



Immigration, Invasion, and Habeas Corpus

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In my last post, I criticized Texas's argument that illegal migration and cross-border drug smuggling qualify as "invasion" under Article I of the Constitution, thereby authorizing state governments to "engage in war" to stop them. If Texas and other advocates of this theory are correct, it has an additional radical implication: the federal government can suspend the writ of habeas corpus at pretty much any time it wants.

The writ of habeas corpus protects people from being detained by the government without trial. If federal or state officials detain you, the writ gives you the right to challenge the legal basis for that detention in court. But the Suspension Clause of the Constitution (Article I, Section 9, Clause 2) states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or *Invasion* the public Safety may require it" (emphasis added).

If illegal migration and drug smuggling qualify as "invasion" for purposes of triggering state and federal authority to resist invasion under the invasion clauses, they surely also qualify as such under the Suspension Clause. And there is a significant amount of illegal migration and smuggling of contraband goods going on at virtually all times in modern history. Thus, presto! The federal government can suspend the writ of habeas corpus virtually any time it wants!

In fairness, even when there is a "Rebellion or Invasion" going on, the Clause says the writ may only be suspended if "the public Safety may require it." But this is the kind of issue on which courts are likely to defer to Congress and the executive. That's especially true since the Clause permits suspension even if public safety only "may" require it. Certainty isn't necessary.

At least in border areas (where many millions of people live), it's almost always possible to argue that "public safety" will be improved by suspension. If law enforcement can indefinitely detain anyone who looks like they might be a drug smuggler or an undocumented immigrant, surely that would help combat the "invaders"! Or at least it's plausible to argue that it "may" do so.

Moreover, the suspension power is not limited to recent immigrants, but applies to US citizens, as well. Historically, suspension has indeed been used against citizens, as was the case during the Civil War and other conflicts. And, obviously, US citizens can and do smuggle drugs across the border, and sometimes help undocumented immigrants cross, as well.

There is a longstanding debate over whether the power to suspend the writ of habeas corpus can be exercised by the President acting on his own, or only with congressional authorization. The Supreme Court has never definitively resolved the issue. Abraham Lincoln famously advocated the former view during the Civil War, while Chief Justice Roger Taney backed the latter. I think this is a rare case where the historical bad guy (Taney) had the better of the argument.

If the suspension power does belong to the president and illegal migration and drug smuggling qualify as "invasion," that means whoever occupies the White House can suspend the writ of habeas corpus anytime he wants, thereby wielding the power of detention without trial. Even if you believe Joe Biden would never abuse that power, I suspect you don't have the same confidence in whoever the next Republican president might be. If you trust Republican presidents to wield such authority responsibly, I bet you probably don't trust the Democratic ones. Personally, I don't think any politician can be trusted with such sweeping detention authority.

Matters are somewhat less dire if suspension requires congressional authorization. At least the power would not be in the hands of any one person. Still, Congress would now be able to enact such authorization at virtually any time. And, historically, Congress is often willing to overdelegate to the executive, especially when the White House is controlled by the same party as Capitol Hill.

In sum, if illegal migration and drug smuggling qualify as "invasion," that implies the writ of habeas corpus can be suspended at virtually any time. And the suspension could be continued so long as the illegal migration and smuggling themselves continue (which is likely to be as long as we have significant immigration restrictions and the War on Drugs). This absurd and dangerous implication of Texas' argument strikes me as yet another reason for courts to reject it.

NOTE: The main point advanced in this post was suggested to me by my Cato Institute colleague David Bier. He deserves credit for the idea, but not blame for any mistakes I may have made in developing it further!

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