

INTERVIEW: ‘Abusive, Incompetent and Feckless’ ... but Impeachable?

Reuvain Borchart

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Gene Healy, senior vice president for policy of the libertarian Cato Institute, spoke with Hamodia last week about the history of impeachment, just after the Republican-led House failed to impeach Department of Homeland Security Secretary Alejandro Mayorkas, a Democrat, over the situation at the U.S.-Mexico border. The Articles of Impeachment against Mayorkas accused him of “willful and systemic refusal to comply with the law” and “breach of public trust,” for his allegedly allowing millions of illegal immigrants to enter and remain in the U.S.

The impeachment effort failed Feb. 6 after a handful of Republicans voted no.

However, one week later, on Feb. 13, the House voted again and impeached Mayorkas by a one-vote margin.

Healy is the author of “Indispensable Remedy: The Broad Scope of the Constitution’s Impeachment Power” and “The Cult of the Presidency: America’s Dangerous Devotion to Executive Power.”

Healy holds a BA from Georgetown University and a JD from the University of Chicago Law School.

Tell us a little about the history of impeachment.

Impeachment is a safety-valve mechanism in the Constitution that the Framers seemed to think would have been used with somewhat more frequency than the once-in-a-blue-moon approach that we’ve had historically.

Much of the discussion around the Constitutional Convention seemed to envision regular impeachments of executive officers, much more than the rate of once in 75 years we’ve had for presidential impeachments until Trump’s two impeachments. All you had before that was Andrew Johnson, Bill Clinton, and Richard Nixon, who actually quit before the hammer could drop and the House could vote. So you had a total of two impeachments, and then in a land-speed record, you got two impeachments in Trump’s one term.

Even less frequently have there been serious attempts to impeach top executive-branch officials below the president. The one major historical case we have was William Belknap, the Secretary of War for President Ulysses S. Grant, who resigned following a scandal but was nevertheless impeached by the House and then acquitted by the Senate.

The vast majority of impeachments we've had by the House have been of federal judges.

Which approach to impeachment do you prefer — the more aggressive approach you say was envisioned by the Framers, or the sparing way it's been used historically?

My longtime view has been that we don't use impeachment, particularly against presidents, nearly enough. I remain convinced that the risks of more frequent impeachments aren't nearly what they're cracked up to be. The Trump experience has made me a little more skeptical of impeachment's upside — that more frequent impeachments will do a lot of good in terms of delivering real punishments to misbehaving executive officers.

It's a bit pathetic, with all of the abusive, incompetent and feckless presidents we've had in 230-plus years of American constitutional history, that prior to Trump, we'd only made three serious attempts at impeaching a president. And on the rare occasions when it looks like the impeachment of the president is a possibility, you typically hear a lot of wailing and gnashing of teeth from supporters of the particular president that this is like a constitutional coup and going to lead to massive divisions in the polity and open a Pandora's box.

That's never been true, this idea that giving a president the pink slip will tear society apart. And I think it all speaks to the over-importance that we place on the particular person who is president.

The few times we've tried it, it never did any harm. And in one case, the near-impeachment and forced resignation of Richard Nixon, it actually did a lot of good, because it was accompanied by a serious effort to rein in presidential powers.

So my preference for a long time, going into the Trump administration, was that we shouldn't be so afraid of using what is a legitimate constitutional mechanism for saying "You're fired!" to a president who is abusing power or doing a bad job.

I still don't think there's any reason to expect drastically bad consequences from any particular impeachment drive, whether it's a president or a Cabinet officer, but now I'm just a little more skeptical than I was before Trump's two impeachments that in current conditions, impeachment is capable of doing much good.

Impeachment attempts on the president have always stoked partisanship, but what's perhaps new is the level to which we've become polarized. It used to be that being impeached by the House — even if the Senate failed to convict you — was considered a kind of constitutional censure, a black mark on a presidency. Nobody took the lesson from the Clinton impeachment that it's okay to commit perjury; even the Democratic senators who voted to acquit Clinton, almost to a person, talked about how reprehensible his behavior was, etc.

But with Trump's two impeachments — particularly the second one, regarding January 6, a case in which whether you call it an insurrection or inciting a riot, is as close a case as you can get for textbook "high crimes and misdemeanors" — the fact that the Senate failed to convict him because of partisan loyalties or partisan fear suggests that in current conditions it's hard to see impeachment playing the role that the Framers clearly expected it to play. The parties are too polarized to remove a president even for egregious behavior. You're going to get something close

to a uniform party-line vote, and impeachment no longer serves as a black mark on a president's legacy. It's almost like a badge of honor — if you can be impeached twice, escape removal, and come back around to get your party's nomination in the next election, impeachment is not doing a very good job of serving as a form of constitutional censure!

So while I still don't think there are any major negative consequences to handing a pink slip to a president or Cabinet secretary, I'm more skeptical about the upside.

It's become more of a vehicle for partisan political posturing than it is an actual effective mechanism for disciplining a wayward executive.

The Impeachment Clause of the Constitution, of course, says, “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” The debate over impeachment generally hinges on how you define “other high Crimes and Misdemeanors.” In your view, what conditions are required for impeachment?

I think it's much broader than people typically understand. James Madison, by the way, called impeachment “indispensable ... for defending the community against the incapacity, negligence, or perfidy of the Chief Magistrate.”

Whenever you have an impeachment debate, there's always an effort on the part of the supporters of the president to push the debate toward a criminal-law framework. So they parse the statute related to the underlying offense and say, “Would he go to jail for this?” That's not what it's about at all. It's about the conduct of men in positions of high trust. And it was always understood to be much broader than the criminal law, and includes an element of a vote of no-confidence. Federal officials have been impeached for conduct that really amounts to embarrassing themselves in office or doing a terrible job, quite apart from corruption or abuse of power. Corruption and abuse of power are at *the core* of what impeachment is about, but that's not *all* it's about.

That's not to say that anything goes. There are some limits, but those are unlikely to be enforced by courts.

When Gerald Ford was in Congress and tried to impeach Supreme Court Justice William O. Douglas, he had a famous quote: “An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.”

That's not totally right — like, if you are going to impeach Donald Trump for having the awful taste to eat a well-done steak with ketchup, that would clearly not constitute a high crime or misdemeanor, and the Supreme Court might strike that down. But in general, the meaning of high crimes and misdemeanors is something that the Supreme Court has held is specifically given to Congress.

What if you were in Congress? What sort of conduct do you think should be subject to impeachment?

The clause says, “Treason, Bribery, or other high Crimes and Misdemeanors.” Rules of construction suggest that abuse of power and corruption are at the core. But in the generation that ratified the Constitution, the first federal official to be impeached by the House and removed from office by the Senate was John Pickering, a federal judge who was impeached basically for being a drunk and acting erratically and ranting from the bench. So there has always been an element of general unfitness for office that’s gone into impeachment.

There are gray areas, of course. If it’s a mere policy disagreement with Mayorkas, I don’t think impeachment is the right remedy. But if it’s essentially a vote of no-confidence in a Cabinet Secretary’s management of his responsibilities, that’s another story.

Andrew Johnson was the first president impeached, in 1868. (A. Gardner/Library of Congress via AP)

Mayorkas was facing impeachment for allegedly not enforcing immigration law. Do you believe the failure to enforce a law constitutes “abuse of power”?

The devil is in the details. I could certainly spin up hypotheticals where failure to enforce the law might rise to that level. But it’s not going to be a bright-line answer that the Constitution clearly addresses, like, “How old does someone have to be to run for president?”

The president has the right to set enforcement priorities. Should Obama have been impeached for not enforcing drug laws against low-level marijuana offenders? I certainly don’t think so.

As for the Mayorkas impeachment, I kind of think it’s political theater. Even if it had passed the House, or will at a future date, it will be a dead letter when it gets to the Senate.

You said that under your ideal view of impeachment, many more presidents would have been impeached. Can you name some names?

JFK actually got away with a lot of the stuff that was in the impeachment articles the House Judiciary Committee later drew up against Nixon, including abuse of power, ordering up audits on political enemies, and illegal wiretapping. LBJ, too; he wiretapped Goldwater’s campaign plane. And Iran-Contra was clearly impeachable for Reagan.

The scope of “other high Crimes and Misdemeanors” properly understood is pretty broad. But there’s a prudential question: Is this particular offense worth removing the president for? I can certainly see people saying obstruction of justice and perjury, which Clinton committed, were impeachable offenses, but it’s not quite like what Nixon did. So there’s also the prudential question of whether you want to hit the “eject” button; that’s not a legal question.

The Constitution doesn’t say that a president must be impeached for any particular offense no matter how egregious; only that he is allowed to be.

That’s right.