Committee on Homeland Security
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Statement of Frank O. Bowman, III
University of Missouri Curators' Distinguished Professor Emeritus
Floyd R. Gibson Missouri Endowed Professor Emeritus

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Introduction

I am honored to have the privilege of addressing the members the House Homeland Security Committee in this first of what I understand to be a series of hearings inquiring into whether constitutional grounds exist to impeach Alejandro Mayorkas, Secretary of the Department of Homeland Security. Although the Committee's previously issued reports, the title of this hearing, and the identity of my distinguished fellow witnesses suggest that much of its focus will be on the performance of Secretary Mayorkas, his department, and the Biden Administration generally in relation to immigration policy and enforcement and other issues concerning control of the United States' southern border, I am not an expert on those topics. I will not comment on them here.

I have, however, been studying and writing about the constitutional standards for impeachment for over twenty-five years. I submitted testimony to the House Judiciary Committee on the meaning of "high Crimes and Misdemeanors" during the Clinton matter[1] and since then have written fairly copiously on a wide range of topics relating to impeachment. In addition to articles in the scholarly and popular press,[2] I published in 2019 a book on the subject with Cambridge University Press, the second edition of which appeared in November of last year.[3]

I want to emphasize that, although I have opinions about whether the evidence I have so far seen regarding Secretary Mayorkas meets the constitutional standard for impeachment of a civil officer of the United States, I am not appearing as a witness for or against any person or party. Rather, I am appearing to offer the Committee such advice as I can based on a quarter-century of study of impeachment under the American constitution.

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[1] *Background and History of Impeachment*, Hearing before the Subcommittee on the Constitution, House Judiciary Committee, 105th Cong., 2d Sess., Nov. 9, 1998, at 342-372.

[2] *See, e.g.*, Bowman, *British Impeachments (1376–1787) and the Present American Constitutional Crisis*, 46 HASTINGS CONSTITUTIONAL LAW QTRLY 745 (2019); Bowman, *High Crimes & Misdemeanors -- The Constitutional Limits on Presidential Impeachment,* 72 SOUTHERN CALIFORNIA L. REV. 1517 (Sept. 1999) (with Stephen L. Sepinuck).

[3] BOWMAN, HIGH CRIMES & MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP, Second Edition (Cambridge University Press 2023) (hereinafter BOWMAN, HIGH CRIMES & MISDEMEANORS).

Constitutional Standards for Impeachment

Article II, Section 4 of the Constitution provides that, "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."[4] A cabinet secretary is a "civil officer" subject to impeachment. But a cabinet secretary, like the President, Vice President, or any other civil officer, is not impeachable unless he or she is proven to have committed "Treason, Bribery, or other high Crimes and Misdemeanors."

We are here today to discuss Secretary of Homeland Security Mayorkas and there is no suggestion that he has committed either treason or bribery. Hence, any article of impeachment against him must establish that he committed "high Crimes and Misdemeanors."

"High Crimes & Misdemeanors" and Policy Disputes

At the constitutional convention in 1787, once the delegates decided that presidents and others should be impeachable, they proposed various definitions of impeachable conduct. In the last exchange, George Mason first suggested "treason, bribery or maladministration." James Madison recoiled at "maladministration," saying, "So vague a term will be equivalent to tenure during the pleasure of the Senate." Whereupon Mason withdrew "maladministration" and proposed instead "other high Crimes and Misdemeanors." This suggestion was adopted with no dissent or further discussion.[5]

The key point about the exchange between Mason and Madison is that, although Madison was a consistent supporter of a strong impeachment power as a check on presidential authority, he rejected any formula that would subordinate the President to Congress. Mason had made the same point earlier in the convention when he coupled his endorsement of impeachment with the admonition that the president should not, by virtue of impeachment, become "the mere creature of the Legislature."[6]

Both Mason and Madison wanted to avoid creating an impeachment mechanism that was the equivalent of the "vote of no confidence" common in modern parliamentary systems, a vote that could remove the president or other executive branch officials between elections whenever the legislature disapproves of the official's behavior or the administration's policy choices.[7] As the great Professor Charles Black put the matter in his seminal Nixon-era survey of impeachment:

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[4] U.S. Const., art II, sec. 4.

[5] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 550-52 (Max Farrand, ed. 1911).

[6] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 86 (Max Farrand, ed. 1911).

[7] BOWMAN, HIGH CRIMES & MISDEMEANORS, supra note 3, at 92. See also, CHARLES L. BLACK, JR. AND PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK 28 (2d ed. 2018); Keith Whittington, *Impeachment in a System of Checks and Balances*, 87 MO. L. REV. 844 (2022) (the adoption of "high crimes and misdemeanors" by the convention "seemed to capture the range of potential dangers that concerned Madison and others, without leaving the president vulnerable to impeachment over routine political and policy disagreements").

> Madison's reason for objecting to "maladministration" as a ground was that the inclusion of this phrase would result in the president's holding his office "during pleasure of the Senate." In other words, if mere inefficient administration, or *administration that did not accord with Congress's view of good policy*, were enough for impeachment and removal, without any flavor of criminality or distinct wrongdoing, impeachment and removal would take on the character of a British parliamentary vote of "no confidence." The September 8 colloquy [between Mason and Madison] makes it very plain that this was not wanted, and certainly the phrase "high Crimes and Misdemeanors," whatever its vagueness at the edges, *seems absolutely to forbid the removal of a president on the grounds that Congress does not on the whole think his administration of public affairs is good*. *** *[W]hatever may be the grounds for impeachment and removal, dislike of a president's policy is definitely not one of them, and ought to play no part in the decision on impeachment*. There is every reason to think that most congressmen and senators are aware of this." [8]

Since at least 1805, there has been consensus among students of impeachment that it should not be attempted based on simple policy disagreements between Congress and the executive branch,[9] and that impeachment must not be employed to subordinate the executive to Congress.[10] In recent years, that consensus has become, if anything, more settled. For example, Chief Justice William Rehnquist wrote in his 1992 history of the impeachments of Justice Samuel Chase and President Andrew Johnson that Johnson's acquittal was beneficial insofar that conviction might have made impeachment merely a means to "frustrate the president in his effort to carry out his program."[11] In 1999, preeminent impeachment scholar Michael Gerhardt reviewed all the Senate impeachment decisions to that point and observed that the Senate has "concluded that impeachable offenses do not include errors of judgment or policy differences."[12]

Moreover, the principle that the limitation of impeachment to "high Crimes and Misdemeanors" was intended to preclude Congress from seeking to control executive policy through removal or its threat extends beyond the president to his principal cabinet officers. As Raoul Berger, the other great impeachment scholar of the 1970s, concluded:

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[8] CHARLES L. BLACK, JR. AND PHILIP BOBBITT, IMPEACHMENT: A HANDBOOK (2d ed. 2018) (emphasis added).

[9] The principle that impeachment should not be a weapon of partisan political warfare was established in the 1805 case of Justice Samuel Chase. Chase, an ardent Federalist, did and said a number of probably intemperate things on the bench, but was impeached primarily because President Jefferson and the Republican-controlled House of Representatives disliked his politics and wanted to remove him and replace him with one of their own. The Senate acquitted Chase, a result said to establish that impeachment should not be employed as a partisan weapon, particularly against the judiciary. BOWMAN, HIGH CRIMES & MISDEMEANORS, *supra* note 3, at 123-31.

[10] Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, Comm on the Judiciary, U.S. House of Representatives, 93d Cong, 2d Sess. 16, 26 (Feb. 1974).

[11] WILLIAM H REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 270 (1992).

[12] Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 921 (1999).

> In setting up an independent President who was to serve for a term, and in making cabinet officers a part of the executive branch, the Framers surely were aware that a mere vote of no confidence could not, as in England, topple a Secretary. *** It was because the separation of powers left no room for removal by a vote of no confidence that impeachment was adopted as a safety valve, a security against an oppressive or corrupt President and his sheltered ministers.[13]

During the first impeachment of President Donald Trump, his defenders vehemently endorsed the ancient principle that impeachment ought not be based on ordinary policy disagreements between a presidential administration and Congress. As John Malcom of the Heritage Foundation wrote:

> The impeachment process is not intended to serve as a partisan political weapon. It is to apply to those who are unfit for office, not those who are merely incompetent or disagreeable. Its purpose is to address serious misconduct, not to settle policy disputes.[14]

The President's defenders got the principle exactly right. Indeed, that principle rests not merely on the text of the Constitution, the original understanding of that document's text, and lengthy American precedent, but on important considerations relating to the proper and efficacious conduct of public business in our tripartite national government.

The Framers adopted impeachment because they recognized that some mechanism other than elections might be needed to remove officials in extraordinary cases of egregious misconduct amounting to, in George Mason's phrase, "great and dangerous offenses." But because they wanted none of the three co-equal branches to exercise undue influence over the other, they were, as noted, equally determined to avoid making impeachment a means by which Congress could subordinate the presidency to its will. Impeachment, conviction, and removal of the *President* over policy disagreements, however heated, would produce just such subordination.

Impeachment of a subordinate executive branch official over policy differences is even less desirable. The purpose of impeachment is to remove an official whose continuance in office would pose an ongoing risk of really serious harm to the governmental body in which he or she serves, to the nation's vital interests, or to the constitutional order itself. Implicit in that purpose is the limitation that impeachment should not be considered if removal of the particular officer would effect no material change. For example, removal of a corrupt judge stops further corrupt

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[13] RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 98 (1973).

[14] John Malcolm, *Impeaching Donald Trump: A Game of Political High Stakes Poker*, The Heritage Foundation (Oct. 8, 2019), https://www.heritage.org/political-process/commentary/impeaching-donald-trump-game-political-high-stakes-poker. *See also*, Andrew C McCarthy, *Trump vs. the 'Policy Community': We resolve policy disputes by elections, not impeachments*, NATIONAL REVIEW (November 12, 2019), https://www.nationalreview.com/2019/11/trump-vs-the-policy-community/; Jordan Sekulow, *Impeachment 101: Policy Disagreements & "Whistleblowers,"* ACLJ (November 26, 2019), https://aclj.org/public-policy/impeachment-101-policy-disagreements-whistleblowers ("Policy disagreements are not a case for impeachment.").

acts by that judge, and removal of a law-breaking autocratic president can prevent incipient tyranny. By contrast, removing a cabinet secretary *because one disapproves of the policy he is pursuing at the behest of his constitutional superior, the President*, changes nothing (other than the personal fortunes of the secretary) because the President remains in office and in charge of policy.[15]

Put simply, on one hand, even if successfully impeaching and removing a cabinet officer could change the policy of a presidential administration, using impeachment for that purpose would be contrary to America's constitutional design. On the other hand, given that removing a cabinet secretary is profoundly unlikely to change policy, such an impeachment would almost certainly be futile.

Adding to the essential futility of a policy-based impeachment, the Framers made successful impeachment very difficult. Not only did they adopt language that, properly construed, limits impeachable offenses to extreme cases and great offenses, but they required a two-thirds majority for conviction in the Senate. If there is no serious prospect that the Senate will convict an official whose impeachment is in contemplation, the House ought to have the most compelling justification for embarking on an impeachment inquiry. Otherwise, the scarce legislative resources of the House will be expended on an inevitably contentious battle that cannot produce any practical result and will serve no public end.

Other Grounds for Impeachment?

It may be that Secretary Mayorkas's critics will disavow any intention of impeaching him because they disagree with the policies of the Biden Administration. But if so, on what proper *constitutional* ground might the Secretary's impeachment be based?

"High Crimes and Misdemeanors" is a specialized constitutional term of art that does not mean what it seems to mean. During President Trump's first impeachment proceeding, his defenders insisted that crime or perhaps "crime-like" conduct was necessary, or at the least that there must be a violation of "established law."[16] As a constitutional matter, they were incorrect. No indictable criminal offense is necessary.[17] Nor indeed must there be a statutory violation or transgression of a specific judge-made rule.[18]

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[15] Moreover, when, as is now the case, the Senate is controlled by the President's party, there is no practical obstacle to replacement of the impeached official with a successor equally committed to the President's policy priorities and approaches.

[16] Trial Memorandum of Pres. Donald J. Trump 81-84 (Jan. 20, 2020), Proceedings of the U.S. Senate in Impeachment Trial of Donald John Trump, Part. III.

[17] Frank O. Bowman, III, *Constitutional Crabgrass: President Trump's Defenders Distort the Impeachment Clause*, Just Security (Jan. 24, 2020), https://www.justsecurity.org/68240/constitutional-crabgrass-president-trump-defenders-distort-the-impeachment-clauses-frank-bowman-high-crimes-misdemeanors/.

[18] As Justice Joseph Story observed in Section 797 of his 1833 treatise *Commentaries on the Constitution*, "no previous statute is necessary to authorize an impeachment for any official misconduct." *See also*, BOWMAN, HIGH CRIMES & MISDEMEANORS, *supra* note 3, at 352-53.

However, President Trump's defenders were right at least in emphasizing that impeachable "high Crimes and Misdemeanors" must be matters of grave public importance and involve misconduct of a magnitude akin to the commission of a very serious crime.

Many commentators have concluded that impeachable offenses ought to be of the magnitude of a serious criminal offense by applying the interpretive maxim *ejusdem generis* to the whole phrase "Treason, Bribery, or other High Crimes and Misdemeanors." The fancy Latin means no more than that later words in a series should be read in relation to the early ones. In this case, impeachable "other high crimes and misdemeanors" should be similar in type and severity to treason and bribery. As Charles Black wrote:

> The catch in applying this *ejusdem generis* rule is the difficulty (sometimes) of correctly pinning down the "kind" to which the specific items belong. In the present case, however, the "kind" to which "treason" and "bribery" belong is rather readily identifiable. They are offenses (1) which are extremely serious, (2) which in some way corrupt or subvert the political and governmental process, and (3) which are plainly wrong in themselves to a person of honor, or to a good citizen, regardless of words on the statute books.[19]

President Trump's defenders were also correct in observing that previous impeachments, particularly of presidents, have tended to involve conduct that at least might be charged as a serious crime. The reason for that historical trend is plain enough. As Black put it, "The fact that [an allegedly impeachable] act is also criminal helps, even if it is not essential, because a general societal view of wrongness, and sometimes of seriousness, is, in such a case, publicly and authoritatively recorded." [20] In short, a provable violation of law is useful in demonstrating the seriousness of alleged misconduct.

In sum, the foundational requirement for impeachable "high Crimes and Misdemeanors" is that they must be of extraordinary seriousness and ought to be of a type that corrupts or subverts governmental processes or the constitutional order. In the United States, the types of behavior most commonly found to meet this basic requirement have been official corruption; abuse of power; betrayal of the nation's foreign policy interests; and subversion of the Constitution.

There is no contention of which I am aware that Secretary Mayorkas has engaged in official corruption of any kind, betrayed the nation's foreign policy interests, or subverted the constitutional order. I can imagine that those who disagree with the Secretary's actions as head of the Department of Homeland Security implementing the policy priorities of President Biden, or with his exercise of the discretionary authority of his office in aid of implementing those priorities, might mischaracterize the Secretary's official conduct as an "abuse of power." However, long precedent establishes that impeachable abuse of power involves employing the powers of one's office for illegal or illegitimate ends – particularly to gain personal political or financial advantage, to benefit one's political allies, friends, or relations, or to injure one's personal or political enemies – and especially when the abusive exercise of official power

[19] BLACK AND BOBBITT, *supra* note 7, at 34.
[20] BLACK AND BOBBITT, *supra* note 7, at 38.

threatens to undermine constitutional values such as electoral democracy, or in the present case, the separation of powers.[21] Following the policy directives of one's elected superior in pursuit of that superior's policy aims is simply not an impeachable abuse of power.

Impeachment for personal incapacity: It also has been argued, although there is less consensus on the point, that "high Crimes and Misdemeanors" can reach extraordinary instances of professional incapacity expressed in failures to perform one's official responsibilities through extreme incompetence, neglect of duty, or official malpractice. In principle, this must be so at least in extreme cases. As Charles Black famously observed fifty years ago, if the president were to move to Saudi Arabia so he could have four wives and proposed to perform his duties henceforth exclusively by phone and wireless communication, that would necessarily be impeachable (not because of the four wives, perhaps, but because he could not properly fulfill many of his constitutional responsibilities).

Despite the theoretical availability of impeachment based on allegations of extreme professional incapacity, the foundational requirement of extraordinary seriousness and corruption or subversion of governmental processes or the constitutional order remains. In part for that reason and in part because other and easier remedies exist, actual instances of impeachment in the United States for personal incapacity or extraordinarily bad professional performance are vanishingly rare.

The only two cases that arguably fit this category are those of U.S. District Judges John Pickering of New Hampshire (1803) and Mark H. Delahay of Kansas (1873). Pickering was impeached, convicted, and removed essentially for being both alcoholic and insane. Delahay was impeached primarily because his "personal habits" – being habitually drunk on the bench – made him unfit for office, and he resigned before formal impeachment proceedings against him could be concluded.[22]

No executive branch official has ever been impeached for personal incapacity. The only cabinet officer ever impeached was William Belknap, President Ulysses Grant's Secretary of War, charged in 1876 with corruptly selling the post of trader at Fort Sill, Oklahoma Territory. Belknap's singular case illustrates two important points.

First, he was impeached for ordinary tawdry corruption. No cabinet officer has ever been impeached for incapacity or radically poor official performance. The obvious reason is that any cabinet officer whose performance is really so egregiously deficient as to border on the impeachable will simply be dismissed by the President. Indeed, that is exactly what happened to Belknap. As soon as the allegations surfaced, President Grant fired the Secretary. But the House, at that point controlled by Democrats for the first time since the Civil War, decided to impeach Belknap anyway to cause political trouble for Grant and his Republican Party.[23]

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[21] *See generally*, BOWMAN, HIGH CRIMES & MISDEMEANORS, *supra* note 3, at 38, 105-07, 192-94, 331-32, 342-46, 353-54, 405-08.
[22] Id. at 132-135.
[23] Id. at 118-19.

Second, the very singularity of the Belknap case is revealing. Only once has the House employed impeachment against a cabinet officer for the transparent purpose of gaining partisan political advantage. And in that case, the officer really had committed impeachable corruption. The House has *never* impeached a cabinet officer because it thought the officer was personally incapable or was doing a terrible job. Nor has it ever sought to categorize a cabinet officer's faithful pursuit of presidential policy as an impeachable dereliction. To paraphrase Charles Black's observation quoted above, until today, "There [has been] every reason to think that most congressmen and senators are aware" that "whatever may be the grounds for impeachment and removal, dislike of a president's policy is definitely not one of them."

In the case of Secretary Mayorkas, I am unaware of any information that would support an argument that he is personally incapable of performing his office. All public information of which I aware concerning his background, education, training, prior service, and record in his current office[24] suggests that he is an experienced, diligent, competent administrator carrying out to the best of his ability directives of his elected superior. That one congressional party disapproves, even disapproves vigorously, of President Biden's policies on immigration or other matters within the Secretary's purview does not make the Secretary impeachable, at least if constitutional language, the original understanding of the founding generation, 230 years of precedent, and considerations of good government and the proper relations between the coordinate branches have any meaning.

Alleged Violations of Immigration Law as Grounds for Impeachment

Perhaps in recognition of the constitutional principles articulated above, the Committee majority seems to be attempting to cast its concerns about Secretary Mayorkas as allegations of violations of law. Most of the supposed legal violations involve debates over the extent and proper exercise of the Secretary's discretionary authority in the immigration field. Although there is pending litigation over some of the Secretary's actions,[25] there has been, so far as I am aware, no final resolution of any of this litigation materially adverse to the positions taken by the Department of Homeland Security. The Department has both lost and won some cases in lower courts, and has in some cases succeeded in having lower court losses reversed on appeal. Critically, in the two cases that have reached the U.S. Supreme Court, the justices sided with the Department.[26]

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[24] Alejandro Mayorkas, Dept. of Homeland Security, https://www.dhs.gov/person/alejandro-mayorkas.

[25] Revealingly, the Department has been sued both by immigrant advocates who think its immigration rules and policies are too restrictive and by those, primarily Republican state attorneys general, who think the opposite.

[26] Biden v. Texas, 597 U.S. 785 (2022) (reversing lower court decision and finding that immigration detention is not mandatory under §1225(b)(2)(A) because §1182(d)(5)(A) grants parole authority and that an administration is not obliged to adopt a return to Mexico policy if the government lacks the capacity to detain all would-be migrants); United States v. Texas, 599 U.S. 670 (June 23, 2023) (reversing lower court decision voiding DHS guidelines for immigration enforcement and removal priorities, holding that plaintiffs did not have standing to challenge these guidelines, and emphasizing that the Secretary had long-recognized discretion over arrest and prosecution decisions as set forth in the guidelines).

As a constitutional matter, the existence of active litigation challenging discretionary actions by a cabinet secretary (or indeed by a president) is no ground for impeachment. This may be even more true where, as in the present case, much of the litigation has been brought by state attorneys general of the opposite party to the President and his administration. This is particularly true when, at least to date, the positions taken by those attorneys general have not been accepted by the U.S. Supreme Court.

Even if the Supreme Court were to rule against the administration on significant questions, that is not a proper ground for impeachment.[27] Legal disputes over the exercises of executive authority are a commonplace in every administration. And every president wins some and loses others. If the mere existence of such disputes were impeachable, every president and every cabinet officer would be impeachable many times over.

There is, at least at present, no constitutional case for impeaching Secretary Mayorkas

I recognize that today's hearing is only the first in a proposed series directed at determining whether grounds exist for impeaching Secretary Mayorkas. However, all the arguments for impeaching Secretary Mayorkas of which I am currently aware boil down to expressions of disapproval of the Biden Administration's alterations of Trump-era immigration policies coupled with claims that these alterations have produced various allegedly harmful consequences. If one believes that both legal and illegal immigration are bad for the country and ought to be dramatically constrained, then one can fairly oppose Biden's policy choices. If members of Congress oppose this Administration's policy choices, they have ample tools to express that opposition through legislation. But, at least if Congress seeks to remain true to established constitutional law and precedent, that opposition cannot be transmuted into a case for impeaching Secretary Mayorkas.

[27] CASS R. SUNSTEIN, IMPEACHMENT: A CITIZEN'S GUIDE 124-25 (2017).