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## Prepared Testimony to the Committee on Homeland Security United States House of Representatives

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**Introduction**

Chairman Green, Ranking Member Thompson, members of the Committee, thank you for the opportunity to participate in the Committee’s consideration of whether constitutional grounds exist to impeach Alejandro Mayorkas, Secretary of the Department of Homeland Security.

Having been a Professor of Constitutional Law for more than a decade, and a director of two different academic centers focused on the study of constitutional democracy, I have repeatedly had occasion to study, write, and teach about the unique role impeachment plays in our system of government. My expertise is in the field of Constitutional Law, not in immigration policy as such, and my testimony is thus limited to questions of constitutional authority as relevant here. This testimony is offered in my personal capacity and should not be understood to reflect the views of my university employer or of any other institution with which I am affiliated.

In this testimony, I make three points. First, impeachment is a narrow remedy for specific kind of misconduct, limited by the Constitution to the most serious class of offenses against our constitutional system of government: “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. Const., Art. II, sec. 4. The apparent allegations against Secretary Mayorkas described in various Committee Majority Reports I have reviewed do not appear to establish grounds for any of those offenses within the meaning of Article II. Second, impeachment is not and has never been an instrument capable of effecting policy change; impeachment of Secretary Mayorkas in particular can have no impact on the Administration’s exercise of immigration enforcement discretion, a power the Supreme Court has repeatedly

recognized is vested by the Constitution in the Executive Branch. Finally, no branch of government has more power under our Constitution to address matters of border security than Congress. While that authority has gone largely untapped in recent decades, Congress remains the sole branch of government constitutionally empowered to, for example, increase expenditures to bolster counter-fentanyl efforts at the border; accelerate the processing of foreign nationals seeking asylum; or define and establish criminal offenses against the United States. U.S. Const., Art. I, sec. 8. Although impeachment is likewise among the many powers afforded by the Constitution to Congress, there appears to be no constitutional basis for pursuing it here.

### **I. The Impeachment Power is Specific and Limited**

While the Framers of the U.S. Constitution were convinced that impeachment would have to be retained from the British regime they had just overthrown as a remedy against the most egregious offenses of public officers, they were determined to limit the scope of the power to ensure it remained consistent with the new design of our constitutional democracy.<sup>1</sup> Central to our system is the principle of separation of powers: each branch of government remains independent, with none empowered fully to control the members of the others. The Framers believed that it was through such interbranch competition for power, through “[a]mbition [being] made to counteract ambition,” as Madison famously put it, that no one branch of government would be able to assert powers that threatened the democratic nature of government.<sup>2</sup>

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<sup>1</sup> Multiple distinguished scholars and jurists have written influential volumes describing the impeachment power over the years; all reflect this basic historical understanding. *See, e.g.*, MICHAEL J. GERHARDT, *IMPEACHMENT: A GUIDE FOR THE ENGAGED CITIZEN* (2024); CHARLES L. BLACK, JR. AND PHILIP BOBBIT, *IMPEACHMENT: A HANDBOOK* 26-28 (2d ed. 2018); LAURENCE TRIBE AND JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* 39 (2018).

<sup>2</sup> *THE FEDERALIST NO. 51*, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

Because impeachment was a potentially dangerous exception to that overriding principle, the Framers thus significantly narrowed the scope of the impeachment power as it had existed under the law of the regime they had just overthrown.<sup>3</sup> Under our Constitution, for example, the consequences of impeachment were limited to disqualification from office; no longer would it carry the other potentially harsh punishments that made it more of a penal sanction under the British King. Likewise, rather than requiring only a simple majority of each chamber of parliament to impeach as had the British, under the U.S. Constitution, no person could be convicted following impeachment without the consent of two-thirds of the Senate. U.S. Const., Art. I, sec. 3. Above all, the Framers significantly narrowed the grounds for which officials could be impeached to “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. Const., Art. II, sec. 4. Then, as now, treason and bribery were recognized as the most serious offenses against a system of government in which the American people were asked to entrust elected leaders with acting in their interest. Treason was a betrayal of the interests of the American people in favor of the interests of a foreign enemy. U.S. Const., Art. III, sec. 3. Bribery involved a public official placing his own interests in personal power or enrichment over the interests of the public.<sup>4</sup> By labeling the residual category “*other* high crimes and Misdemeanors,” the Framers signaled they meant to include only those offenses that posed a *similarly* severe threat not to the accomplishment of particular political or policy agendas, but to the very system of government that depends on officials acting in good faith on behalf of the people who placed them in office.<sup>5</sup> Policy differences could be addressed through elections. Impeachment was to be – and largely has been – a last-ditch mechanism to address offenses

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<sup>3</sup> See, e.g., GERHARDT, *supra* note 1.

<sup>4</sup> See, e.g., TRIBE AND MATZ, *supra* note 1, at 33.

<sup>5</sup> See, e.g., BLACK AND BOBBIT, *supra* note 1, at 33-35.

against constitutional democracy that could not be adequately addressed through ordinary channels of government.

Although the incomplete records of the Constitutional Convention only occasionally shed much light on constitutional meaning, here, those records are clear on what impeachment is not: “maladministration,” including malpractice, mismanagement, incompetence, or even unpopular policies. While Virginia delegate to the Convention George Mason had initially suggested limiting impeachable offenses to “treason, bribery or maladministration,”<sup>6</sup> Madison rejected the last term out of just the separation-of-powers concerns noted above. As Madison put it: “So vague a term will be equivalent to tenure during the pleasure of the Senate.”<sup>7</sup> It would effectively give Congress a degree of power over the Executive equivalent to that in the parliamentary system the Framers rejected – tying the Executive to the policy preferences of the legislature, rather than maintaining it as the independent, co-equal branch the Framers envisioned. Mason soon agreed to delete “maladministration” in favor of “other high Crimes and Misdemeanors,” the language that remains today.<sup>8</sup> The legislature should not be able to disable the Executive function, the Framers were convinced, solely because it objects to the administration’s performance in office or disagrees with its policies – even if, and indeed especially when, the White House is controlled by one party and Congress another.<sup>9</sup>

To the extent it is possible to identify from the various impeachment resolutions and reports made public thus far by this Committee’s Majority, the Majority’s allegations against Secretary Mayorkas relate to neither treason nor bribery, but to the suggestion that the Secretary

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<sup>6</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 550-52 (Max Farrand, ed. 1911).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *See, e.g.*, Various Law Professors, Letter to Background and History of Impeachment: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 105th Cong. Rec. 230 (1998) (accessible at [https://www.salon.com/1998/11/06/newsf\\_2/](https://www.salon.com/1998/11/06/newsf_2/)).

has either been derelict in or neglectful of his duties, or that he has in some respect exceeded or abused his lawful authority.<sup>10</sup> On the former claim, there have only been two occasions in U.S. history in which officials were impeached based on allegations related to the failure to carry out their official role: U.S. District Judge John Pickering in 1804, and U.S. District Judge Mark Delahay in 1873.<sup>11</sup> In both of those cases, the charges alleged that the officials were either chronically inebriated or mentally incapacitated, or both. In short, neither involved a case in which Congress was simply dissatisfied with the official's performance in office; both involved officials who were at base physically or mentally unable to carry out their duties. No remotely comparable evidence of Secretary Mayorkas' incapacity has been presented here.

The subject of the Majority's other set of allegations, related to the lawful authority of the Secretary of Homeland Security over immigration affairs, has been the subject of extensive litigation in the courts in recent years. As discussed in greater detail below, the courts have found Secretary Mayorkas to have acted within the scope of his constitutional and statutory authority in cases that have categorically rejected many of the precise allegations on which Majority Reports and witnesses appear to rely on in support of their claims to the contrary here. To the extent any such disputes are still pending in the courts, they stand as evidence of why impeachment should be understood as a constitutionally unavailable remedy in this case. Far from a circumstance involving an exercise of power incapable of being addressed by ordinary channels of government in our constitutional democracy, *see supra*, page 5, the grounds for

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<sup>10</sup> *See, e.g.*, Committee on Homeland Security Majority Report, DHS Secretary Alejandro Mayorkas' Dereliction of Duty, July 19, 2023.

<sup>11</sup> *See* EMILY FIELD VAN TASSEL, WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789-1992, FEDERAL JUDICIAL CENTER (1993), available at <https://www.fjc.gov/sites/default/files/2012/judgeres.pdf>. Pickering was convicted in the Senate; Delahay resigned before his trial. *Id.*

impeachment here involve the same claims that have been, and in some cases still are, the subject of ordinary dispute resolution in the independent courts.<sup>12</sup>

## **II. Impeachment Can Have No Impact on Executive Enforcement Discretion**

There is only a single case in all of U.S. history in which a federal official other than a judge or a President has been subject to impeachment. Secretary of War William Belknap was impeached almost 150 years ago for allegations that he received financial “kickbacks” from the operation of a trading post controlled by the U.S. military on Indian lands.<sup>13</sup> The allegations against Secretary Belknap – charged with “basely prostituting his high office to his lust for private gain” – manifestly had nothing to do with his efforts to implement the policies of the presidential administration of which he was a part.<sup>14</sup> Indeed, Belknap’s case presented, in essence, the opposite situation than is presented here – in which Secretary Mayorkas is accused, at base, of *carrying out* immigration policies that have been embraced by the presidential administration in which he serves and has been defended by it in court. In this case, even if Secretary Mayorkas is impeached and removed from office, the President retains the constitutional authority simply to task the Secretary’s successor with pursuing exactly the same set of policies. This reality is almost certainly a central reason why Congress has only once in the history of the United States believed it was worth legislators’ time and taxpayers’ substantial

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<sup>12</sup> See, e.g., *M.A. v. Mayorkas*, 2023 WL 5321924 (D.D.C. July 6, 2023).

<sup>13</sup> U.S. Senate, Impeachment Trial of Secretary of War William Belknap, 1876, available <https://www.senate.gov/about/powers-procedures/impeachment/impeachment-belknap.htm>. Belknap resigned shortly before he was impeached and was later acquitted of these charges in the Senate. *Id.*

<sup>14</sup> Trial of William W. Belknap, 4 CONG. REC. 2 (Apr. 4, 1876). Historians report that President Grant on learning of the scandal personally wrote Belknap’s letter of resignation and referred the case to his Department of Justice for investigation. See JEAN EDWARD SMITH, GRANT 595 (2001); WILLIAM MCFEELY, GRANT: A BIOGRAPHY 433-44 (1981).



expense to pursue the impeachment of a cabinet official notwithstanding the certainty that the official's removal will have no effect on administration policy.<sup>15</sup>

To the extent the Majority Reports' allegations against the Secretary are related to those policies, in particular the suggestion that Secretary Mayorkas somehow exceeded the scope of his lawful authority to set priorities for the enforcement of U.S. immigration law, that claim has been rejected most recently by an overwhelming, bipartisan majority of the U.S. Supreme Court – for reasons that came as little surprise to experts in constitutional law. Article II of the Constitution assigns the “executive Power” to the President and provides that the President “shall take Care that the Laws be faithfully executed.” U.S. Const., Art. II, secs. 1, 3. As the Court has made clear on multiple occasions, this power includes the authority to decide “how to prioritize and how aggressively to pursue legal actions against defendants who violate the [criminal] law.”<sup>16</sup> As the Court has equally made clear, most recently in an 8-1 ruling just last year, precisely the same principle applies with even greater force when it comes to the enforcement of immigration laws, a context in which “the Executive’s enforcement discretion implicates not only ‘normal domestic law enforcement priorities’ but also ‘foreign-policy objectives.’”<sup>17</sup>

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<sup>15</sup> There can be little question that impeachment proceedings drain legislative resources that might be devoted to other matters. For example, during one three-year period, the House pursued three judicial impeachment proceedings that together involved seventeen days of hearings; in two of those, the time from commencement of the investigation until approval of final articles of impeachment exceeded a year. Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265 (1993), available [https://judicial-discipline-reform.org/judicial\\_complaints/1993\\_Report\\_Removal.pdf](https://judicial-discipline-reform.org/judicial_complaints/1993_Report_Removal.pdf); see Emily Field van Tassel, Why Judges Resign: Influences on Federal Judicial Service, 1789-1992, Federal Judicial Center (1993), available <https://www.fjc.gov/sites/default/files/2012/judgeres.pdf>.

<sup>16</sup> *TransUnion LLC v. Ramirez*, 594 U.S. \_\_\_, (2021); see also *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”); *Printz v. United States*, 521 U. S. 898, 922–923 (1997) (Congress cannot constitutionally transfer power to execute federal law to state officials); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (decisions about enforcement of “the Nation’s criminal laws” lie within the “special province of the Executive”).

<sup>17</sup> *United States v. Texas*, 599 U.S. 670 (2023) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–491 (1999)).

It was in the very same case, *United States v. Texas*, that the Court noted in rejecting a state challenge to Biden Administration immigration enforcement policies, that the Department of Homeland Security was in key respects exercising discretion in this field in just the same way every past recent administration has during the decades-long period in which Congress has essentially absented itself from the task of immigration policy reform. As Justice Kavanaugh explained for the Court’s majority: “[T]he Executive Branch does not possess the resources necessary to arrest or remove all of the noncitizens covered by [current federal immigration law]. That reality is not an anomaly—it is a constant. For the last 27 years since [these laws] were enacted in their current form, all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.”<sup>18</sup> It is precisely that discretion Secretary Mayorkas has exercised during his tenure. Far from amounting to an “abuse” of his powers or “neglect” of his duties, he is carrying out those duties exactly as the Constitution, the Supreme Court, and every one of the past five administrations have contemplated he would.

### **III. Congress Has Sweeping Constitutional Power to Remedy Border Security**

The first and most important remedy the Constitution provides to address perceived failings of the President and the Executive Branch remains the separation of powers – including Congress’ constitutional authority to effect policy change itself. When it comes to immigration in particular, the Supreme Court has long described congressional power in the field as “plenary.”<sup>19</sup> Article I of the Constitution grants Congress a range of both specific authorities – to

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<sup>18</sup> *United States v. Texas*, 599 U.S. 670; *see also* *Arizona v. United States*, 567 U.S. 387, 396 (2012) (“Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all”).

<sup>19</sup> *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (sustaining Congress’s ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden’).

regulate foreign commerce and to set the terms and conditions by which a foreign national may become a U.S. citizen – and sweeping authorities to “provide for the common Defence and general Welfare of the United States,” and to “make all Laws which shall be necessary and proper” for carrying out its duties. U.S. Const., Art. I, sec. 8. And Congress of course may enact legislation delegating some of its own authority to the Executive, tasking it with carrying out statutory duties as interpreted by the courts. Of at least as much significance is the Constitution’s parallel requirement in the Article I, Section 9 Appropriations Clause, providing: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” As reflected in these and other express provisions of the Constitution, Congress’ “power of the purse” is exclusive and is among our democracy’s most fundamental checks on the exercise of Executive power.<sup>20</sup>

Despite these vast reserves of constitutional authority, Congress has at times allowed its own powers to address pressing national problems to go unused, particularly as it has become increasingly hamstrung by partisan polarization.<sup>21</sup> As an important task force of the American Political Science Association began documenting a decade ago, nowhere has this effect been more apparent than in Congress’ failure to develop national policy on immigration.<sup>22</sup> Informed by the findings of the bipartisan Commission on Immigration Reform, and introduced by bipartisan members of both chambers, the last significant piece of comprehensive immigration legislation passed Congress in 1986. Since then, Congress has established just one other

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<sup>20</sup> See, e.g., THE FEDERALIST NO. 58, at 297-98 (James Madison) (Ian Shapiro ed., 2009) (describing Congress’ power of the purse “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure”).

<sup>21</sup> See, e.g., NOLAN MCCARTY, POLARIZATION (2019).

<sup>22</sup> Michael Barber and Nolan McCarty, *Causes and Consequences of Polarization*, in NEGOTIATING AGREEMENT IN POLITICS: TASK FORCE REPORT OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 39 (Mansbridge & Martin, eds. 2013) (citing The Immigration Reform and Control Act, Pub. L. No. 99–603 (1986)).

bipartisan commission of experts on immigration to examine the problems independently, and based on research and analysis, develop recommendations for reform.<sup>23</sup> While there have been multiple efforts to enact immigration reform legislation since then, including significant bills in 2005, 2006, 2010, and 2013 that garnered bipartisan sponsorship, these bills ultimately foundered in the face of objections from non-moderates in either the House or Senate chamber.<sup>24</sup>

Without taking a position on the wisdom of any particular policy initiative now under consideration, it is apparent that multiple pieces of legislation with bipartisan sponsorship are today pending in the House,<sup>25</sup> and multiple press reports indicate that very active negotiations seeking bipartisan agreement on border security matters are likewise now underway in the Senate.<sup>26</sup> While use of the impeachment power here will, for the reasons noted above, address none of the serious policy concerns the Majority Reports raise, use of the legislative power to enact relevant reforms might. The Framers of the Constitution well understood the acute difficulty of embracing compromise with their domestic political opponents. But for the purpose of actually addressing the needs and concerns of the American people, this process remains the most powerful tool the Constitution provides.

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<sup>23</sup> The Jordan Commission was established in 1990 and concluded its work by 1997. Commission on Legal Immigration Reform, P.L. 101-649, 104 Stat. 5001, November 29, 1990.

<sup>24</sup> See *id.*, at 39-40; see also Carmines & Folwer, *The Temptation of Executive Authority*, 24 IND. J. GLOBAL LEGAL STUD. 369 (2017) (describing various legislative initiatives).

<sup>25</sup> See, e.g., H.R. 5856 – The Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2023 (introduced Sept. 29, 2023).

<sup>26</sup> See, e.g., Julia Ainsley, et al., “Negotiators Consider Expanding Expedited Deportations as Border Talks Near ‘Finish Line,’” NBCNEWS, Jan. 13, 2024, available <https://www.nbcnews.com/politics/immigration/negotiators-consider-expanding-expedited-deportations-border-talks-fin-rcna133571>.