February 7, 2024 / The border standoff at Eagle Pass

[HALF SECOND OF SILENCE]

[BILLBOARD]

*<CLIP> REP MARJORIE TAYLOR GREENE (R-GA): Madam Speaker: I rise in strong support of HRes 863 impeaching Secretary Alejandro Mayorkas…*

SCORING <Hoodoo Instrumental (APM)>

NOEL KING (host): Everyone knew the Republican-lead vote to impeach the Homeland Security Secretary was political theater. So, Republican Marjorie Taylor Greened:

*<CLIP> GREENE: … Criminals, gang members, terrorists, murderers, rapists…*

NOEL: Democrat Bennie Thompson responded:

*<CLIP> REP BENNIE THOMPSON (D-MI): Representative Margaret Taylor Greene has raised doubts about 9/11. She also thinks Jewish space lasers cause wildfires.*

NOEL: It would have been an ad hominem attack had he managed to get her name right

*<CLIP> THOMPSON: Margaret Taylor Greene*

NOEL: This shouldn’t have mattered. Republicans were going to vote along party lines, done and dusted except … three voted NOT to impeach.

*<CLIP> SPEAKER MIKE JOHNSON (R-LA): The resolution is not adopted. <gavel>*

NOEL: A major embarrassment in a day full of them.

NOEL: Texas Governor Greg Abbott, may have watched this mess on C-SPAN. He says the feds have lost control of the border and Texas should take over. And he’s forced a standoff. That’s coming up on *Today, Explained*.

[THEME]

*<CLIP> TODAY, EXPLAINED PRODUCER VICTORIA CHAMBERLIN: This is Today, Explained.*

ARELIS HERNÁNDEZ (*Washington Post* national reporter): My name is Arelis Hernández. I am a national reporter for *The Washington Post* focused on the border.

NOEL: Arelis is based in San Antonio. She’s just back from a two-week assignment in Eagle Pass, Texas where the Texas National Guard and the federal Border Patrol are fighting over who controls a park.

*<CLIP> CNN: Governor Greg Abbott and Republicans have been accusing the Biden administration of not enforcing federal immigration laws. Well, in this area of Eagle Pass, in Shelby Park and in these 2.5 miles of river, Border Patrol can’t enforce federal law – because they don’t have access.*

NOEL: This state-federal showdown is happening even as people continue to seek refuge in Eagle Pass.

ARELIS: The first image that comes to mind is a, is a photo from Reuters, from Go Nakamura, who I’ve actually worked with, and it's this photo taken from the Mexican side of people about waist-deep in the water…

*<AMBI> MIGRANTS CROSSING RIO GRANDE*

ARELIS: … wading through the Rio Grande and approaching the Texas riverbank or Eagle Pass’s Municipal Park, Shelby Park. And there being on the other side, the sort of reams of razor wire and, and soldiers and Humvees there. It's quite an image because just a few years ago, that riverbank was completely sort of clear. Yes, people would cross, but it was a site of recreation. It's a beautiful place, actually. And it's kind of wild to see. On the other side, in the Mexican bank, they have this gorgeous river walk. And it's something that the people of Eagle Pass have aspired to for a long time.

AMBI OUT

*<CLIP> KSAT 12: This is the entrance to Shelby Park, and typically you wouldn’t see fences up there, but the state put those up days ago. And you can see there’s also military humvees and Texas National Guard members manning the gate…*

ARELIS: Shelby Park, is named after, actually, a Confederate general who refused to surrender and cross into Mexico while burying, you know, the Confederate battle flag into the waters of the Rio Grande. And it's sort of that theater, that theatrical, that drama, is playing out once again in that same place with the shipping containers that are on the riverbank with the soldiers with, you know, what looks like a forward operating base somewhere else in the world is sort of unfolding right there in Shelby Park, which is being controlled by the Texas National Guard.

*<CLIP> KSAT 12: There’s only Texas state personnel here, not a single Border Patrol agent…*

NOEL: We hear about places along the US-Mexico border where there are floods of people coming through. But I'll admit, Eagle Pass is not a city that I'd heard that I had heard much about until recently. Is this a place where you have huge numbers of migrants, typically?

ARELIS: Historically, no, this is not a place where, where people cross. But this part of the river that is bordering Coahuila state, which is reportedly one of the more safer states in Mexico to cross, has become a huge crossing point, and Eagle Pass because in part, you know, the river is pretty wide and shallow. And right by Shelby Park has become a staging area for the processing of thousands of migrants, unprecedented numbers of people crossing at the same time. It's not unusual to hear local officials talking about having watched a thousand people like a sort of wave of humanity just, you know, cross the river together.

*<CLIP> SEN. TED CRUZ (R-TX): One day last week, they had in a single day: 4,000 cross illegally into Eagle Pass. 4,000 people in a town of 28,000, that’s about 14% of the city’s population.*

NOEL: In Eagle Pass you have two groups that are claiming responsibility for securing the border, so to speak. You've got the Border Patrol, which is a federal force, and then you have the Texas National Guard. How do those two groups normally interact in Eagle Pass? Whose job is it to oversee migration?

ARELIS: In the beginning aughts of Operation Lone Star, which is this border crackdown, uh, that Governor Abbott has undertaken since 2021. They actually worked together…

NOEL: Ah!

ARELIS: …pretty well.

NOEL: Shocking! <laughs>

ARELIS: <laugh> Yeah, right. I mean, most people who do any kind of border law enforcement work together quite, intimately. And so you had both of these agencies, they're keeping a lookout, whereas Border Patrol are the only ones who actually have the jurisdiction and the immigration enforcement powers to detain people, to screen them for any number of immigration-related processes and to take them into custody at their self cited facility. National Guard can't put their hands on, on migrants unless they're, you know, trying to help or save them. And we had that tragic incident of that one National Guardsmen who actually drowned after trying to help a couple of migrants. But, yeah, no, this is sort of a no-fuss kind of thing. You know, Border Patrol would welcome more boots on the ground. They're chronically asking for more help, you know, while Border Patrol is processing folks and running them through these screening processes, they're not watching the river. And so they would have – they welcomed the National Guard, watching the river and keeping an eye out. Now they're at odds because their leaders are at odds.

SCORING <Half Man Half Horse>

ARELIS: Since 2021, Governor Abbott has been beating this drum, saying that the federal government is essentially abandoning its duty to protect Texas's borders.

*<CLIP> TEXAS GOVERNOR GREG ABBOTT: The Biden Administration’s open-border policies have created an open season for drug traffickers, for drug smugglers, for cartels and gangs.*

*<CLIP> ABBOTT: Because the federal government is failing to respond to these dangers, Texas is stepping up to secure the border and to keep our communities safe.*

ARELIS: So it started with, you know, sending state troopers down to the border. It started with sending National Guardsmen.

*<CLIP> ABBOTT: This is necessary because more than 45,000 people have been apprehended crossing our border in just the last three weeks.*

ARELIS: It's building state border wall. It was busing migrants from the NGOs to other cities across the country.

*<CLIP> ABBOTT: Before we began bussing illegal immigrants up to New York, it was just Texas and Arizona that bore the brunt of all of the chaos and all of the problems that came with it. Now the rest of America understands exactly what is going on.*

ARELIS: And then it was arresting migrants accused of trespassing. You need landowners to sign onto that. So they were getting permissions from various landowners, riverfront property landowners to be able to arrest people and run them through, a sort of specially-created justice system. And so Abbott, little by little, has been like taking bites out of this apple until we get to this point where, you know, Shelby Park is a municipal park, and they decided that, the fact that Border Patrol was using this park as a staging area that was allowing, you know, thousands of people into the country, at least from their point of view, that they needed to shut that down.

*<CLIP> ABBOTT: So, Texas has the legal authority to control ingress and egress into any geographical location in the state of Texas. And that authority is being asserted in that park in Eagle Pass, to maintain operational control of it.*

SCORING OUT

ARELIS: And basically the Biden Administration asked the Supreme Court to intervene because of a confrontation that happened. We’re still, like, mulling through the details, but essentially the National Guard kept Border Patrol from entering the park in a moment of what they considered a medical emergency, that there were migrants that were in distress. Now, if you ask. You know, Texas National Guard and Texas state troopers, they’ll tell you that those people had already drowned. But it's the fact that Border Patrol couldn't go in when they wanted to and have access to the border that pushed the Biden administration to say, ‘Hey, SCOTUS, like, this can't be happening - this is an enumerated power in the Constitution that we have. Texas has no leg to stand on here.’

*<CLIP>* *WQAD: Tonight, a narrowly-divided Supreme Court delivering a victory for the Biden Administration, <FADE DOWN ON:> clearing the way for federal agents…*

NOEL: Can we talk a bit about how Abbott is framing this for his constituents, for the people of Texas? What, what is he saying when the Supreme Court says, ‘hey, buddy, you got to step aside?’

ARELIS: Well, he invoked the Constitution, that Texas has a right to defend itself and that this constitutes – the tide of humanity that's coming across the border – constitutes an invasion.

*<CLIP> ABBOTT: Because Joe Biden has completely abdicated and abandoned his responsibility to enforce the laws of the United States, I have used a clause in the Constitution that empowers states to defend themselves. It is Article 1, Section 10, Clause 3.*

ARELIS: It's the kind of rhetoric that has been used by extremists throughout all of this. And so, you know, Abbott is saying, ‘Look, Texas is going to do whatever it can to defend itself against what it fears is an invasion.’ And a lot of people in the state agree with him. While they might not agree specifically with his methods, the numbers are such and the images are such that, you know, it provokes concern. Whether you're a Republican Democrat with your regressive or, conservative, a sort of across the spectrum.

NOEL: Where does this where does this leave us? Where does this stand right now?

ARELIS: We’re waiting on the courts to help us figure out, you know, who's actually in charge here and who has authority as enumerated by the Constitution to continue to operate on the border. We have this border deal that came through over the weekend that Republican leaders are saying is dead on arrival. So we're just kind of in stasis the way that the border has been in stasis now for almost four decades. I mean, migration has changed. The hemisphere is on the move. And it's not just folks from Central and South Americans. It’s folks from all over the world. So the question is, how much work is the United States willing to put into working with Latin America to try and staunch some of these flows, which it already has –– and conversation in Mexico has gotten a lot more aggressive with migrants. And that's why you see the levels plummeting the way they have in January, in terms of crossings. But, you know, we're also entering the spring, and then the summer, when migration traditionally and historically has continued to increase. It's just a matter of waitin’ to see what happens in the courts, what happens in Congress, and what the United States is able to do with its partners in Latin America.

SCORING <Spaghetti Western (a)>

NOEL: Arelis Hernández in San Antonio. Coming up: a physical showdown, a legal showdown, and a governor of Texas who doesn’t like to back down.

*<CLIP> VOX SR. CORRESPONDENT IAN MILLHISER: I mean, what the Supreme Court said was that federal agents are allowed to cut these razor wire barriers. I mean, how is Abbott going to prevent that? Is he going to station armed guards at the barriers to prevent the federal officials from cutting them? I just don't know what that looks like.*

[BREAK]

[BUMPER]

NOEL: It’s *Today, Explained*. We’re back with Ian Millhiser, senior correspondent at *Vox*. He writes about the justice system, and his current beat is Texas v. America.  
  
IAN MILLHISER (*Vox* senior correspondent): So, yes, there are three different – at least three different cases right now that involve disputes between the federal government and the state of Texas about what our border policy should be.

SCORING <New Tension 08 - Infinite Whack-a-Mole>

IAN: One of those cases recently went up to the Supreme Court. It's called *Department of Homeland Security v. Texas*.

NOEL: Hmm.

IAN: And that case involved these razor wire barriers that Texas constructed in order to try to keep immigrants from coming across the Mexican border. The problem is that these razor wire borders also kept the Border Patrol out. And there's a federal statute that says that the Border Patrol is allowed to enter into private land in order to enforce immigration laws. And so this case went to the Supreme Court. The Supreme Court said that the Border Patrol agents are allowed to cut these border wire barriers when necessary, when it's necessary for them to do their job. The really disturbing thing about this case is that it was a 5 to 4 decision out of the Supreme Court. One of the most well-established principles in immigration law, is that the federal government has primacy. In many cases, states aren't even allowed to augment the federal government's, um, enforcement.

NOEL: Hmm.

IAN: And they certainly aren't allowed to do what Texas did here, which is erect a barrier that physically prevents federal agents from doing their job. I mean, this should have been a slam-dunk nine-nothing decision. And it's, you know, fairly shocking that four justices agreed with Texas here.

SCORING OUT

NOEL: All right. So you said there's at least three cases. You've just given us one. Give us the next one.

IAN: Sure. So there's one other that deals with Texas Governor Greg Abbott's attempt to create physical barriers…

NOEL: Hmm.

IAN: .. that prevent immigrants from crossing the border. This involves a long chain of buoys.

*<CLIP> ABC NEWS: The Department of Justice is suing the state of Texas and Governor Abbott over these red buoys. They claim the hard plastic balls, tethered to the bottom of the river with heavy cable wire, were installed without consulting the Army Corps of Engineers and it violates several national treaties.*

IAN: The legal issue here is that there's a federal law which says that you can't erect a barrier – or an obstruction – to navigable waters without the federal government's permission. And so the question in this case is whether this particular stretch of the Rio Grande is a navigable waterway that can't have an obstruction in it. This particular case is – right now, it's going to be heard by the full United States Court of Appeals for the Fifth Circuit. And, like, the thing you have to understand about the Fifth Circuit, this is the Trumpiest court in the country. It has many, many Trump appointees. It is absolutely dominated not just by Republicans, but by MAGA Republicans. The Fifth Circuit is a rubber stamp…

NOEL: Hm.

IAN: …for pretty much anything that the right, most rightward extreme of the Republican Party wants to do. And so I'm anticipating that the Fifth Circuit is going to uphold this barrier. The question is what the Supreme Court is going to do.

NOEL: Okay, so we're two for three. What's the third big case?

IAN: So the third big case, and I mean, I've covered something like two dozen cases called *United States v Texas* in my career…

NOEL: Oh!

IAN: The, the federal government and Texas are always sparring. Whenever the Biden administration does anything that Texas doesn't like, Texas sues the Biden Administration. So this is one of the many, many cases called *United States v Texas*. And what this last case is about is Texas passed a state law that essentially tries to turn Texas’s state courts into immigration courts. It allows state judges to issue deportation orders. It allows the state government of Texas to then enforce those deportation orders. And that is a world of not allowed. The reason why is that in a 1941 case called *Hines v Davidowitz*, the Supreme Court said there is that the federal government must have primacy over all questions of foreign policy. And I mean, the reason for that should be obvious: we, if we're one country, then the decisions that affect our entire country's foreign policy must be made by the national government that everyone gets to vote for, and not the government of just one state that only people in that state get to vote for. Because when you're talking about foreign policy, it affects all of us.

NOEL: Hey, so it seems like the thing these three cases have in common is that Texas does not want the federal government to have primacy over the border in Texas. It's like, ‘This is our land. It's become our problem.’ Can Texas, with cases like these three and others, can they get anything changed here, like fundamentally changed?

IAN: I mean, quite possibly. I mean, what Texas is betting on – the only reason we're having this conversation is because of the Supreme Court that we have right now, and because of the Fifth Circuit we've had right now. I mean, again, Abbott's been able to get away with a lot of this because the federal courts in Texas will basically rubber stamp anything he wants to do. But eventually those cases get appealed to the Supreme Court. And what we are seeing now is, I think every time there's a Democratic president in office, we're going to see some red state engage in these kinds of shenanigans. When Obama was in office, the red state that did so (although it's no longer red state) was Arizona. Arizona – this is a case called *Arizona v. the United States* – passed a law called SB 1070.

*<CLIP> ABC: The law requires police here in Arizona to question anyone they have a reasonable suspicion may be illegal.   
OFFICIAL: Well, nothing really’s going to change, other than the fact that if we come across a, uh, illegal alien that doesn’t have a state charge, now we can arrest them and book ‘em into the jail or turn them over to ICE.*

IAN: And this case went up to the Supreme Court. The intention behind this case was to get what was then a moderately conservative Supreme Court to walk away from what it said in 1941 in the *Hines v Davidowitz* case, and to walk away from the principle that the federal government is in charge of immigration.

NOEL: Hm.

IAN: And rather than walk away from it, the Supreme Court reaffirmed it.

*<CLIP> DEMOCRACY NOW: The Court struck down three of the law’s four provisions that subject undocumented immigrants to criminal penalties for seeking work or seeking to carry immigration papers at all times. In each case, the Court said those powers rest with the federal government, not with Arizona.*

IAN: But since that decision was handed down, Justice Kennedy, who was in the majority, left the court, was replaced by the much more conservative Brett Kavanaugh. Justice Ruth Bader Ginsburg died, she was in the majority. She was replaced by the also very conservative Amy Coney Barrett. And so I think what Texas and Greg Abbott are betting here is that the law will change because the personnel of the Supreme Court has changed. That they can relitigate Hines, they can relitigate Arizona, but they can get a different outcome this time because there's different justices.

NOEL: So Governor Greg Abbott is banking on the composition of the Supreme Court having changed – the court having become more conservative. But! But, Ian! In the case with the razor wire – the *Department of Homeland Security v Texas* – the Supreme Court overturned the Fifth Circuit that sided with Texas. So! Is Abbott wise to bank on the Supreme Court siding with him if they didn't the first time around?

IAN: So, I mean, I think that the decision in the razor wire case is a hopeful sign for the federal government that *Hines* and *Arizona,* these two long-standing precedents I mentioned, probably are going to still have some life. I mean, it was a 5 to 4 decision. It was the three, Democratic appointees, plus Chief Justice Roberts and Amy Coney Barrett, who form the majority there. But like, the one data point we have right now is this razor wire case. And that does suggest that Abbott may lose his bet here.

NOEL: Okay. And so if he does – now, you're not a Texas reporter, but you do know Abbott. If Abbott loses, is he going to do what the Supreme Court says he’s got to do?

IAN: It's a good question. I mean, the other thing that I think that Abbott is banking on here is that he thinks he has the public on his side, and the polls suggest he's right. I mean, the polls suggest that, that a lot of people are upset by the situation at the border. And so I think he thinks he can get away with it, even if what he is doing is illegal. But, you know, you could conceivably see a situation if the Supreme Court strikes down this deportation law where Abbott tries to put someone on a plane and fly them to another country even though he's not legally allowed to do so. And then, I mean, I don't know what happens in that case, like does the federal government…

NOEL: Yeah you do! You do know what happens, right? Because have haven't, haven't governors defied the Supreme Court before? What happened?

IAN: Well, I mean, there are examples of it.

*<CLIP> FORMER PRESIDENT DWIGHT D EISENHOWER: Whenever normal agencies prove inadequate to the task, and it becomes necessary for the executive branch of the federal government to use its powers and authority to uphold federal courts, the president’s responsibility is inescapable.*

IAN: Ike sent troops to Little Rock, Arkansas…

NOEL: There it is.

IAN: … after the governor of Arkansas refused to obey *Brown v Board of Education*.

*<CLIP> EISENHOWER: This became necessary when my proclamation of yesterday was not observed, and the obstruction of justice still continues.*

IAN: So if Abbott defies a federal court order, President Biden has any number of tools at his disposal, up to and including sending the U.S. Marines after Abbott. The question is, I mean, if Abbott is right – and I'm not sure that he isn't right – that the politics are on his side here. I mean, sending troops to Texas is a big step. And I don't know that Biden is going to have the political stature to take that step, even if it's something that's legally within, within his rights. The other big immigration story right now is that Democrats and Republicans in the Senate just negotiated this big border package that's pretty draconian. I mean, it involves the authority to shut down the border entirely. And Biden came out right away and said, yeah.

*<CLIP> PRESIDENT BIDEN: If that bill were the law today, I’d shut down the border right now and fix it quickly.*

IAN: Like he agrees that there's a crisis here that needs to be addressed and that needs to be addressed legislatively. We need to make our immigration laws harsher in order to deal with the situation. But even though this bill was negotiated, you've got a lot of Republicans in Congress who aren't just saying they don't want to pass it, but they're saying specifically we don't want to pass it because we think it will help Joe Biden get reelected.

NOEL: Hmm.

SCORING <New Tension 01 Time’s Arrow>

IAN: So the game that we're seeing here is we've got this situation at the border that many, many people are upset with. But the Republican Party, including Greg Abbott, they care more about making Joe Biden look bad – either because the crisis continues or because Joe Biden, it can be painted as making it worse, because he's interfering with Greg Abbott's illegal efforts to prevent people from crossing the border. It's all political theater. I mean, there is a bill that could potentially solve this problem. It has already been negotiated. And again, like as soon as Biden says he wants to sign it, Republicans are saying, we don't want to do that because we don't wanna help you get reelected.

SCORING BUMP

NOEL: That was Vox’s Ian Millhiser. Today’s show was produced by Amanda Lewellyn and edited by Amina al-Sadi. It was engineered by David Herman and fact-checked by Laura Bullard and Hady Mawajdeh. Thanks Hady. I’m Noel King. It’s *Today, Explained*.

SCORING OUT

[10 SECONDS OF SILENCE]