



## Andrew Hyman Responds on Migration and Invasion

*I have posted his response to my previous post, along with a rejoinder.*

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In my [last post](#) on this subject I critiqued the argument that illegal immigration qualifies as "invasion" under relevant provisions of the Constitution and thereby empowers federal and state governments to use military force to prevent it. Andrew Hyman, one of the advocates of this position whom I criticized, has sent me the following response, which I am posting at his request. Hyman's response is in the block quote. My rejoinder follows, and is in regular text:

A Reply to Professor Somin about Illegal Immigration and "Invasion"

Professor Ilya Somin recently wrote a blog post here titled "[Immigration is not 'Invasion'](#)" responding to [an earlier blog post of mine](#) at the Originalism Blog. Among other things, Professor Somin writes, "If you want to know what Madison thought about the claim that immigration counts as 'invasion,' look to the Report of 1800 where he actually discusses that issue." The repeated attribution of that very broad claim to me is incorrect, I have not said that immigration counts as invasion, which is also alleged in the title of Professor Somin's blog post. I appreciate the opportunity to explain why I never made that claim, and to also briefly address here [the 1800 report](#) by James Madison. For now, I will skip other points in Professor Somin's blog post with which I may disagree.

Lawful immigration absolutely does not count as invasion, I never said or implied otherwise, and Madison was discussing people who had immigrated lawfully. I have discussed the current situation on the ground at the U.S. southern border, where (as I wrote) "many of the undocumented immigrants are simply seeking better lives for themselves and their loved ones," but a significant minority of the undocumented immigrants are surely agents of governments with which the U.S. has tense relations, or would-be terrorists, or moles, or convicted criminals set free from prison on condition that they will leave their home countries, or fentanyl distributors, human traffickers, et cetera. People who immigrate to the United States lawfully, after proper screening, are not invaders by any stretch of the imagination. My own ancestors were immigrants, and I strongly support legal immigration, as well as generous foreign aid to uplift countries so their people will be happy if they decide to stay where they are.

As to Madison's report of 1800, it is not the best evidence of the 1789 Constitution's original meaning, given its post-ratification date in the middle of a raging political controversy more than

a decade after the Constitution came into being. However, I agree with Professor Somin that the 1800 report can still be useful for describing arguments and doctrines that may have had pre-ratification validity. Using the 1800 report to interpret the 1789 Constitution becomes even harder because our present controversy is very different from the controversy of 1800 which involved (per Madison) "banishment of an alien from a country into which he has been invited." Illegal immigrants and/or undocumented aliens are definitely not invited to the United States, and Madison apparently did not address situations where aliens are prohibited to enter the U.S. in the first place.

Nor have I spotted in the 1800 report other pertinent issues such as whether the war power can be applied against non-state-actors (it can), and whether non-violent acts are sometimes acts of war (they are). Admittedly, Madison did assert in his 1800 report that, "Alien enemies are under the law of nations, and liable to be punished for offences against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only." Madison thus supported congressional power to use the war power (and also the Define and Punish Clause) against alien enemies, but not against alien friends. But who are alien friends, and who are not?

Madison's report of 1800 repeatedly referred to alien friends as members of nations in "peace and amity with the United States," so an individual is not necessarily an "alien friend" even if his home country is at peace (but not amity) with the United States. There were also other criteria in the English common law for an individual from one country to be in "amity" with another country; an especially cruel example is Lord Coke's statement that, "All infidels are in law perpetui inimici" (meaning that all Muslims are perpetually out of amity regardless of country of origin). So, I doubt Madison would have deemed a person who has entered the United States unlawfully to be an "alien friend" just because his home country is in both peace and amity with the United States. It does not strike me as particularly amicable to trespass into another country, but Madison's report of 1800 did not address that issue. It instead strikes me as quite "ambitious," which is the word Madison used in 1788 when discussing invasions in Federalist 43.

A chaotic or open border makes it impossible to screen out people who really do very urgently need to be screened out. The people who are genuinely seeking freedom and opportunity ought to apply lawfully, or else find homes in another country along their journey, instead of cutting ahead of would-be lawful immigrants to the United States. Preferably, there will be minimal resort to war powers for expelling freedom-seekers, but (as I wrote), "It is unfortunate that the civil power of the states has been so constricted by judicial error that we have to discuss the military power now as well, and the civil power alone might be sufficient were it not for cases like *Arizona v. United States*." If the framers had wanted to qualify the word "invasion" in the Constitution, then they probably would have used a qualifier, but under any interpretation unarmed immigrants invited by Congress are not invaders. In any event, Madison was arguing in 1800 to constrain both civil and military power of the federal government, and to the extent he was correct about constraining federal civil power, that could only enhance state civil power to address the same subject, per the Tenth Amendment.

I am grateful to Mr. Hyman for his thoughtful response. But I remain unpersuaded. To start with a relatively simple point, I did in fact focus on illegal migration in [my earlier post](#). The very first sentence indicates as much, noting that I am responding to claims that "illegal migration across

the southern border [qualifies] as an 'invasion.'" Much of the rest of the post also addresses that issue.

James Madison's *Report of 1800* is in fact highly relevant to that very issue, despite Hyman's suggestion to the contrary. It is not true that the controversy over the Alien Acts of 1798 (which Madison argued were unconstitutional) was limited to the expulsion of foreigners who have previously entered the US legally.

Section 2 of the Alien Friends Act also gave the president the power to bar reentry by any foreigner expelled under Section 1, and even to impose a prison term as punishment for violations. Moreover, the expulsion power under Section 1 is not limited to people who had been living or working in the United States, but could be used to bar "all such aliens as he shall judge dangerous to the peace and safety of the United States," including those who had just arrived at a port or border area. In sum, therefore, the Alien Act effectively gave the president the power to create a class of aliens who are barred from entering the US so long as the Act remained in force. Madison and others consistently argued that both Section 1 and Section 2 were unconstitutional, and that the "invasion" provision of the Guarantee Clause does not authorize them. If the Guarantee Clause could be used to bar any migrants whose entry was illegal, it could also authorize Alien Friends Act.

Hyman also quotes Madison to the effect that his argument only applies to aliens from countries "peace and amity with the United States," and claims that some nations at peace with the US might not be in "amity" with it. I am skeptical that "amity" actually adds anything. "Peace and amity" was just a stock legal phrase of the time. But even if "amity" does have some separate additional meaning for Madison, that term cannot be used to justify barring any significant number of migrants under the "invasion" provision of the Constitution either then or now.

Much of the focus of the debate over the Alien Acts was on immigrants from France and territories controlled by that nation. At the time, France was even waging a kind of undeclared "quasi-war" with the US, including clashes between French and US ships in the Caribbean. Yet Madison and other opponents of the acts still argued that the Alien Acts could not be constitutionally used to expel or bar citizens of France, because France and the US were not at war. If there was sufficient "amity" between France and the US to prevent the use of the "invasion" provision as a justification for barring migration, then such amity is even more clearly present today between the US, Mexico, and virtually all other nations from which migrants crossing the southern border hail.

Hyman is right to note that the *Report of 1800* doesn't comprehensively address such issues as "whether the war power can be applied against non-state-actors (it can), and whether non-violent acts are sometimes acts of war." But it *does* address the particular question in dispute here: whether migration, as such, can qualify as an act of war that qualifies as an "invasion." It cannot.

it is also true that the *Report of 1800* came a decade after the ratification of the Constitution. Had it come earlier, it would have been even more powerful evidence of original meaning. But it is nonetheless by far the most relevant analysis by a leading Framer of the Constitution of the question of whether migration can qualify as "invasion."

Finally, Hyman raises a number of policy issues tangential to the constitutional point. I will not try to go over them in detail here. But I will refer interested readers to previous writings, where I point out that most of the disorder at the southern border is in fact the product of policies that make legal migration difficult or impossible for most would-be migrants. We can largely fix the problem by making legal migration simple and easy. Among other things, that would enable many would-be migrants to avoid the southern land border entirely, and instead come by ship or plane.

In addition, the violent crime rate of migrants (including undocumented migrants) is actually lower than that by native-born Americans. It is simply not true that "a significant minority of the undocumented immigrants are surely agents of governments with which the U.S. has tense relations, or would-be terrorists, or moles, or convicted criminals set free from prison on condition that they will leave their home countries." Unless, of course, the word "significant" applies even to very small numbers of dangerous people among a much larger group. If that kind of "significant" number is enough to qualify as "invasion," then we have been in a state of perpetual invasion through virtually the entire time the US has had significant immigration restrictions.

To the extent that there is a danger at the southern border, it is not one that can be properly addressed by invoking the "invasion" provisions of the Constitution. Ordinary law enforcement powers must suffice.

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