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BACKGROUNDER

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Impeachable High Crimes and Misdemeanors: Not Limited to Criminal Offenses

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KEY TAKEAWAYS

Public officials may be impeached for gross misconduct in office—whether or not they have committed an indictable crime.

DHS Secretary Alejandro Mayorkas should be impeached because he has violated his oath of office, abused the powers of his office, and betrayed the public trust.

Impeaching Mayorkas would be completely consistent with Congress's historical understanding and exercise of its impeachment power.

The drumbeat is building for the U.S. House of Representatives to take up articles of impeachment against Homeland Security Secretary Alejandro Mayorkas.[1] A recent *Special Report* by Heritage Foundation analysts[2] lays out in detail three grounds for impeachment:

Mayorkas has *violated his oath* of office by refusing to enforce and repeatedly violating the laws he is sworn to uphold.

He has *abused the powers of his office* through the deliberate pursuit of policies that have precipitated a humanitarian and border catastrophe, that undermine the sovereignty of the United States, and that put the safety and security of the American people at risk.

He has *betrayed the public trust* by making false statements to Congress and purposely misleading the public about the nature and effects of his policies.

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

That *Special Report* shows that Secretary Mayorkas has assumed the power to suspend key provisions of the country's immigration laws and is illegally releasing hundreds of thousands of unscreened aliens into all parts of the U.S. in reckless disregard of the enormous harm done to America's communities. Unknown numbers of violent criminals, gang members, drug traffickers, human traffickers, and potential terrorists are being released into the country, and all regions of the U.S. have become flooded with deadly fentanyl from Mexico that is pouring over the open, unsecured border that Secretary Mayorkas has recklessly created through his actions.[3]

As the Members of the House of Representatives contemplate their constitutional duty and consider how best to respond to the national crisis created by Mayorkas, it is worth examining again the purposes of impeachment and the historical meaning of the phrase "high Crimes and Misdemeanors" as used in Article II, Section 4 of the U.S. Constitution.[4]

That examination reveals a settled understanding—beyond dispute—that impeachable offenses are *not limited to prosecutable crimes*. Rather, the Framers of the Constitution understood, and the House of Representatives has consistently concluded, that the impeachment power reaches all manner of *gross misconduct in office that does serious harm to the U.S. political system or the U.S. constitutional order*. The actions, policies, and statements of Secretary Mayorkas easily meet that standard.[5]

Understanding the Constitutional Text and Interpretations of the Framers and Early Commentators

As Alexander Hamilton explained in *The Federalist* No. 65, the Framers of the U.S. Constitution modeled the impeachment clause on the traditional impeachment practices of the English parliament.[6] Hamilton affirmed that impeachment was "designed as a method of NATIONAL INQUEST into the conduct of public men" and that "the true light in which" the practice of impeachments "ought to be regarded" was "as a bridle in the hands of the legislative body upon the executive servants of the government."[7]

Consistent with that conception, Hamilton stressed that impeachment is inherently a "political" response to the abuse of official power by an officer of the government and should not be seen as personal punishment for criminal offenses: "The subjects of [impeachment] are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[8]

The Framers knew that impeachment was an important means by which the English parliament had come to check the abuses of the king's ministers and favorites. One of the most prominent examples was the impeachment of Thomas Wentworth, Earl of Strafford, during the showdown between the House of Commons and King Charles I leading up to the English Civil War. The grounds for Wentworth's impeachment included that, as Lord Deputy of Ireland and as a principal advisor to the king, he had attempted "to introduce Arbitrary and Tyrannical Government against Law," had acted "to subvert the Fundamental Laws and Government of the Realms," and had undermined the rights of parliament.[9]

Over the centuries, the grounds for impeachment included a wide range of misconduct in office by governmental ministers, variously described with phrases like "treason," "high treason," "misdemeanors," "malversations," and "high Crimes and Misdemeanors."[10] By the time the American constitutional convention was held in the summer of 1787, the key term of art "high Crimes and Misdemeanors" was well established and had been used by the English parliament for more than 400 years. The earliest instance of its use was in the impeachment of Michael de la Pole, First Earl of Suffolk, the Lord Chancellor of England under King Richard II, who was impeached by the so-called Wonderful Parliament of 1386—the first English minister removed from office by impeachment. De la Pole's "high Crimes and Misdemeanors" included, in addition to apparent common law offenses, at least one breach of trust and one omission that were distinctly non-criminal in nature: *breaking a promise to parliament* that he would follow the recommendations of a committee of the House of Lords and *failing to expend a sum of money* that parliament had directed be used to ransom the city of Ghent, which was lost to Burgundy and France as a result.[11]

Parliament also used the phrase "high Crimes and Misdemeanors" in impeaching Sir Henry Yelverton, attorney general to King James I, in 1621. The charges against Yelverton included failing to prosecute lawsuits he had commenced and prematurely exercising authority before it was properly vested in him.[12] The phrase was used in nearly all impeachments approved by the House of Commons in the 1700s, most of which charged the impeached officers with abuses of power and breaches of trust, not criminal offenses.[13]

When the delegates to the Constitutional Convention gathered in Philadelphia in 1787 to debate the framing of the U.S. Constitution, the British parliament was famously considering the impeachment of Warren Hastings, the first governor-general of India. The original resolution of impeachment

introduced in the House of Commons by Sir Edmund Burke in 1786 and accepted as articles of impeachment by the House in 1787 charged Hastings with various "high Crimes and Misdemeanors." Certain corruption charges were potentially criminal in nature, such as the charge that Hastings had illegally confiscated property belonging to one of the princely families of India, but most of the charges were non-criminal, including allegations of gross maladministration of his authorities and cruelty to the people of India that had precipitated violent uprisings.[14]

Back in Philadelphia, the initial draft of the Constitution's impeachment clause named only "treason or bribery" as grounds for impeachment. George Mason of Virginia objected that these grounds were too limited, and he specifically referred to the Hastings case:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden [to Congress in the U.S. Constitution], it is the more necessary to extend: the power of impeachments.[15]

Mason made a motion to add the word "maladministration" to treason and bribery as grounds for impeachment—maladministration being a term used by six of the 13 original state constitutions, including Virginia's, as a basis for impeachment. But James Madison objected that "maladministration" was "so vague" and broad a term, potentially encompassing minor failings, that it would be "equivalent" to giving the President and civil officers of the government a mere "tenure during pleasure of the Senate." So, Mason withdrew his first suggestion and substituted the tried-and-true phrase "high crimes and misdemeanors agst. the State," which was approved by eight states, with three opposed, and no further debate. The phrase was clarified later the same day to "high crimes and misdemeanors against the United States" and was eventually shortened to the final version—"or other high Crimes and Misdemeanors"—by the Committee on Style and Revision, which was charged with improving the language of the constitutional articles adopted by the convention without altering their substance.[16]

When the Framers approved the term of art "high Crimes and Misdemeanors" in 1787, they well knew its broad meaning, history, and usage in English parliamentary practice, and they understood and accepted that it extended to gross misconduct in office that was not confined to criminal

offenses. That was manifestly true of many of the most serious charges raised by Edmund Burke against Warren Hastings in the high-profile impeachment case then occupying the House of Commons, and the attention of the Framers was specifically focused on the charges against Hastings when they voted to adopt this phrase.

The qualifying term "high" was important to the specialized meaning of the phrase. As explicated in Blackstone's *Commentaries*, a work familiar to Madison and most of the other delegates in Philadelphia, a "high crime" or "high misdemeanor," like "high treason," was an egregious offense against the systems and constitutional order of the government, rather than against any particular person (as was the case, for example, with "petit treason").

An ordinary crime or misdemeanor harms individual victims and is subject to punishment through the established processes of the criminal law, but a *high crime or high misdemeanor* is a form of misconduct committed by an officer of the government which harms the entire government and is appropriately remedied in the first instance through removal of the officeholder by impeachment. The "first and principal high misdemeanor," according to Blackstone, was the gross maladministration of governmental authority by "such high officers, as are in public trust and employment," and was "usually punished by the method of parliamentary impeachment."[17]

This well-established understanding of "high" offenses explains why Mason suggested the full phrase "high crimes and misdemeanors *against the United States*" (emphasis added) to the constitutional convention. It also explains why the Committee on Style and Revision could drop the final four words as unnecessary (being redundant) without changing the understood meaning of the impeachment clause.

After Philadelphia, the Framers who addressed the impeachment clause in the state ratifying conventions, and the other delegates to those state conventions who discussed impeachment and voted to ratify the Constitution, consistently affirmed, with specific examples, the understanding that the impeachment power would broadly reach all manner of serious offenses against the government, including usurpations of authority, abuses of power, and breaches of trust. No delegate to the ratifying conventions, including those who opposed ratification, contended that impeachment was or should be limited to remedying only indictable crimes.[18]

Illustrative are the examples of impeachable offenses given by Madison and Mason in the Virginia ratifying debates: If the President used his pardon power to avoid discovery or prosecution of a crime that he was party to, or if the President called only friendly Senators from certain states to ratify a treaty that he feared would be rejected by the full Senate.[19] Or the

examples offered by James Iredell in the North Carolina debates: If the President gave "false information to the Senate" or "concealed important intelligence" to gain Senate support for his foreign policy objectives.[20] Or Charles Cotesworth Pinckney of South Carolina: "those who behave amiss [in office], or betray their public trust."[21] At the same time, Edmund Randolph of Virginia emphasized that impeachment would, of course, not be the proper response for mere differences of opinion or involuntary errors of judgment.[22]

In the debates of the First Congress, leading Members of the House, including Madison, expressed the view that impeachment would be an available response if the President failed to "superintend" the "excesses" of his subordinates or if he or the other officers of the executive branch neglected their duties or failed to carry out their statutory responsibilities.[23]

In the first decades of the republic following ratification, commentators continued to stress the broad nature and flexibility of the impeachment power as a response to executive misconduct. In his great *Commentaries on the Constitution*, Justice Joseph Story wrote in 1833:

> Not but that crimes of a strictly legal character fall within the scope of the [impeachment] power…but that it has a more enlarged operation, and reaches, what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations of foreign as well as domestic political movements; and in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.[24]

In short, those early authorities most familiar with the development and purposes of the Constitution attested one basic truth: "The framers intended that the impeachment language they employed should reflect the grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify impeachment."[25]

Historical Use of Impeachment Power by the House of Representatives

If the text of the Constitution and the analysis of the Framers and early constitutional commentators left any room for doubt that impeachable offenses are not limited to prosecutable crimes, the record of impeachment charges approved by the House of Representatives over the history of the republic puts the question to rest.

As the House impeachment inquiry found when considering impeachment of President Richard Nixon in 1974, and as the House Judiciary Committee reiterated most recently in its December 2019 report examining the constitutional grounds for impeaching President Donald Trump: "A strong majority of the impeachments voted by the House since 1789 have included 'one or more allegations that did not charge a violation of criminal law.'"[26]

The 1974 House impeachment report canvassed each of the 13 cases in which the House had previously voted to impeach a civil officer since the ratification of the Constitution. The report separately examined all charges approved by the House in each of those cases, from the impeachment of Senator William Blount in 1797, through the impeachments of Associate Justice of the Supreme Court Samuel Chase in 1804, President Andrew Johnson in 1868, and Secretary of War William W. Belknap in 1876, to the impeachments of nine lower court judges approved by the House between 1803 and 1936.[27]

The 1974 report found a common thread in all the previous impeachments: Each had "involved charges of misconduct incompatible with the official position of the officeholder."[28] The House report grouped these charges into three general categories: (1) exceeding the constitutional bounds of the powers of the office in question in derogation of the powers of another branch of the government, such as Congress; (2) behaving in a manner grossly incompatible with the functions and purposes of the office; and (3) employing the powers of the office for improper purposes or for personal gain.[29]

The report highlighted numerous types of non-criminal conduct the House had previously found sufficient to support impeachment. These included, for example, in the case of President Andrew Johnson, exceeding the powers of his office, failing to respect the prerogatives of Congress, and making inflammatory speeches ridiculing Congress, and, with regard to judicial impeachments, intoxication on the bench, vindictive use of power, haranguing parties and counsel in an intemperate manner, and expressing political bias in judgments.[30]

The 1974 report made the general observation that "the House appears to have considered the individual offenses less significant than what they said together about the conduct of the official in the performance of his duties,"[31] and it concluded that "in keeping with the nature of the remedy" (removal from office and disqualification from holding a future office), impeachment "*is intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office*."[32] (Emphasis added.)

The 2019 House impeachment report added that the articles of impeachment ultimately approved by the House Judiciary Committee against President Nixon "encompassed many non-criminal acts,"[33] and it pointed out that the Judiciary Committee's impeachment report concerning President Bill Clinton, too, stated that "the actions of President Clinton do not have to rise to the level of violating the federal statute regarding obstruction of justice in order to justify impeachment."[34]

Both the 1974 and the 2019 reports delve into the reasons why impeachable offenses cannot be confined to prosecutable crimes. *First*, criminal law and impeachment serve very different purposes: personal punishment of the offender in the case of the criminal law, versus protecting the office and insulating the exercise of governmental power from personal misconduct in the case of impeachment.[35] Article I, Section 3, of the Constitution confirms this fundamental difference by limiting the consequences of conviction in cases of impeachment and by making clear that an officer who has been impeached and removed from office is nevertheless liable under law for harms caused by his misconduct in office and remains subject to indictment, trial, and punishment if that misconduct was criminal in nature.[36]

Second, whereas the criminal law prescribes general societal standards of conduct and is concerned with applying those standards equally to all persons in the society, impeachment is focused specifically on the functions and duties of a particular civil office of the government and turns on whether the officer's conduct in holding that office has been compatible with the proper performance of those functions and duties.[37]

Third, while a criminal violation usually requires commission of a wrongful act, impeachable conduct may involve non-action—the refusal or "serious failure to discharge the affirmative duties" of the office in question.[38] Thus, the one Cabinet officer previously impeached by the House, William Belknap, was charged, among other things, with using his office to pursue private gain and thereby "criminally disregarding his duty as Secretary of War."[39]

Fourth, if impeachable conduct were defined by the criminal law, the House would face a significant conundrum each time it considered potential articles of impeachment: Which version of criminal law should the House rely on? Would it be the elements of traditional common law crimes as they were recognized

by courts at the time of the Founding, when there were no criminal codes and Congress's power to establish crimes was seen as extremely limited? Or the expansive criminal provisions of federal law as they exist in today's U.S. Code? Or state-law crimes? If state law, which states' criminal codes should govern in a particular case? It would be strange, indeed, if the House's authority to impeach officers of the federal government were determined by state law.[40]

For all these reasons, as the House impeachment inquiry concluded in 1974:

> To confine impeachable conduct to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government. Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law.[41]

Tying impeachment to criminal liability would severely impair the utility and effectiveness of the House's constitutional impeachment power.

Secretary Mayorkas's "High Crimes and Misdemeanors"

As is abundantly clear from the discussion laid out above, the historical meaning and uses of the impeachment power apply directly to the three categories of offenses committed by Homeland Security Secretary Mayorkas.[42]

First, impeachment is the proper response for any gross misconduct in office that does serious harm to the political system or constitutional order. That standard is satisfied when a civil officer of the government violates his oath of office by failing to carry out the duties of his office or by acting in contravention of those duties—certainly including circumstances in which the officer, as Mayorkas has, suspends the laws he is charged with enforcing in derogation of Congress's constitutional role.

Second, the standard for impeachment is satisfied when the officer abuses the powers of his office, including through reckless misconduct that erodes U.S. sovereignty and threatens the lives and property of U.S. citizens, as Mayorkas has done. This conduct is exactly the opposite of what is expected and required of a responsible Secretary of Homeland Security.

Third, the standard is certainly met any time a senior officer of the federal government betrays the public trust by making false statements to Congress and by deliberately withholding information from the public and misleading the American people about the nature and effects of his actions, as Mayorkas has repeatedly done.

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Endnotes

1. Steven G. Bradbury, "Impeaching Mayorkas: The House's Duty," The Daily Signal, February 15, 2023, https://www.dailysignal.com/2023/02/15/impeaching-mayorkas-the-houses-duty/.
2. Hans A. von Spakovsky, Lora Ries, and Steven G. Bradbury, "The Case for Impeachment of Alejandro Nicholas Mayorkas Secretary of Homeland Security," Heritage Foundation *Special Report* No. 266, February 6, 2023, https://www.heritage.org/immigration/report/the-case-impeachment-alejandro-nicholas-mayorkas-secretary-homeland-security.
3. See Hans A. von Spakovsky, Lora Ries, and Steven G. Bradbury, "Impeaching Mayorkas Is a Must, He Violated His Oath and Committed 'High Crimes and Misdemeanors,'" FoxNews.com, February 13, 2023, https://www.foxnews.com/opinion/impeaching-mayorkas-is-must-he-violated-his-oath-committed-high-crimes-misdemeanors (accessed February 27, 2023). Also see Heritage Foundation Oversight Project and Center for Border Security and Immigration, "Tracking Movement of Illegal Aliens from NGOs to Interior of USA," public memorandum, December 5, 2022, https://thf_media.s3.amazonaws.com/2022/BorderNGOMemo.pdf.
4. U.S. Constitution, Article II, § 4: "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*." (Emphasis added.)
5. Von Spakovsky, Ries, and Bradbury, "The Case for Impeachment of Alejandro Nicholas Mayorkas Secretary of Homeland Security."
6. See *The Federalist* No. 65 (Alexander Hamilton): "The model from which the idea of this institution [impeachment] has been borrowed, pointed out that course to the [constitutional] convention. In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the [same] example."
7. Ibid.
8. Ibid.
9. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 93rd Cong., 2nd Sess., February 1974, pp. 4 and 5, https://docs.house.gov/meetings/JU/JU00/20160622/105095/HHRG-114-JU00-20160622-SD004.pdf (accessed March 15, 2023).
10. Ibid., p. 5.
11. Ibid.
12. Ibid., p. 6.
13. Ibid.
14. Ibid., p. 7 and footnote 19.
15. Max Farrand, ed., *The Records of the Federal Convention of 1787*, Vol. 2, p. 550 (New Haven, CT: Yale University Press, 1911), p. 550, quoted in U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," p. 11.
16. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 1974, pp. 11 and 12, and footnote 48, quoting ibid.
17. Ibid., p. 12 and footnote 51 (quoting William Blackstone, *Commentaries on the Laws of England: Of Public Wrongs*, Vol. IV, 1769, p. 75).
18. Ibid., pp. 13–15 (detailing discussions of impeachable misconduct in the ratifying debates).
19. Ibid., pp. 13 and 14, and footnotes 64 and 65 (quoting Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol. 3, reprint of 2nd ed., 1907, p. 177).
20. Ibid., p. 14 and footnote 68 (quoting Elliot, *The Debates in the Several State Conventions*, p. 127).
21. Ibid., p. 13 and footnote 60 (quoting Elliot, *The Debates in the Several State Conventions*, p. 281).
22. Ibid., p. 14.
23. Ibid., p. 15 and footnote 72 (quoting *Annals of Congress*, Vol. 1 (1789), pp. 372 and 373).
24. Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 1, § 764, p. 559 (5th ed. 1905), quoted in U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 1974, pp. 16 and 17.
25. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 1974, p. 22.
26. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 116th Cong., 1st Sess., December 2019, p. 33, https://www.congress.gov/116/meeting/house/110281/documents/HHRG-116-JU00-20191204-SD001.pdf (accessed February 27, 2023) (quoting 1974 House Impeachment Report, p. 24: "Of the thirteen impeachments voted by the House since 1789, at least ten involved one or more allegations that did not charge a violation of criminal law.").
27. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 1974, pp. 18–21.
28. Ibid., p. 17.

29. Ibid., p. 18.
30. Ibid., pp. 18–20.
31. Ibid., p. 21.
32. Ibid.
33. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 2019, p. 33.
34. Ibid., pp. 33 and 34.
35. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 1974, p. 24, and U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 2019, p. 35.
36. U.S. Constitution, Article I, § 3.
37. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 1974, p. 24.
38. Ibid., and U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 2019, p. 37.
39. U.S. Senate, "Impeachment Trial of Secretary of War William Belknap, 1876," https://www.senate.gov/about/powers-procedures/impeachment/impeachment-belknap.htm (accessed December 16, 2022).
40. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 1974, p. 25, and U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 2019, pp. 35 and 36.
41. U.S. House of Representatives, Committee on the Judiciary, "Constitutional Grounds for Presidential Impeachment," 1974, p. 24.
42. Von Spakovsky, Ries, and Bradbury, "The Case for Impeachment of Alejandro Nicholas Mayorkas Secretary of Homeland Security."