



## **Cuccinelli: No judge has ever declared invasion before in U.S. history**

By Bethany Blankey

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U.S. judges declaring an invasion at the southern border hasn't occurred before until this week, Ken Cuccinelli, former U.S. Citizenship and Immigration Services director and deputy secretary of Department of Homeland Security, said.

On Tuesday, four county judges in Texas declared an invasion citing Article 4, Section 7 of the Texas Constitution and Article 1, Section 10, Clause 3 of the U.S. Constitution. They called on Texas Gov. Greg Abbott to “immediately prevent and/or remove all persons invading the sovereignty of Texas and that of the United States.”

Illegal border crossings have surged since President Joe Biden took office and implemented policies that Texas officials and many other critics say directly caused the spike.

“We are taking unprecedented steps with the hope of encouraging Gov. Greg Abbott to acknowledge the existence of an invasion on our border with Mexico and take necessary actions to preserve and protect the sovereignty and territorial integrity of Texas,” Kinney County Judge Tully Shahan and Kinney County Attorney Brent Smith said.

The former attorney general of Virginia and now senior fellow at the Center for Renewing America, Cuccinelli said at this week's news event, “Today, this is the first time in American history that a legal authority that a court, a judge of this country, has found as a matter of law that the United States is being invaded. That has never happened before today. What does that

trigger? Well, here in Texas what it triggers is it gives the governor, if he decides similarly, the authority to repel that invasion.”

Assuming the Biden administration continues with its open border policies, Cuccinelli said, “that leaves it up to the state of Texas and the other border states to utilize the authority inherent in their governors to declare an invasion ... the governor can repel an invasion. And the attorney general can issue an opinion in support assuming that’s what he believes the proper legal conclusion is.”

In February, Arizona Attorney General Mark Brnovich was the first attorney general in U.S. history to issue a legal opinion declaring that Arizona was being invaded. Arizona Gov. Doug Ducey didn't act in response. Smith and others have called on Texas Attorney General Ken Paxton to issue a similar opinion, which he has yet to do. Since Paxton hasn't acted, they called on the governor.

While Abbott has provided unprecedented support to border security efforts, Cuccinelli noted, “It doesn't change the fact that Texas and America is being invaded. ... There is no legal authority that has found the contrary. An attorney general of Arizona and judges of Texas both came to the same conclusion, living with the same facts and basing it on the same federal constitution. Having said that, that is historic.”

Article I, Section 10, Clause 3 specifies that state war powers may be exercised when a state is invaded. The provision clarifies what states can't do, including waging war, with one exception: invasion. It states, “No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit delay.”

“The states reserve this right,” Cuccinelli said. “They decide that question. The state decides. And that means the governor.

“When the judges say turn them back at the border, that’s literally what he’s talking about. That’s the one step Gov. Abbott hasn’t taken.”

In response to the announcement, Abbott’s press secretary Renae Eze told The Center Square in part, “All strategies remain on the table as Texas continues stepping up in the federal government’s absence. While President Biden ignores the ever-growing humanitarian crisis, and Congressional members visit the border for photo-ops and then return to Washington to do

nothing, Texas has deployed thousands of Texas National Guard soldiers and DPS troopers and allocated over \$4 billion of Texas taxpayer money to secure our border.”

David Bier, associate director of immigration studies at Cato Institute, told the Houston Chronicle that “the idea that the first ‘invasion’ in the history of the world where invaders seek to subject themselves to the law of the country that they’re invading – it’s a total mischaracterization of what an invasion is.” He also characterized those coming across the border as “actively seeking to place themselves under the laws of the United States by seeking asylum.”

Other news organizations cited immigration experts claiming that governors deporting foreign nationals in the U.S. illegally was likely illegal.

But their analysis appears to be a misunderstanding of the constitution, Cuccinelli said. Declaring an invasion is entirely separate from immigration law. And it’s based on imminent danger – danger being facilitated by Mexican cartels.

“There is no limitation within the text of what constitutes an ‘invasion,’” the center said in a policy brief it’s published on the issue. When the framers of the Constitution wrote it they were aware that “threats to the states were not limited to foreign armies from Great Britain or Spain, but also ‘some nation of Indians,’ ‘pirates,’ and other external lawless groups intent on inflicting harm or seeking their own ends at the expense of Americans,” the center wrote. The original meaning of the word “invasion,” the center argued, “encompasses all such external threats to the safety, security, or well-being of the states and their citizens.”

More than 2 million people from over 150 countries were apprehended illegally entering the U.S. southern border since Biden has been in office. Another million are estimated to have evaded capture and their whereabouts are unknown. These numbers total more than the individual populations of 23 states.

Additionally, Border Patrol agents have seized enough fentanyl to potentially kill 2.5 billion people. This excludes the amounts seized by state and local law enforcement. The transnational human smuggling and drug trafficking operations being spearheaded by violent Mexican cartels that have operational control over the southern border poses an ongoing danger to Americans, the judges who signed the declarations said.

These factors all pose as threats to the safety, security, or well-being of the residents of their counties, the judges maintain.

