Now Is the Time for Texas to Seek a Writ of Prohibition

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The on-going conflict between the State of Texas and the Biden Administration over whether that State is entitled, on her own behalf and with her own resources, to repel the invasion of illegal aliens now flooding across her borders (and then advancing throughout the remaining several States) raises an host of constitutional conundra which Texas, the Administration, and the lower levels of the National Judiciary seem to comprehend only vaguely. One of these is whether the United States District Court and the United States Court of Appeals for the Fifth Circuit – two of the "Tribunals inferior to the Supreme Court" which the Constitution empowers Congress "[t]o constitute" (Article I, Section 8, Clause 9) – are authorized to exercise any of "[t]he judicial Power of the United States" (Article III, Section 1) in this particular matter, or in fact can claim no such "Power" (that is, "jurisdiction") at all.

The authority of the State of Texas in the premises is beyond rational dispute. Article I, Section 10, Clause 3 provides (in pertinent part) that "[n]o State shall, without the Consent of Congress, * * * keep Troops * * * in time of Peace, * * * or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay". Plainly, this imports that each and every State may "engage in War[when] actually invaded, or in such imminent Danger as will not admit of

delay", and may "keep Troops * * * in [such] time of [War]", "without the Consent of Congress" and therefore not subject to the absence of such "Consent" or to the "[Dis]sent of Congress" – howsoever Congress might attempt to withhold its "Consent" or to express its "[Dis]sent". Unlike the somewhat vague reservation of undefined powers to the States within the Tenth Amendment, this power is reserved in the original Constitution to each and every State in explicit and unmistakable, indeed emphatic, language.

Precisely because this power is explicitly reserved to the States in the original Constitution, it cannot be nullified, negated, overridden, abridged, infringed upon, or otherwise impaired in its exercise by the exercise of any power the Constitution delegates to Congress. For all constitutional powers are of equal dignity. None is supreme over or superior to any other. Each must be exercised in harmony with all of the others. In this regard, Congress is not superior to the States, and the States are not superior to Congress, but each is situated on the selfsame constitutional plane.

For this reason, the statutes which Congress has enacted (or perhaps will enact) with respect to immigration and control of the National borders (pursuant, say, to its powers "[t]o establish an uniform Rule of Naturalization", "[t]o regulate Commerce with foreign Nations", and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof", under Article I, Section 8, Clauses 4, 3, and 18) cannot interfere with the constitutional power of the States under Article I, Section 10, Clause 3. Certainly the so-called "Supremacy Clause" (Article VI, Clause 2), upon which the Biden Administration sets such unjustifiable store, can have no effect whatsoever. That Clause provides (in pertinent part) that "[t]his Constitution, and the Laws of the United States which shall be made in

Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". Self-evidently, the "supremacy" being invoked on behalf of "the Laws of the United States" is over "the Constitution or Laws of any State to the Contrary" – not some fictional, indeed logically and legally self-contradictory, "supremacy" of one provision of the Constitution of the United States over another provision of the selfsame Constitution. In short, the Supremacy Clause is irrelevant to matters arising under Article I, Section 10, Clause 3; and anyone contending otherwise is simply constitutionally illiterate (or astride some ideological hobbyhorse).

Now the peculiarity of the present situation, unknown in the tortuous course of constitutional law heretofore (as far as the present author is aware), is that both of the "Tribunals inferior to the Supreme Court" with which Texas is now enmeshed in the toils of litigation are the mere statutory creatures of Congress. Neither of them has independent and self-sufficient constitutional provenance, existence, recognition, or authority of any sort. That being so, at least arguable is that these "Tribunals" neither enjoy authority of their own, nor can claim authority from Congress, either to withhold "Consent" or to "[Dis]sent" from the exercise by Texas of the powers explicitly reserved to her in Article I, Section 10, Clause 3. Surely the Constitution affords these "Tribunals" no such authority directly, and Congress cannot delegate any such authority to them, because Congress itself enjoys no authority either to "Consent" (which option is irrelevant), or (conversely) to withhold "Consent" or express "[Dis]sent" (which alternatives are prohibited), with respect to the exercise by Texas of those powers. Thus, these "Tribunals" can claim no "jurisdiction" whatsoever in the premises, from any constitutional source, directly or indirectly. Therefore, they cannot issue any purported

“judgements”, “rulings”, “orders”, decisions”, and so on in any litigation supposedly involving Texas (or any other State similarly situated) which arises under the “keep[ing] Troops” and “engag[ing] in War” provisions of Article I, Section 10, Clause 3.

So, what is to be done? The most direct course would be for Texas to present “a suggestion concerning absence of jurisdiction” to both the District Court and the Court of Appeals, respectfully but firmly requesting their recognition of their lack of jurisdiction. (A litigant can always bring to a court’s attention the court’s lack of jurisdiction, at any stage of the proceedings.) Simultaneously, Texas should file with the Supreme Court of the United States an emergency petition for an extraordinary writ in the nature of prohibition, to compel these lower courts to cease and desist from their improvident exercises of nonexistent jurisdiction, if they fail to do so on their own *sua sponte*.

This would not leave unaddressed the constitutional questions arising out of the State’s assertion of her powers under Article I, Section 10, Clause 3. No, indeed. For the United States (or some officers thereof) could sue Texas, or Texas could sue the United States (or some officers thereof), with respect to those issues in the “original Jurisdiction” of the Supreme Court, because any such suit would be a “Case[ ] * * * in which a State shall be a Party” (Article III, Section 2, Clause 2). This, of course, is precisely the venue in which all weighty matters of constitutional first principles involving the States should be heard – especially in this “Case[ ]”, given that it brings to the fore questions of constitutionally reserved State sovereignty stemming from no less than the Declaration of Independence itself, wherein the thirteen original “Free and Independent States” assumed for themselves (and for all other States later confederating with them) “full Power to levy War”, a power not relinquished outright in the Constitution, but only qualified in Article I,

Section 10, Clause 3.

To be sure, the Supreme Court might attempt to evade its plain constitutional responsibility to hear such a “Case[ ]”, by invoking a supposed privilege to refuse to exercise its “original Jurisdiction” (as it did in the “Case[ ]” which Texas brought, raising the issue of voting irregularities in the 2020 Presidential election). One can hope that the well of judicial dereliction of duty is not so deep that two buckets of everlasting shame can be drawn from it in such a short span of time.

Whatever the Supreme Court might or might not do, it would behoove Texas to follow this course of action in order to bring to the public’s attention, in the sharpest focus possible, exactly how extremely serious constitutionally (as well as politically, economically, and socially) the invasion of this country by illegal aliens actually is. As always in matters of such grave consequence, time is running out. Pussy-footing around is no longer an option, if it ever was one.

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