to make its own rules of proceeding, it may not make rules that ignore constitutional restraints or violate fundamental rights.

While the case law is limited in terms of spelling out what due process looks like in impeachment hearings and, of course, in the Nixon case—Water, not Richard—we know that there is a great deal of leeway afforded Congress with respect to its impeachment
rules. It is clear that the fundamental principles that underlie our understanding of what due process must always look like apply.

In Hastings v. United States, a DC court case vacated on different grounds by the Supreme Court, clearly concluding that the due process clause applies to impeachment proceedings and that it imposes an independent constitutional constraint on how the Senate exercises its sole power to try all impeachments under article I, section 3, clause 6.

The court wrote in Hastings:

Impeachment is an extraordinary remedy. As an essential element of our constitutional system of checks and balances, impeachment must be invoked and carried out with solemn respect and scrupulous attention to fairness. Fairness and due process must be the watchword of a Branch of the United States Government conducting a trial, whether it be in a criminal case, a civil case or a case of impeachment.

A 1974 Department of Justice memo suggested the same view, opining that “...whether or not capable of judicial enforcement, due process standards would seem to be relevant to the manner of conducting an impeachment proceeding...”

More specifically, as the Hastings court described it, “one of the key principles that lies at the heart of our constitutional democracy: fairness.”

Again, fairness.

The Supreme Court’s “precedents establish that the rule that individuals must receive notice and an opportunity to be heard before the government deprives them” of a constitutionally protected interest. It is also true that “in any proceeding that may lead to deprivation of a protected interest, it requires fair procedures commensurate with the interests at stake.”

Impeachment proceedings plainly involve deprivations of property and liberty interests protected by the due process clause, and the House surely seeks to strip Donald Trump of his highly cherished constitutional rights, including the right to be eligible to hold public office again, should he so choose.

Due process must apply, and, at a minimum, due process in the impeachment process must include that the evidence must be disclosed to the accused, and the accused must be permitted the opportunity to test and confront the evidence, particularly through “the rights to confront and cross-examine witnesses,” which “have long been recognized as essential to due process.” In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine.

It is unfathomable that the Framers, steeped in the history of Anglo-American jurisprudence, would create a system that would allow the Chief Executive and Commander in Chief of the Armed Forces to be impeached based on a process that developed evidence without providing any of the elementary procedures that the common law developed over centuries for ensuring the proper testing of evidence in an adversarial process. We would never countenance such a system in this country.

Current Members of the House and Senate leadership are themselves on record repeatedly confirming these procedural due process requirements. Indeed, Congressman NADLER clearly believes he deserves, based on the Congressman’s description of due process, that must be afforded to an accused in an impeachment proceeding: “...the right to be informed of the law, of the charges against you, to call your own witnesses, and to have the assistance of counsel.”

Then-President Trump was not given any semblance of the due process Congresswoman NADLER clearly believes he deserves, based on the Congressman’s description of due process, that must be afforded to an accused in an impeachment proceeding: “...the right to be informed of the law, of the charges against you, to call your own witnesses, and to have the assistance of counsel.”

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A review of the House record revealed that the Speaker streamlined the impeachment process—H. Res. 24—to go straight to the floor for a 2-hour debate and a vote, without the ability for amendments. The House record reflects no committee hearing, no witnesses, no presentation or cross-examination of evidence, and no opportunity for the accused to respond or even have counsel present to object, as required by law.

As the New York Times recently reported, “there were no witness interviews, no hearings, no committee debates and no real additional fact finding.”

House managers claim the need for impeachment was so urgent that they had to rush the proceedings, with no time to spare for a more thorough investigation or, really, any investigation at all. But that claim is belied by what happened or didn’t happen next. The House leadership unilaterally and by choice waited another 12 days to deliver the Article to this Senate to begin the trial process. In other words, the House leadership spent more time holding the adopted Article than it did on the whole process leading up to the adoption of the Article.

The intentional delay, designed to avoid having the trial begin while Mr. Trump was still President, led to yet another egregious denial of due process. Article I, section 3, clause 6 of our Constitution, of course, provides, in pertinent part, that:

The Senate shall have the sole Power to try all impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside.

By intentionally waiting until President Trump’s term of office expired before delivering the Article of Impeachment longer is the Presiding Officer’s described as subject to impeachment in article I, section 3, clause 6 and in article II, section 4, and this body, therefore, has no jurisdiction as a function of that additional due process violation by Speaker Pelosi.

Moreover, with all due respect, then-President Trump suffered a tangible detriment from Speaker Pelosi’s actions, which violates not only his rights to due process of law, but also his express constitutional right to have the Chief Justice preside.

That tangible detriment includes the loss of the right to a conflict-free, impartial Presiding Officer—with all due process due to the very process requiring the Chief Justice to preside over the President’s impeachment trial, along with the other benefits of having the two branches combined—the Chief Justice from the Judiciary and the Senate—for the impeachment trial of the President, reflected in Federalist 66, one of the reasons the Chief Justice was chosen for that task.

Mr. Trump now faces a situation in which the Presiding Officer will serve as both judge, with all the powers that that role confers, and jury with a vote. And beyond that, the Presiding Officer, although enjoying a lifelong, honorable reputation, of course,
has been Mr. Trump’s vocal and adamanent opponent throughout the Trump administration. And, in fact, in the very matter on trial, the Presiding Officer, respectfully, already has publicly announced his fixed view before hearing any argument or evidence fact. Mr. Trump is not a candidate for re-election. The impeachment Article invoked on the Article of Impeachment before the Senate and, indeed, that Members in both parties have an obligation to vote to convict, as well.

Nor is this, in great country where any American—and, certainly, not this honorable Presiding Officer—consider this scenario to be consistent with any stretch of the American concept of due process and a fair trial and certainly not even the appearance of either.

By no stretch of the imagination could any fairminded American be confident that a trial so conducted would or could be the fair trial promised by the leader.

While most procedural aspects of a Senate impeachment trial may be non-justiciable political questions, this is not an excuse to ignore what law and precedent clearly require. The present situation either presents a violation of the constitutional text found in the articles mentioned above that require the precedent clearly require. The present not an excuse to ignore what law and the Constitution guarantees our freedom.

Other countries fear those freedoms and seek to ensure adherence to a party line in all civic, political, spiritual, and other affairs to ensure that the party line is too. And those systems have no place for due process.

Snap decisions that remove political figures are the norm. Maintaining their systems depend on it. That is not our way in America and never must be.

We choose in America to live by our Constitution and its amendments and that demands that every citizen among us. By putting your imprimatur on the snap judgment made in this matter, to impeach the President of the United States without any semblance of due process at every step along the way, puts the Office of the President of the United States at risk every single day. It is far too dangerous a proposition to countenance, and you must resoundingly reject it by sending the message now that this proceeding, lacking due process from start to finish, must end now with your vote that you lack jurisdiction to conduct an impeachment trial for a former President, whose term in office has expired and who is now a private citizen.

So let that message here and is because of the complete lack of due process that brought this Article of Impeachment before this body. God forbid we should ever lower our vigilance to the principle of due process.

An impeachment trial of Private Citizen Trump held before the Senate would be nothing more nor less than the trial of a private citizen by a legislative body. An impeachment trial by the House of a private citizen violates Article I, Section 3 of the United States Constitution, which provides that “[n]o bill of attainder . . . shall be passed.”

The bill of attainder, as this clause is known, prohibits Congress from enacting “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

A judicial trial—

The distinguishing characteristic of a bill of attainder is the substitution of a legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence. (The Bill of Attainder Clause), and the separation of powers doctrine generally, reflect the Framers’ concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.

As the Supreme Court explained in United States v. Brown, “[t]he best available evidence, the writings of the architects of our constitutional system, indicate that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.” The bill of attainder “reflected the Framers’ belief that the Legislative Branch is not so well suited as politically independent judges and jurys.”

When the Senate undertakes an impeachment trial of a private citizen, as it clearly understands to be the case here, supported by the fact that the Chief Justice is not presiding and Mr. Trump is not “the President.” It is acting as a judge and jury rather than a legislative body. And this is exactly the type of situation that the bill of attainder constitutional prohibition was meant to preclude.

It is clear that disqualification from holding future office, the punishment the House managers intend to seek here, is a kind of punishment, like banishment and others, that is subject to the constitutional prohibition against the passage of bills of attainder, under which designation bills of pains and penalties are included. The cases include Cummings, Ex parte Garland, and this Brown case. The Supreme Court three times has struck down prohibitions that penalized the South or support of communism from holding certain jobs as being in violation of this prohibition. Thus the impeachment of a private citizen in order to disqualify them from holding office is an unconstitutional act constituting a bill of attainder.

Moreover, this is the exact type of situation in which the fear would be great that some Members of the Senate might be susceptible to acting in the House the House acted in when it rushed through the Article of Impeachment in less than 48 hours, acting hastily simply to appease the popular clamor of their political base—the very kind of concern expressed by Mr. Hamilton in Federalist 65.

Moreover, as Chief Justice Marshell warned in Fletcher v. Peck, “it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts that might grow out of the feelings of the moment: and that to the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property
from the effects of those sudden and strong passions to which men and women are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States is designed by a bill of rights for the people of each state. No state shall pass any bill of attainder. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained.’’ So now let’s turn to the text of the Constitution.

Turning to the text of the Constitution is, for many, of course, the most appropriate and the most important starting place to trying to answer a Constitution-based question. There are several passages of the United States Constitution that relate to the Federal impeachment process. Let’s turn to a reading of the text now.

A true textual analysis, as the name implies, always begins with the words of the Constitution. This text is guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. And “[w]here a plain and unambiguous statutory language according to its terms.”

If a President is impeached, the unambiguous text of the Constitution commands that the Chief Justice of the United States shall preside, as we discussed earlier. Again, the Chief Justice is disinterested and nonpartisan. His presence brings dignity and solemnity to such a proceeding. In this case, the Chief Justice clearly is not presiding, and it is more than merely a technicality. It necessarily just arise as a substitute for the Vice President. It is the appearance of a conflict of interest and the— and a conflict of interest and the pre-judgment that we have discussed. In this case, as we say, the Chief Justice clearly is not presiding. The Senate President pro tempore is presiding. It appears that in the leader’s view, undoubtedly joined by other Senators, this is permitted by the Constitution because the subject of the trial is a non-President. As such, it is conceded, as it must be, that for constitutional purposes of the trial, the accused is a non-President. The role of the Senate, though, is to decide whether or not to convict and thereby trigger the application of Article II, section 4:

The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

From which office shall a non-Presi- dent be removed if convicted? A non-President doesn’t hold an office, therefore, cannot be impeached under this clause, which provides for the removal from office of the person under the impeachment attack.

The House managers contend that the fact that the Chief Justice is not presiding does not impact the constitu-

tional provision requiring the Chief Justice to preside can refer only to the sitting President, and not to former presidents, then the textual identification of “[t]he President” contained in article II, section 4, which makes the President amenable to impeachment in the first place, also excludes anyone other than the sitting President. In ful-

ness, that sentence provides that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Mis-
demeanors.” This is the substantive phrase of the Constitution vesting the conviction and removal power in the Senate, and it contains a clear jurisdictional limitation. The House managers do understand what the word “Presi-
dent” means and describe the purposes of other constitutional provisions, and so they should understand this limitation as well. Only a sitting President is referred to as the President of the United States in the Constitution. And only a sitting President, not a former President, can be impeached, convicted, and removed upon a trial in the Senate. “The President” in article II, section 4 and “the President” in article I, section 3 identify the same person. If the accused is not “the Presi-
dent” in one of these cases, they are not “the President” in the other. No sound textual interpretation—I emphasize “textual interpretation”—principle permits a con-

trary reading. In the words of the Su-
preme Court, it is a “normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.” Unwittingly or unwillingly as it may be, Senate Democrats, in their reference to this overarching constitutional plan, are pointing to a non-President pro tempore to remove or disqualify him—a legal nullity—as if he was the President.

The House managers contend that the Senate has jurisdiction over this impeachment because despite the fact that he is no longer the President, the conduct that the former President is charged occurred while he was still in office. That argument does not in any way alter the Constitution’s clear textual identification of “the President.”

Private persons may not be im-

peached in America, and so they ask you to look back at the British model. The Constitution, as I see it, does not make private citizens subject to im-

peachment. The Founders rejected the British model that allowed Parliament to impeach anyone, except for the King, and so they limited impeachment to certain public officials, including Presidents in our country.

Next on the textual front, the pri-

mary—and in fact, the only—inde-

nite remed[y] of a conviction is removal.

Article II, Section 4, states a straightforward rule: whenever a civil officer is im-

peached and convicted for high crimes and misdemeanors, they shall be removed.

It is undeniable that in this instance removal is moot in every possible re-

gard. Removal is a factual and legal impossibility. Yet the Article of Im-

peachment itself—read it in the where-

fore clause; it calls for removal. This is contrary to the reason why our impeach-

ment proceedings are different from ordinary trials and why the Constitution point-

edly separates the two. In ordinary criminal jurisprudence, a person convicted of public crimes committed while he or she was in office may still be punished even though they no longer hold that office. Not so with im-

peachment. In a Senate impeachment trial, conviction means and requires re-

moval, and conviction without a re-

moval is no conviction at all. Only valid convictions and its requisite, enforceable removal may the additional judgment of disqualification plausibly be entertained.
Presidents are impeachable because Presidents are removable. Former presidents are not because they cannot be removed. The Constitution is clear. Trial by the Senate sitting as a Court of Impeachment is reserved for the President of the United States, not a private citizen unless he is an existing officer subject to removal, in State v. Hill, from Nebraska, and Smith v. Brantley, a 1981 decision from the Florida supreme court.

This is the first time that the United States Supreme Court has ever been asked to apply the Constitution’s textual identification of “the President” in the impeachment provisions to anyone other than the sitting President of the United States. And, of course, most significantly from a textual approach, the term specifically used is “the President” not “a President.” And there can only be one “the President”—the incumbent—at a time.

Judge Luttig relies on this textual reading for his firm conclusion that a former President cannot be impeached or convicted. Consider the alternative, as Robert Delahunt and John Yoo have: If Mr. Trump can be convicted as “the President,” the language the Constitution uses, then why is he still not “the President” under the Commander in Chief clause, for example? They are joined by Professor Alan Dershowitz and University of Chicago Professor Richard Epstein in their focus and conclusion. They point out the dangers of an approach that deviates from a focus on the text. If there is no temporal limitation—that is what they suggested to you—remember, you can go back in time and impeach any civil officer who ever served for anything that occurred during the course of their service, to the immemorial. With the House managers’ position, the concept necessarily includes all executive officers and judges, including, perhaps, the impeachment now of Jimmy Carter for his handling of the Iran hostage scandal, as one example. That flows logically from their argument without any hesitation. Further, they ask, why not then countenance the broad reading of other terms? When I say “they ask,” I mean the experts who opined on this. Without reference to a broad reading of other terms, such that terms like “high crimes and misdemeanors,” however broadly construed, are not intended to be exclusively the only kind of conduct intended as impeachable. They conclude—these experts—by writing that a nontextual impeachment power would undermine the Constitution’s effort to make the President independent of Congress, a central goal of the authors of the document. The authors convincingly argue for textual analysis over nontextual reliance on a presentation of history, suggesting that if one’s presentation of history were to control, it would expressly permit conviction contrary to the expression language, leading to clearly unintended results.

I must tell you that I have spoken to Judge Ken Starr at some length over this past week about this. This textual approach is something he, too, feels very strongly about. I also happen to be friendly with Chuck Cooper, by the way. He is a fine person. He also happens to be a person who has a strong animus against President Trump. But Chuck Cooper is a fine lawyer and a fine person, and I assure you that our friends from Alabama know.

As we already have discussed, the risks to the institution of the Presidency and to any and all past officers is limited only by one’s imagination. The weakness of the House managers’ case is further demonstrated by their reliance on the unproven assertion that if President Trump is not impeached, future officers who are impeached will evade removal by resigning either before impeachment or Senate trial. For example, they contend, citing various legal scholars, that “[any official] who betrayed the public trust and was impeached could avoid accountability simply by resigning one minute before the Senate’s final conviction vote.”

This argument is a complete canard. The Constitution expressly provides in article I, section 3, clause 7 that a convicted party, following impeachment, “shall be removed from office and subject to indictment, trial, judgment, and punishment according to law” [after removal]. Clearly, a former civil officer who is not impeached is subject to the same.

We have a judicial process in this country. We have an investigative process in this country to which no former officeholder is immune. That is the process that should be running its course. That is the process the bill of attainder tells us is the appropriate one for investigation, prosecution, and punishment, with all of the attributes of that branch. We are missing it by two articles here that the article III courts provide. They provide that kind of appropriate adjudication. That is accountability.

There are appropriate mechanisms in place for full and meaningful accountability not through the legislature, which does not and cannot offer the safeguards of the judicial system, which every private citizen is constitutionally entitled to.

But more to the point here. Their argument does nothing to empower a different reading of the Constitution’s plain text; that is, one that reads “the President” in one provision to include former Presidents but reads “the President” in the other provision to mean only the sitting President.

The real problem with this red herring of an argument also fails because the former President did not resign, even amid calls by his opponents that he do so. As a result, the Senate need not decide whether it possesses the power or jurisdiction to try and convict the former President who resigned, as how it might best proceed to effectuate justice in such a case. That is not this case.

The plain meaning of the Constitution’s text, faithfully and consistently applied, should govern whether the United States Senate is vested with the power to convict a private citizen of the United States. It is not.

The House managers posit in their trial memorandum that despite the fact that the House managers have never been asked to consider and which only takes effect upon a later, separate vote—disqualification from future office—can still theoretically be applied to a former President.

The managers contend that “Article II, Section 4 states a straightforward rule: whenever a civil officer is impeached and convicted for high crimes and misdemeanors, they ‘shall be removed.’ Absolutely nothing about this rule implies, let alone requires, that former officials—who can still face disqualification—are immune from impeachment and conviction.”

That is what they say. I told you that today. In other words, so the argument goes, a President no longer holds office, the former President does not get the remedies afforded by impeachment. This, however, also flies in the face of both the plain meaning of the text and the canons of statutory interpretation.

First of all, the managers, once again, simply choose to ignore the text. Even in the passage that the managers cite, the word “shall” does, to put it mildly, imply a requirement, an imperative such that an impeachment in which removal would be impossible is invalid. “Shall” means shall. The Supreme Court, in United States v. Green, has made clear that when a statute uses the word “shall,” Congress has imposed a mandatory duty upon the subject of the command, as in shall remove. Indeed, “the mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”

And “[w]herever the Constitution commands, discretion terminates.” “Shall” means mandatory, and “shall be removed” is not possible for a former officer no longer in office. Impeachment cannot apply.

Now, here is the “and” argument. You may have heard about it or read
about it if you follow such things. This is another one Judge Starr is big on, and many of the textual scholars have written about it.

The managers critically ignore this language in article I, section 3, clause 7, which punish an offender, as in a list means that all of the listed requirements must be satisfied, while use of the conjunctive “or” means that only one of the list of requirements needs be satisfied.

Judge Kenneth Starr subscribes strongly to this argument and understands the comma to provide further support for the reading.

As Judge Michael Luttig, again, recently argued, “The Constitution links the impeachment remedy of disqualification from future office with the remedy of removal from the office that person currently occupies; the former remedy does not apply in situations where the officer is, as unlikely as that may be, unwilling to resign. Conviction and removal are inextricably entwined. If removal no longer is possible, neither is an impeachment conviction.”

Judge Luttig’s view is consistent with that of Justice Joseph Story in his famous “Commentaries on the Constitution of the United States,” where in Justice Story analyzed “that impeachment is inapplicable to officials who have left their position because removal—a primary remedy that the impeachment process authorizes—is no longer necessary.”

Justice Story noted that he is not coming to a firm posit on this. This is his belief, and this is his thought process.

There is also much force in the remark, that an impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdeeds. It touches neither his person, nor his property; but simply divests him of his political capacities.

Professor Philip Bobbitt, Now, this is—I have to say this is insulting. We heard earlier today we don’t cite any scholars. Professor Philip Bobbitt is a distinguished Webster professor at Columbia University who, along with Professor Black, wrote the handbook on impeachment used for many, many years. He is a constitutional expert on impeachment. He has written that “there is little discussion in the historical record surrounding the precise question of whether a person not currently an officer can be impeached—and in light of the clarity of the text, this is hardly surprising.”

Professor Bobbitt wrote.

Professor Bobbitt, by the way, who has a rich family history in the Democratic Party, he is also an expert. The following, as recently as January 27, 2021, arguing against holding this trial. He said:

There is no authority granted to Congress to impeach and convict persons who are not “civil officers of the United States.” It’s as simple as that. But simplicity doesn’t mean unimportance.

Professor Bobbitt wrote:

Limiting Congress to its specified powers is a crucial element in the central idea of the United States Constitution: putting the state under law.

Professor Bobbitt and former Stanford University Law professor Richard Danzig have remarked that impeachment’s principal purpose, as the 66th of the Federalist Papers makes clear, is to check the “encroachments of the executive.” Trial by jury, rules of evidence, and other safeguards are put aside, they write, because of the need to protect the public from further abuse of office.

Similarly, yesterday, Professor Eugene Kontorovich wrote: The Constitution provides that the impeachment process is to be used to remove “all Civil officers of the United States”—that is, people holding a government position. Yet in the case of Mr. Trump, the House is reading the Constitution as if it applies to “all Civil officers of the United States, and people who aren’t civil officers, but once were.” Exactly what it does not say.

We have been told by the House managers about missed citations in our brief. I would like to draw your attention to page 37. This is a substantive misrepresentation to you, I would respectfully suggest, and it reflects to me a very different view of democracy—a fear of democracy.

They wrote on page 37 of their brief that the Framers—I am paraphrasing the first part.

The Framers themselves would not have hesitated to convict on these facts. Their thirty years of study of colonial history, as well as a lived experience of resistance and revolution. They were well aware of the danger posed by opportunists who incited mobs to violence for political gain. They drafted the Constitution to avoid such thuggery, which they associated with “the threat of civil disorder and the early asumptions of Mr. Lincoln’s favorite poets who wrote in 1849, at a time fraught with division and at risk for even more. The message from that other time of division—a call for hope and unity to bring strength—has special meaning today.

A poem Longfellow wrote:

Sail on, O Union, strong and great!
Through wind and wave, right onward steer!
The moistened eye, the trembling lip,
Are not the signs of doubt or fear.
They are the tokens of your love,
For gentleness and love and trust
Prevail o’er angry wave and gust;
And in the wreck of noble lives
Sail on, O ship! sail on!

Theo coming, and the storm be!
Oh! gentle, loving, trusting wife,
And safe from all adversity
Upon the bosom of that sea.

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And the second message is from one of Mr. Lincoln’s favorite poets who wrote in 1849, at a time fraught with division and at risk for even more. The message from that other time of division—a call for hope and unity to bring strength—has special meaning today.

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The PRESIDENT pro tempore. On this vote, the yeas are 56, the nays are 44.

Pursuant to S. Res. 47, the Senate having voted in the affirmative on the resolution, the Senate shall proceed with the trial as provided under the provisions of that resolution.

MORNING BUSINESS

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, and were referred as indicated:

EC-336. A communication from the Director of Legislative Affairs, Federal Deposit Insurance Corporation, transmitting, pursuant to law, the report of a rule entitled "Unsafe and Unsound Banking Practices: Brokered Deposits and Interest Rate Restrictions" (RIN 3516–EA14) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Banking, Housing, and Urban Affairs.

EC-337. A communication from the Legal Counsel, Equal Employment Opportunity Commission, transmitting, pursuant to law, the report of a rule entitled "Compliance Manual 2009" (RIN 6604–EA01) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Health, Education, Labor, and Pensions.

EC-338. A communication from the Management and Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled "Standard Instrument Approach Procedures, and Takeoff Off Minimums and Obstacle Departure Procedures; Miscellaneous Amendments; Amendment 3905" ((RIN2120–AA67) (Docket No. FAA–2020–0644)) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Commerce, Science, and Transportation.

EC-339. A communication from the Management and Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled "Standard Instrument Approach Procedures, and Takeoff Off Minimums and Obstacle Departure Procedures; Miscellaneous Amendments; Amendment 3907" ((RIN2120–AA66) (Docket No. FAA–2020–0645)) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Commerce, Science, and Transportation.

EC-341. A communication from the Management and Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled "Amendment of Class D and Class E Airspace; Airspace Provisions of the먹치기법" ((RIN2120–AA67) (Docket No. FAA–2020–0645)) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Commerce, Science, and Transportation.

EC-343. A communication from the Management and Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled "Standard Instrument Approach Procedures, and Takeoff Off Minimums and Obstacle Departure Procedures; Miscellaneous Amendments; Amendment 3907" ((RIN2120–AA66) (Docket No. FAA–2020–0644)) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Commerce, Science, and Transportation.

EC-344. A communication from the Management and Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled "Amendment of Class D and Class E Airspace; Airspace Provisions of the먹치기법" ((RIN2120–AA67) (Docket No. FAA–2020–0645)) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Commerce, Science, and Transportation.

EC-345. A communication from the Management and Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled "Amendment of Class D and Class E Airspace; Airspace Provisions of the먹치기법" ((RIN2120–AA67) (Docket No. FAA–2020–0645)) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Commerce, Science, and Transportation.

EC-346. A communication from the Management and Program Analyst, Federal Aviation Administration, Department of Transportation, transmitting, pursuant to law, the report of a rule entitled "Amendment of Class D and Class E Airspace; Airspace Provisions of the먹치기법" ((RIN2120–AA67) (Docket No. FAA–2020–0645)) received in the Office of the President of the Senate on February 2, 2021; to the Committee on Commerce, Science, and Transportation.

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