

UVA LAW | Impeachment and National Security

MICAH SCHWARTZMAN: My name is Micah Schwartzman. I am the Director of the Karsh Center for Law and Democracy. Thank you for being here for our third session in this series on the power of impeachment. And today we have with us two members of our faculty. And I just want to say a brief word of introduction of them, and then I will turn it over for their comments.

And after that, they'll talk for about 10 or 15 minutes. And after that, I'll open the floor for questions from you. And someone will have a microphone and will come to you so that you can ask your questions, and we can have a conversation.

So with us are Ashley Deeks, who is the E. James Kelly Junior, Class of 1965 Research Professor of Law and Senior Fellow of the Center for National Security Law. Professor Deeks teaches courses in national security and international law.

Professor John Harrison is the James Madison Distinguished Professor of Law. And he teaches classes about everything. And you may have encountered him in one or more of those wide range of subjects that he is an expert on. So I'll keep these introductions brief so that we have more time to talk. And I'll turn it over to Professor Harrison to start us off. Thanks.

JOHN HARRISON: Thank you, Micah. One thing about topics like impeachment is that the substance of the legal issues sometimes gets a little mixed up with political issues, views about particular people who are involved. In order to try to discipline myself, I took a look at the last time I talked about impeachment. This was in 1998. So long ago, not only was there a different president, but I was an Associate Professor of Law and my hair was orange. Different things have changed since then. And I'm trying to maintain, as I say, consistency.

The only thing I'll read to you from that episode is this excellent and penetrating question that I was asked. This was a hearing before the House Judiciary Committee Subcommittee on the Constitution. They got a bunch of academics and other people like that. And I got this probing question from the chairman of the subcommittee.

"Mr. Kennedy, some members ask that you pull the microphone closer." You might think that's a minor matter, but I say the glass is half full. He might have said, some members ask that you move the microphone farther away, so doing better there at least.

I have four thoughts about impeachment and national security and foreign affairs. They're at different levels of connection to national security and foreign affairs, but I think all have some connection. The first thing I'll say is specifically about national security and foreign affairs.

One argument that is in play these days about what is and is not impeachable when the

activity involved has something to do with foreign relations contacts with a foreign government, something along those lines, is the claim that the president has complete discretion in conducting the nation's foreign relations and making national security decisions. That discretion is conferred on him by the Constitution. And as a consequence, nothing he does in that connection can constitute a high crime or misdemeanor under the impeachment clause of the Constitution.

First thing I want to say about that is the claim that the Constitution itself confers on the president discretion with respect to national security foreign affairs is that lots of people believe it, lots of people deny it. It is a highly controversial claim.

One thing about legal scholarship-- maybe this is a good thing or a bad thing. Legal scholarship-- you know, you've heard the line about how the Supreme Court follows the election returns. To some extent, legal scholars do that. And when there is a controversial president, scholars start writing again about executive power. And so perhaps not surprising, there is another round of scholarship on that question. How much, if any, discretion does the Constitution itself confer on the president with respect to foreign relations, national security matters?

And again, the thing I want to stress I'm not going to get into the details of it now-- but the thing I want to stress is that is very much a point of debate. My own view-- and this is something I've changed my mind about maybe since 1998, but certainly since the time I worked at the Office of Legal Counsel. I no longer believe that the Constitution confers that discretion. But again, lots of people do. [INAUDIBLE] does. And people thought that for a long, long time, so it's a respectable position. The important thing to see is that it's contested.

The next thing to see is that, even if it's true that the Constitution confers substantial discretion on the president in these fields, the next question is whether all that discretion is subject to the impeachment clauses. That is to say, if an exercise of discretion the president otherwise legitimately engages in is still a high crime or misdemeanor, is that subject to removal?

And I think a lot of people who think that, yes, the president has that kind of discretion, would say that, even so, all of his Constitutional powers are subject to removal on grounds it was a high crime or misdemeanor. If, for example, the president gives a pardon-- and the pardon power really is conferred by the Constitution. The president clearly has very broad discretion with respect to pardons.

But lots of people would say and I would say that if the president gives a pardon in return for a bribe-- because the impeachment clause says, impeached and removed for bribery, treason, or other high crimes and misdemeanors. If he does that for a bribe, he can be impeached and removed for that even though, yes, he has the pardon power and he has a lot of choice in deciding who to pardon. So those are the first two-- the first two points.

The next thing I want to talk about some-- and this is a little less connected specifically to national security, but it has relations in national security and foreign relations. The issues that have come up right now are about the motivation or reasons before exercising government power. Presidents routinely negotiate with foreign rulers. Presidents routinely put pressure on foreign rulers to get them to do things the United States wants them to do.

That's the great thing about being a superpower, is you can be the one who puts on the pressure. When the Constitution was created, the United States was more likely to feel the pressure. But either way, conducting those negotiations-- very much part of what the president does.

So in the current context, the claim is, well, there are some reasons for doing things like that that are OK. There are others that are impermissible, in the lines between what is in pursuit of the public interest, or at least the public interest as the president understands it, and what is in pursuit of a private interest.

One thing about the military and national security context-- I can't resist raising this. I don't know how many of you are familiar with the story in the Bible of King David and Uriah the Hittite. Anybody know Uriah the Hittite? Exactly. Uriah the Hittite was a soldier who worked for King David. King David had a reason to get Uriah the Hittite into battle in the front line of battle. King David's reason was related to Mrs. Hittite.

Exactly. That's not the sort of thing you would normally think of as a governmental reason for acting, whether it was at the time of King David or the time today. I want to get my mistress's husband out of the way. That probably counts as a personal motivation.

So yeah, it's certainly possible to draw that distinction. And you may well-- you may well think that government power is conferred on people only to pursue public ends, not to pursue private ends. And therefore, it is a misuse of power. And if it's a severe enough misuse of power, it might cost you a high crime or misdemeanor-- that that that could be a misuse of

power. So yes, that certainly is a possible ground. Lots of people believe that theory that there is such a thing as abuse of power, meaning using it for personal purposes.

That then leads to a question that can come up easily in the national security context but is not limited to it that I think is a genuinely difficult one. And I'm going to just raise it. OK, what does the impeachment clause imply what's a high crime or misdemeanor, assuming you think that there are permissible and impermissible purposes?

Permissible purposes are those for which the power is conferred having to do with the public interest. The impermissible purposes are personal reasons. What about the situation in which a decision-maker-- remember, the impeachment clause doesn't apply just to the president. It applies to all civil officers of the United States-- in which the decision-maker has both motives?

And of course, politicians think this-- this is good for America, and it's good for me. Naturally, people are going to think that. Under those circumstances, is the "this is good for me" enough to make it wrongful? Or is the "this is good for America" enough to make it not wrongful? Or is it sometimes necessary when the mixed motives are present, as I think they often will be, especially probably in the areas of national security? Because it's so easy to believe that something you're doing in foreign relations is, that's going to be good for the country.

What to do in that situation of mixed motives? I'm not sure. That's something that people in the House of Representatives need to be thinking about because that's a genuine question whenever you're identifying an impeachable offense on the basis for the reason for doing it and not just objectively what was the conduct-- or what was the conduct.

The fourth point, I want to make another issue that I'm going to raise. And this is more specific to the Ukraine-related matters that have given rise primarily to the current interest in impeachment, is, OK, I've said it's entirely possible that counts of high crime or misdemeanor includes the idea of misuse of power. The abuse of power includes using public power for a personal motive, like, again, the excellent story of Uriah the Hittite.

How should electoral motives be counted there? That is to say, you have a politician who either wants to be re-elected-- say, somebody who's-- the person who's going to be subject to impeachment is primarily a sitting politician, the president here-- who wants to be re-elected or wants the politician's party to be successful and acts for that reason. Is that a personal reason, or is that a public reason, a governmental-related reason?

Point I want to make about that is, the answer to that question is not at all clear. Because one of the ways in which the American political system is designed to work is by creating personal incentives. This is what the Framers of the Constitution sometimes called their new science of politics.

The idea of the new science of politics was that an important part of a constitution is to operate on the incentives of officeholders and people seeking office as opposed to the older way in which the assumption was office seekers, office holders would be like their constituents. They would resemble their constituents. Farmers would be represented by farmers.

The new science of politics said not necessary to have farmers represented by farmers if the person who represents the farmers wants to serve the interests of the farmers in order to get elected or re-elected. Well, that suggests that electoral interests, getting the people what they want, are a legitimate public interest because that's the thing that public officials are supposed to be thinking about.

And I want to say, in discussions of this, you often hear people saying, well, of course politicians are looking to their electoral interests. You can't do anything about that. But maybe that's a personal interest. Maybe it's not the sort of thing they're supposed to be doing.

The possibility I want to raise is, no, it may well be the thing they are supposed to be doing-- responding to what the people want by taking steps that they think are going to favor their electoral interests. So having identified the distinction between personal and governmental reasons for acting, I want to suggest there's at least a quite plausible case that interests-- that political interests, electoral interests, count as governmental and not as personal.

ASHLEY DEEKS: Great. So I'll start by saying I've never had orange hair.

[LAUGHTER]

Not sure I ever will. So I think my comments pick up on but focus on different aspects of national security than Professor Harrison's did. It occurred to me I think there are at least two other ways in which impeachment and national security intersect beyond what John just said.

So I think the first way you could think about the impeachment inquiry is to think about it as-- it's about the threat that President Trump is seen to pose to our national security. So you could think about the impeachment inquiry as an exercise in trying to condemn and potentially

ultimately correcting something that is being seen as a threat to our national security.

I think there's a second way in which this impeachment inquiry and national security overlap-- and maybe this is true of all impeachment inquiries-- is that the inquiry and the surrounding procedures that are happening inside the executive branch and inside Congress complicate our ability to robustly conduct national security.

So, you might think about those two things, and think that you could come away with a positive takeaway from the first intersection between impeachment and national security. And that is by thinking about the inquiry as an exercise in sending a broader message both to the country and outside the country's borders about what the US government expects about its seniormost executive officials when it comes to the country's national security commitments and what it won't tolerate. So there is a potentially positive message to take away from that.

I think it is harder to be positive about the second interaction that is between the messiness and the processes surrounding impeachment. So let me say a little bit more about those two categories. So on the first aspect, here's, I think, how the argument goes-- one very significant responsibility of the executive branch is to protect the country and its national security.

So we know-- John has suggested this-- the executive is the most empowered of the three branches in its ability to do this. The president has the repel attacks power. The intelligence, defense, and diplomatic agencies work for the president. They are within executive agencies. The president has access to and almost complete control over classified information.

So, president, highly empowered when the security of the country is at stake. And he is expected to put the national security of the country first, right? The oath that he takes when coming into office is to preserve, protect, and defend the Constitution. And with that, we might think that includes the people who live under the Constitution. And he is generally expected-- senior officials are generally expected to act with the people's interests in mind, whether collecting intelligence during warfare, taking steps to protect nationals abroad who are under threat.

And along this line of argument, the core allegation against the president is that he undercut US national security by using his powerful position vis a vis another state in pursuit not of the country's interests, but of his own. So some have framed this as effectively inviting foreign interference with a US election, some people would say, again.

Further, a different aspect of the impeachment inquiry is thinking about the attempt to conceal this wrongdoing by employing traditional tools of government secrecy and putting the transcript that is the primary focus of the inquiry onto a very highly classified computer system within the National Security Council. And the argument might go that that kind of activity leads the American people to lose faith in the things the executive branch commonly does, otherwise has to do, behind the veil of secrecy if we see examples of that secrecy being misused.

Further, you might think that kind of exchange with a friendly foreign leader, President Zelensky, evidences a lack of attention to our national interests. And if that kind of behavior is not challenged, it might lead to further corrupt exchanges between senior leadership and other friendly or not-so-friendly countries that might not advance what people see as the US's interests writ large. In other words, it makes us an unreliable interlocutor in a space in which we need reliable interlocutors with other countries.

So on this view, you can think about the impeachment inquiry as a broader systemic corrective, saying these kinds of acts hurt our national security-- not acceptable when performed by people who have significant amounts of power in the national security space.

And while we may, as a country and as different parties, have significant policy disagreements about what the right things to do are in the national security space, we potentially agree that we need to know that our officials have our country's national security interests in mind, rather than their own personal interests. So that is aspect one of this argument about the intersection between the inquiry and national security.

The second aspect, which I think should make us all somewhat pessimistic-- it's not to say that the inquiry should not continue. It's just a flag that there are costs to impeachment inquiries-- is that it could potentially give rise to new, different national security problems. So, let me say first about some potential problems within the executive branch itself.

The US government generally prides itself on being able to walk and chew gum at the same time. However, I think that impeachment is heavily distracting to a host of different agencies right now. Some of these agencies were already in some level of disarray already, in part because of significant personnel turnover. So there's been lots of turnover at places like the Department of Homeland Security, turnover at the State Department, even at the Defense Department. The National Security Council itself in the White House has seen a lot of turnover.

And I'll suggest that this distracts-- can be distracting from really pressing national security

issues, including cyber attacks, including protecting elections, including a host of conflicts with which we have some interaction abroad, fighting ISIS, worried about Syria, activities in Yemen, and so on. We're engaged in negotiations with the Taliban. These are all important foreign policy and national security issues.

I do think things leading up to the impeachment inquiry, things have happened already before the inquiry itself, reflect deep problems within the State Department. We appear to be decimating our soft power. And I think that has national security implications.

We have large numbers of experienced diplomats who have decided to retire or leave the department. And that weakened diplomacy leaves the US government with fewer non-military tools to work with. So that might mean that we find ourselves with fewer allies to work with us to impose sanctions on North Korea. Or it might mean fewer countries willing to join coalitions with us fighting ISIS, so on.

I think another thing that happens in the course of an impeachment inquiry is that it's turning the executive officials' focus away from the substance and towards process and procedures. So that agency bureaucrats-- and I don't use that term as insulting term-- are probably quite-- some of them are quite nervous, fearful in the general counsel's offices of some of these agencies.

They're having to spend time advising individuals who are potentially going to have to appear before Congress. There is coordination among agencies that have been asked by Congress to turn over documents. That's an actually-- and it's a time-consuming and complicated process. And I think this is true in agencies like State and the CIA and the Defense Department.

I would suspect-- although I can't speak for the president, I suspect that he himself is surely distracted as well. And that decreases focus on a lot of these very hard issues, questions about what to do in Syria or with Yemen-- these aren't easy questions. And if you're distracted, they become harder.

I think there are also problems within Congress. Some of them mirror the kinds of problems I've just flagged with the executive. So if Congress is very focused on an impeachment inquiry, that might mean that they are distracted from providing robust intelligence and military oversight. In the classified space, we rely a lot on the intelligence committees, the judiciary committees, the armed services committees. Some of those-- two of those committees are tied up right now on the impeachment inquiry.

Second, I suspected that the partisanship that has followed from the announcement of an impeachment inquiry presumably worsens, or at least complicates, what can already be difficult committee minority/majority relationships. OK, so that's Congress.

Third, I do think it is quite possible that enemies see this as a good time to take advantage of our distraction. President Putin, I suspect, couldn't be happier about how everything is going right now in the United States. It is obviously hard to make clear causal claims about the relationship between investigations and inquiries and US policy decisions that we've made over the past few months. But I think surely having a system that appears to be in some level of chaos is attractive to adversaries.

I think it's also a problem for allies. So, allies like predictability. They like to know what they're going to get when they're dealing with the United States. I think we're in a case in which that is the opposite. I think allies might be more reluctant to make deals. They might be worried about who their interlocutor is going to be in the next couple of months at different levels of government.

And they might also possibly be less willing to share information. They might be worried about getting caught up in investigations. We've seen Australia get caught up in this. We've seen, obviously, Ukraine caught up in this as well.

And finally, I'll suggest the American public, for those who are skeptical of President Trump and who feel as though what he's alleged to have done is problematic-- I think it makes the public less willing to credit the need for government secrecy. And I'm somebody who genuinely believes that there are important places in the government where we have to do things in secret. But uploading a conversation onto a system that's generally used for covert action to conceal an embarrassing phone conversation doesn't give people confidence that the government, when acting in secrecy, is always acting with full integrity.

So, are there any benefits to that gloomy story? I mean, it may instill some sense within the US government that the truth will generally come out, whether you want it to or not. But I don't want to be too rosy about that. So on that note, I'll turn it back to Micah.

MICAH

Great. Hey, there are people with a couple microphones that-- over here. And if you have

SCHWARTZMAN:

questions, they will pass you a microphone. And [INAUDIBLE] the floor is open.

AUDIENCE: Thanks. So following up on that, Professor Harrison, I think there is a piece in *The Atlantic* last week-- I forget who it's by, but that made the claim that, for President Trump, the personal and public distinction has effectively collapsed, and he's sort of speaking of himself as the state and the state as himself, so America's triumphs as his triumphs, and conversely, attacks on him as attacks on America and our system.

So obviously, there's a lot of arguments about whether that's a truly, sincerely held belief, or that's a cynical ploy to use the power of the office to protect himself. But assuming that it is sincerely held and Donald Trump believes that exposing Joe Biden and keeping him from the presidency is what is in America's best interest and keeping Donald Trump in the White House is in America's best interest, if you're a Republican senator, is that-- you know, voting on an impeachment trial-- is that a mens rea defense? Does that suggest that maybe Donald Trump's intent is not for personal gain, but for what he believes is in the best interest of the country?

Or on the flip side, does that suggest, even if I wouldn't have voted to impeach otherwise, this guy is such a danger to the country because he no longer has the ability to make this distinction that we need to get him out?

JOHN HARRISON: Good question, and raises an important part of the impeachment-- the larger impeachment problem. The first thing I'm going to say is that for an ordinary high crime or misdemeanor situation, yes, there is both some kind of conduct requirement. There is both an actus reus and some kind of mens rea requirement. Of course, the mens rea it doesn't have to be highly specific to use common law terminology.

I do want to make the point though-- and this is related to some of the things that Ashley was talking about. I do want to make the point though that-- I think this is right-- that the idea of impeachment for high crimes and misdemeanors means that the argument for impeachment needs to be not just "this is bad policy," not just "this is destructive of the public interest," but that it is wrongful in the sense of being the kind of conduct that calls for moral opprobrium-- not just "your judgment is wrong," "you don't understand what's good for America," but "what you did was wrong." So that's the first point.

And some of the arguments about, well, what the president has been doing may have seriously damaged the national security might be true-- may be Good reasons not to re-elect him. But-- and one of the flaw-- one of the either strength or flaw of the American

impeachment system is this isn't a parliamentary system. President doesn't fall when a majority in the legislature loses confidence in him. The requirement is narrower than that.

The other point-- and the thing you're talking about-- more specifically, I think this is interesting and difficult. Notice the specific situations we're talking about where the problem is abuse of power in the sense of public authority used for private reasons-- that's a subcategory of impeachment, I think, that very much turns on subjective considerations. That's the thing.

What draws the distinction between the permissible use of power and the impermissible use of power is precisely the reason for doing it. You might say in model penal code terms, this is something like a purpose requirement-- that to have that kind of crime-- that there are other impeachable offenses that don't have that structure, but this one turns on the motivation.

And one perhaps seemingly odd consequence of that is that a president whose ego is so huge that he thinks, I am the state. I really I really am America-- bizarrely enough, somebody like that might not formulate the impermissible purpose precisely because he can't tell the difference between his own interests and those of the country.

AUDIENCE:

So, my question is for Professor Deeks. So you talked a fair bit about the potential drawbacks of-- or the costs of going through with impeachment and talked a little bit when you were asked the previous question about the benefits. Given that the chance of conviction by a co-partisan senate of a president is extremely low, if not zero, does that give you reason to believe that the drawbacks are quite likely to outweigh the benefits?

ASHLEY DEEKS:

So, I mean, it's a good question. I would say, not necessarily. And here's why. If it goes to trial, many allies will be keenly focused on it and will, I think, at some level appreciate the seriousness with which some significant part of our Congress has taken the underlying acts.

Many of our allies are very sophisticated consumers of our politics and are probably not assuming, or shouldn't be assuming, that he will be convicted by the Senate, but will appreciate that this is our constitution in action, our democracy in action, and that there is a very significant concern about the kind of foreign policy/national security conversation that our president has. So I think that's maybe the potential upside of a trial, even if nothing formally happens after that.

AUDIENCE:

I think, building on that, we seem to be getting to a point where everyone agrees on the basic, factual, underlying nature of what actually went on. And given the chance that there's a-- given

the very low chance that there's a conviction in the Senate, do either of you think there's a unique national security risk about the Senate, in effect, sanctioning the president's behavior, saying that it's not impeach-- or not warranting removal would effectively open the door to future presidents acting in a similar way in the future that might undermine national security?

JOHN HARRISON: Do you want to take that? I will say that I think that there are issues on which the House and the Senate do take seriously their own precedents. And indeed, that's the main thing I was actually testifying about in 1998, was the bearing of some of the House of Representatives' earlier decisions on when a judge is impeachable, on when a president would be impeachable.

So to some extent, they set precedents and regard themselves later on as at least presumptively bound by their precedents. I don't think, in these circumstances, that the kind of judgment you're asking about would be likely to set much of a precedent precisely because it is so, as we say, fact intensive.

That is to say, it's about this particular situation. It's about the costs and benefits right now of responding to this problem by removing this president. I think-- to use the phrase, I think that's a ticket good for this day and train only, that that's a highly factual judgment and really-- whereas some of the more legal principles, what constitutes an impeachable offense-- again, that's what I was talking about.

There, I think, certainly the House, at least, does take seriously its prior practice as to when have we impeached and when have we not. But those are legal principles, whereas the fact-based ones, I think not.

ASHLEY DEEKS: Yeah, I guess it may also depend on how it unrolls. You've already started to see some Republicans saying, look, we don't actually think this was a very good thing for the president to do. We don't condone this behavior. But we don't think it's impeachable. And you might see people voting against impeachment and saying the same thing, right?

So maybe in a less legal sense and more of a kind of factual sense, piling on to the one-ticket-one-day thing, this is not something we think represents the best activities of our seniormost leadership. But we're not going to vote for impeachment at this time.

AUDIENCE: So, either one of you could answer it. And excuse me if this is a silly question. But to the extent that the president's actions relate to foreign affairs and that's a basis that's driving the impeachment inquiry, how does a deference to the president on foreign affairs relate at all?

Does national security deference affect how the impeachment analysis goes?

ASHLEY DEEKS: Oh, this was the point you were making right in the beginning of your conference.

JOHN HARRISON: Yeah, I think that it is-- those concepts that you often see elsewhere in American law-- like, there are a lot of-- there are a lot of-- on the relevant instances in which issues like this come before the courts, the courts are often highly deferential to the executive branch's position on a lot of issues.

I don't think that has much or any bearing here, first, because the point that I do think that whatever the president's powers are, they're all qualified by impeachment, just like all of Congress's powers are qualified by the First Amendment. And then the specific inquiries that the impeachment clause call for-- in part because they're not about, was something sound policy or not. Deference is designed to have courts in particular not making judgments like that.

But since the impeachment clauses do call for the House and Senate to be making judgments about, is this sufficiently morally wrongful as to be a high crime or misdemeanor, to be making the factual judgments? What was the president's motive? Was it actually personal as opposed to public-- something else the courts are reluctant to get into. But I think the impeachment structure calls on the House and Senate to ask questions like that. So I think those principles that routinely apply elsewhere don't have much application here.

AUDIENCE: Question for Professor Deeks. Do you see any connection between the chaos of the impeachment inquiry or the underlying allegations and what's happening in northern Syria or other current world events?

ASHLEY DEEKS: So, it's hard for me to draw a direct causal link between those. I mean, there's some overlap in timing. But given that we don't have immediate access to conversations that are happening in the Situation Room if the president's convened a national security meeting, it's hard to know for sure.

I mean, it's more or less armchair psychology to say, well, surely a president who is facing an impeachment inquiry has a bunch of things on his mind, and it might be harder to administer laser-like focus to the pros and cons of different policy options in Syria. Maybe that's happened, but I can't say I've seen a causal link between those two.

AUDIENCE: Excuse me. If the president just openly said that this was a personal quid pro quo and that he

didn't do it on behalf of the country, and he was still able to get 20 Republicans to protect him from conviction, I'm wondering what the broader institutional damage is if, legally, he committed impeachable offenses, but for political reasons, the jury doesn't convict him. I mean, I think that's a plausible scenario, and I'm curious what you all think.

ASHLEY DEEKS: Go ahead.

JOHN HARRISON: The first thing I think is that the-- in the situation where the motivation is a crucial question, the impermissible motivation by itself, I would say, is a necessary but not a sufficient condition for something to be impeachable. There's also the, was it morally wrong, how serious was it.

The next thing that you get at is, OK, what are the permissible considerations for the House and Senate? That is to say, what motivations are OK for them? And what about their judgments about what is a politi-- what is desirable? Can they be governed by their own political judgments?

One thing-- I'm not sure about that. But one thing I will say is it is very much a part of the system. And indeed, for those you care about drafting history type things, a deliberate choice in the federal convention that these decisions be made by elected officials-- that's-- the original version of the impeachment clause had impeachments being tried before the Supreme Court of the United States. The federal convention changed that. They made it House then Senate, knowing that those judgments would therefore be made by politicians.

Now, the positive spin on that is that's right, and it's politicians who can best judge the magnitude of the harm to the public interest in so far as that and, I think, legitimately is a consideration certainly for the Senate in deciding whether to convict.

Whether the Constitution's decision to have politicians making these judgments brings with it, well, what about the other more political parts of what they are-- of what they're doing is a harder question. I tend to think probably yes. That is to say, they're supposed to make judgments about politics.

But I think that's a harder question than the one-- are they supposed to make judgments about the public interest, which maybe you would think a court can't well make. No, that's the reason it's the Senate.

ASHLEY DEEKS: But of course, there is an added aspect to the fact that it is a political actor making the votes

as if they're also subject to their election in the next round. Whenever there are senators who vote not to convict come up for election again, because they're politicians, they, you know, potentially stand to pay for the vote.

AUDIENCE:

So, I've got a question relating to, I guess more broadly, national security policy. Now in the last four years, both in the 2016 election and now recently with the Ukraine phone call, with that allegations on both sides about improper uses of classification systems and classified computer systems, and what exactly do you feel like are the broader implications for national policy and if those alleged violations seem to have been brushed under the carpet.

Because in the civilian world, if at my previous job, I'd done something that either of these people were accused of, I would have lost my clearance and would have spent significant time in federal prison. But it almost feels like there's a separate set of rules that the higher-ups are playing by. And do you see that as undermining national security policy for people going forward?

ASHLEY DEEKS:

So, I'll focus on the use of the classified system. I mean, I averted to this, I think, in my comments that there are different actors you might inquire about what is their take away from the fact that this transfer of the transcript to the classified system happened.

So, one audience for that is the public, right? And I think not everybody in the United States, but there is some group of people, a not-insignificant group, that worries about government secrecy, that worries about overclassification, that worries about the fact that the Freedom of Information Act is not a hugely robust system, and that worries that the executive has very tight control over classification and sometimes refuses to share things with Congress that Congress itself believes that it should have access to.

And so if you are in that group of people that worries about this, then this is exhibit A for you to continue to be worried about what's going on behind the scrim of classification that you don't know and that you worry is being reflective of abuse or poor policy judgments and so on.

A different audience is people inside the executive branch and thinking about, well, is this-- is it OK for me to use a system to put-- you know, I'll put a memo that I received the details-- misbehavior by my inferior officers. I'll put that on a classified system. And then I'll call my lawyers, and maybe they'll tell me to put it on a more classified system.

I mean, you want people inside the executive branch to have a good understanding of what's

acceptable, when is it acceptable to classify information, when is it not, who can declassify it, and so on. And so it would be troubling if people in the executive learned the wrong lesson from whatever happened here.

AUDIENCE: One of the surprising things about the-- at least to me, about the impeachment inquiry so far has been the pretty steady march of bureaucrats, particularly from the State Department, to Capitol Hill to testify about these issues. I wonder how you sort of-- I mean, you could make the case that the people who've testified so far are relatively low-- I mean, some of them are ambassador-level or assistant secretary-level, but relatively low-level officials. Do you foresee a clash over executive privilege coming? And how soon do you think that might happen?

ASHLEY DEEKS: So, I think it's already happening. There are a number of officials, including John Bolton and-- who's the individual who filed a suit asking how to justify-- there's an individual who has basically brought his case before a federal court to say, look, on the one hand, I've been told by the White House that I may not go up to the Hill and testify that the executive has invoked privilege. And on the other hand, I've received a valid congressional subpoena, and I don't know what to do.

And the judge is currently considering this issue. And I think she's doing it on a fast track. So we may well see a judicial opinion on that. A number of the people-- I think at least one person has gone up to the Hill over the objection of the executive. And a number of people are former State Department people over whom the executive has a harder time keeping control.

So yes, I do think we will actually potentially see a judicial opinion about the-- what to do about a clash between a subpoena and executive privilege here. It's something that courts have generally preferred that the political branches work out themselves. But this seems to be a case in which there's very little likelihood of that happening.

JOHN HARRISON: One of the interesting things about impeachment is that there is-- an impeachment is itself a mechanism for enforcing House of Representatives's investigatory demands. Nixon was not impeached by the House because he resigned before he almost certainly would have been. But the Judiciary Committee voted out several articles of impeachment, one of which was failure to comply with Judiciary Committee subpoenas. They thought that that by itself was an impeachable offense.

MICAH We have time for maybe one more question.

SCHWARTZMAN:

AUDIENCE: [INAUDIBLE]

MICAH That raises lots of questions.

SCHWARTZMAN:

[LAUGHTER]

All right, then. But I just want to thank you all for coming. And then you can join me in thanking our speakers.

[APPLAUSE]