Is It An Invasion?

The Constitution's 'Invasion Clause' won't help

by Barnaby Zall

In the recent movie *Mars Attacks*, President Jack Nicholson calls out the American military to battle aliens invading from Mars. The earthlings can't do anything about the invasion for most of the movie. All their advanced technology is ineffective until a donut maker discovers that ancient recordings of yodeling literally explode the aliens. It may feel like the middle of that movie in some communities on our southern border.

Residents of southern border areas certainly feel that they are being invaded. At a July 24, 2000, meeting of the Cochise County (Arizona) Board of Supervisors, Chairman Mike Palmer estimated that 60 percent of the sheriff's patrol division resources are spent responding to problems related to illegal immigration. Murphy, "Supes award grant funds to ease local border woes," Sierra Vista [Arizona] *News*, Aug. 10, 2000, p.1, col. 2-3. The direct costs to the sheriff's department were $2,900,798. *Id.* There were other costs in health care, legal defense for indigents, and additional firearms needed to deal with high-powered arsenals used by smugglers. *Id.,p.3*. With unreim-bursed health care costs driving her hospital into bankruptcy, one administrator reported that the costs to Copper Queen Community Hospital have tripled in less than a year. The federal government generously reimbursed the County only one-fifth of its costs – a measly $778,000. *Id.,p.1*.

Perhaps Arizona ranchers beset by hordes of illegal immigrants crossing their lands could ask for federal assistance to set up huge speaker systems playing yodels or modern rock music? Music aside, it isn't likely that the afflicted ranchers and counties can easily make a federal case of it. The courts have repeatedly held that immigration and border protection decisions are "political," and they won't interfere.

At first blush, it seems clear that the U.S. Constitution should protect the ranchers, health care workers, and county governments against this heavily-armed invasion. After all, Article IV, Section 4 of the Constitution – known as the "Invasion Clause" – says: "The United States … shall protect [the States] against Invasion." So why doesn't the Invasion Clause protect border areas from this invasion?

There are three highly-technical legal reasons:

- It's not the right kind of invasion;
- The federal government can choose not to act; and
- It's a "political question" which the courts won't touch.

Invasion

The Invasion Clause in the U.S. Constitution says "invasion," but it doesn't say what an invasion is. In a way this is odd, since, among the Founders, the topic of protection against invasion was one of the most important reasons to discard the old Articles of Confederation in favor of the new Constitution with a federal government. *See, e.g.*, "Debate in North Carolina Ratifying Convention, 24 July 1788," Elliot 4:15-26 (Statement of Mr. Davie: "The general objects of the union are, 1st, to protect us against foreign invasion; 2d, to defend us against internal commotions and insurrections; 3d, to promote the commerce, agriculture, and manufacturers, of America. These objects are requisite to make us a safe and happy people, and they cannot be attained without a firm and efficient system of union."); Story, *Commentaries on the Constitution*, Boston, 1833, § 481.

But the lack of a definition may have been because all the Founders knew, in the wake of the Revolutionary War and the predatory antics of States under the Articles of Confederation, what "invasion" meant. One of the few statements by the Founders about the Invasion Clause was by James Madison, in *The Federalist* No. 43, published January 23, 1788. Madison said:

> *A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises*

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> *of its more powerful neighbors. The history, both of ancient and modern confederacies, proves that the weaker members of the union ought not to be insensible to the policy of this article.*

Thus, Madison included both invasions from foreign powers and from other States. This view was reiterated by Founder William Rawle, who used the example of a State which refused to "refer its controversies with another state to the judicial power of the Union." Rawle, *A View of the Constitution of the United States,* 2d Ed. Philadelphia, 1829.

Later the new Congress enacted a law providing for a militia, to be called up in the event of an invasion. Act of February 28, 1795, c. 101. That Act provided

> *that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion. Id.*

This description of invasion was more narrow, dealing only with foreign nations and Indian tribes.

The Supreme Court interpreted this Act, following the War of 1812, in *Martin v. Mott*, 12 Wheat. 19 (1827), a case brought by a man who refused to enter the militia as required, but the actual issues involved the declarations by the governors of Massachusetts and Connecticut that they had the power to judge for themselves whether the militia should be called out. The Supreme Court held unanimously that

> *the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. . . . The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. Id.*

The Supreme Court noted that any abuse of the President's power would be corrected by elections or Congress's "watchfulness." *Id.* Thus, the definition of invasion was left to the President alone, and the Supreme Court said that any errors in judgment would have to be corrected by the political process.

Of course, not everyone is enamored of the views of the Founders. Some people believe that invasion includes pollution and "greed." *See, e.g.* www.article4.com, *citing* Diamond, *If You Can Keep It: A Constitutional Roadmap to Environmental Security*, Brass Ring Press, 1996. Others believe that right now there is an "ongoing clandestine invasion" by space aliens who abduct and assault Arizonans. *Citizens Against UFO Secrecy v. United States*, U.S. District Court for Arizona, filed Sept. 1, 1999.

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Courts, on the other hand, take a much more narrow view of the term "invasion," usually referring to Madison's *Federalist No. 43*. *See, e.g., Padavan v. United States*, 82 F.3d 23 [2d Cir. 1996] (rejecting claim by New York for federal reimbursement for costs of illegal immigration: "In order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state's government."); *New Jersey v. United States*, 91 F.3d 463, (3d Cir. 1996)(rejecting same claim by New Jersey: Invasion Clause "offers no support whatsoever for application of the Invasion Clause to this case or for its reading of the term 'invasion' to mean anything other than a military invasion."); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997)(rejecting same claim by California: "there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion.").

Thus, except as described below, it would be unlikely that the afflicted areas in Arizona could get courts to consider the tremendous influx of illegal immigrants as an "invasion."

Federal Decision

As noted above, it is the President's decision to call something an invasion. The Founders considered calling federal protection into a State to be such an important decision that it was to be left to the President alone. *Martin v. Mott*. Oversight was to be by Congress and the people (through an election) *Id*.

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The President does have the power to stop the influx of illegal immigration. Although Congress has "plenary" (complete) power over immigration, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), it has delegated the administration of immigration policy to the President and the Attorney General, in the form of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq*. The Attorney General is principally charged with enforcing the immigration laws, with some duties undertaken by the Commissioner of the Immigration and Naturalization Service, 8 U.S.C. § 1103. Under Section 212(f) of that Act, the President may "suspend the entry of all aliens or any class of aliens" whenever he "finds that the entry of any aliens … would be detrimental to the interests of the United States," 8 U.S.C. § 1182(f).

In 1997, Attorney General Reno announced a new policy to block illegal immigration by shifting more resources to border enforcement in "traditional illegal crossing and drug smuggling traffic patterns along the southern border." U.S. Dept. of Justice, "Strategic Plan, 1997-2002," September 1997, 17. The new policy was successful in blocking many traditional illegal entry patterns, but the policy did not provide enough resources to block nontraditional entry points. The results were that illegal migration shifted heavily to the ranches and deserts of southern Arizona.

But it's not as if the federal government is doing nothing, or is doing the wrong thing in stopping illegal immigration. The budget for the Immigration and Naturalization Service is over three billion dollars a year, with much of that money going to the Border Patrol. And the new border control policy has reduced illegal immigration (though by how much is still a matter of some contention).

So it's not likely that the border communities will be able to claim that the federal government is not doing anything to help them.

Political Issue

But the most important roadblock to using the Invasion Clause to force more federal assistance to border communities is the "political question" doctrine. Courts will not get involved in matters that are too political. And every court which has reviewed Invasion Clause claims has refused to intervene because the questions are too political.

At heart, the courts won't consider political questions because of the constitutional structure separating the three branches of the federal government: executive, legislative and judicial. Where the Constitution commits a policy area to the political branches of government, the courts won't step in, *Baker v. Carr*, 369 U.S. 186, 217 (1962).

As noted above, immigration is committed to the political branches, *Fiallo v. Bell*, 430 U.S. at 792. Every court to have considered whether immigration comes within the Invasion Clause has declared the question to be political and refused to step in. *See, e.g., Barber v. Hawaii*, 42 F.3d 1185, 1199 (9th Cir. 1994)(rejecting claim that federal government permit-ted "economic invasion" of Hawaii by Japanese); *Chiles v. U.S.*, 69 F.3d 1094, 1097 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1674 (1996)(rejecting Florida's attempt at same claim for reimbursement for costs of illegal immigration as other states mentioned above).

Is There A Way to Proceed?

So are the border communities simply out of luck? Can they ever get any relief from the federal government for the massive influx of illegal immigrants suddenly streaming across their property?

It would be a difficult road, but the way is not

entirely blocked. There are two possible avenues available to them. The first, and most obvious, is political pressure. If, as the courts have decreed, this is a political question, then the solution is also political. There is no active constituency for illegal immigration in Washington (as opposed to those who either ignore or like illegal immigration or those who promote legal immigration), and a well-organized attempt to increase border resources might return some semblance of peace to the border communities.

The second method is to find a sympathetic judge who will let the border communities tell their tale and allow them some relief. This was the method used by the Haitian community in past years; the immigration laws blocked attempts by Haitian refugees themselves to get judicial review of federal policies requiring their deportation. But federal Judge James Lawrence King ignored the ban on judicial review – on the basis of a fiction that he was really hearing the claims of American citizens whose constitutional rights were violated by low-level officials. *Jean v. Nelson,* 472 U.S. 846 (1985), *aff'g,* 727 F.2d 957 (11th Cir.1984). Perhaps the border communities could convince another judge that their claims for violations are just as great as the Haitian communities'.

There are also legal grounds for this review which do not rely on the Invasion Clause. For example, the border communities might challenge the new enforcement policy as an illegal taking of their property, or as having failed a required procedural or environmental review. These constitutional or statutory rights will be mixed up with the political and policy questions which courts refuse to consider, but they might also entice an appropriate federal judge to take a chance on reviewing them. And a little-known secret of American constitutional law is that the choice of the original judge is critically important to establishing or contesting constitutional doctrines; federal judges' decisions are usually sustained on appeal. Thus, if the border communities can craft an appropriate and appealing legal case and find a sympathetic judge, they may well find some relief in the courts.

But as for using the Invasion Clause itself, it's not likely to be a fruitful exercise. •