



Mayorkas Has Followed the Constitution, Not Violated it

David Bier

February 9, 2024

Even with Tuesday's embarrassing failed vote to impeach Department of Homeland Security (DHS) Secretary Alejandro Mayorkas, House Republicans have vowed to try again, alleging Mayorkas has violated “his oath to support and defend the Constitution of the United States.” It’s just the opposite. Secretary Mayorkas is being impeached for following the Constitution.

The main charges against the secretary involve claims that he has failed to detain everyone Congress has said should be detained. Setting aside that Congress has also authorized the secretary to release these immigrants under certain circumstances, it’s not a mystery why DHS must release some immigrants. As the Supreme Court recently recognized, “congressional funding has consistently fallen well short of the amount needed to detain all land-arriving” immigrants.

This year, Congress has funded Immigration and Customs Enforcement (ICE) detention beds for only about 34,000 people — approximately the number of people who showed up at the border every three days in December 2023.

In the absence of resources needed to detain them, it would be unconstitutional for DHS to attempt to do so. When detention facilities fill up, conditions quickly deteriorate. In 2019, for instance, Border Patrol was detaining 41 detainees in a cell with a maximum capacity of eight. People were standing on toilets. They had no places to sleep. They were denied toothbrushes, soap or showers, leaving even infants in soiled clothes. People were getting ill from the inadequate diet and lack of medical care.

These conditions occurred despite officials releasing more than 600,000 immigrants into the United States — about two-thirds of all those crossing. If everyone had been detained — a physical impossibility — it would have involved torturing and killing incalculable numbers of them, holding them without food or water. Congress cannot require a DHS secretary to violate the Constitution in this way.

The 2019 conditions would already have constituted “cruel and unusual punishment,” which is prohibited by the Eighth Amendment. This provision of the Constitution is not a right given only to U.S. citizens. This provision protects literally everyone in the United States. It even protects

someone convicted of homicide or terrorism. The Constitution categorically stops the government from imposing cruel punishments on anyone.

But courts don't even need to consider the Eighth Amendment because the Fifth and 14th amendments prohibit punishment of any kind for any "person" without a trial. Immigrants may be subject to civil detention when necessary to enforce immigration law, but officials cannot impose conditions harsher than the conditions imposed on convicted criminals in the country's prisons. This conclusion protects the rights of Americans whenever the government detains them as well.

In February 2019, for instance, a U.S. district court in Arizona ruled that DHS Secretary Kirstjen Nielson had to cease holding immigrants longer than two days unless she "can provide conditions of confinement that meet detainees' basic human needs for sleeping in a bed with a blanket, a shower, food that meets acceptable dietary standards, potable water, and medical assessment performed by a medical professional."

Thus, there are two ironies in this impeachment: First, prior secretaries have always released immigrants, so at a minimum, this case would apply to every DHS secretary, and second, prior secretaries have often been caught unconstitutionally detaining immigrants. So why is Secretary Mayorkas being impeached?

They naturally accuse Mayorkas of having released more immigrants than prior administrations, but this is irrelevant. More people came, but detention funding has actually decreased since 2019. Yet despite this lack of funding, Mayorkas released a lower share during Biden's first two years in office than Trump's DHS secretaries did in his last two years in office.

The bottom line is that Congress has passed a law that is impossible to enforce or at least impossible to do so constitutionally. That's not unusual. Congress has a habit of passing such laws. But what is unusual is that Congress is now impeaching a Cabinet secretary over his failure to do the impossible.

Instead of wasting more time taking a second crack at impeaching Mayorkas, Congress should be asking why it's impossible for the detention mandate to be enforced. The answer here is obvious too: legal immigration is very difficult for those coming to the U.S. border. The legal immigration system hasn't been updated at all in 30 years, and the basic system dates back a century.

Congress should be working on rewriting those laws to make Mayorkas's job easier rather than attacking him for following the Constitution.

David J. Bier is the associate director of immigration studies at the Cato Institute. He is an expert on legal immigration, border security, and interior enforcement.