Office of the General Counsel
U.S. Department of Homeland Security

Washington, DC 20528

February 5, 2024

Chairman Tom Cole
Ranking Member Jim McGovern
House Committee on Rules
H-312, The Capitol
Washington, D.C. 20515

Dear Chairman Cole and Ranking Member McGovern,

We write in connection with House Resolution 863 (the "Resolution"),[1] which was introduced by Representative Marjorie Taylor Greene and approved along partisan lines by the Committee on Homeland Security (the "Committee"). The Resolution contains two articles impeaching Secretary Mayorkas.

Passage of this Resolution by the House of Representatives would be unconstitutional. The effort to impeach Secretary Mayorkas represents a dramatic departure from over two centuries of established understanding and precedent about the meaning of the Impeachment Clause of the Constitution and the proper exercise of that extraordinary tool. In addition to lacking any basis in the Constitution, the impeachment articles reflect a basic misrepresentation of key statutes governing immigration law. Contrary to the Resolution's charges, the Department of Homeland Security ("DHS" or the "Department") under Secretary Mayorkas's leadership has always followed the law in good faith, and any suggestion otherwise is false.

[1] Impeaching Alejandro Nicholas Mayorkas, Secretary of Homeland Security, for High Crimes and Misdemeanors, H.R. Res. 863, 118th Cong. (as reported to the House Calendar on Feb. 3, 2024), https://www.govinfo.gov/content/pkg/BILLS-118hres863rh/pdf/BILLS-118hres863rh.pdf [hereinafter Resolution].

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I. Introduction and Summary

This letter explains why the proposed impeachment of Secretary Mayorkas is illegitimate, invalid, and dangerous. It proceeds in three parts. Part I describes the broad and overwhelming consensus that the constitutional standard for impeachment—"Treason, Bribery, or other high Crimes and Misdemeanors"—does not encompass mere disagreements with policy decisions made in good faith or the lawful exercise of enforcement discretion. Both the Constitution's text and the Framers' explicit intent make clear that impeachment is not a lawful remedy for partisan disputes, nor is it a permissible means for Congress to voice its disapproval of how a Cabinet Secretary is furthering the Administration's policies. Indeed, Congress has twice rejected proposals to impeach Executive Branch officials based on partisan disagreement with their immigration enforcement decisions.

Part II explains why the effort to impeach the Secretary lacks any basis in law and consists only of a thinly-veiled dispute about border security and immigration policy. While the Resolution has charged the Secretary in Article I with "willful and systemic refusal to comply with the law," there is no legal or factual basis for that allegation. At its core, the Article is nothing more than a simple list of criticisms of the policies of the current Administration. These assertions do not meet the Constitutional standard for impeachment. The Secretary has followed the law in good faith in each and every action that the Resolution cites as a purported ground for impeachment, whether related to asylum, detention, removals, parole processes, or any others. All of those decisions find ample support in existing provisions of the Immigration and Nationality Act ("INA"). To the extent Congress wants to change the Administration's policies, the Constitution prescribes a different path: passing legislation. In fact, the Secretary has worked for months with Members of Congress from both parties to seek bipartisan legislation—the draft of which was released yesterday—to help solve the challenges faced at the border.[2] There has been no "refusal to comply with the law," much less the kind of deliberate malfeasance or personal corruption that the Constitution requires for the extraordinary remedy of impeachment.

Finally, Part III addresses the hodgepodge of claims under Resolution Article II, entitled "Breach of Public Trust." That Article claims that the Secretary made false statements about "operational control" or border security, that he inappropriately reversed Trump-era immigration policies, and that he failed to comply with unidentified Congressional subpoenas. These conclusory assertions are false, and the Resolution provides no support for them. As detailed below, the Secretary has not made false statements about conditions at the border but rather transparently provided his opinions about border security. His reversal of certain earlier immigration policies is the result of a change of Administrations, not a breach of the public's trust. And he has not failed to comply with subpoenas or other oversight; under his leadership, DHS has been extraordinarily cooperative with Congress. It is the Committee, not the Secretary, that has departed from regular order by abandoning established standards and procedures that have characterized every relevant impeachment effort in this Nation's history.

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[2] *See* Siobhan Hughes, *Biden Willing to 'Shut Down' Border During Migrant Surges if Deal Passes*, WALL ST. J. (Jan. 26, 2024, 10:57 PM), https://www.wsj.com/politics/mike -johnson-takes-dim-view-of-border-talks-plans-mayorkas-impeachment-96700991 ("Homeland Security Secretary Alejandro Mayorkas has been central to border-security talks."); Daniella Diaz et al., *Senators unveil long-awaited border deal*, POLITICO (Feb. 4, 2024, 6:40 PM), https://www.politico.com/news/2024/02/04/senators-unveil-border-deal-00139523.

Impeachment in these circumstances, and on this record, would represent a radical and dangerous step in violation of the Constitution. Taken to its logical conclusion, it would alter the balance between the Legislative and Executive Branches and would disrupt the relationship between a President and his or her Cabinet. The House of Representatives should reject the proposed Articles of Impeachment.

II. Impeachment Based on Partisan Policy Disputes Is Unconstitutional and Unprecedented

Under the Constitution, impeachment is an extraordinary measure limited to "Treason, Bribery, or other high Crimes and Misdemeanors."[3] Although the Resolution alleges a "Willful and Systemic Refusal to Comply with the Law" and "Breach of Public Trust," there is no basis to support either Article. To the contrary, the entire Resolution reduces to an expression of disagreement with and disapproval of the Secretary's good-faith policy decisions, judgments, and opinions about how best to pursue the Administration's policy choices on border security and immigration enforcement within legal bounds. Disagreement with an Administration's policy positions and opinions is not a valid basis to impeach a Cabinet Secretary, whose job is to execute those policies. Constitutional text, historical precedent, and the overwhelming body of scholarship—including every Constitutional scholar who testified before the Committee and dozens of others who have commented publicly on these proceedings—confirm that impeachment of the Secretary in these circumstances would be unconstitutional, unprecedented, and destabilizing.

A. The Framers Established a High Bar for Impeachment That Does Not Encompass Policy Disagreements

The Framers carefully erected a high bar for impeachment, deliberately rejecting the more liberal use of that tool that had characterized British Parliamentary practice. The Framers specifically limited impeachment to a narrow set of intentional and grave crimes against the public that could undermine the constitutional order.[4] In adopting the phrase "high Crimes and Misdemeanors" as grounds for impeachment, the Framers first considered, and squarely rejected, a lower standard that would have encompassed less severe offenses such as "malpractice," "neglect of duty," and "maladministration."[5] The Framers thereby sought to prevent impeachment from becoming a mere partisan weapon that could be used to supplant the President's policies for those favored by the legislature. As the Constitution's text, the Founding debates, and overwhelming weight of expert opinion make clear, impeachment is not an appropriate means for Congress to express disagreement with an official's exercise of his duties or the policies he pursues. Rather, the Framers determined that impeachable conduct would

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[3] U.S. CONST., Art. II, § 4.

[4] *See* Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 603 (1999); Michael J. Gerhardt, *Chancellor Kent and the Search for the Elements of Impeachable Offenses*, 74 CHI. KENT L. REV. 91, 123 (1998) ("[M]any Framers seemed to presume that some sort of malicious or bad intent would be an element of an impeachable offense.").

[5] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78–79 (Max Farrand ed., 1966) (Journal of Saturday, June 2, 1787); 2 THE RECORDS OF THE FEDERAL CONVENTION of 1787, at 550 (Max Farrand ed., 1966) (Report of the Committee of Saturday, September 8, 1787, recorded by James Madison).

consist only of the most serious intentional wrongdoing that regular elections could not adequately remedy.

1. The Constitution's Text Makes Clear That Policy and Enforcement Decisions Are Not "High Crimes and Misdemeanors"

Article II, Section 4 of the Constitution limits Congress's power to impeach the President, Vice President and, as relevant here, officers of the United States to: "Treason, Bribery, or other high Crimes and Misdemeanors."[6] Because Secretary Mayorkas has not been accused of either treason or bribery, any article of impeachment against him must establish that he committed "high Crimes and Misdemeanors." The Framers of the Constitution intended that this term of art encompass a narrow set of "great" and "dangerous" crimes against the public characterized by serious and intentional "abuses of official power."[7] That was the kind of "breach of the public trust," in which the office-holder pursued some illegitimate interest over his duty to country, that the Framers deemed worthy of impeachment.[8]

The Framers recognized treason and bribery as the most serious offenses one could commit against the constitutional system of government.[9] The use of the word "*other*" before "high Crimes and Misdemeanors" signaled that this category comprises only those offenses that are similar to "treason" and "bribery" both in kind and degree.[10] Any impeachable "high Crimes and Misdemeanors" must involve an act of deliberate malfeasance as serious and damaging to the constitutional order as betraying the Nation in exchange for personal gain, "not merely a mistake in judgment or policy or partisan differences."[11]

2. The Framers Rejected "Maladministration" and Good-Faith Policy Disputes as a Basis for Impeachment

While American impeachment practice has roots in the British Parliamentary system, the Framers intentionally rejected the lower impeachment standard that system applied. Consistent with the separation of powers established in the Constitution, the Framers rejected "maladministration" as grounds for impeachment, instead requiring deliberate and egregious misconduct.[12] The Framers thereby sought to prevent Congress from employing impeachment as a mere political tool that could subordinate the Executive to the will of Congress.

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[6] U.S. CONST., Art. II, sec. 4.

[7] *See* Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 603 (1999).

[8] *Id.*

[9] *Voices for the Victims: The Heartbreaking Reality of the Mayorkas Border Crisis*: *Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 4 (2024) (statement of Deborah N. Pearlstein, Professor of Law and Former Co-Director of the Floersheimer Center for Constitutional Democracy).

[10] *Id.* Under the principle of *ejusdem generis* ("of the same kind"), the plain text of the Constitution commands that the definition of "high Crimes and Misdemeanors" must carry the same import as "treason" and "bribery."

[11] *Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen (Part II): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 49–50 (2016) (statement of Michael J. Gerhardt, Samuel Ashe Distinguished Professor of Constitutional Law, University of North Carolina at Chapel Hill); *see also id.* ("The Founders did not want high-ranking officials in the executive or judicial branches to be subject to impeachment for their mistakes in office.").

[12] *Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen (Part I): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 49–50 (2016) (statement of Michael J. Gerhardt, Samuel Ashe

The Framers adapted the concept of impeachment from the British Parliament, which first employed impeachment procedures in the fourteenth century as a legislative check against disfavored royal ministers.[13] Because the hereditary monarchy wielded absolute power that insulated it from direct criticism, Parliaments dissatisfied with a monarch's policies devised a method for removing ministers charged with carrying out royal policies by alleging that the ministers were incompetent or malicious in the execution of their duties.[14] In practice, this broad standard meant royal ministers served at the pleasure of Parliament. Parliament's impeachment power was limited to instances typically involving an abuse of power exercised either through corruption or maladministration.[15] Because there was no formal codification of the term, however, British officials were impeached for a wide variety of misdeeds, ranging from personal corruption and the commission of crimes to neglect of duty and even providing bad advice.[16]

Against this historical backdrop, the Framers debated whether to adopt the British use of "high crimes and misdemeanors" but decided to narrow it to willful and egregious abuses of power. Under the resulting American formulation, good-faith policy decisions or the exercise of discretion do not constitute impeachable conduct.

Initially, some delegates to the Constitutional Convention proposed that the Constitution provide for impeachment in cases of "mal-practice or neglect of duty."[17] That language was rejected in favor of the phrase "treason, bribery, or corruption,"[18] a revision that "seemed to exclude mere mismanagement or incompetence."[19] George Mason then proposed adding "maladministration" as a basis for impeachment. The delegates also rejected that formulation, believing "[a]n election of every four years will prevent maladministration."[20] James Madison added that if the Constitution made "maladministration" impeachable, "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate" rather than allowing officials to serve out their terms and execute the policies that they were elected to pursue.[21] In other words, "maladministration" would create an impeachment standard more analogous to the British Parliamentary system. It would thereby subject the Executive Branch to the will of Congress and allow for the removal of the President or other Executive Branch officials for a wide range of common transgressions, including "inefficient administration, or administration that did not accord with Congress's view of good policy."[22] Having created a government executive power that, unlike the monarch in Britain, was answerable to the voters, they concluded the

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Distinguished Professor of Constitutional Law, University of North Carolina at Chapel Hill) ("[T]he Constitution requires both a bad (or malicious) intent *and* a bad act as the basis for an impeachment.").

[13] Frank O. Bowman III, High Crimes and Misdemeanors 99–111 (2019) (ebook).

[14] Frank O. Bowman III, British Impeachments (1376 –1787) and the Preservation of the American Constitutional Order, 46 HASTINGS CONST. L.Q. 745, 752 (2019).

[15] *Id.* at 789.

[16] FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS 46–48 (2019) (ebook); Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 11–14 (1999).

[17] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78 (Max Farrand ed., 1966) (Journal of Saturday, June 2, 1787).

[18] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 186 (Max Farrand ed., 1966) (Report of the Committee of Monday, August 6, 1787, delivered by John Rutledge, recorded by James Madison).

[19] Frank O. Bowman III, High Crimes and Misdemeanors 94 (2019) (ebook).

[20] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1966) (Report of the Committee of Saturday, September 8, 1787, delivered by John Rutledge, recorded by James Madison).

[21] *Id.*

[22] Charles L. Black, Jr. & Philip Bobbitt, Impeachment: A Handbook 28 (2018).

impeachment power should and need not be available for mere policy differences or failure to perform the job adequately. The Framers thus established that "high Crimes and Misdemeanors" would not encompass mere "maladministration."[23]

Additional historical records indicate that impeachment is reserved for conduct characterized by intentional or purposeful wrongdoing. For example, during the Virginia Ratifying Convention, Edmund Randolph remarked that even in England, "[n]o man ever thought of impeaching a man for an opinion."[24]

Scholars across the ideological spectrum agree that the "Framers' rejection of 'maladministration' as a basis for impeachment was, in effect, a rejection of a standard" that lacked prerequisites such as bad faith or corrupt intent.[25] As Professor Charles Black explained in his seminal treatment of impeachment, "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."[26] Thus, "whatever 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."[27] Likewise, impeachment scholar Professor Michael Gerhardt observed, following a comprehensive review of historical impeachment precedent, that the Senate has "concluded that impeachable offenses do not include errors of judgment or policy differences."[28] Professor Keith Whittington similarly concluded that the adoption of the phrase "high crimes and misdemeanors" "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."[29]

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[23] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1966) (Report of the Committee of Saturday, September 8, 1787, delivered by John Rutledge, recorded by James Madison).

[24] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (Jonathan Elliot ed., 1827). Randolph continued, "[i]t would be impossible to discover whether the error in opinion resulted from a willful mistake of the heart" (when impeachment might be appropriate), "or an involuntary fault of the head" (when it would not be). *Id.*; *see also* 14 ANNALS OF CONG. 601 (1805) (The impeachment managers of Samuel Chase stated that if the Senate "be satisfied that [Chase] acted innocently wrong, that it was an honest error of judgment which led him astray, he will no doubt stand acquitted."). Similarly, during the North Carolina Ratifying Convention, James Iredell observed: "[W]hen any man is impeached, it must be for an error of the heart, and not of the head. God forbid that a man, in any country in the world, should be liable to be punished for want of judgment. . . . As to errors of the heart, there is sufficient responsibility." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 125–26 (Jonathan Elliot ed., 1827).

[25] Examining the Allegations of Misconduct Against IRS Commissioner John Koskinen, (Part II): Hearing Before the H. Comm. on the Judiciary, 114th Cong. 5 (2016) (statement of Michael J. Gerhardt, Samuel Ashe Distinguished Professor of Constitutional Law, University of North Carolina at Chapel Hill), https://docs.house.gov/meetings/JU/JU00/20160622/105095/HHRG-114-JU00-Wstate-GerhardtM-20160622.pdf; see also James C. Phillips & John C. Yoo, You're Fired: The Original Meaning of Presidential Impeachment, 94 S. CAL. L. REV. 1191, 1238 (2021).

[26] Charles L. Black, Jr. & Philip Bobbitt, Impeachment: A Handbook 28 (2018).

[27] *Id*. (emphasis in original).

[28] Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 920 (1999).

[29] Keith E. Whittington, *Impeachment in a System of Checks and Balances*, 87 MO. L. REV. 835, 844 (2022).

B. Congress Has Expressly Rejected Impeachment of a Cabinet Official Based on Disapproval of Immigration Policy Decisions or Exercise of Enforcement Discretion

Only one Cabinet official has ever been impeached in our Nation's history, and that was for egregious, personal, criminal misconduct. In 1876, the House voted to impeach Secretary of War William Belknap based on clear evidence of corruption: he had accepted bribes in exchange for awarding contracts at military bases.[30] Belknap earned an estimated $20,000 from this scheme, an enormous amount at the time.[31] Hoping to prevent his impeachment, Belknap resigned, but the House nonetheless voted unanimously to impeach.[32] Referencing the bribery scheme, the articles of impeachment charged Belknap with "criminally disregarding his duty as Secretary of War and basely prostituting his high office to his lust for private gain."[33] As one scholar of impeachment has noted, the "singularity of Belknap's case as the only impeachment of a federal cabinet officer" speaks volumes in demonstrating that Cabinet officials have not been thought impeachable, except for very grave misconduct.[34] Belknap's acceptance of a kickback fit squarely within the Framers' view of impeachment as the remedy for an abuse of office committed with corrupt intent.

Congress has never impeached a Cabinet or other Executive Branch agency official in the almost 150 years since Belknap. Twice, however, the House of Representatives has considered such a step in circumstances that bear a striking similarity to the allegations against Secretary Mayorkas. Both of those efforts were premised on partisan disapproval of the official's policy decisions concerning immigration enforcement. Both failed, and the reasons that Congress abandoned them further underscore the baselessness of the current proceedings.

In 1920, when the Labor Department had responsibility for enforcement of the Nation's immigration laws, the House referred an impeachment resolution to the Rules Committee to investigate charges that Assistant Secretary of Labor Louis Post committed "high Crimes and Misdemeanors" in connection with his decision to cancel the deportation of more than 1,000 arrested immigrants who were alleged to be members of the Communist Party.[35] Post testified before the Committee and explained the reasons for his decisions and the exercise of his

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[30] *See* 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, §§ 2444–45 (1907).

[31] *See* ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 166–67 (1992). The amount Belknap received in bribes, $20,000, would be worth over $570,000 today. *See* Ian Webster, *$20,000 in 1876 to 2024 | Inflation Calculator*, OFFICIAL INFLATION DATA, https://www.officialdata.org/us/inflation/1876?endYear=2024&amount=20000 (last visited Jan. 31, 2024). Thus, an impeachment of Secretary Mayorkas would actually be wholly without precedent—the first *sitting* Cabinet Secretary to be impeached by the House.

[32] *See* 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, §§ 2444–45 (1907).

[33] *See Impeachment Trial of Secretary of War William Belknap, 1876*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-belknap.htm (last visited Jan. 29, 2024).

[34] FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS 123 (2019) (ebook).

[35] *Investigation of Administration of Louis F. Post Assistant Secretary of Labor, in the Matter of Deportation of Aliens: Hearings on H.R. 522 Before the H. Comm. on Rules*, 66th Cong. 60 (1920); Joshua Matz & Norman Eisen, *Why Impeaching Mayorkas Would Violate the Constitution*, WASH. POST (Jan. 9, 2024, 6:19 PM), https://www.washingtonpost.com/opinions/2024/01/09/impeachment-alejandro-mayorkas-unconstitutional-border-security/.

discretion over deportations.[36] Toward the end of Post's testimony, Representative Edward Pou (D-N.C.), who had previously appeared to favor impeachment, declared to Post, "I believe you have followed your sense of duty absolutely," even though Pou was "not in sympathy" with Post's views and may have made different policy decisions himself.[37] Failing to find that Post engaged in any impeachable offense by exercising his good-faith enforcement discretion, the Rules Committee and the House abandoned the impeachment effort.

About twenty years later, the House again considered and declined to pursue the impeachment of an Executive Branch official for her administration of immigration policy, again concluding that good-faith disagreements over immigration policy are not impeachable. In 1939, the House weighed impeaching Secretary of Labor Frances Perkins, along with two of her subordinates, for their alleged wrongful failure to prosecute a deportation case against an accused Communist. After hearing testimony from Perkins and other witnesses in closed-door hearings, the Judiciary Committee unanimously found "no competent evidence" to support the impeachment resolution.[38] The Committee concluded instead that the decisions involved "question[s] of judgment, and there [was] no evidence that it was not exercised in good faith."[39] Without such evidence of bad faith or intentional wrongdoing, "sufficient facts ha[d] not been presented or adduced to warrant the interposition of the constitutional powers of impeachment by the House."[40] No Committee member voted to impeach, with several Members registering "additional views" that while as a matter of policy they "condemn[ed]" Perkins's conduct, the record "lack[ed] proof of any kind as to the motive actuating such leniency and indulgence."[41] The Committee's disagreements with Perkins's good-faith immigration policy decisions "d[id] not justify impeachment."[42] The House took no further action after the Judiciary Committee returned its Report.[43]

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[36] *Investigation of Administration of Louis F. Post Assistant Secretary of Labor, in the Matter of Deportation of Aliens: Hearings on H.R. 522 Before the H. Comm. on Rules*, H.R. Res. 522, 66th Cong. 61–62 (1920).
[37] *Id.* at 248.
[38] H.R. REP. NO. 76–311, at 5, 6 (1939).
[39] *Id.* at 5.
[40] *Id.* at 10.
[41] *Id.* at 11.
[42] *Id.*
[43] 84 CONG. REC. 3285–88 (1939).

This history of failed efforts to impeach Executive Branch officials for policy disputes comports with the broader impeachment record. Every other impeachment effort that has turned on policy and therefore lacked a valid constitutional basis has ultimately ended without conviction.[44] As Chief Justice Rehnquist has explained, "[n]o matter how angry or frustrated" one branch may be by the actions of another, removal based on differing philosophy is "not permissible."[45] The same conclusion follows from an examination of impeachments for "high Crimes and Misdemeanors" that ended in conviction. Each of those successful impeachments involved acts of deliberate and serious malfeasance damaging to the constitutional order.[46]

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[44] In 1805, the Senate voted to acquit Justice Samuel Chase on all counts of impeachment the House had adopted in response to his judicial decisions while presiding over trials under the Alien and Sedition Acts. *See Impeachment Trial of Justice Samuel Chase (1804-05)*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-chase.htm (last visited Jan. 29, 2024). While many Democratic-Republican Senators disagreed with Justice Chase's politics and behavior in office, they found Chase acted "innocently wrong" rather than acting in bad faith or with corrupt intent. 14 ANNALS OF CONG. 601 (1805). Similarly, the acquittal of former President Andrew Johnson in 1868 on impeachment charges related to disagreements over his firing of a Cabinet Secretary reflected "a general understanding that while impeachment is appropriate for abuses of power or violations of the public trust, it does not pertain to political or policy disagreements with the President, no matter how weighty." Jared P. Cole & Todd Garvey, CONG. RSCH. SERV., R46013, IMPEACHMENT AND THE CONSTITUTION 21 (2023). More recently, the attempted impeachment of IRS Commissioner John Koskinen, based on allegations that the IRS had reviewed applications for tax-exempt status in a discriminatory manner, ended in the Judiciary Committee after widespread criticism. *See* Katy O'Donnell & Bernie Becker, *House Rebukes Freedom Caucus Effort to Oust IRS Chief*, POLITICO (Dec. 6, 2016, 6:54 PM), https://www.politico.com/story/2016/12/koskinen-dodges-impeachment-bullet-232279. Senator Orrin Hatch (R-Utah) remarked during this process that the Senate would not convict Koskinen even if articles were adopted; "[w]e can have our disagreements with [Koskinen]," Senator Hatch explained, "but that doesn't mean there's an impeachable offense." David M. Herszenhorn & Jackie Calmes, *House to Consider I.R.S. Commissioner's Impeachment*, N.Y. TIMES (May 23, 2016), https://www.nytimes.com/2016/05/24/us/politics/house-set-to-begin-irs-commissioners-impeachment-hearing.html.

[45] WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 134 (1992).

[46] *See, e.g.*, 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, §§ 2319–41 (1907) (describing the conviction of Judge John Pickering in 1804 of impeachment charges related to drunkenness and unlawful rulings); *id.* §§ 2385–97 (describing the conviction of Judge West H. Humphreys in 1862 of impeachment charges related to supporting the Confederacy and aiding an armed rebellion); 6 CLARENCE CANNON, CANNON'S PRECEDENTS §§ 498–512 (1936) (describing the conviction of Judge Robert W. Archbald in 1913 of impeachment charges related to improper acceptance of gifts from litigants and attorneys); 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS (1994) (describing the conviction of Judge Halsted L. Ritter in 1936 of impeachment charges related to tax evasion and corruption); *Impeachment Trial of Judge Harry E. Claiborne, 1986*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-claiborne.htm Claiborne (last visited Feb. 2, 2024) (describing the conviction of Judge Harry E. Claiborne in 1986 of impeachment charges related to tax fraud); *Judicial Impeachments*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S4-2-3-7/ALDE_00000697 (last visited Feb. 2, 2024) (describing the conviction of Chief Judge Walter Nixon in 1989 of impeachment charges related to perjury to a grand jury); *Impeachment Trial of Judge Alcee L. Hastings, 1989*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-hastings.htm (last visited Feb. 2, 2024) (describing the conviction of Judge Alcee L. Hastings in 1989 of impeachment charges related to conspiracy, bribery, and perjury); *G. Thomas Porteous, Jr.*, LIBRARY OF CONGRESS RESEARCH GUIDES, https://guides.loc.gov/federal-impeachment/thomas-porteous (last visited Feb. 2, 2024) (describing the conviction of Judge G. Thomas Porteous in 2010 of impeachment charges related to corruption and perjury).

There is thus a strong consensus that allegations ultimately based on policy disagreements cannot and do not support removal by impeachment. Any effort to impeach Secretary Mayorkas on such a rationale would violate the Constitution.

C. The Resolution Is an Unprecedented and Dangerous Attempt to Expand Impeachment Beyond Its Constitutional Bounds

Constitutional scholars from all parts of the political and ideological spectrum, including the two experts who testified before the Committee, have condemned the effort to impeach Secretary Mayorkas as unconstitutional and lacking in any "cognizable basis."[47] Impeachment on these facts would violate the Constitution and harm the operation of the Executive Branch.

1. Constitutional Scholars and Experts Across the Ideological Spectrum Agree That This Impeachment Effort Is Illegitimate

The constitutional experts who appeared before the Committee in this effort, Professors Frank Bowman and Deborah Pearlstein, testified that there is "no constitutional case" and "no

[47] Dominick Mastrangelo, *Turley says there's no 'cognizable basis' for Republicans to impeach Mayorkas*, THE HILL (Jan. 29, 2024, 9:54 AM), https://thehill.com/homenews/media/4435259-turley-republicans-impeach-mayorkas/ (quoting Jonathan Turley); *see also* Letter from Laurence H. Tribe, et al. to Speaker Mike Johnson & Chairman Mark Green, *Constitutional Law Experts on the Impeachment Proceedings Against Secretary of Homeland Security Alejandro Mayorkas* (Jan. 10, 2024), https://www.justsecurity.org/91123/constitutional-law-scholars-on-the-impeachment-proceedings-against-secretary-of-homeland-security-alejandro-mayorkas/ (signed by 25 constitutional scholars); *Havoc in the Heartland: How Secretary Mayorkas' Failed Leadership Has Impacted the States: Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 2 (2024) (statement of Frank O. Bowman, III, University of Missouri Curators' Distinguished Professor Emeritus and Floyd R. Gibson Missouri Endowed Professor Emeritus); *Voices for the Victims: The Heartbreaking Reality of the Mayorkas Border Crisis*: *Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 4 (2024) (statement of Deborah N. Pearlstein, Professor of Law and Former Co-Director of the Floersheimer Center for Constitutional Democracy); Joshua Matz & Norman Eisen, *Why Impeaching Mayorkas Would Violate the Constitution*, WASH. POST (Jan. 9, 2024, 6:19 PM), https://www.washingtonpost.com/opinions/2024/01/09/impeachment-alejandro-mayorkas-unconstitutional-border-security/; Jonathan Turley, *Homeland Security Chief Alejandro Mayorkas' Failures Are Not Impeachable*, DAILY BEAST (Jan. 29, 2024, 10:18 AM), https://www.thedailybeast.com/homeland-security-chief-alejandro-mayorkas-failures-are-not-impeachable; Alan Dershowitz, *Republicans who voted against impeaching Trump should not vote to impeach Mayorkas*, THE HILL (Jan. 30, 2024, 6:30 PM), https://thehill.com/opinion/white-house/4438471-republicans-who-voted-against-impeaching-trump-should-not-vote-to-impeach-mayorkas/; Frank Bowman, *Analysis of Mayorkas Articles of Impeachment – Article 2: "Breach of the Public Trust,"* IMPEACHABLE OFFENSES? (Jan. 31, 2024), https://impeachableoffenses.net/2024/01/31/analysis-of-mayorkas-articles-of-impeachment-article-2-breach-of-the-public-trust/; Ari Shapiro, Tinbete Ermyas & Tyler Bartlam, *Constitutional scholar says GOP charges against Mayorkas don't meet impeachment bar*, NPR (Jan. 31, 2024, 4:21 PM), https://www.npr.org/2024/01/31/1228214208/constitutional-scholar-says-gop-charges-against-mayorkas-dont-meet-impeachment-b (interview with Philip Bobbitt); Editorial Board, *Impeaching Mayorkas Achieves Nothing*, WALL ST. J. (Jan. 30, 2024, 6:38 PM), https://www.wsj.com/articles/alejandro-mayorkas-impeachment-house-republicans-border-immigration-homeland-security-1a431a5d. The outlier, a Heritage Foundation report authored by three members of that organization, was published long before the Committee heard from a single witness. *See* Hans von Spakovsky et al., *The Case for Impeachment of Alejandro Nicholas Mayorkas Secretary of Homeland Security*, HERITAGE FOUND. (Feb. 6, 2023), https://www.heritage.org/ immigration/report/the-case-impeachment-alejandro-nicholas-mayorkas-secretary-homeland-security; *see also* Steve Bradbury, *Case for Impeaching Mayorkas Over Border Crisis Is Clear, Compelling*, DAILY SIGNAL (Feb. 2, 2024), https://www.dailysignal.com/2024/02/02/case-for-impeaching-mayorkas-over-border-crisis-is-clear-compelling/ (repeating many of the arguments the author previously advanced in the Heritage report).

constitutional basis" for impeaching Secretary Mayorkas.[48] Professor Bowman explained that the charges "boil down to expressions of disapproval of the Biden Administration's alterations of Trump-era immigration policies." "[I]f Congress seeks to remain true to established constitutional law and precedent," Professor Bowman concluded, "that opposition cannot be transmuted into a case for impeaching Secretary Mayorkas."[49] Professor Pearlstein agreed that "[t]he apparent allegations against Secretary Mayorkas" described by the Committee "do not appear to establish grounds for any of th[e] offenses" set forth in the Constitution.[50]

Likewise, conservative legal scholar Jonathan Turley—who has frequently been called by Republicans to testify as a constitutional expert on impeachment, including as recently as last year—has flatly rejected the impeachment effort against Secretary Mayorkas. Professor Turley commented that while the Committee majority has alleged that the Secretary is "bad at his job" and has "enforc[ed] wrongheaded Biden administration border policies," "there is no current evidence [the Secretary] is corrupt or committed an impeachable offense."[51] Professor Turley emphasized that charges of "dereliction of duty" and "maladministration," among others, are not legally cognizable and that an impeachment on those grounds would violate the longstanding bipartisan "understanding that policy-based impeachments could open up endless tit-for-tat impeachment politics."[52]

Constitutional experts have pointed to historical precedent for the long-settled understanding that impeachment is not a proper tool in policy disagreements. Professor Turley has noted that the Belknap impeachment stands alone "[d]espite decades of controversial cabinet members."[53] Similarly, citing the Post and Perkins proceedings, impeachment experts Joshua Matz and Norman Eisen have explained that "[i]n launching an impeachment attack against Mayorkas, House Republicans not only violate the Constitution but also defy long-standing precedents."[54]

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[48] *Havoc in the Heartland: How Secretary Mayorkas' Failed Leadership Has Impacted the States: Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 9 (2024) (statement of Frank O. Bowman, III, University of Missouri Curators' Distinguished Professor Emeritus and Floyd R. Gibson Missouri Endowed Professor Emeritus); *Voices for the Victims: The Heartbreaking Reality of the Mayorkas Border Crisis*: *Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 3 (2024) (statement of Deborah N. Pearlstein, Professor of Law and Former Co-Director of the Floersheimer Center for Constitutional Democracy).

[49] *Havoc in the Heartland: How Secretary Mayorkas' Failed Leadership Has Impacted the States: Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 9 (2024) (statement of Frank O. Bowman, III, University of Missouri Curators' Distinguished Professor Emeritus and Floyd R. Gibson Missouri Endowed Professor Emeritus).

[50] *Voices for the Victims: The Heartbreaking Reality of the Mayorkas Border Crisis*: *Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 2 (2024) (statement of Deborah N. Pearlstein, Professor of Law and Former Co-Director of the Floersheimer Center for Constitutional Democracy).

[51] Jonathan Turley, *Homeland Security Chief Alejandro Mayorkas' Failures Are Not Impeachable*, DAILY BEAST (Jan. 29, 2024, 10:18 AM), https://www.thedailybeast.com/homeland-security-chief-alejandro-mayorkas-failures-are-not-impeachable.

[52] *Id*.

[53] *Id*.

[54] Joshua Matz & Norman Eisen, *Why Impeaching Mayorkas Would Violate the Constitution*, WASH. POST (Jan. 9, 2024, 6:19 PM), https://www.washingtonpost.com/opinions/2024/01/09/impeachment-alejandro-mayorkas-unconstitutional-border-security/.

Echoing this consensus against impeachment, twenty-five constitutional scholars sent a letter to the Committee opposing this effort as "utterly unjustified as a matter of constitutional law."[55] The bipartisan group included Donald Ayer, who served as Deputy Attorney General in the George H.W. Bush Administration, as well as distinguished scholars such as Professor Laurence Tribe of Harvard University, Professor Philip Bobbitt of Columbia Law School, and Erwin Chemerinsky, Dean of Berkeley Law School. They agreed that "the Constitution forbids impeachment based on policy disagreements between the House and the Executive Branch, no matter how intense or high stakes those differences of opinion."[56] Noting that the charges against the Secretary "come nowhere close to meeting the constitutional threshold for impeachment," the scholars concluded that the Committee's purported bases "are the stuff of ordinary (albeit impassioned) policy disagreement in the field of immigration enforcement."[57] Professor Alan Dershowitz, who represented President Trump in his first impeachment case, opined that "[w]hatever else Mayorkas may or may not have done, he has not committed bribery, treason, or high crimes and misdemeanors." Professor Dershowitz therefore "urge[d] principled Republicans who care about the Constitution to oppose those in their party who are seeking to impeach and remove Mayorkas based on nonconstitutional accusations."[58]

Tellingly, the Committee did not offer a single constitutional expert willing to contradict this overwhelming consensus. In its Report,[59] the Committee includes pages of scholarly quotations without mentioning that virtually every single one of the scholars who wrote the quoted passages and has considered this impeachment is on record opposing it.[60] Instead of acknowledging that near-unanimous repudiation, the Report makes two irrelevant points: that impeachment does not require "indictable crimes" in the sense that the conduct meets all "the elements of statutory criminal codes" (at 31); and that Cabinet Secretaries may be impeached (at 29). But the reason all of these experts have rejected this impeachment has nothing to do with any argument that the Resolution fails to charge the Secretary with a crime or that he is somehow

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[55] Letter from Laurence H. Tribe, et al. to Speaker Mike Johnson & Chairman Mark Green, *Constitutional Law Experts on the Impeachment Proceedings Against Secretary of Homeland Security Alejandro Mayorkas* (Jan. 10, 2024), https://www.justsecurity.org/91123/constitutional-law-scholars-on-the-impeachment-proceedings-against-secretary-of-homeland-security-alejandro-mayorkas/.

[56] *Id*.

[57] *Id*.

[58] Alan Dershowitz, *Republicans who voted against impeaching Trump should not vote to impeach Mayorkas*, THE HILL (Jan. 30, 2024, 6:30 PM), https://thehill.com/opinion/white-house/4438471-republicans-who-voted-against-impeaching-trump-should-not-vote-to-impeach-mayorkas/.

[59] REPORT OF THE COMMITTEE ON HOMELAND SECURITY HOUSE OF REPRESENTATIVES TOGETHER WITH DISSENTING VIEWS TO ACCOMPANY H. RES. 863, H.R. REP. NO. 118-346 (2024) [hereinafter Report].

[60] *Compare* Report (citing Professors Tribe at 34, 35–36; Gerhardt at 35, 38, 92, 115; and Rodriguez at 50–51), *with* Letter from Laurence H. Tribe, et al. to Speaker Mike Johnson & Chairman Mark Green, *Constitutional Law Experts on the Impeachment Proceedings Against Secretary of Homeland Security Alejandro Mayorkas* (Jan. 10, 2024), https://www.justsecurity.org/91123/constitutional-law-scholars-on-the-impeachment-proceedings-against-secretary-of-homeland-security-alejandro-mayorkas/ (letter signed by 25 constitutional law scholars, including Professors Tribe, Gerhardt, and Rodriguez, to Chairman Green, stating in part: "As scholars of the Constitution, considering the facts currently known and the charges publicly described, we hereby express our view that an impeachment of Secretary Mayorkas would be utterly unjustified as a matter of constitutional law"), *and* June Grasso, *Bloomberg Law: Impeaching Mayorkas & Multibillion Dollar Bayer Verdicts*, BLOOMBERG (Feb. 2, 2024), https://www.bloomberg.com/news/audio/2024-02-01/bloomberg-law-impeaching-mayorkas-bayer-verdicts-pile-up (Professor Gerhardt stating at 5:06 that, with respect to this effort: "There is no legitimate basis for impeachment.").

immune from impeachment. Rather, sources from Jonathan Turley to the *Wall Street Journal* Editorial Board to the many constitutional scholars on which the Report relies have dismissed this effort because the entire premise is a dispute over the Secretary's faithful and good-faith implementation of the President's immigration policy.

2. Impeachment of Secretary Mayorkas Is Inconsistent with the Separation of Powers

The House's attempt to impeach Secretary Mayorkas over policy disagreements is fundamentally inconsistent with the separation of powers and the President's exclusive and unrestricted Article II power to remove executive officers. The Constitution vests Executive power in the President who, in turn, is directed to "take Care that the Laws be faithfully executed."[61] That Executive Branch authority includes the President's "unrestrictable power . . . to remove purely executive officers."[62] Article II also vests the President with significant authority to exercise discretion in making decisions involving foreign policy and defense.[63]

Impeachment on the grounds the Committee has offered would upend that basic feature of the federal system.[64] The Framers vested the discretionary authority of the Executive in a single individual, rather than in Congress, in order "to focus, rather than to spread, Executive responsibility," and to preserve the President's accountability to the electorate.[65] The Constitution provides Congress with an important but specific and limited role in the President's choice of his most important personnel: the Senate must provide advice and consent to the appointment of certain Executive Branch officials, including Cabinet Secretaries. The Committee's case for impeachment here would fundamentally change that structure. The logical corollary of the Committee's effort is that not only could the Senate withhold approval of a President's nominee at the outset, but it would also have a new power to remove that official at

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[61] U.S. CONST., art. II, § 3.

[62] *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2199 (2020) (citation omitted); *see also id.* at 2197 (statement of James Madison on the floor of the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws" (quoting 1 ANNALS OF CONG. 463 (1789))).

[63] *See U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936) (recognizing the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress"); *Ex parte Milligan*, 71 U.S. 2, 139 (1866) (recognizing that the "command of the [armed] forces and the conduct of campaigns" are a "power and duty [that] belong to the President as commander-in-chief").

[64] *See* Steve Vladeck, *64. Federal vs. State Immigration Enforcement Under Arizona v. United States*, SUBSTACK: ONE FIRST (Jan. 29, 2024), https://stevevladeck.substack.com/p/64-federal-vs-state-immigration-enforcement (referring to the Supreme Court's 2012 decision in *Arizona v. United States*, 567 U.S. 387 (2012)) ("Part of the President's prerogative under the Take Care Clause is the right to set enforcement priorities—even when those priorities include **non-enforcement** in some cases in which that non-enforcement imposes costs on others. In the immigration context, specifically, it has long been true, politics aside, that the federal government lacks the **resources** to find, arrest, and remove every single non-citizen who is subject to removal from the country. Politics may drive **which** groups of removable non-citizens each successive administration chooses to prioritize; but limits on enforcement capacity is what requires prioritization in the first place.") (emphasis in original).

[65] *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

any time after confirmation based on Congress's disagreements with the official's good-faith judgments. That is not what the Constitution prescribes.[66]

The effect of that change, if carried to its conclusion, would be dramatic and severe. The President cannot control the Executive Branch and direct its policies if he loses exclusive authority to decide whether his Cabinet Secretaries' policy judgments warrant their continued service. Like other Cabinet officials, Secretary Mayorkas "acquires [his] legitimacy and accountability to the public through a clear and effective chain of command down from the President."[67] If allegations like the ones levied against Secretary Mayorkas "were sufficient to justify impeachment, the separation of powers would be permanently destabilized."[68] "Future Cabinet officials would be unduly chilled in doing their job, and presidents would fear that heated policy disputes might engulf their most senior officials in an impeachment quagmire."[69] Such officials would become responsive primarily to Congress, not to the President whose policies they are duty bound to carry out. During this Administration, Members of the House have already filed impeachment resolutions against Vice President Kamala Harris,[70] Secretary of Defense Lloyd Austin,[71] FBI Director Christopher Wray,[72] Secretary of State Antony Blinken,[73] Attorney General Merrick Garland,[74] and U.S. Attorney for the District of Columbia, Matthew Graves.[75] If the Committee's efforts became the norm, there would be no limit to the number of our highest officials who would be distracted from their duty to the public by partisan, policy-based impeachment attempts.

III. The Secretary's Decisions Are in Good Faith and Consistent with Law

Faced with the overwhelming consensus that the Constitution does not permit impeachment of a Cabinet Secretary based upon policy disputes—even heated ones—the Committee has attempted to camouflage its criticisms of the Administration's border policies with language intended to summon the "high Crimes and Misdemeanors" standard. That is why the Committee has couched its Resolution in terms of "Willful and Systemic Refusal to Comply With the Law."

There are two fatal flaws with that effort. First, the Committee has presented no evidence whatsoever that the Secretary has acted with bad faith in any of his decisions. Indeed, the

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[66] *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (Congress may not "invest itself or its members with either executive power or judicial power" nor "assum[e] . . . the constitutional field of action of another branch").

[67] *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) (internal quotation marks and citation omitted).

[68] Letter from Laurence H. Tribe, et al. to Speaker Mike Johnson & Chairman Mark Green, *Constitutional Law Experts on the Impeachment Proceedings Against Secretary of Homeland Security Alejandro Mayorkas* (Jan. 10, 2024), https://www.justsecurity.org/91123/constitutional-law-scholars-on-the-impeachment-proceedings-against-secretary-of-homeland-security-alejandro-mayorkas/.

[69] Joshua Matz & Norman Eisen, *Why Impeaching Mayorkas Would Violate the Constitution*, WASH. POST (Jan. 9, 2024, 6:19 PM), https://www.washingtonpost.com/opinions/2024/01/09/impeachment-alejandro-mayorkas-unconstitutional-border-security/.

[70] H.R. Res. 494, 118th Cong. (2023).

[71] H.R. Res. 951, 118th Cong. (2024); H.R. Res. 666, 118th Cong. (2023).

[72] H.R. Res. 406, 118th Cong. (2023).

[73] H.R. Res. 608, 117th Cong. (2021).

[74] H.R. Res. 410, 118th Cong. (2023).

[75] H.R. Res. 405, 118th Cong. (2023).

Secretary's letter to the Committee demonstrates exactly the opposite: he has always acted with the utmost diligence and good faith on behalf of the American people.[76] For purposes of impeachment, that should be dispositive. The Committee's citation to court cases challenging certain of the Secretary's policies is of no moment. Agency actions are routinely challenged in the courts. For example, the Trump Administration faced numerous legal challenges over its immigration policies and received numerous adverse decisions.[77] But there can be no serious contention that a Cabinet Secretary should face impeachment anytime a court invalidates an agency policy or action, particularly where, as is the case with Secretary Mayorkas, the Department has complied with all court orders, including those with which it disagrees. The Committee has not presented evidence that the Secretary carried out policies he knew to be illegal, because no such evidence exists.

Second, claims that the Secretary has not followed the law are false. As detailed below, the Secretary's decisions on every issue raised by the Committee are consistent with the INA and accompanying law. Upon examination, all that remains of the Committee's complaints are the sort of partisan policy disputes that even the Committee appears to recognize cannot justify impeachment.

A. The Impact of Historic Migration Flows

Immigration at our southern border has been a core challenge facing every Secretary and Administration for decades.[78] While Secretary Mayorkas can only operate within the authority that the Congress has provided, he has diligently used all available tools to address the extreme

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[76] Letter from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., to Rep. Mark E. Green, Chairman, H. Comm. on Homeland Sec. (Jan. 30, 2024).

[77] *See, e.g.*, *U.S. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1896 (2020) (DHS's rescission of DACA was "arbitrary and capricious"); *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020), *vacated sub nom. Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021), *vacated as moot sub nom., Innovation L. Lab v. Mayorkas*, 5 F.4th 1099, 1100 (9th Cir. 2021) (concluding that the "MPP is inconsistent with 8 U.S.C. § 1225(b), and that it is inconsistent in part with 8 U.S.C. § 1231(b)"); *Immigrant Defs. L. Ctr. v. Mayorkas*, No. CV209893JGBSHKX, 2023 WL 3149243, at *28 (C.D. Cal Mar. 15, 2023) ("Plaintiffs have plead with great specificity the ways in which MPP [under the Trump Administration] 'obstructed legal representation for all individuals subjected to [it], blocking it entirely for over 90 percent of impacted individuals.'"); *Ms. L v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1145 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019) (holding "This practice [Zero Tolerance Policy] of separating class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their due process claim"). Moreover, courts also leveled nationwide preliminary injunctions against the Trump Administration for its Public Charge Rule, which the courts found was in likely violation of the Administrative Procedure Act. *See Make the Rd. New York v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); *New York v. U.S. Dep't of Homeland Sec.*, 475 F. Supp. 3d 208, 214 (S.D.N.Y. 2020); *Washington v. U.S. Dep't of Homeland Sec.*, 598 F. Supp. 3d 1051, 1066 (E.D. Wash. 2020); *Casa de Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760, 771 (D. Md. 2019), *rev'd*, 971 F.3d 220 (4th Cir. 2020).

[78] As former Secretary of Homeland Security Michael Chertoff noted, "[t]he truth is that our national immigration system is outdated, and DHS leaders under both parties have done their best to manage our immigration system without adequate congressional support." He concluded, "[p]olitical and policy disagreements aren't impeachable offenses" and thus "for all the investigating that the House Committee on Homeland Security has done, they have failed to put forth evidence that meets the bar" for impeachment. Michael Chertoff, *Don't Impeach Alejandro Mayorkas*, WALL ST. J. (Jan. 28, 2024, 4:57 PM), https://www.wsj.com/articles/dont-impeach-alejandro-mayorkas-misuse-of-process-for-policy-differences-1f0ba02c.

pressures confronting the Department at the Southwest Border. Those efforts demonstrate his faithful and lawful discharge of his duties.

As a threshold matter, it is important to understand the conditions that drive mass migration at the Southwest Border and constitute the modern reality that any Secretary of Homeland Security faces. Violence, food insecurity, severe poverty, corruption, climate change, the continuing effects of the COVID-19 pandemic, and dire economic conditions have all contributed to the highest levels of irregular migration since the end of World War II.[79] This wave of global migration is also challenging many other nations' immigration systems. Failing regimes in Venezuela, Cuba, and Nicaragua, along with ongoing humanitarian issues in Haiti, have driven millions of people from those countries to leave their homes. Violence, corruption, and the lack of economic opportunity are also pushing individuals from countries such as Brazil, Colombia, Ecuador, and Peru to attempt to migrate to the United States and other countries. In the first two years of the Trump Administration, encounters along the Southwest Border more than doubled from lows between 2011 and 2017.[80] Former DHS Secretary Kirstjen Nielsen addressed these issues in March 2019:

> Today I report to the American people that we face a cascading crisis at our southern border. The system is in freefall. DHS is doing everything possible to respond to a growing humanitarian catastrophe while also securing our borders, but we have reached peak capacity and are now forced to pull from other missions to respond to the emergency.
>
> Let me be clear: the volume of 'vulnerable populations' arriving is without precedent. This makes it far more difficult to care for them and to prioritize individuals legitimately fleeing persecution.[81]

Following a significant drop during the beginning of the COVID-19 pandemic, migrant flows continued to increase in 2021 and 2022. In Fiscal Year ("FY") 2021, encounters at the Southwest Border reached levels not seen since the early 2000s, with Border Patrol reporting 1.7 million encounters. Those numbers increased in FY 2022 (2.3 million encounters) and dropped slightly in FY 2023 (2.0 million). Compounding the stress these numbers place on our border security and immigration system, much of the growth was driven by individuals from countries to which repatriation is particularly difficult.[82]

These numbers demonstrate that current migration patterns started before the Secretary took office and involve migrants emigrating to many countries other than the United States. In

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[79] Declaration of Blas Nunez-Neto at 4, *E. Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810-JST (N.D. Cal. June 16, 2023).

[80] *Id.*

[81] Press Release, Kirstjen Nielsen, Sec'y, U.S. Dep't of Homeland Sec., Secretary Kirstjen Nielsen Statement on Border Emergency (Mar. 29, 2019), https://www.dhs.gov/news/2019/03/29/secretary-kirstjen-nielsen-statement-border-emergency.

[82] Declaration of Blas Nunez-Neto at 5, *E. Bay Sanctuary Covenant v. Biden*, No. 4:18-cv-06810-JST (N.D. Cal. June 16, 2023).

Venezuela alone, more than 7.7 million people—over 25% of the population—have left the country, the vast majority of whom have migrated to Latin America and the Caribbean.[83] Despite these facts to the clear contrary, the Resolution (at 10–11) summarily and without basis blames the Secretary's policies on parole and detention for causing mass migration.

The unprecedented levels of irregular migration and the resulting flow of migrants into the United States have had severe impacts on border security and immigration infrastructure. DHS and Secretary Mayorkas have used the legal tools and resources available to them to address border security in light of these pressures. Existing resources and structures in our immigration system were not built for these numbers of migrants. As a result, there is limited capacity to stop all illegal crossings or detain all who enter illegally, and the Department has necessarily needed to prioritize enforcement efforts.

Heated debate about the right policy responses to these challenges is inevitable and healthy. But disagreements about the wisdom of this Administration's decisions do not establish that the Secretary has ignored or violated the law in the performance of his duties. In fact, the border security and immigration policy choices he has made to address the flow of migration have always been based on the applicable law. There is no merit to the allegations of "willful and systemic refusal to comply with the law" in the areas of asylum, detention, parole, and removals.[84]

B. Federal Law Generally Prohibits Secretary Mayorkas From Barring Migrants From Seeking Asylum

Contrary to the implications of the Resolution, the legal tools available to stem those flows are exceedingly limited, including because DHS generally must give noncitizens, even those who cross illegally, the opportunity to seek asylum.[85] Section 208 of the INA provides: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival[)] . . . *may apply for asylum*."[86] Section 235 of the INA is also clear: "An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival[)] . . . shall be deemed for purposes of this chapter *an applicant for admission*."[87]

Because DHS must generally give noncitizens, even those who cross illegally, the opportunity to seek asylum, it must process them and then determine whether they will be

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[83] *Venezuela Situation: 2024 Situation Overview*, U.N. HIGH COMM'R FOR REFUGEES, (last visited Jan. 31, 2024), https://reporting.unhcr.org/operational/situations/venezuela-situation; *Venezuela*, CIA: THE WORLD FACTBOOK (Jan. 25, 2024), https://www.cia. gov/the-world-factbook/countries/venezuela/ (estimated population of Venezuela as of 2023: 30,518,260).

[84] Resolution at 2–16.

[85] There are limited exceptions to this asylum requirement. For example, migrants who enter illegally between ports of entry ("POEs") for whom a prior order of removal is reinstated pursuant to Section 241(a)(5) of the INA are not eligible to apply for asylum. Such individuals may, however, be eligible for withholding of removal or protection under the regulations implementing Article 3 of the Convention against Torture. *See* 8 C.F.R. § 208.31 (2012). Under Section 208, the Department of Homeland Security and the Department of Justice may also impose by regulation limits on asylum eligibility that are consistent with the INA.

[86] Immigration and Nationality Act ("INA") § 208(a)(1) (emphasis added).

[87] *Id.* § 235(a)(1) (emphasis added).

detained. When the volume of illegal crossings occurring each day rises, the system from border processing through a final determination of asylum, and all steps in between, can be severely stressed. The statistics cited in the Resolution reflect the consequences. But the cause is not, as the Committee suggests, the Secretary's failure to follow the law.[88] The true cause is instead the combination of high levels of migration and an immigration system, as reflected in current law, that was not built to handle such volume.

C. The Law Does Not Require DHS to Detain All Illegal Crossers

Once migrants are taken into custody, decisions must be made about their pathway and detention status. The Resolution (at 3–7) criticizes Secretary Mayorkas for failing to detain every individual who crosses illegally, including those placed in expedited removal proceedings, asserting that his policies represent the implementation of "catch and release." That criticism is fundamentally misplaced. To the extent the contention is that the law requires detention of all such individuals and the Secretary is ignoring the law, the criticism is false both legally and factually. To the extent the argument is that releasing migrants who entered illegally is bad policy, that criticism both fails as a ground for impeachment and ignores an indisputable reality: *no* Secretary of Homeland Security has ever been in a position to take such an approach to mandatory detention because Congress has never appropriated funding sufficient to detain everyone who crosses illegally.

As for the law, the INA does not require that everyone who crosses illegally must be detained and specifically provides for release in certain circumstances. Section 236(a) provides:

> On a warrant issued by the Attorney General, an alien *may be* arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General- (1) may continue to detain the arrested alien; and (2) *may release* the alien on- (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole.[89]

Section 236(c) identifies limited categories of individuals, such as certain criminals, who are subject to mandatory detention. The rest are not.

Section 235(b)(1) of the INA generally mandates the detention of noncitizens in the expedited removal process.[90] But as the Supreme Court has recognized, DHS may parole noncitizens detained pursuant to this provision under Section 212(d)(5) for urgent humanitarian reasons or significant public benefit.[91] Under regulations issued in 1982,[92] parole under INA

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[88] MAJORITY OF H. COMM. ON HOMELAND SEC. 118TH CONG., DHS SECRETARY ALEJANDRO MAYORKAS' DERELICTION OF DUTY: PHASE 1 INTERIM REPORT, 18 (2023), https://homeland.house.gov/wp-content/uploads/2023/07/Phase-One-Report.pdf.

[89] INA § 236(a) (emphases added). The statute refers to the Attorney General because it was enacted prior to the creation of DHS. The law currently bestows these authorities and duties on the Secretary of Homeland Security.

[90] *See id.* §§ 235(b)(1)(B)(ii), 235(b)(1)(B)(iii)(IV).

[91] *See Jennings v. Rodriguez*, 583 U.S. 281, 287–88, 299 (2018).

Section 212(d)(5) is generally warranted for, among other reasons, noncitizens "whose continued detention is not in the public interest." The same language exists in current DHS regulations that predate this Administration.[93] Courts have also recognized that DHS has prosecutorial discretion to determine whether a noncitizen eligible to be processed for expedited removal should instead be placed in the formal and more extended removal proceedings under Section 240 of the INA. [94] Detention is not required for any noncitizen placed in such proceedings who crossed between ports of entry ("POEs").[95]

DHS's decisions to permit the release of eligible noncitizens are hardly remarkable. No DHS Secretary ever—Republican or Democrat—has been in a position to detain anywhere close to all migrants who cross illegally.[96] Nor has Congress ever provided the funding that would permit such a policy choice.[97] When the INA was passed, there were fewer than 10,000 beds available for detention while there were routinely over 1 million apprehensions annually.[98]

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[92] Detention and Parole of Inadmissible Aliens; Interim Rule With Request for Comments, 47 Fed. Reg. 30044, 30045 (July 9, 1982).

[93] 8 C.F.R. § 212.5(b)(5); *see* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10348 (Mar. 6, 1997).

[94] *See In re E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011); *see also Innovation L. Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019). With respect to the claim (Resolution at 6–7) that the Secretary has violated Section 241(a)(2) of the INA, since at least 2000, DHS (and former Immigration and Naturalization Service ("INS")) has maintained the position that detention during the 90-day removal period is not mandatory for non-criminal noncitizens. *See* Memorandum from Bo Cooper, Gen. Couns., Immigr. and Naturalization Serv., to Regional Counsel (Mar. 16, 2000).

[95] The Report (at 55) contains an extended discussion of the opinion of a single District Court judge, in *Florida v. United States*, 660 F. Supp. 3d 1239 (N.D. Fla. Mar. 8, 2023), a matter now on appeal in the Eleventh Circuit. The court's views of the law, however they may be resolved on appeal, point, at most, to a disagreement with DHS's interpretation of the INA, not whether the Secretary "willfully and systemically refused to comply with the law."

[96] The Report (at 75) acknowledges this fact, stating "it is not practically possible to detain every illegal entrant ever." Instead, the Report argues that the INA's provisions "must, at the very least, mean that inevitably limited enforcement resources be directed toward enforcing mandatory provisions of law over others and, most particularly, that limited resources should not be directed away from mandatory detention[.]" This fatally undermines the Committee's claim that Secretary Mayorkas has violated the law for failing to detain every individual who crosses illegally, and makes plain that this impeachment amounts to nothing more than a dispute over policy differences.

[97] Moreover, existing bed space has been limited by precautions regarding communicable disease in a custodial environment and court challenges over conditions. *See* Settlement Agreement at 9, *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36 (N.D. Cal. 2020) (No. 3:20-CV-02731), https://lccrsf.org/wp-content/uploads/2023/07/Zepeda-Rivas-settlement-agreement.pdf (agreeing that until 2025, the Mesa Verde ICE Processing Center and the Yuba County Jail will "maintain the status quo regarding population caps . . . unless and until CDC modifies its guidance"). The settlement agreement sets this population cap of 52 persons in the dorms if the facility is accepting new intakes or 78 persons if the dorms if it is not. *Id.* at 7.

[98] *The Border Crisis: Is the Law Being Faithfully Executed*: *Hearing Before the Subcomm. on Immigr. Integrity, Sec., and Enf't of the H. Comm. on the Judiciary*, 118th Cong. (2023) (testimony of Aaron Reichlin-Melnick, Policy Director, American Immigration Council) ("In fact, when Congress first passed [Section 235(b)(1)(B) of the INA] in 1996, there were actually fewer than 10,000 detention beds, and this is at a time when there were routinely 1.6-1.7 million Border Patrol apprehensions a year. So, it was not possible when Congress passed the law [to detain all asylum seekers]. It's not been possible anytime over the last 27 years. It's still not possible today."), https://www.govinfo.gov/content/pkg/CHRG-118hhrg52733/html/CHRG-118hhrg52733.htm; ALISON SISKIN, CONG. RSCH. SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 13 (2004), https://irp.fas.org/crs/RL32369.pdf ("[Many] contend that DHS does not have enough detention space to house all those who should be detained. . . . [Others] argue that the

Every Administration since has faced a similar reality. For example, a recent CATO analysis found that in the final two years of the Trump Administration, more than 700,000 migrants were released pending their immigration proceedings.[99] President Trump's Secretary of Homeland Security acknowledged this fact:

> What we will do is, we will put them through the regular process. As you know, we have laws in this country and will process them accordingly. Unless they have committed an underlying crime, unless they are a terrorist, unless they have multiple illegal entries—what we'll do is give them, essentially, a 'Notice to Appear' equivalent. They'll pass through their initial interview with USCIS, and then they'll go to an immigration judge.[100]

Secretary Mayorkas, too, has faced the realities of large migration flows and limited detention capacity in the context of a statutory requirement to take into custody and process these individuals as opposed to immediately expelling them. The Department has continued to utilize available statutory authority, including releasing certain migrants with Notices to Appear[101] for their removal proceedings under Section 240 of the INA.[102]

D. The Administration's Parole Processes Are Lawful

The Resolution (at 7–8) criticizes Secretary Mayorkas for the use of so-called "categorical" or "*en masse*" parole processes, such as the parole processes for migrants from Cuba, Haiti, Nicaragua, and Venezuela ("CHNV"). Those processes are consistent with Section 212(d)(5) of the INA, which states that the Secretary may in "his discretion parole into the United States temporarily under such conditions as he may prescribe" noncitizens "on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[103] The CHNV processes are designed to encourage an orderly and safe process for case-by-case determination of parole. DHS identified the significant public benefits and urgent humanitarian reasons

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increase in the number of classes of aliens subject to mandatory detention has impacted the availability of detention space for lower priority detainees.").

[99] David J. Bier, *New Data Show Migrants Were More Likely to Be Released by Trump Than Biden*, CATO (Nov. 2, 2023, 4:02 PM), https://www.cato.org/blog/new-data-show-migrants-were-more-likely-be-released-trump-biden.

[100] Interview by John Burnett, NPR, with Kirstjen Nielsen, Secretary, Dep't of Homeland Sec. (May 10, 2018, 2:35 PM), https://www.npr.org/2018/05/10/610113364/transcript-homeland-security-secretary-kirstjen-nielsens-full-interview-with-npr.

[101] The Trump Administration used some of the very same processes—including Notices to Appear—that Republicans criticize Secretary Mayorkas for using under their rubric of "catch and release." *Ports of Entry Are Issuing More Notices to Appear Than Ever Before*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Oct. 11, 2023), https://trac.syr.edu/reports/730/ (noting the Trump Administration's use of at least 139,865 Notices to Appear).

[102] DHS alternatively pursued the "parole plus alternatives to detention" policy that is currently under challenge in litigation. A judge in the Northern District of Florida found the policy to be inconsistent with the INA in a decision now on appeal in the Eleventh Circuit. *See generally Florida v. United States*, 660 F. Supp. 3d 1239 (N.D. Fla. 2023).

[103] INA § 212(d)(5).

supporting these processes in the Federal Register notices it issued publicly.[104] Contrary to the Resolution's assertions, the Department reviews both the biographical and biometric information of every potential parolee and the background and financial information of each supporter of a parolee on a case-by-case basis. There is no valid argument that Secretary Mayorkas intentionally violated the very law the Department follows in implementing these processes. The real crux of the Committee's claim is a non-impeachable disagreement over the Secretary's policy choices.

As the Committee and Congress know well, parole processes for defined groups are not new under Secretary Mayorkas; they have been used in prior Administrations of both political parties. The Obama Administration, for example, initiated the Haitian Family Reunification Program, Filipino WWII Family Veterans, and Parole in Place for Immigrant Military Families programs, and the Trump Administration processed thousands of applicants to those programs through 2019.[105]

The Committee's criticism is equally unfounded as applied to the Circumvention of Lawful Pathways ("CLP") Rule. That Rule provides that those who enter the United States at the Southwest Border or adjacent coastal borders without documents sufficient for lawful admission after traveling through another country are presumed ineligible for asylum unless they meet certain limited exceptions, including having (i) availed themselves of an existing lawful process, such as CHNV; (ii) presented at a POE at a pre-scheduled time and place; or (iii) been denied asylum in a third country through which they traveled.[106] The Rule is designed to discourage irregular migration by providing a route for lawful, safe, and orderly entry into the United States and imposing conditions on asylum eligibility for those who fail to follow available processes and pathways.[107] It would be preposterous to claim that Secretary Mayorkas

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[104] Implementation of a Parole Process for Venezuelans, 87 Fed. Reg. 63507 (Oct. 19, 2022); Implementation of a Parole Process for Haitians, 88 Fed. Reg. 1243 (Jan. 9, 2023); Implementation of a Parole Process for Nicaraguans, 88 Fed. Reg. 1255 (Jan. 9, 2023); Implementation of a Parole Process for Cubans, 88 Fed. Reg. 1266 (Jan. 9, 2023).

[105] *See The Border Crisis: Is the Law Being Faithfully Executed?: Hearing Before the Subcomm. on Immigr. Integrity, Sec., and Enf't of the H. Comm. on the Judiciary*, 118th Cong. 4 (2023) (statement of Aaron Reichlin-Melnick, Policy Director, American Immigration Council), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/reichlin-melnick-testimony.pdf (noting that during the Trump Administration from "FY 2017 through FY 2020, over 1.1 million people encountered at the U.S.-Mexico border were eventually released into the United States, including over 500,000 people who were never detained and over 600,000 people who were initially detained and then subsequently released."). These trends are commensurate with prior Administrations, for "in each of the last three presidential administrations, tens of thousands of migrants encountered at the southwest border were released directly from [U.S. Customs and Border Protection ("CBP")] custody without ever being detained by [U.S. Immigration and Customs Enforcement ("ICE")]." *Id.*; *see also* Geneva Sands, *Trump Admin Ends Family-based Reunification Programs for Haitians and Filipino World War II Vets*, CNN (Aug. 2, 2019, 4:45 PM), https://www.cnn.com/2019/08/02/politics/trump-end-two-family-reunification-programs/index.html.

[106] Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31450–51 (May 16, 2023) (8 C.F.R. §§ 208.33, 1208.33).

[107] *Fact Sheet: Circumvention of Lawful Pathways Final Rule*, U.S. DEP'T OF HOMELAND SEC., (May 11, 2023), https://www.dhs.gov/news/2023/05/11/fact-sheet-circumvention-lawful-pathways-final-rule.

intentionally violated the law by publicly issuing this Rule, which was produced jointly with the Department of Justice.[108]

E. The Department's Enforcement Guidelines Are Lawful

The Resolution (at 5–7) alleges that the Secretary has violated the law on detention in issuing his September 2021 Guidelines for the Enforcement of Civil Immigration Law.[109] As explained in detail in Section III.C.III.C above, the Department's detention policies, including with respect to Sections 236(c), 235(b)(1), and 241(a)(2), are consistent with the INA and long-standing agency practice,[110] and they are rooted in the reality of limited detention space. But as the Supreme Court recognized, the Guidelines address an entirely different part of the process—arrest and removal—not continued detention.[111] The Guidelines were designed to better focus the Department's limited resources on the apprehension and subsequent removal of noncitizens who pose a threat to national security, public safety, and border security and to advance the interests of justice by ensuring a case-by-case assessment of whether an individual poses such a threat.

To the extent the Resolution attempts to address case law on this issue, it fails even basic standards of credibility. The Resolution (at 6) quotes the decision of the U.S. Court of Appeals for the Fifth Circuit in *Texas v. United States*, which involved a challenge to the lawfulness of the Guidelines, in support of the Committee's charges. But the Resolution fails to appreciate that the Supreme Court *reversed* the Fifth Circuit decision by a vote of 8-1.[112] The Resolution also relies (at 14–15) on the opinion of the Supreme Court's sole dissenting Justice as if it were the controlling outcome.[113] In concluding that the plaintiff States lacked standing, the Justices in the majority emphasized the Executive Branch's prosecutorial discretion. As the Court observed: "the Executive Branch must prioritize its enforcement efforts. . . . That is because the Executive Branch (i) invariably lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs

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[108] Consistent with the longstanding reality that immigration policy is highly charged politically and often attacked from both ends of the political spectrum, the CLP Rule is under challenge by the ACLU and other plaintiffs for being too restrictive of asylum, *see generally E. Bay Sanctuary Covenant v. Biden*, No. 18-cv-06810, 2023 WL 4729278 (N.D. Cal. July 25, 2023); Complaint, *M.A. v. Mayorkas*, No. 23-cv-01843 (D.D.C. June 26, 2023) and by certain states for not being restrictive enough, *see generally*, Complaint, *Texas v. Mayorkas,* No. 2:23-cv-00024 (W.D. Tex. May 23, 2023); Complaint, *Indiana v. Mayorkas*, No. 1:23-cv-00106-DMT (D.N.D., May 31, 2023).

[109] Memorandum from Sec'y Alejandro N. Mayorkas on Guidelines for the Enf't of Civ. Immigr. L. to Acting Dir. of U.S. Immigr. and Customs Enf't (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

[110] *See supra* note 94.

[111] *United States v. Texas*, 599 U.S. 670, 683 & n.5 (2023).

[112] *See Texas v. United States*, 40 F.4th 205 (5th Cir. 2022) *rev'd*, 599 U.S. 670 (2023). The Resolution in fact relies on not just one but two decisions of the Fifth Circuit that were subsequently reversed. *See* Resolution at 6–7, 19 (quoting *Texas v. Biden*, 20 F. 4th 928 (5th Cir. 2021) *rev'd*, 597 U.S. 785 (2022)). As discussed below, the Supreme Court held in that case that the Secretary's decision to terminate the Trump Administration's Migrant Protection Protocols was fully consistent with the INA.

[113] The Report (at 86–91) pulls out all the stops to support its unsupportable claim by extended quotations from the reversed District Court, reversed Court of Appeals, and another a District Court in a different case. *See United States v. Texas*, 606 F. Supp.3d 437 (S.D. Tex. 2022) *rev'd*, 599 U.S. 670 (2023); *Texas v. United States*, 40 F.4th 205 (5th Cir. 2022) *rev'd*, 599 U.S. 670 (2023); *Florida v. United States*, 660 F. Supp. 3d 1239 (N.D. Fla. 2023).

of the American people."[114] In this area as well as all others, the Secretary has acted well within his authority and consistent with the law.[115]

The Report (at 80) quotes the Court on ways for Congress to address policy differences such as those raised in the case: "Congress possesses an array of tools to analyze and influence those policies — oversight, appropriations, the legislative process, and Senate confirmations, to name a few"—and dismisses each of them as "clearly non-solutions in this case." As to the legislative process option, the Report claims it would be futile in light of the Secretary's positions, failing to acknowledge that Speaker Johnson has publicly dismissed bipartisan efforts to craft legislative changes in the Senate, with the full participation of Secretary Mayorkas, as "dead on arrival" in the House.[116]

The facts also squarely refute the Resolution's related suggestion that the Secretary has not made use of the Department's removal authority.[117] During the Secretary's tenure, the Department has removed individuals legally subject to removal at record rates. In FY 2022, more individuals encountered at the border were removed under Title 8 or expelled under Title 42 than in any previous year (1.4 million individuals).[118] From FY 2021 through FY 2023, a total of over 4 million individuals were removed or expelled.[119]

In sum, there is no substance to the allegation that the Secretary has willfully and systemically refused to follow the law.

IV. There Is No Basis for the Allegations That the Secretary Has "Breached the Public Trust"

The Resolution's second Article (at 16–20) accuses the Secretary of breaching the public trust by allegedly making false statements to the American people and the Congress, by reversing three immigration policies of the Trump Administration, and by allegedly failing to comply with Congressional subpoenas. Each contention is meritless. As an initial matter, in the

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[114] *United States v. Texas*, 599 U.S. 670, 679–80 (2023).

[115] Whether a particular individual would be viewed as a priority for arrest under the Guidelines versus under guidelines of previous Administrations is, if course, a policy choice, not an impeachable offense.

[116] Emily Brooks, *Speaker Johnson: Senate border deal 'dead on arrival' in House*, THE HILL (Jan. 26, 2024, 10:45 AM), https://thehill.com/homenews/house/4431375-speaker-johnson-senate-border-deal-dead-on-arrival-in-house/.

[117] Resolution at 4–7; MAJORITY OF H. COMM. ON HOMELAND SEC., 118TH CONG., DHS SECRETARY ALEJANDRO MAYORKAS' DERELICTION OF DUTY: PHASE 1 INTERIM REPORT, at 16 (2023), https://homeland.house.gov/wp-content/uploads/2023/07/Phase-One-Report.pdf.

[118] *Update on Southwest Border Security and Preparedness Ahead of Court-Ordered Lifting of Title 42*, U.S. DEP'T OF HOMELAND SEC. (2022), https://www.dhs.gov/sites/default/files/2022-12/22-1213-plcy-update-sw-border-security-preparedness.pdf.

[119] *See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2022*, U.S. CUSTOMS & BORDER PROT. (last modified Nov. 2, 2023), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy22; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2021*, U.S. CUSTOMS & BORDER PROT. (last modified May 26, 2023), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021; *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2020*, U.S. CUSTOMS & BORDER PROT. (last modified Mar. 27, 2023), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020.

context of impeachment, an official "breaches the public trust" only if he willfully misuses the privileges of his office "for his own benefit or the benefit of his own power or on behalf of a foreign power" at the expense of the constitutional system.[120] This narrow category consists of offenses so egregious that they demean the public office and cause great harm to the country's faith in government.[121] The only constitutional scholars to testify before the Committee have attested that none of the Resolution's accusations come close to satisfying the standard for breach of the public trust.[122] In any event, the facts show that Secretary Mayorkas has been truthful with Congress and the public; reversing Trump-era policies is a non-impeachable disagreement over policy; and the Department has complied with subpoenas.

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[120] *See Voices for the Victims: The Heartbreaking Reality of the Mayorkas Border Crisis: Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. (2024) (statement of Deborah N. Pearlstein, Professor of Law and Former Co-Director of the Floersheimer Center for Constitutional Democracy at 3:52:13), https://www.youtube.com/watch?v=gsod6sbSHSA&t=13931s; *see also* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 343 (quoting Gouverneur Morris's statement expressing concern that the President might "be bribed by a greater interest to betray his trust," and citing the example of Charles II receiving a bribe from Louis XIV); THE FEDERALIST NO. 65 (Alexander Hamilton) (noting that impeachment is a "method of national inquest into the conduct of public men" for "the abuse or violation of some public trust" and that impeachable offenses are those that "relate chiefly to injuries done immediately to the society itself").

[121] Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 921 (1999). Previous impeachments premised on allegations of perjury or deception demonstrate why that allegation is fundamentally misplaced here. For example, the House impeached Judge Walter Nixon in 1989 after he was convicted of lying in testimony before a federal grand jury about his unlawful attempts to influence the prosecution of a business associate's son. *See* H.R. 87, 101st Cong. (1989) ("Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts."). These offenses involved egregious subversion of his obligation to the public as an impartial judge for his own personal gain, and demonstrated his lack of moral standing to effectively carry out his duties as a federal judge. Similarly, the House's proposed impeachment articles against President Nixon explained that he caused great harm to the country's faith in public institutions by "misus[ing] . . . the powers and privileges of his office to facilitate his reelection and to hurt his political enemies as well as to frustrate or undermine inappropriately legitimate attempts to investigate the extent of his misconduct." Gerhardt, *Putting the Law of Impeachment in Perspective*, *supra* note 28 at 921. His alleged misconduct, carried out for the purpose of securing a personal advantage against his opponent for public office, "effectively disabled him from continuing to exercise the constitutional duties of his office." *Id.* Failing to remove Nixon "would have countenanced serious breaches of the public trust and abuses of power and substantially demeaned the office of the presidency." *Id.*

[122] Frank O. Bowman III, *Analysis of Mayorkas Articles of Impeachment – Article 2: "Breach of the Public Trust,"* IMPEACHABLE OFFENSES? (Jan 31. 2024), https://impeachableoffenses.net/2024/01/31/analysis-of-mayorkas-articles-of-impeachment-article-2-breach-of-the-public-trust/ ("None of these claims [asserted by Article II] can survive even modest scrutiny."); *Voices for the Victims: The Heartbreaking Reality of the Mayorkas Border Crisis*: *Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. (2024) (statement of Deborah N. Pearlstein, Professor of Law and Former Co-Director of the Floersheimer Center for Constitutional Democracy, at 3:52), https://www.youtube.com/watch?v=gsod6sbSHSA&t=13931s ("Having read through the materials, I see no evidence that Secretary Mayorkas has acted on behalf of his own benefit financially or politically, and I see no evidence that there is collusion or other cooperation or acting on behalf of a foreign power.").

A. The Secretary Has Been Truthful with Congress in Describing the State of Border Security

The Resolution's allegations of false statements about the state of the border (at 16–17) do not satisfy the standard of an impeachable offense. The Secretary's statements concerning "operational control" and his views on whether the border is "secure" reflect his assessments and opinions based on key facts relevant to conditions at the border. While these statements may be subject to good-faith disagreements, they are neither "false statements" nor "high Crimes or Misdemeanors."

The Resolution appears to focus on Secretary Mayorkas's testimony at an April 2022 House Judiciary Committee hearing in which he answered in the affirmative when asked whether there was operational control at the Southwest Border.[123] In the Committee's view, that statement was inconsistent with one specific and unusual definition of "operational control" found in the Secure Fence Act of 2006:

> In this section, the term 'operational control' means the prevention of *all unlawful entries* into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.[124]

The Committee's contention is deeply misguided. No Administration, Republican or Democratic, has ever achieved "operational control" as defined in the literal text of the Act. In the year the statute was enacted, there were nearly 1.1 million unlawful entries (as measured by the Border Patrol agent apprehensions of illegal crossers). Even at the lowest point of migration during the Trump Administration in FY 2017, there were approximately 310,000 unlawful

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[123] The Committee relies one exchange between the Secretary and Congressman Chip Roy at an April 28, 2022 House Judiciary Committee hearing in which Congressman Roy repeatedly interrupted the Secretary and prevented him from explaining his answer:

> Q: The entirety of [your] plan says that. The Secure Fence Act of 2006 says what? That the Secretary of Homeland Security shall take all actions the Secretary determines necessary to achieve and maintain operational control over the entire international land and maritime borders. Will you testify under oath right now, do we have operational control?
> Yes or no?
> A: Yes, we do. And we –
> Q: We have operational control of the borders?
> A: Yes, we do. And Congressman, we are working to –
> Q: Assume—operational control—defined in this section the term operational control means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband. Do you stand behind your testimony that we have operational control in light of this definition?
> A: I do. And Congressman, I think the Secretary of Homeland Security would have said the same thing in 2020 and in 2019.

Oversight of the Department of Homeland Security: Hearing Before the H. Comm. on the Judiciary, 117th Cong. 65 (Apr. 28, 2022), https://www.congress.gov/event/117th-congress/house-event/114673/text.

[124] Secure Fence Act of 2006 § 2(b), Pub. L. No. 109–367, 120 Stat. 2638 (emphasis added).

entries (as measured by the number of Border Patrol agent apprehensions).[125] Simply put, it has never been the case that the "zero-entry" operational control definition in the Act was a realistic measure of border security effectiveness.[126] As Secretary Nielsen put it in her confirmation hearing in November 2017:

> While it is impossible to stop *every* illegal crossing and all illegal activity across the border, it is the mission of the Department to achieve and maintain a secure border.[127]

It is doubtful that any Member of Congress could seriously have thought Secretary Mayorkas was representing in his testimony that *zero* illegal crossings were occurring, and the Resolution comes nowhere close to demonstrating that Secretary Mayorkas intended to deceive any Member of Congress on this point.

Not surprisingly, those directly responsible for securing the Southwest Border have used multiple definitions of operational control, all more realistic than what appears in the Act. In its 2007 National Border Patrol Strategy, CBP defined operational control as the "ability to detect, respond, and interdict border penetrations in areas deemed as high priority for threat potential or other national security objectives," not as the successful prevention of all crossings.[128] According to information collected by the Government Accountability Office in 2011, DHS measured "the number of border miles under effective control—also referred to as operational control—defined by DHS as the number of border miles where Border Patrol had the *ability* to detect, respond, and interdict cross-border illegal activity."[129] In a 2013 hearing before the Committee, the CBP Chief and Office of Field Operations Assistant Commissioner described operational control as a "tactical term" used to allocate resources brought to the border.[130] In 2016, former DHS Secretary Michael Chertoff publicly stated that a reasonable definition of operational control was a 75% to 80% rate of apprehending illegal crossers, a goal that DHS has

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[125] U.S. BORDER PATROL, *U.S. Border Patrol Monthly Encounters (FY 2000 – FY 2020)* (2021), https://www.cbp.gov/document/stats/us-border-patrol-monthly-encounters-fy-2000-fy-2020.

[126] *See* Raul L. Ortiz, Chief, U.S. Border Patrol, Secretary Mayorkas and U.S. Customs and Border Protection Leadership Remarks at a Press Conference at Camp Monument Brownsville, TX (May 5, 2023) (transcript available at https://www.dhs.gov/news/2023/05/05/secretary-mayorkas-and-cbp-leadership-remarks-press-conference-camp-monument) ("[S]o the question that was posed during my hearing was the Congressional legislative definition of operational control, where nobody crosses the border. I've been doing this job for 32 years. We've never had operational control.").

[127] *Nomination of Kirstjen M. Nielsen: Hearing before the S. Comm. on Homeland Security and Governmental Affairs*, 115th Cong. 132 (Nov. 8, 2017), https://www.govinfo.gov/content/pkg/CHRG-115shrg30099/pdf/CHRG-115shrg30099.pdf (emphasis in original).

[128] U.S. CUSTOMS & BORDER PROT.: OFF. OF BORDER PATROL, NATIONAL BORDER PATROL STRATEGY 3 (2007), https://www.hsdl.org/?view&did=457100.

[129] *Securing Our Borders – Operational Control and the Path Forward: Hearing Before the H. Comm. on Homeland Sec., Subcomm. on Border & Maritime Sec.*, 112th Cong. 4, at 13 (Feb. 15, 2011), https://www.govinfo.gov/content/pkg/CHRG-112hhrg72215/pdf/CHRG-112hhrg72215.pdf (Statement of Richard M. Stana, Director, Homeland Security and Justice Issues, Government Accountability Office) (emphasis added).

[130] *What Does a Secure Border Look Like?: Hearing Before the H. Comm. on Homeland Sec., Subcomm. on Border & Maritime Sec.*, 113th Cong. (Feb. 26, 2013) (Written testimony of U.S. Customs and Border Protection U.S. Border Patrol Chief Michael Fisher and Office of Field Operations Acting Assistant Commissioner Kevin McAleenan), https://www.dhs.gov/news/2013/02/26/written-testimony-us-customs-and-border-protection-house-committee-homeland-security.

achieved under Secretary Mayorkas.[131] Even an Executive Order issued by former President Trump, which returned to a stricter definition of "operational control," gave the Secretary discretion to determine when the Secretary believed operational control was achieved. That Order directed certain steps to be taken "to obtain *complete* operational control, *as determined by the Secretary*, of the southern border."[132] The standard for border security was modified again under the Biden Administration. In the 2022 Border Patrol Strategy, the goal was described as operational "advantage."[133]

This history makes two conclusions abundantly clear. First, those on the ground who are responsible for securing our borders have never utilized the implausible definition in the Secure Fence Act to determine the extent to which operational control has been achieved. Second, because there are many ways of defining this term, the assessment of whether operational control exists ultimately is a matter of opinion.

The Secretary has been straightforward about his opinion and the basis for it. He has repeatedly identified the definition of operational control he uses, explaining that despite all of the challenges, he believes DHS has operational control at the Southwest Border, and he has supported his opinion with facts. For example, in his testimony before the Senate Committee on the Judiciary on March 28, 2023, he stated:

> With respect to the definition of operational control, *I do not use the definition that appears in the Secure Fence Act* . . . operational control is defined as preventing all unlawful entries into the United States. By that definition, no administration has ever had operational control. The way I define it is maximizing the resources that we have to deliver the most effective results and we are indeed doing that. We have for the first time since 2011 increased the number of border patrol agents.[134]

Similarly, in his testimony before the Senate Appropriations Committee on March 29, 2023 he stated:

> The Secure Fence Act of 2006 defines operational control as the prevention of all unlawful entries at our border. That means that one single got-away means it would—would equal the failure to have operational control of our—of our border and so under that definition, no administration has ever had operational control. So what I try to do in communicating to the public is be practical and speak to them in a way that they could understand, so that I—so

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[131] *See* Rachel Martin, *Trump Chooses Retired General John Kelly As Homeland Security Secretary*, NPR (Dec. 9, 2016, 5:35 AM), https://www.npr.org/2016/12/09/504930235/trump-chooses-retired-general-john-kelly-as-homeland-security-secretary (interview with Michael Chertoff).

[132] Exec. Order No. 13767, 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017) (emphasis added).

[133] U.S. CUSTOMS & BORDER PROT., 2022-2026 U.S. BORDER PATROL STRATEGY 3 (2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/USBPStrategy%20-%20FINAL.pdf.

[134] *Oversight of the Department of Homeland Security: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. (2023) (statement of Secretary Mayorkas at 38:00) (emphasis added), https://www.c-span.org/video/?526938-1/secretary-mayorkas-testifies-homeland-security-oversight-hearing.

> that not every single administration has to throw its hands up and say we've never had operational control. I speak of maximizing the resources that we have to deliver the most effective results.[135]

As these passages reflect, the Secretary has been transparent and truthful about his opinion on operational control, just as he has been when he has stated that, in his opinion, the border is secure.[136] There is no indication that the Secretary intended to mislead anyone. To the contrary, the Department *itself* openly publishes statistics about noncitizen encounters.[137]

Furthermore, the facts demonstrate that DHS has surged available resources to the Southwest Border and implemented policies and programs that maximize operational control given the circumstances and resources available to the Department.

- In FY 2023 DHS secured funding to hire more than 300 additional Border Patrol agents, the first such increase in more than a decade.[138] On numerous occasions, DHS brought additional resources to the Southwest Border to help process the surge of migrants and allow Border Patrol agents who had been engaged in processing or related matters to get back into the field to patrol between POEs. These resources included hiring 1,000 new Border Patrol Processing Coordinators and temporarily relocating a voluntary force of existing personnel from DHS components to increase the workforce at the border.[139] In its zeal to hold the Secretary responsible for agents being too involved in processing, the Resolution (at 12–13) fails to recognize that it was the Secretary who led this surging of additional resources to ensure more agents were in the field.

- DHS has conducted intense interdiction and law enforcement efforts to prevent and prosecute the importation of fentanyl. Those efforts include Operation Blue Lotus, launched in March 2023, which increased CBP and Homeland Security Investigations ("HSI") resources to Southwest Border POEs; [140] Operation Four Horsemen, a complementary Border

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[135] *A Review of the President's FY 2024 Budget Request for the Department of Homeland Security: Hearing Before the S. Comm. on Appropriations*, 118th Cong. (Mar. 29, 2023) (statement of Secretary Mayorkas at 45:54), https://www.appropriations.senate.gov/hearings/a-review-of-the-presidents-fy-2024-budget-request-for-the-department-of-homeland-security.

[136] The Report (at 92–93) cites to the Secretary's statements that the border is "secure" or that the border is "not open." There is no statutory or regulatory definition of when a border is "secure" or "not open" nor is there any fixed and enduring standard by those who secure the border. It is quintessentially a matter of opinion.

[137] *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STAT., *Immigration Enforcement and Legal Processes Monthly Tables - September 2023*, https://www.dhs.gov/sites/default/files/2024-01/24_0105_ohss_immigration-enforcement-and-legal-processes-tables-september-2023_1.xlsx.

[138] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (2022); *see also Homeland Security, 2023*, S. APPROPRIATIONS COMM. REPUBLICANS (2020), https://www.appropriations.senate.gov/imo/media/doc/FY23%20BILL%20HIGHLIGHTS_DHS1.pdf.

[139] U.S. DEP'T OF HOMELAND SEC., UPDATE ON SOUTHWEST BORDER SECURITY AND PREPAREDNESS AHEAD OF COURT-ORDERED LIFTING OF TITLE 42, at 3 (2022), https://www.dhs.gov/publication/update-southwest-border-security-and-preparedness-ahead-court-ordered-lifting-title-42.

[140] *Fact Sheet: DHS is on the Front Lines Combating Illicit Opioids, Including Fentanyl*, U.S. DEP'T OF HOMELAND SEC. (Dec. 22, 2023), https://www.dhs.gov/news/2023/12/22/fact-sheet-dhs-front-lines-combating-illicit-opioids-including-fentanyl.

Patrol operation to stop fentanyl between POEs and at check points near the border;[141] CBP's Operation Artemis, which targeted the fentanyl supply chain and interdicted items required in the production of fentanyl, supported by HSI;[142] and Operation Apollo, a new CBP counter-fentanyl operation launched in October 2023 to disrupt drug and chemical supply, collect and share intelligence, and leverage valuable partnerships in Southern California.[143]

- DHS has aggressively pursued the cartels, who control migrant smuggling into the United States through a high-impact disruption campaign, which has led to the arrest of more than 14,000 smugglers throughout the region, and the prosecution of thousands of smugglers by the Department of Justice.[144]

- DHS has significantly increased its commitment to border security technology, including by investing in non-intrusive inspection technology at POEs to detect drugs, currency, guns, ammunition, illegal merchandise, and human smuggling [145] and numerous forms of surveillance and detection technology between POEs.[146]

- As noted above, the Secretary has presided over a record number of removals and expulsions of noncitizens who illegally cross the Southwest Border,[147] including 1.4 million in FY 2022 alone and over 4 million in the first three years of the Administration.[148]

- Through the CHNV processes and the CLP Rule, DHS has implemented regulatory changes that incentivize migrants to follow safe, orderly, and lawful pathways instead of crossing illegally.[149]

In addition, the Secretary's position concerning the status of the border is consistent with the measure articulated by former DHS Secretary Chertoff, under which an apprehension rate of between 75% to 80% constitutes operational control. As a result of the efforts of the Secretary to

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[141] These operations seized nearly 10,000 pounds of fentanyl, and more than 10,000 pounds of narcotics like cocaine and methamphetamines. *Id.*

[142] *Id.*

[143] *Id.*

[144] *Oversight of the Department of Homeland Security: Hearing Before the H. Comm. on the Judiciary,* 118th Cong. 6 (2023) (statement of Secretary Alejandro Mayorkas), https://www.congress.gov/118/chrg/CHRG-118hhrg53168/CHRG-118hhrg53168.pdf.

[145] By installing 123 new large-scale scanners at multiple POEs along the Southwest Border, CBP will increase its inspection capacity of passenger vehicles from 2% to 40%, and of cargo vehicles from 17% to 70%. Press Release, White House, Fact Sheet: In State of the Union, President Biden to Outline Vision to Advance Progress on Unity Agenda in Year Ahead (Feb. 7, 2023), https://www.whitehouse.gov/ondcp/briefing-room/2023/02/07/fact-sheet-in-state-of-the-union-president-biden-to-outline-vision-to-advance-progress-on-unity-agenda-in-year-ahead/.

[146] *See id.*

[147] The Resolution (at 17) alleges that the Secretary made false statements that noncitizens with no legal basis to remain in the United States "were being quickly removed." These facts support that statement and thoroughly undercut the allegation.

[148] U.S. DEP'T OF HOMELAND SEC., UPDATE ON SOUTHWEST BORDER SECURITY AND PREPAREDNESS AHEAD OF COURT-ORDERED LIFTING OF TITLE 42, at 2 (2022), https://www.dhs.gov/publication/update-southwest-border-security-and-preparedness-ahead-court-ordered-lifting-title-42.

[149] For a fuller discussion of the Secretary's accomplishments in this area, *see* Letter from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., to Rep. Mark E. Green, Chairman, H. Comm. on Homeland Sec. (Jan. 30, 2024).

bring resources and technology to the border, the average apprehension rate during the past three years was 78%, virtually identical to the Trump Administration's 79% rate, and far superior to the rates between 2006 and 2013, which were below 50%.[150] These apprehension rates further demonstrate that there is no basis on which to claim that the Secretary made false statements about operational control or border security.[151]

Some Republican Members may nevertheless be unhappy with the results of the Secretary's policies, and they may have a different opinion as to whether the border is secure or whether operational control exists, but those are unimpeachable matters of opinion, and the Secretary's opinion is strongly supported by the facts.

B. The Additional Allegations of False Statements Lack Merit

The Resolution (at 17) advances two other conclusory allegations that the Secretary made false statements. The first appears to assert that the Secretary falsely represented the scope and adequacy of vetting for Afghans granted parole in the United States. The second centers on the claim that the Secretary "support[ed] the false narrative that U.S. Border Patrol agents maliciously whipped illegal aliens." Both of these contentions lack merit.

As an initial matter, the Resolution offers nothing close to the kind of specificity that would support a false statement allegation. It does not identify which statements about vetting or "supporting the false narrative" are of concern or why. This sort of "kitchen sink" approach to impeachment not only fails to meet constitutional standards but is also fundamentally unfair to the Secretary, who is prevented from providing any meaningful response to such vague claims.

In any event, to the extent the Resolution's claims on these points can be reduced to discernable allegations, they lack any basis. As to the Afghan vetting claim, DHS explained to the Committee in an August 17, 2023 letter[152] that, during the non-combatant evacuation operation, U.S. citizens and their family members, as well as vulnerable Afghans, were evacuated to safety in third country locations under Operation Allies Welcome ("OAW"), a whole-of-government effort to resettle vulnerable Afghans.[153]

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[150] U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STAT., FISCAL YEAR 2021 SOUTHWEST BORDER ENFORCEMENT REPORT 3 (2022), https://www.dhs.gov/sites/default/files/2022-09/2022_0818_plcy_southwest_border_enforcement_report_fy_2021.pdf; U.S. DEP'T OF HOMELAND SEC., BORDER SECURITY METRICS REPORT: 2022, at 13 (2023), https://www.dhs.gov/sites/default/files/2023-07/2023_0703_plcy_fiscal_year_2022_border_security_metrics_report_2021_data.pdf.

[151] The Resolution (at 9–11) ignores apprehension rates, instead focusing on the raw numbers of individuals evading apprehension, which reflects higher migration flows but not the success of DHS under Secretary Mayorkas to maintain control in a period of increased flows. Moreover, the Resolution ignores that there were significantly higher numbers of individuals evading apprehension and lower apprehension rates in prior years than there are now—2006 (1.7 million), 2007 (1.3 million), and 2008 (1.0 million). U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STAT., FISCAL YEAR 2021 SOUTHWEST BORDER ENFORCEMENT REPORT 4 (2022), https://www.dhs.gov/sites/default/files/2022-09/2022_0818_plcy_southwest_border_enforcement_report_fy_2021.pdf.

[152] Letter from Zephranie Buetow, Assistant Sec'y for Legis. Affs., Dep't of Homeland Sec., to Rep. Mark Green, Chairman, H. Comm. on Homeland Sec. (Aug. 17, 2023).

[153] *Id.*

During OAW, the U.S. Government facilitated relocation of approximately 88,500 Afghan nationals—many of whom risked their lives in support of U.S. troops in Afghanistan—while maintaining national security and public safety. After departing Afghanistan and before entering the United States, these individuals underwent a multilayered interagency screening and vetting process that started overseas, where individuals underwent biometric and biographic vetting. This process included national security and criminal records checks conducted by intelligence, law enforcement, and counterterrorism professionals from the Departments of Defense and Homeland Security, the Federal Bureau of Investigation, the National Counterterrorism Center, and other Intelligence Community partners. Only those who cleared this comprehensive screening and vetting process were approved to enter the United States. Those who did not clear these checks remained outside the United States.[154] The Department carefully and accurately explained this process to the Committee, and there is simply no basis to claim that the Secretary made any false statement about it.[155]

With respect to the Border Patrol incident, the Secretary offered the following comments from the White House Press Briefing Room on September 24, 2021:

> First of all, the images, as I expressed earlier—the images horrified us in terms of what they suggest and what they conjure up, in terms of not only our nation's history, but, unfortunately, the fact that that page of history has not been turned entirely. And that means that there is much work to do, and we are very focused on doing it.
>
> *But I will not prejudge the facts. I do not, in any way, want to impair the integrity of the investigative process*. We have investigators who are looking at it independently. They will draw their conclusions according to their standard operating procedures, and then the results of that investigation will be dete- — will be determined by the facts that are adduced.[156]

These comments—and the Secretary's commitment to allowing the investigative process to play out—are the very opposite of "supporting a false narrative."[157]

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[154] *Id.*; *see also id.* n.1 ("Afghans under the age of 14 and over the age of 79 were not biometrically enrolled; however, their biographic information was collected for processing, consistent with vetting procedures for all other foreign populations.").

[155] The Report (at 100–102) suggests that the Committee's complaint is that the Secretary should not have said that the vetting process was "rigorous" and "thorough" because the OIG stated "it was challenging for DHS to fully screen and vet the evacuees" and points to two individuals out of the tens of thousands who might not have been fully vetted and a former Border Patrol Chief noted that DHS "checked U.S. databases to see if the alien had any known criminal history inside the U.S. or if the alien had been identified and placed in the Terrorist Screening Database or Data Set" but only infrequently had access to foreign databases. The fact is that the vetting process was rigorous and thorough, and the Report has not and cannot explain why criticisms around the edges of the process prove otherwise.

[156] *Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas*, WHITE HOUSE (Sept. 24, 2021) (emphasis added), https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/24/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas-september-24-2021/.

[157] On July 8, 2022, CBP released the results of its investigation:

Later, during a May 11, 2023 briefing at the White House, the Secretary even made sure to correct a reporter who suggested that whipping of migrants had occurred: "Well, let me just correct you right there because actually the investigation concluded that the whipping did not occur."[158]

C. Reversing Trump-Era Policies Reflects Legitimate Policy Differences

The Resolution (at 19) focuses on the Secretary's reversal of three Trump Administration policies—the Migrant Protection Protocols ("MPP"), use of border wall funding, and termination of the Asylum Cooperative Agreements. It is telling that the Resolution bundles these allegations into its kitchen-sink litany labeled "breach of public trust" and does not even attempt to argue that these reversals amount to a refusal to comply with the law. That tacit acknowledgement makes plain that these are just policy differences masked as so-called impeachable offenses.

It is simply nonsensical to claim that implementing the policy choices of the elected President, including by reversing some of the policies of the individual whom the American public chose not to re-elect, amounts to a "breach of public trust." Indeed, with respect to MPP, the President signed an Executive Order expressly directing the Secretary to "promptly review and determine whether to terminate or modify the program" and to "promptly consider a phased strategy for the safe and orderly entry into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subjected to MPP for further processing of their asylum claims."[159]

Moreover, the Supreme Court made clear in *Biden v. Texas* that the decision to terminate MPP was fully within the Secretary's legal discretion.[160] MPP was authorized under Section 235(b)(2)(C) of the INA, which provides: "In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary] *may return* the alien to that territory pending a proceeding under section 1229a of this title."[161] The Supreme Court concluded that this provision "plainly confers a *discretionary* authority to return aliens to Mexico

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> The investigation concluded that there were failures at multiple levels of the agency, a lack of appropriate policies and training, and unprofessional and dangerous behavior by several individual Agents. The investigation found no evidence that agents struck any person with horse reins. In keeping with the agency's and the Department of Homeland Security's commitment to transparency and accountability, and given significant interest from the workforce, Congress, and the public, CBP is releasing the Office of Professional Responsibility investigative report of this incident in its entirety on the Accountability and Transparency page of its website.

Press Release, U.S. Customs & Border Protection, CBP Releases Findings of Investigation of Horse Patrol Activity in Del Rio, Texas (July 8, 2022), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-findings-investigation-horse-patrol-activity-del-rio.

[158] Gabriel Hays, *Mayorkas cuts off reporter's false claim that Border Patrol whipped migrants: 'Let me just correct you,'* FOX NEWS (May 11, 2023, 5:30 PM), https://www.foxnews.com/media/mayorkas-cuts-reporters-false-claim-border-patrol-whipped-migrants-correct.

[159] Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8269 (Feb. 2, 2021).

[160] 597 U.S. 785 (2022).

[161] INA § 235(b)(2)(C) (emphasis added).

during the pendency of their immigration proceedings."[162] In sum, the Secretary implemented the policy choice of the Administration in a manner thoroughly in keeping with the INA.

The Resolution (at 19) also labels as a "breach of public trust" the Secretary's part in the Administration's decision to change direction over building a border wall. Whether or not to build more border wall is again a quintessential policy choice. Some Members have tried to sidestep that reality by focusing instead on whether the Secretary is complying with appropriations language for border infrastructure funding.[163] He is.[164] The FY 2020 and FY 2021 appropriations stated that the relevant money was to be used "for the construction of *barrier system* along the southwest border."[165] DHS is using that funding on the barrier system, specifically to remedy hazards from incomplete border barrier construction projects, to install barrier system components such as lighting, cameras, and detection technology in areas where a physical barrier has already been constructed, and for improvements to enhance the effectiveness of the barrier system, such as technologies to provide Border Patrol agents with domain awareness, and to allow them to track and respond to illicit cross-border activity more effectively.[166]

Finally, the termination of Asylum Cooperative Agreements is not a "breach of the public trust." Between July and October 2019, DHS entered into a series of agreements with El Salvador, Guatemala, and Honduras, which allowed the United States to remove certain migrants seeking asylum to those countries.[167] The Agreements were required to comply with Section 208(a)(2)(A) of the INA defining what constitutes an acceptable country for purpose of these removals.[168] On February 2, 2021, President Biden issued an Executive Order stating:

> (ii) The Secretary of Homeland Security, in consultation with the Attorney General, the Secretary of Health and Human Services (HHS), and the Director of CDC, shall promptly begin taking steps

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[162] *Biden v. Texas*, 597 U.S. at 802 (emphasis in original).

[163] H.R. Res. 8, 118th Cong. 4 (2023); *see also* H.R. Res. 89, 118th Cong. 3 (2023) ("[u]nder Secretary Mayorkas's direction, the Department of Homeland Security terminated contracts for additional border wall construction despite funds being appropriated by Congress for this purpose. His decision has left key portions of the southern border unsecure and cost American taxpayers billions of dollars."); H.R. Res. 470, 118th Cong. 4 (2023) ("Secretary Mayorkas has used his Federal position and resources to cease all additional construction of border wall system, fencing, and other associated infrastructure and technology, which were not only authorized, but also funded, by the United States Congress.").

[164] *See* Matter of: Off. of Mgmt. & Budget & U.S. Dep't of Homeland Sec.—Pause of Border Barrier Constr. & Obligations, B-333110.1, 2021 WL 2451823 (Comp. Gen. June 15, 2021).

[165] *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 209(a), 133 Stat. 2317, 2511 (2019) (emphasis added).

[166] Press Release, U.S. Dep't of Homeland Sec., DHS Update on Border Wall Remediation Efforts, (July 11, 2022), https://www.dhs.gov/news/2022/07/11/dhs-update-border-wall-remediation-efforts. Unsurprisingly, these choices have been challenged in courts. *See Texas Gen. Land Off. v. Biden,* 619 F. Supp. 3d 673 (S.D. Tex. 2022), *rev'd and remanded sub nom. Gen. Land Off. v. Biden*, 71 F.4th 264 (5th Cir. 2023); *Missouri v. Biden*, 7:21-cv-00420 (formerly No. 6:21-cv-00052) (S.D. Texas).

[167] Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act, 84 Fed. Reg. 63994 (Nov. 19, 2019).

[168] INA § 208(a)(2)(A) (a country "in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection").

> to reinstate the safe and orderly reception and processing of arriving asylum seekers, consistent with public health and safety and capacity constraints. Additionally, in furtherance of this goal, as appropriate and consistent with applicable law:
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> * * *
>
> (D) The Attorney General and the Secretary of Homeland Security shall promptly review and determine whether to rescind the interim final rule titled "Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act," 84 Fed. Reg. 63,994 (November 19, 2019), as well as any agency memoranda or guidance issued in reliance on that rule. In the interim, the Secretary of State shall promptly consider whether to notify the governments of the Northern Triangle that, as efforts to establish a cooperative, mutually respectful approach to managing migration across the region begin, the United States intends to suspend and terminate the [Asylum Cooperative Agreements].[169]

On the same day, February 2, the Senate confirmed Secretary Mayorkas to the position of DHS Secretary.

The decision to terminate the agreements was thus based on the Biden Administration's change in direction on asylum issues, as well as the limitations of the asylum systems in those three countries. There is no basis to claim that Secretary Mayorkas, who assumed his responsibilities on the very day the Administration signaled its withdrawal of support for these Agreements, committed an impeachable offense by participating in the implementation of the Administration's policy choices.

D. The Secretary Has Cooperated with Congress

The Resolution (at 17) claims that the Secretary has "failed to comply with multiple subpoenas issued by congressional committees" but fails to reveal which subpoenas are at issue. In reality, Secretary Mayorkas has made it a priority for the Department to be as forthcoming as possible with Congress's numerous requests for documents. During this Congress alone, the Department has produced more than 20,000 pages of documents in response to over 1,400 Congressional letters, including more than 13,000 pages to the Committee.[170] The Department has provided nearly 20 employees for voluntary transcribed interviews. It has done so while answering to more than 70 committees and subcommittees of jurisdiction.[171]

During this Congress, the Department has received two subpoenas from the Committee. The first subpoena was received on August 22, 2023. On October 13, 2023, the Department

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[169] Exec. Order No. 14010, 86 Fed. Reg. 8267, 8269–8270 (Feb. 2, 2021).

[170] Letter from Zephranie Buetow, Assistant Sec'y for Legis. Affs., U.S. Dep't. of Homeland Sec., to Mark E. Green, Chairman, H. Comm. on Homeland Sec. 3 (Jan. 29, 2024).

[171] *Id.*

produced a narrative response to the Committee, accompanied by a data set and additional responsive records totaling 146 pages. The Committee issued a second subpoena to the Department on October 31, 2023. At the time this subpoena was issued, the Department had already produced significant numbers of documents responsive to that subpoena, including a data set of 7,437 pages, on October 20 and October 27, 2023. To further accommodate the Committee, the Department reproduced an earlier data set in a different format requested by the Committee on November 8, 2023. On December 15, 2023, the Department produced an additional 566 pages of responsive documents. The Department continues to search for and review records responsive to the subpoenas.[172] The allegation that the Secretary has failed to comply with subpoenas or been uncooperative with the Committee's oversight is false.[173]

In addition, the Secretary's broader track record of cooperation with Congress belies the allegation. He has appeared 27 times before Congress as a witness, more than any other member of the President's Cabinet and more than his predecessors during the first three years of the Trump Administration (23).[174] He has consistently made himself available to testify at the Committee's annual hearings on the budget and worldwide threats.

Under the Secretary's leadership, the Office of the Chief Financial Officer ("OCFO") has also ramped up its coordination with Congress. When Secretary Mayorkas was sworn in, there were 55 reports overdue to the Senate and House Appropriations Committees. Forty-seven of those overdue reports have now been issued to Congress. By way of comparison, under the first three years of the Trump Administration, 366 reports were transmitted to appropriators; under the first three years of the Biden Administration, 477 such reports have been transmitted. Similarly, during Secretary Mayorkas's tenure, the Department has seen a 215% increase in OCFO's delivery of briefings to House and Senate appropriators.

The Secretary has also taken action to increase transparency with the public. On November 9, 2023, the Secretary announced the creation of the Department's Office of Homeland Security Statistics ("OHSS") to foster transparency and advance data-driven decision-

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[172] *Id*.

[173] The Resolution's final halfhearted example (at 17–18) of a supposed "breach of public trust" is that the Secretary has "delayed or denied access of DHS Office of Inspector General [("OIG")] . . . to DHS records and information." Again, the Resolution offers no specific factual allegations and fails to acknowledge the Department's responses to the OIG's complaint over access, which explain why the OIG claims are inaccurate. *See* Letter from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., to Mitch McConnell, Minority Leader, U.S. Sen. 2–4 (Jan. 26, 2024); Memorandum from Jim H. Crumpacker, Dir., Departmental GAO-OIG Liaison Off., to Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec., 5–6 (Nov. 7, 2023). For a variety of reasons, DHS is not always able to provide wholesale access to various Department or component databases in the exact manner OIG requests. These requests could be satisfied without compromising OIG independence using a more targeted and reasonable approach, and without potentially leaving sensitive information vulnerable to misappropriation and loss. Such disagreements between an agency and an inspector general are hardly unusual and the Department has been transparent about it, describing it in detail in its FY 2023 Agency Financial Report available on its website. U.S. DEP'T OF HOMELAND SEC., AGENCY FINANCIAL REPORT FY 2023, at 308–09 (Nov. 19, 2023), https://www.dhs.gov/ publication/dhs-fiscal-year-2023-performance-accountability-reports.

[174] Letter from Zephranie Buetow, Assistant Sec'y for Legis. Affs., U.S. Dep't. of Homeland Sec., to Mark E. Green, Chairman, H. Comm. on Homeland Sec. 2 (Jan. 11, 2024).

making.[175] Last month, OHSS launched a monthly Immigration Enforcement and Legal Processes Report which includes data on encounters, CBP One appointments, administrative arrests, book-out outcomes, book-ins, detention, removals, returns, repatriations, credible fear, and parole processes.[176]

E. The Committee's Process Was Unfair to Secretary Mayorkas

It is deeply ironic that the Committee would criticize the Secretary for his level of cooperation with Congress when the Committee itself has abandoned established procedures that have characterized every analogous impeachment effort in this Nation's history.

This proposed impeachment is a purely partisan move that has nothing to do with any application of constitutional text to facts or evidence. The effort began because, as the lead proponent put it nearly ten months ago, "[s]omebody needs to be impeached," and Secretary Mayorkas was "the lowest hanging fruit."[177] Consistent with that obviously partisan goal, the Committee majority had already committed to impeachment before hearing from a single witness.[178] The two public hearings the Committee held featured majority witnesses who were either elected state officials opposed for partisan reasons to the Administration or citizens testifying about their personal experiences. None had any direct knowledge of the Secretary's personal conduct, decision-making, or intent—the facts that matter to the constitutional standard.

The Committee has structured this inquiry in a manner designed to deny Secretary Mayorkas basic protections, such as notice and a meaningful opportunity to be heard, that are necessary to "ensure that the impeachment inquiry is fair."[179] The Committee revealed the allegations against the Secretary only two days before a scheduled mark-up and a rushed effort to bring the matter to the House Floor. The sole reason to advance this process is to complete the partisan mission the Committee began.

V. Conclusion

There are manifold ways to address extraordinarily difficult policy challenges for the Nation, and any chosen solution will inevitably spawn heated political debate and disagreements. The Constitution provides the means to resolve those controversies. Congress can pursue collaborative and constructive engagement between the parties and with the Executive Branch.

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[175] Press Release, U.S. Dep't of Homeland Sec., Sec'y Mayorkas Launches New Off. of Homeland Sec. Stats. (Nov. 9, 2023), https://www.dhs.gov/news/2023/11/09/secretary-mayorkas-launches-new-office-homeland-security-statistics.

[176] *Immigration Enforcement and Legal Processes Monthly Tables – Sept. 2023*, U.S. DEP'T OF HOMELAND SEC. OFF. OF HOMELAND SEC. STATS. (Jan. 5, 2024), https://www.dhs.gov/ohss/topics/immigration/enforcement-and-legal-processes- monthly-tables.

[177] Mike Lillis, *Greene Leaning Toward Yes on 'S—sandwich' Debt Bill—but She Also Wants Impeachment*, THE HILL (May 30, 2023, 8:20 PM), https://thehill.com/homenews/house/4027240-greene-leaning-towards-yes-on-s-sandwich-debt-bill-but-she-also-wants-impeachment/.

[178] Rebecca Beitsch, *GOP memo shows plans for Mayorkas impeachment markup Jan. 31*, THE HILL (Jan. 17, 2024, 6:47 PM), https://thehill.com/homenews/house/4414805-mayorkas-impeachment-gop-memo/.

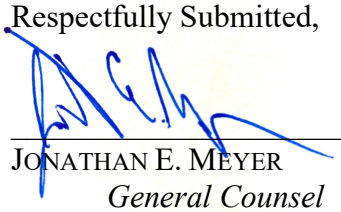
[179] *See* H.R. REP. 105-795, at 25–26 (1998). Notably, in the Congressional attempts to impeach Assistant Secretary of Labor Post and Secretary of Labor Perkins referenced above, each official was offered an opportunity to testify. Demonstrating the importance of that opportunity, the House abandoned each impeachment effort afterwards.

Committees can hold hearings that explore the challenges and potential solutions. Members can express their strongly held views about their preferred policies and criticize policies with which they disagree. Most important, Congress can pass laws—in this case laws that would fix a broken and outdated immigration system, meet the current realities of migration patterns, and provide adequate tools to those in the Executive Branch who must confront the problem of irregular migration on a daily basis.

What Congress may not do, however, is to seize on policy disagreements with the current Administration as a basis to attempt to remove from office the person whom the President has selected to carry out those policies. Yet that is exactly what the Committee is attempting here. Despite its efforts to borrow from the language of previous impeachments, the Resolution now before the House of Representatives is no more than a list of criticisms of lawful policies, accurate statements, and good-faith judgments, all of which reflect an honest and devoted effort to serve this country and protect its security. The Secretary has followed the law at every turn, and the Committee has failed to show even a single instance of wrongdoing, much less the kind of grave abuse or perversion of power that would justify impeachment.

The use of impeachment in this manner is unconstitutional and potentially destabilizing. Approval of these Articles would provide a precedent for upending the separation of powers that the Framers carefully constructed. Carried to its end, the result would be a fundamental change to the structure of the federal government, where the President's most important advisors would no longer serve at the pleasure of the President but at the whims of Congress and whatever Committee threatens to begin an impeachment inquiry. The House of Representatives should reject that grave step and vote down the proposed Articles of Impeachment.

Respectfully Submitted,



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