

CHRISTOPHER HAJEC

Chairman Roy, Ranking Member Scanlon, and distinguished Members of the Subcommittee: My name is Christopher Hajec, and I am an attorney and the Director of Litigation of the Immigration Reform Law Institute. Thank you for the opportunity to appear before you today to testify on the vital and timely subject of what, under the Constitution, states may do about the border crisis.

Overall, the Constitution provides well for this emergency, in my view, because it empowers the states to act, in two ways. In the current circumstances, states may pass non-preempted laws to deal with this crisis, and they may also decide to engage in war.

The Supremacy Clause of the Constitution provides that the Constitution, and federal laws made in pursuance of it, is the supreme law of the land. Potentially, then, federal immigration law may preempt measures states take to deal with the border crisis.

Despite this potential, the actual preemption picture, at this time, is not so dire for the states. This is very much because of what the states are trying to accomplish, and the contrary thing the administration they are reacting to is trying to accomplish.

The administration is in the poor legal posture of adopting enforcement policies calculated to achieve the direct opposite of the purpose of federal immigration law. That purpose is operational control of the border, and that is defined as *zero* illegal entries. The law wants zero illegal entries; the administration seems to want as many as possible.

These policies clearly lack preemptive force. If a state interferes with the administration's efforts not to enforce the law, that is not the same as interfering with the law. A state is free to pursue congressional objectives that the administration has spurned, as long as it does not violate federal law while doing so.

Take, for example, Texas's placement of razor wire to block illegal entries, at issue in one case now before the courts. This wire does not violate any federal law, and it is effective in achieving Congress's purpose in the immigration laws. It does not stand as an obstacle to those purposes, but only to the anti-enforcement purpose of the administration. Such executive enforcement or non-enforcement policies lack preemptive force, as the Supreme Court has clearly held. They are not the law, and are not supreme.

In short, there is much that states can do—including in the area of defensive barriers—even without invoking their powers of self-defense under the Constitution.

Also, Article I, Section 10, Clause 3, of the Constitution provides that, without the consent of Congress, states may engage in war if actually invaded. Governor Abbott of Texas has invoked this provision and acted under it, declaring that his state is being invaded by the trafficking cartels, which are given cover and material support by the flood of illegal aliens from around the world who pay the cartels to smuggle them in.

And decisions about these matters, in my view, are very much Governor Abbott's to make. There are strong grounds for thinking that whether a state has been invaded—and also what steps to repel an invasion are appropriate—is a non-justiciable political question to be decided by states, not the courts. In the 1990s, states like Illinois and New York sued the federal government for failing to repel the invasion of their states by illegal aliens, and thus violating the federal government's duty, imposed on it in another constitutional provision, to protect the states from invasion. The courts uniformly threw these cases out, holding that the question of whether a state had been invaded for purposes of this provision was a non-justiciable political question to be decided by the federal government, not the courts. The Constitution commits this question to political actors, and the courts lack workable standards for resolving it.

By the same token, the question of whether a state has been invaded, for purposes of Sec. 10, is a non-justiciable political question for that state to decide, not the courts. Here, too, the Constitution commits that question to political actors, and courts lack workable standards for resolving it. Likewise, the courts lack workable standards for deciding whether a given war measure—such as Texas's razor wire and floating barriers—is an appropriate means of waging war. That, too, is a non-justiciable political question for the state to decide, not courts, which are ill-equipped to decide war.

Thus, following the example of the courts that threw out the invasion cases against the federal government, the courts should throw out cases against Texas's war, because they present non-justiciable political questions. This question of war is one to be decided by political actors, not the courts. Thank you.