



State of West Virginia
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President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Biden:

I write on behalf of the hundreds of thousands of West Virginians who are fed up with your failures on immigration. Because you cannot or will not meet your responsibility to protect our nation, I urge you to at least support—rather than obstruct—the State of Texas’s efforts to fill the void.

For years now, I have pushed your administration to pay more attention to the escalating crisis at our southern border—and the out-of-control drug epidemic that the crisis fuels. “Trafficking of fentanyl appears to largely occur at the southwest border,”¹ after all, and not just at ports of entry.² Given that reality, I have long implored the federal government to implement policies that will stop the deaths of thousands of West Virginians from the fentanyl and other opioids that make their way across the border and into our homes.

You responded by *dialing back* protections at the border, forcing my colleagues and me to file multiple legal challenges to your misguided, free-for-all immigration strategies. I was even compelled to sue your Department of Homeland Security when it refused to consider the drug-related consequences of ending the effective Remain in Mexico program a few years ago.

The situation has only worsened over the last few weeks and months. Illegal immigration is at an all-time high, surging to over two million illegal crossings in the last fiscal year. The numbers just don’t lie: this number is a “clear outlier” compared to previous administrations, and it’s paired with longer backlogs in immigration courts, years-long wait times before asylum decisions, more asylum grants across the board, more unaccompanied children crossing the border, and fewer arrests and deportations.³ But your administration has done next to nothing in response.

¹ Quinn Owen, *Border Officials Seizing a Lot of Fentanyl, But Say It’s a Complicated Problem to Solve*, ABC NEWS (Dec. 1, 2023, 11:58 AM), <https://bit.ly/47UQEvr>.

² See, e.g., Andrew R. Arthur, *Border Patrol Keeps Finding the Fentanyl that Supposedly Only Comes Through the Ports*, CTR. FOR IMMIGR. STUD. (Oct. 28, 2022), <https://bit.ly/480nYBq>.

³ *America’s Border Crisis in Ten Charts*, THE ECONOMIST (Jan. 24, 2024), <https://bit.ly/3SiMvf6>.

The ugly results speak for themselves. Stories of violence, human-trafficking, and drug-running are becoming a constant part of the daily news. Our communities are being overrun, as even Democratic mayors have complained that the people pouring over the border will “crush city budgets around the country.”⁴ And as fentanyl and other synthetic opioids flow in unabated, West Virginians continue to die at a higher overdose rate than anywhere else in the country.⁵

No wonder, then, that 58% of Americans recently said that you have “worked to systematically undermine America’s border security” since you took office.⁶ And they’re right.

Lawsuits are no longer enough—States must take real action on the ground. Texas’s Operation Lone Star is one appropriate response to the serious problems that your government has refused to address. Here again, the results speak for themselves: Texas has apprehended almost a half-million illegal crossers and charged about 35,000 of them with felony charges.⁷ Maybe most importantly for West Virginia, Texas law enforcement has seized over 453 million lethal doses of fentanyl.⁸ For these and other reasons, West Virginia and other States sent National Guard troops to the border this summer to supplement Texas’s efforts to address the needs that you’ve shirked.

Yet as Texas and other States have stepped up, you and your allies have decried those efforts, complaining that they intrude on federal terrain. You have run to court to impede a fellow sovereign’s efforts to protect its own citizens. And administration surrogates have even proclaimed that Texas is trying to start a second Civil War.⁹

Your view is wrong. Putting aside the outrageous rhetoric, States have an unqualified constitutional right to defend themselves from “invasion” under Article I, Section 10, Clause 3 of the United States Constitution.¹⁰ Beyond that express constitutional authority, the Supreme Court

⁴ Associated Press, *Democratic Mayors Renew Pleas for Federal Help Over Migrant Crisis*, VOICE OF AM. (Dec. 27, 2023, 9:16 PM), <https://bit.ly/3HBleQ4>.

⁵ National Center for Health Statistics, *Drug Overdose Mortality by State*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <https://bit.ly/47TzYVc> (Mar. 1, 2022).

⁶ Paul Bedard, *Majority Call Border Crisis a ‘Catastrophe,’ Blame Biden and Democrats*, WASH. EXAM’R (Jan. 22, 2024, 11:17 AM), <https://bit.ly/3ubSfzc>.

⁷ Press Release, Off. of the Tex. Governor, *Operation Lone Star Reinforces Border Barriers to Deter Illegal Crossings* (Jan. 19, 2024), <https://bit.ly/3vOts4x>.

⁸ *Id.*

⁹ See, e.g., Will Bunch, *Eagle Pass Is Today’s Fort Sumter. Biden Must Federalize the Texas National Guard.*, PHILA. INQUIRER (Jan. 25, 2024, 1:23 PM), <https://bit.ly/47U27eP>.

¹⁰ Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 174 (2007) (explaining why “engaging” in “war” has been understood to include acts of self-defense, such that “[t]his clause is conventionally read to give states independent authority to defend themselves against attacks”); Robert G. Natelson, *The False Doctrine of Inherent Sovereign Authority*, 24 FEDERALIST SOC’Y REV. 346, 355 (2023) (“The Constitution also left the states with the power to wage defensive war.”).

has long acknowledged that a State can “repel invasions ... within its own territory, and directed against its own existence or authority.”¹¹ Texas is merely exercising that right.

Some have wrongly proposed that what’s happening along our border does not amount to an “invasion.” Yet Texas is far from the first to suggest that waves of illegal aliens can constitute a constitutional “invasion.” Arizona, California, Colorado, Florida, and New Jersey—not to mention officials from New York—have all argued similarly before.¹² Texas is therefore not doing anything particularly unprecedented in declaring that large groups of uncontrolled foreign persons unlawfully entering its lands could constitute an invasion, especially when some are entering with expressly criminal objectives.¹³

But more to the point, the situation at our border is just the kind of event that Framers had in mind when they empowered States to respond to invasions. As James Madison explained in *The Federalist No. 43*, “[a] protection against invasion is due from every society to the parts composing it. ... [The Constitution] seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors.”¹⁴ So, for instance, the Framers believed an invasion could happen when local authorities were overwhelmed by pirates or smugglers.¹⁵ And here, when unlawful entries lead to identifiable casualties in West Virginia and other States—that is, when organized groups sneak across our borders to peddle poison in our communities that in turn take our people’s lives—then that’s a “vindictive enterprise,” no less than Virginia smugglers were in the 1700s.¹⁶

Some of your supporters have also wrongly suggested that this right to self-defense is a stopgap measure. They say States can’t exercise the power if it could be shown that the federal government is able to respond. But just reading the relevant constitutional provision’s text is all it takes to put that argument to bed. Article I, Section 10, Clause 3 states that States may “engage in War” when

¹¹ *Houston v. Moore*, 18 U.S. 1, 54-55 (1820); see also *Luther v. Borden*, 48 U.S. 1, 45 (1849) (“The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government.”).

¹² See generally *People of Colo. ex rel. Suthers v. Gonzales*, 558 F. Supp. 2d 1158 (D. Colo. 2007); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *Arizona v. United States*, 104 F.3d 1095, 1096 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995).

¹³ See, e.g., BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “invasion” as “[a] hostile or forcible encroachment on the rights of another”); Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1284 (2007) (“We need not restrict an ‘invasion’ to an attack by a nation-state in which a significant enemy armed force has a sustained presence on American territory.”).

¹⁴ Melissa Blair, *Terrorism, America’s Porous Borders, and the Role of the Invasion Clause Post-9/11/2001*, 87 MARQ. L. REV. 167, 202-03 (2003) (“[I]t appears that the term ‘invasion’ can be interpreted to refer to any hostile and foreign invasion perpetrated on American soil.”).

¹⁵ Heather Dwyer, *The State War Power: A Forgotten Constitutional Clause*, 33 U. LA VERNE L. REV. 319, 323-25 (2012).

¹⁶ *Id.* at 351-52 (explaining why Mexican drug cartels give rise to an invasion that triggers States’ rights to self-defense).

“actually invaded, or in such imminent Danger as to not admit of delay.” The “stopgap” argument would need to rest on the “admit of delay” language—but observe how that limiting language modifies only “imminent Danger” and not “invasion.” The Framers’ choice not to use the limiting language when it comes to invasion must be given real meaning.¹⁷ Quite simply, “the Constitution provides that the states may confront even the most serious threats,”¹⁸ And though some might invoke notions of federal supremacy in insisting that can’t be the case, Governor Abbott was right that contrary federal law must yield when an invasion happens. Indeed, States can take “otherwise unconstitutional action” once an invasion is underway.¹⁹

In any event, all this wrangling over the nature of the States’ power proves academic given your government’s near-total failure to act. Even if the States’ power to repel an invasion is meant to be a temporary measure, it’s triggered here by your continuing abdication of responsibility over the border.

It’s thus time to work with the States in resolving these issues, not against them. Rather than spending your time floating unjustified legal attacks in opposition to strong state action, or fighting the States in court, why not partner with border states—and States like West Virginia that are directly affected—to implement a meaningful border policy? How many of our people must die from foreign-sourced drugs before your administration gets serious about meeting its obligation to secure our borders? When will enough be enough?

Until you’re ready to answer those kinds of questions, West Virginia will continue standing with Texas.

Sincerely,



Patrick Morrisey
West Virginia Attorney General

¹⁷ *Id.* at 319-20 (“[W]hen a state is invaded ...; the United States has a duty to protect against the invasion and the state has a concurrent right to defend itself by engaging in war against the invading force.”).

¹⁸ Adam M. Giuliano, *Emergency Federalism: Calling on the States in Perilous Times*, 40 U. MICH. J.L. REFORM 341, 367 (2007).

¹⁹ *Sveen v. Melin*, 584 U.S. 811, 828 (2018) (Gorsuch, J., dissenting).