



## The Other Impeachment Count

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Although public attention appears to be focused, understandably enough, on Count One of the Articles of Impeachment – the Abuse of Power—I think that Count Two, Obstruction of Congress, presents the far stronger case for impeachment.

Let's put aside—just for the moment, and just for argument's sake—whatever opinions we might have about the Count One allegations. I happen to think that the evidence produced thus far is sufficient to prove that Trump abused his presidential power in his dealings with the Ukrainians, but I can at least understand that there is a contrary argument: that whatever his subordinates were doing, or thought they were doing, there is no direct, first-hand evidence that Trump *himself* was acting with an improper motive—exchanging military aid for damaging information on a political opponent.

So I'll accept, for now, that a Member of Congress could, acting in good faith and weighing the evidence fairly and unbiasedly, vote "No" on Count One.

But Count Two? I am having a hard time coming up with any reasonable argument that could support a "No" vote on Count Two.

The facts are clear and not in dispute. The President publicly directed his subordinates in the Executive Branch not to "participate" in the House's "partisan and unconstitutional" impeachment inquiry, because that inquiry "lacks any legitimate constitutional foundation, any pretense of fairness, or even the most elementary due process protections."

The argument that this violates the President's oath to "take care" that the Laws and the Constitution be "faithfully executed" strikes me as clear and straightforward and, as far as I am aware, un rebutted.

Article I Sec. 2 gives the House the "sole power of impeachment." If, in the exercise of that power, it demands that Executive Branch officials provide it with testimonial or documentary evidence, who decides whether those officials must comply with the demands?

Although the Constitution doesn't answer that question explicitly, it cannot seriously be maintained that it gives *the president himself* the power to decide that question. "No man shall be

judge in his own cause." The Framers were not stupid men. They realized the obvious: if you lodge that decision with the president, he will decide it—surprise!—in his favor. The whole point of the impeachment process, recall, is to uncover, and punish, presidential wrongdoing, and it is precisely in those cases where there actually *is* presidential wrongdoing that the president is *especially* likely to decide that question in his own favor—to make his *own* determination that the inquiry is "unconstitutional" and "baseless," etc. and to act accordingly.

The President's position is not only a failure to "faithfully execute" the Constitution's impeachment provisions, it poses a substantial threat to the very existence of the impeachment power and its effectiveness as a constitutional check on the president. Without the power to get evidence of a future president's wrongdoing from those within the Executive Branch—the very people with whom the president interacts most closely, on a daily basis, and who are responsible for carrying out his orders—makes the impeachment power a bit of a joke, though its implications for the conduct of future presidents are far from funny.

What possible constitutional argument can be mustered for the proposition that the Constitution gives the president the power to make this decision? That because the *president* has determined that the House inquiry is "unconstitutional" and "baseless," members of the Executive Branch need not comply with House subpoenas? Even if you agree (as I most emphatically do not) with the White House position—that the impeachment inquiry is unconstitutional, baseless, a deprivation of due process, etc.—it does not follow that the *president* is constitutionally empowered to make that determination. Does it?

It is not enough, it seems to me, to say that the President would direct subordinates to comply when (and only when) there has been a court determination that the request was lawful and proper. That stands the constitutional scheme on its head. The Constitution gives the *House* the "sole power of impeachment." The House, by issuing its requests and subpoenas, has made its decisions about what information it needs to exercise that power. The President is of course free to fight those in court. But until *he* obtains a court order saying that the House's requests are *not* within the scope of the impeachment power, he (and the members of the Executive Branch) have to comply; he can't arrogate the decision about compliance to himself.

Because I can't conjure up a reasonable counter-argument, I therefore can't understand how on Count *Two* a Member of Congress, acting in good faith and weighing the evidence fairly and unbiasedly, could vote "No." I'm sure ever-alert VC readers will let me know what I'm missing.

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