

There Is No Constitutional Impediment to an Impeachment Inquiry that Concerns National Security

by Lawrence
Friedman and Victor
Hansen

October 1, 2019

By nearly any measure, President Donald Trump's conversation in July with his Ukrainian counterpart was extraordinary. Further investigation may reveal more evidence of presidential wrongdoing, and articles of impeachment are now a real possibility. Of course, as numerous commentators have noted, impeachment is ultimately a political question—but one that should be informed by legal considerations. The former Deputy Assistant Attorney General in the Office of Legal Counsel under President George W. Bush, John Yoo, has [suggested](#) that potential harm to national security interests through an impeachment investigation should deter Congress from even conducting such an investigation. In this he is wrong.

Yoo argues in the *New York Times* that, because the Constitution delegates to the president the responsibility for conducting foreign affairs and for managing our national security interests, Congress should not, through an impeachment investigation, interfere with his ability to engage in confidential communications with world leaders. Indeed, Yoo goes so far as to insist that, even if it is revealed that President Trump offered millions of dollars in aid to Ukraine in exchange for damaging information about Democratic presidential candidate Joe Biden, Congress should decline to pursue impeachment.

Yoo's view of the President's virtually unlimited constitutional authority in national security matters is decidedly one-sided, incomplete, and not reflected in either the language of the Constitution or more than two centuries of history. The better understanding of the Constitution is that that the House of Representatives, on the publicly available facts, has some obligation to investigate the president.

As an initial matter, Yoo's premise is faulty: the Constitution does not give the President exclusive control over foreign affairs and national security. Article II makes the President the commander-in-chief of the armed forces, but under Article I, Congress has the power

to authorize conflicts, to raise and support our forces, to authorize spending on national security and, indeed, a host of other national security and foreign affairs-related matters. The President has the power to negotiate treaties, but those agreements must be ratified by two-thirds of the Senate. The President has the power to appoint ambassadors, but those appointments, too, must be approved by the Senate.

History and practice further support a sharing of powers between the executive and Congress on foreign affairs and national security matters. In the *Steel Seizure Case*, for example, the U.S. Supreme Court famously struck down President Harry Truman's attempt to nationalize the steel industry to prevent a strike on the steel mills during the Korean War. A majority of the court concluded that, even in times of war, the President's power may be subject to congressional limits—and, more importantly, that presidential claims of authority are strongest when supported by Congress. More recently, of course, Congress has investigated the President's conduct (or that of his top advisors) in a wide range of national security and diplomacy matters, ranging from the Iran-Contra scandal during the Reagan years to the events at Benghazi during the Obama Administration, to name just a few.

It makes sense that the framers, ever concerned with the potential for tyranny posed by unchecked power, would design a governmental system requiring the president to work with Congress to pursue foreign policy and national security goals. The American people select a president every four years. The members of the House, on the other hand, face election every two years and, given the size of their districts, are closer to their constituents than any other federal elected official. They are the means through which the people can express their frustration or anger with a president's foreign policy or national security initiatives. The will of the people would mean little if the House could not act on those impulses, to check the president in the years between elections. To fulfill this end, the House must be able to investigate a president's alleged misconduct, even when such investigation touches matters requiring sensitivity to foreign policy or national security concerns, and even when those investigations ultimately may lead to articles of impeachment.

This is especially true in light of President's Trump's conduct vis-à-vis Ukraine. It's difficult to believe the framers would have thought Congress should be restrained from taking action in the face of evidence that the president's conduct of foreign affairs was motivated primarily by personal, rather than national, interests. Nonetheless, Yoo

suggests that Congress should decline to pursue an impeachment investigation, claiming “the founders believed that impeachment should come only as a last resort.” Rather, Yoo believes the House should wait and let the people decide in 2020 whether the president’s conduct warrants his re-election.

This argument fails on its own terms. Even if impeachment should be seen as a last resort, a president who arguably has taken steps to consort with a foreign power to influence his re-election and to place his own interests above the very citizens he is sworn to protect, poses a serious and ongoing risk to national security. If the allegations regarding President Trump’s conduct prove to be true, his actions would violate the public trust in the most basic sense—one so important, and so immediate, that the members of the House reasonably might believe they ought not wait until the next election for an uncertain remedy. This is precisely why the framers assigned the House the impeachment power.

Members of the House may well harbor legitimate concerns about an investigation of President Trump’s interactions with Ukraine’s leader. And the House should seriously consider the potential impact on diplomacy that an impeachment investigation might have. But that impact is just one of many factors that the members of the House should keep in mind, as we have [discussed elsewhere](#). Just because an investigation raises national security issues does not mean that Congress lacks the power to proceed.

IMAGE: WASHINGTON, DC – SEPTEMBER 26: House Speaker Nancy Pelosi (D-CA) speaks during a weekly news conference on Capitol Hill on September 26, 2019 in Washington, DC. Speaker Pelosi discussed an impeachment inquiry into President Donald Trump. (Photo by Zach Gibson/Getty Images)

About the Author(s)

Lawrence Friedman

Lawrence Friedman teaches national security law at New England Law | Boston and is co-author with Victor Hansen of *The Case for Congress: Separation of Powers and the War on Terror*. Follow him on Twitter [@LFriedmanNEL](#).

Victor Hansen

Victor Hansen teaches national security law at New England Law | Boston and is co-author with Lawrence Friedman of *The Case for Congress: Separation of Powers and the War on Terror*.