Primer: Federal Law Does Not Criminalize the Conduct of State Officials When They Act to Repel an Invasion

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Introduction

The unrelenting and unprecedented illegal immigration crisis at the U.S. southern border continues to worsen. Yet, the Biden administration is threatening at the same time to make the crisis even worse by rescinding COVID-related Title 42 removal authority just as we move into the apprehension-heavy Summer months. The Biden Administration's refusal to secure the southern border continues to pose severe threats to communities across the United States because illegal aliens are allowed to spread, largely unchecked, throughout the nation's interior under federal government and NGO auspices. So far, FY2022 apprehensions are 73 percent higher than those at the same point in FY2021 and a staggering 412 percent higher than at the same point in FY2020—the last full fiscal year of the Trump Administration.[1] One recent study pegged the total number of illegal immigrants released into the interior by the Biden Administration as approaching 2 million individuals.[2]

In response to this crisis, border States have the ability—and indeed the responsibility—to invoke their constitutional authority, explicitly stated in Article I, Section 10 of the Constitution to declare an invasion and secure the border, particularly in light of the federal government's refusal to carry out its Article IV, Section 4 duties to the States to protect them from invasion. The constitutional propriety of using Article I authority to declare and respond to an invasion is clear, and a recent landmark opinion from Arizona Attorney General Mark Brnovich affirmed that the legal underpinning for such action is sound.[3]

However, Texas Governor Greg Abbott has suggested such state action could put Texas Department of Public Safety ("DPS") officers or Texas State Guardsmen in danger of being

[1] U.S. Customs and Border Protection, *Southwest Land Border Encounters* (last modified May 13, 2022).

[2] *See* Mark Hemingway & Ben Weingarten, *Willful Blindness: Feds Ignore Illegal Alien ID Theft Plaguing Americans as U.S. Coffers Fill*, REALCLEAR INVESTIGATIONS (June 30, 2022), *available at* https://tinyurl.com/5n6cf6m8.

[3] *See* Arizona Attorney General Opinion No. I22-001 (R21-015), *The Federal Government's Duty to Protect the States' Sovereign Power of Self Defense When Invaded* (hereafter "AZ AG Op."). *See also* Judge Tully Shahan, Kinney County, *Local State of Disaster* (July 5, 2022), *available at* https://www.co.kinney.tx.us/upload/page/0335/docs/Kinney%20County%20Declaration%20of%20Local%20State%20of%20Disaster%20-Final.pdf at 2 (reciting facts and concluding "[t]hat as a matter of law, the aforementioned facts constitute—among other things—an ***invasion*** of Kinney County, Texas, as the term 'invasion' is used in Article IV, Section 4 of the U.S. Constitution and in Article 4, Section 7 of the Texas Constitution[.]") (emphasis in original).

detained and even prosecuted by federal authorities—presumably under 18 U.S.C. § 242.[4] However, neither Article I of the Constitution, the statute's text, its legislative history, nor its case law to date, justifies Governor Abbott's concern.

Roadmap

This Primer is organized as follows: Part I sets out Section 242's legislative history as related to the Fourteenth Amendment. Part II explains why the Constitution and principles of harmonious construction would prevent reading Section 242 to block or frustrate use of the States' powers of self defense. Part III analyzes the text of Section 242 and the elements of a criminal offense thereunder. Part IV then discusses pertinent case law involving Section 242—case law that has narrowed the theoretical reach of the statute. Part V provides supporting statistics and analysis drawn from studies of the history of Section 242 enforcement, reflecting that successful Section 242 cases are quite rare. Part VI considers and rejects certain counterarguments to the ones made in this Primer, including one based on using 18 U.S.C. § 241 instead of Section 242. Finally, Part VII ends the Primer by providing an action- and policy-oriented bottom line.

I. Brief Legislative History of Section 242 & Related Fourteenth Amendment History

The history of 18 U.S.C. § 242 dates back to the Civil Rights Act of 1866.[5] Following the Civil War, Congress passed the statute to ensure that law enforcement officials—or anyone acting under the presumed force of law (*i.e.*, under the color of law)—would be barred from violating certain federally protected rights or from targeting people for heightened law enforcement on account of their former status as a slave or involuntary servant. Section 242 thus laid the foundation for the federal government to exercise the power to punish federal, state, and local officials for actions or behaviors denying U.S. citizens constitutional rights or their privileges and immunities under federal law.

Section 2 of the 1866 law stated:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pain, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished

[4] *See* Hayden Sparks, *Though Skeptical, Abbott Mulls Calling Illegal Immigration 'Invasion' Under U.S. Constitution: The Governor stated that law enforcement officers could be prosecuted by the federal government if they deport illegal aliens,* The Texan (Apr. 22, 2022).
[5] Library of Congress, A Century of Lawmaking for a New Nation (1775-1875), *Civil Rights Act of 1866*.

> by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Following the Fourteenth Amendment's ratification in 1868, Congress moved to reinforce the prohibitions against extralegal activity, especially by imposing a ban on violence perpetrated in the South by former Confederates, slaveholders, or members of the Ku Klux Klan. Three bills—collectively known as the Force Acts[6]—were passed in the 41st and 42nd Congresses pursuant to Section 5 of the Fourteenth Amendment.[7] Perhaps the most well-known of these enactments was the Ku Klux Klan Act of 1871,[8] signed into law by President Ulysses S. Grant, which gave the President the power to intervene in former Confederate states that were trying to deny equal protection or immunities under the law to any person or "class of persons."

In 1874, Congress continued advancing enforcement mechanisms under Section 5 of the Fourteenth Amendment by revising and broadening the Civil Rights Act of 1866 into something very similar to its current incarnation in the U.S. Code. Accordingly, by 1948, the "color of law" violations had been moved into Section 242 and included expanded language that offered Section 242 protections "*on account of such inhabitant being an alien*."[9] One of the main evils to be redressed by adding the alienage feature to the statute was to bar discrimination, like that which occurred in California, against those of Chinese heritage:

> Although, as expressed in the Slaughter-house Cases, the war amendments were adopted primarily for the emancipation and protection of the African race, their power is not circumscribed to such limits. They have already, and will in the future, serve a vastly wider and more beneficent purpose. The prohibitions of the fourteenth amendment have been found effectual to protect the Chinaman against the viciously-oppressive legislation of the Pacific states.

United States v. Buntin, 10 F. 730, 739 (S.D. Ohio 1882) (Section 242 prosecution).

Additional tweaks were made to the Civil Rights Act of 1968 that provided for imprisonment or life in prison should death occur as a result of such violations. The Anti-Drug Abuse Act of 1988[10] incorporated statutory changes to what is now 18 U.S.C. § 242 regarding bodily injuries sustained during violations, coupling such injury claims with commensurate fines and a graduated schedule of prison terms (including a death or life sentence applied to the most serious

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[6] House of Representatives, *Legislative Interests*, Ku Klux Klan and Amnesty Acts (subsection).

[7] U.S. Const., amend. XIV, § 5. Section 5 of the Fourteenth Amendment states "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[8] House of Representatives, *The Ku Klux Klan Act of 1871*.

[9] 62 Stat. 683, 696, ch. 645, sec. 242 (June 25, 1948) (as it appears on the House of Representatives site).

[10] Anti-Drug Abuse Act of 1988, sec. 7019, Pub. L. 100-690, 102 Stat. 4181 (Nov. 18, 1988).

offenses). And the most recent significant change occurred in 1996 following passage of the Economic Espionage Act.[11] That legislation expanded the territorial reach of Section 242 by changing "any State, Territory, or District" in the original to "any State, Territory, *Commonwealth, Possession*, or District" (emphasis added).[12]

Now, with all of those amendments cumulated, the current statutory language found in Section 242 reads as follows (all forms of emphasis added):

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ***or*** to different punishments, pains, or penalties, *on account of such person being an alien, or by reason of his color, or race*, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Note that the statute specifies *two types of offenses* (as is clear from the bolded, italicized "***or***" in the block quotation above): *first*, willfully subjecting, under color of law, a person to the deprivation of constitutional rights, privileges, or immunities protected by the laws of the United States ("Type 1 offenses"); and *second*, willfully subjecting, under color of law, a person to different punishments, pains, or penalties on account of that person's race, color, or alien status ("Type 2 offenses").[13] Type 2 offenses are the ones primarily focused on in this Primer because

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[11] Economic Espionage Act of 1996, sec. 607a, Pub. L 104-294, 110 Stat. 3488 (Oct. 11, 1996).

[12] A more complete summary of the year-by-year evolution of the statute up until 1951 appears in an Appendix to Justice Frankfurter's opinion for the Court in *United States v. Williams*, 341 U.S. 70 (1951), entitled "Criminal Civil Rights Legislation: Comparative Table of Successive Phraseology." *Williams* was later overruled in *United States v. Price*, 383 U.S. 787, 798 (1966), but that does not eliminate the usefulness of *Williams*' Appendix.

[13] "We think that [the statute] authorizes the punishment of two different offenses. The one is willfully subjecting any inhabitant to the deprivation of rights secured by the Constitution; the other is willfully subjecting any inhabitant to different punishments on account of his color or race, than are prescribed for the punishment of citizens. The meager legislative history of the section supports this conclusion." *United States v. Classic*, 313 U.S. 299, 326-27 (1941).

The Circuits have faithfully taken to heart *Classic*'s teaching that Section 242 involves two distinct crimes ever since. *See, e.g., United States v. Gaggi*, 811 F.2d 47, 55 (2d Cir. 1987) ("[I]t was Congress' purpose from the outset

that is where Congress referenced alien status. Part II below is thus focused on the second type of race/color/alien offense, and not on the more general first type of offense (*but see* Part VI, *infra*, briefly discussing and rebutting the applicability of Section 242's Type 1 offense). Type 1 offenses are the ones most commonly prosecuted but they typically involve individual instances of police brutality. For instance, the prosecution of Derek Chauvin for depriving George Floyd of his civil rights is a Section 242 Type 1 offense.[14]

II. Constitutional Barriers Will Prevent Prosecutors from Trying to Apply Section 242 to Override the States' Powers Under Article I to Resist Invasions.

A Governor invoking Article I authority to repel an invasion, while acting in the safety and security interests of the State in question (especially set against the backdrop of federal unwillingness or negligence in fulfilling its constitutional Article IV obligations), is wielding a legitimate power. This power cannot be nullified because the majority of alien invaders happen to share a similar race, language, and/or ethnicity. The Arizona Attorney General correctly explains that Article I authority is not limited to repelling invasions by foreign governments (especially because it can reach, for instance, smugglers and drug- or human-trafficking cartels).[15] Similarly, Article I authority can be applied to ordinary illegal border crossers who are violating our laws in various respects by entering the United States without appropriate permission, especially when they are doing so in the kinds of mass numbers seen at the border right now. Neither assistance by the Mexican government nor participation in cartels (or supervision by cartel "coyotes") limits the span of the invasion. In other words, *all types* of illegal border crossers must be deemed part of the invasion that is currently underway, even those who have no government or cartel involvement.

Section 242 cannot be interpreted to curtail the Article I constitutional power that resides in States to resist invasions. In 1916, New Mexico was invaded by Mexican forces led by Pancho Villa, who claimed authority in Mexico that was not acknowledged by the U.S. Government.[16]

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in enacting §§ 241 and 242 to address distinct evils aimed at different groups—one citizens, the other inhabitants—residing in the United States.") (a prior version of Section 242 referred to "inhabitants" rather than to "persons"); *see also id.* at 56 n.3 (noting that in 1870, discrimination on the basis of alienage was made an "additional offense"); *United States v. Harrison*, 671 F.2d 1159, 1160 n.2 (8th Cir. 1982) ("The qualification with respect to alienage, color, or race refers only to differences in punishment and not to deprivations of any rights or privileges secured by the Constitution or laws of the United States."); *Miller v. United States*, 404 F.2d 611, 612 (5th Cir. 1968) (per curiam) ("The bill of information under which Miller and Vallee were charged shows that they were convicted of the first offense denominated by the statute, and that race, color and alienage were therefore irrelevant.").

[14] *See* U.S. Department of Justice, Press Release, *Four Former Minneapolis Police Officers Indicted on Federal Civil Rights Charges for Death of George Floyd; Derek Chauvin Also Charged in Separate Indictment for Violating Civil Rights of a Juvenile* (May 7, 2021).

[15] AZ AG Op. at 1-7, 10.

[16] Pancho Villa was a Governor of Chihuahua and general in the Mexican Revolution from 1910-1920. He was part of one of the competing governments vying for control over Mexico at the time. *See* History.com Editors, *Pancho Villa* (Aug. 21, 2018), *available at* Pancho Villa - HISTORY.

Clearly, it was lawful for the State of New Mexico to resist such an invasion under Article I, despite the fact that the invaders were generally (and maybe entirely) of the same race and ethnicity.

The fact that Section 242 can, under entirely different circumstances, be used to prosecute a state official who discriminates against aliens, perhaps by using excessive force when executing an arrest warrant when a resident illegal alien commits a crime here, offers no reason to narrow or eliminate the constitutional sphere of authority States possess to resist invasions. Nor, for the same reason, could it eliminate state authority to repel transnational criminal gangs hailing from Mexico or to repel non-U.S. citizen lawbreakers crossing the border without some form of authorization to enter our Nation.[17]

Indeed, one of the foremost principles of construction is to read constitutional provisions to harmonize and not conflict with one another. Even taking into account that Section 242 is a Fourteenth Amendment, Section 5 statutory enactment, *at best* this means that the harmonious construction canon applies with full force to ensure that Section 242's adjunct function in enforcing the Fourteenth Amendment does not swallow a State's Article I anti-invasion powers. Applying this canon, there is clearly no repugnance between allowing a State to resist a foreign invasion while also criminalizing invidious discrimination against aliens who happen to become the subjects of individualized law enforcement activities. But, in reality, the doctrine of harmonious construction should apply with *even more force* to avoid reading Section 242, *a mere statutory provision*, as conflicting with the States' Article I constitutional power to resist invasion.[18] In other words, when evaluating even a potential conflict between the Article I power and the Section 242 statute, the former should trump because it operates at a higher level of constitutional dignity.

Malign discrimination impinging on our Nation's guarantee of equal protection to citizens or aliens is simply not occurring when an invasion comprised of illegal aliens is underway and the federal or state governments take steps to fend off any such invasion. Resisting an invasion is a colorblind course of action. The purpose and intent are to resist the invasion (here the illegal incursion of aliens across the U.S.-Mexican border), whatever the invaders' race, ethnicity, alien status, or motivation. Indeed, it would be conceptually indistinguishable from a northern border

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[17] *See generally* J.D. Davidson, *A Brief History of Border Security 1836 to the Present*, (May 29, 2019), *available at* https://www.texaspolicy.com/a-brief-history-of-border-security-1836-to-present/.

[18] *See, e.g., Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821) ("What, then, becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument."). For this reason, the Article I anti-invasion power and the Fourteenth Amendment must be harmonized wherever fairly possible. Moreover, there is no indication that the Fourteenth Amendment was intended to have any impact whatever on the Article I anti-invasion power. There is thus no even "seeming" repugnance between Article I and the Fourteenth Amendment here.

State in the United States resisting an invasion coming from Canada comprised entirely of Canadians.

Accordingly, repelling an invasion is a category of event that simply does not involve what the Equal Protection Clause or the Privileges & Immunities Clause in the Fourteenth Amendment are designed to and intended to protect. Any other approach would be imagining that the Framers of the Fourteenth Amendment and in particular that Amendment's Section 5 had *sub silentio* gutted federal and state power to resist foreign invasions. And that position is a self-evident constitutional absurdity.

Suggesting that individuals repelling an invasion of people sharing similar characteristics (e.g., race/ethnicity/national origin) could be prosecuted under Section 242 would necessarily lead to the analogous conclusion that enforcing criminal laws in a neighborhood of one race, be it white, black, Hispanic or Asian, would trigger the applicability of Section 242. This would be another self-evident absurdity.

Furthermore, as Part III below will show, analysis of Section 242's text and its case law suggests that reticence by border state governors to invoke their Article I powers, animated by a fear of having agents of their State being successfully prosecuted under Section 242, is unfounded for reasons that go beyond even the constitutional logic construed in light of the harmonious construction doctrine as set out above. And that constitutional logic, standing alone, is already very powerful.

III. The Text of Section 242, & the Elements of the Alien-Related Crime It Defines

An offense under Section 242 has these elements: (1) any person; (2) under color of any law; (3) who willfully subjects any person; (4) in any State, Territory, Commonwealth, Possession or District; (5) to different punishments, pains, or penalties than are prescribed by law; and (6) on account of such person being an alien or by reason of his race—shall be punished as the statute prescribes.[19]

We can ignore elements 1, 2 and 4 because any military or law enforcement officer acting to repel an invasion will be acting under color of law within their State, thereby meeting these elements. The fatal problem for any effort by the federal government as to the second type of offense defined in Section 242 to prosecute state military or law-enforcement officers acting to repel an invasion will come from the inability of federal prosecutors to meet elements 3, 5 and 6, based on any fair reading of the statute.

Taking each remaining element in turn, element 3 will fail because the intent/willfulness needed is that the official intends to treat the alien differently than an ordinary citizen, because of the alien's status as such. The problem for any prosecution is that, so long as the intent of the official in question is to follow what he reasonably and sincerely believes to be lawful orders from his governor to repel the current invasion by detaining those crossing the border without permission, and returning them back into Mexico, proving the malicious intent element will then collapse back into the original question of whether there is in fact an invasion, as a matter of law. If there is an invasion, then repelling that invasion constitutes a legitimate and lawful act. And as it relates to a particular state agent, so long as he reasonably and sincerely believes that he is within the boundaries of his legal authority, this intent element will fail as to him.

It bears noting that in assessing whether state law enforcement officials have qualified immunity when they are acting within the apparent scope of their authority, the prosecution must show that

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[19] Interestingly, the Pattern Jury Instructions (Criminal Cases) prepared by the Committee on Pattern Jury Instructions District Judges Association Fifth Circuit (2019 edition) Section 2.12 ("Deprivation of Civil Rights, 18 U.S.C. § 242), at 123-24, *available at* https://www.lb5.uscourts.gov/juryinstructions/Fifth/crim2019.pdf, do not even recognize that Section 242 includes the second type of offense involving the application of heightened punishments, pains, or penalties to persons on account of their alien status, race, or color. This puts the Pattern Instructions in considerable tension with the Supreme Court's holding that Section 242 embraces two separate crimes in *Classic*.

These Pattern Jury Instructions proceed as if Section 242 includes only the first type of offense Section 242 defines (violating the constitutional or statutory rights of the victim). Indeed, the words "punishments," "pains," "penalties," "alien," "race," and "color" (in the sense of the color of one's skin) do not appear anywhere in this pattern jury instruction. (The word "color" appears only as part of the phrase "color of law.") This suggests that few, if any, of the Fifth Circuit's District Courts have ever *even seen* a defendant being prosecuted for the second type of offense involving differential penalties being applied based on race, skin color, or alien status. And our research into the full span of Section 242 cases bears out this intuition. As such, there is not a specific Pattern Jury Instruction on point that offers much assistance on the main legal questions focused on in this Primer. Nevertheless, the existing Pattern Jury Instruction and Committee comments are sometimes cited in this Primer when they do prove useful.

there was some prior legal basis for the officer to know he did not have the authority to take the action in question.[20] Given that there is no case law in the Supreme Court or in the Fifth Circuit (or any Circuit) to suggest that state officials repelling an invasion under Article I, Section 10 authority somehow contravene the rights of aliens crossing the border illegally, the intent element cannot be met for this reason as well. Of the more than 200 reported cases involving Section 242, none of them involve agents of a State trying to resist an invasion denominated as such and invoking Article I power as a result.

The test for determining which rights are encompassed by Section 242 is the same as the test for qualified immunity in civil cases. In *United States v. Lanier,* the Supreme Court held that the defendant was entitled to "fair warning" that his conduct deprived his victim of a constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was "clearly established" under 42 U.S.C. § 1983. 520 U.S. 259, 265-72 (1997); *see also Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002). Similarly here, under a Type 2 Section 242 prosecution, the charged state official would have to be proven to *lack* proper authority to repel an invasion, and to know that he did not have such authority (either by the Constitution's express terms, United States statutes, or by decisions interpreting them). This is generally a question of law, and given that the federal government can point to no clearly established authority demonstrating States lack the authority to repel invasions, it has no way to overcome qualified immunity.

Element 5 is not met because a State repelling an invasion is not subjecting a targeted person or group to "different punishments, pains, or penalties." Subjecting a person, whether an alien or someone singled out, because of his ethnic background, to discrimination under color of law requires that a particularized process designed to produce a judgment that could lead to "punishments, pains, or penalties" be involved[21]—*i.e.,* the sort of state action to which due process of law attaches. A State repelling an invader is not subjecting them to a prosecutorial or judicial process. Instead, they are being repulsed on the basis of a very different non-judicial, non-prosecutorial, non-law enforcement form of state action: *i.e.*, state action directed at stopping or driving back the invasion. Even in situations where a State is not actually in its own state of war, States possess the power to supplement the federal government's efforts to conduct

[20] *See* Pattern Jury Instructions, *supra*, at Section 2.12 ("Notes"), at 124 ("The test for determining which rights are encompassed by this statute is the same as the test for qualified immunity in civil cases.").

[21] Section 242, of course, also reaches *investigations or arrests* designed to eventually lead to such judicial relief. But the point is that when *invaders* are subject to process protections, they are those provided under the law of war. Those invaders who fought during or who were captured on such a war footing would thus not possess the full panoply of due process rights that apply to criminal prosecutions and civil disputes in our court system.

war.[22] Concurrent power where the territory of our country is penetrated is consistent with the logic of the Federalist Papers that it is an absolute necessity that *all of the United States* be capable of defending itself energetically.[23]

Lastly, element 6 cannot be met either, as an invader is not being "punished" because of their alien status or their color but they are instead being repulsed (not "punished") because they are an invader. The purpose of repelling invaders negates or makes their alien status irrelevant (for no rational invader is first going to pause to seek legal immigration status before becoming part of an invasion). While an errant federal prosecution might attempt to argue a law enforcement officer is "victimizing" a particular invader due to their ethnicity, so long as the officer in question has not been selective in conducting invasion repulsion activities, and there is no specific evidence of such maliciousness, the prosecution would have no way to fulfill its burden of proof beyond a reasonable doubt. For these reasons, without some targeted evidence of such scienter, the case would be subject to dismissal without ever reaching a jury.

IV. Pertinent Case Law Involving Section 242

In *Screws v. U.S.*, 325 U.S, 91 (1945), the Supreme Court plurality held that in a Section 242 prosecution,[24] the government must prove the defendant officer had "a specific intent to deprive a

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[22] *See Gilbert v. Minnesota*, 254 U.S. 325, 331 (1920) (rejecting the argument that a state statute under which a defendant was convicted during WWI of illegally discouraging men to enlist in the U.S. armed forces was unconstitutional where Minnesota was not in its own state of war and thus could not properly have invoked its Article I "actual invasion" powers) (reasoning that "the state is not inhibited from making the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.") (internal quotation marks omitted). *See also Sveen v. Melin*, 138 S. Ct. 1815, 1826-27 (2018) (Gorsuch, J., dissenting) (contrasting the absolutism of the Contract Clause in blotting out state power, on the one hand, with federal primacy coupled with a reservation of States' rights in the Article I self-defense clause, on the other—a less absolutist assignment of power).

[23] Justice Powell in the passage below was focused on the federal government's powers of national defense but the same logic would seem to apply to construing the Article I powers of self defense. The Articles of Confederation made the federal government too dependent on the States for national defense. The solution in the Constitution that replaced the Articles, however, was not to displace the States entirely but to add energetic federal national defense powers on top of the powers granted to States in the Articles:

> Many of the opponents of the national union argued against "the raising of armies in time of peace." Responding to this argument, Alexander Hamilton answered that the "United States would then exhibit the most extraordinary spectacle which the world has yet seen—that of a nation incapacitated by its constitution to prepare for defence before it was actually invaded." The Federalist No. 25, p. 161 (J. Cooke ed. 1961). Hamilton also spoke of the danger of "expos[ing] our property and liberty to the mercy of foreign invaders and invit[ing] them, by our weakness [to attack our country]." *Ibid.*; *see also* The Federalist No. 24 (A. Hamilton).

Selective Serv. Sys. v. Minnesota PIRG, 468 U.S. 841, 861 n.2 (1984) (Powell, J., concurring in part and concurring in the judgment). The weakness of the Biden Administration at our southern border is inviting, among others, Mexican drug cartels to attack the country, using human pawns from a variety of nations. *See also Arizona v. United States*, 567 U.S. 387, 419 (2012) (Scalia, J., concurring in part and dissenting in part) (the Article I state self-defense power "limits the States' sovereignty (in a way not relevant here) but leaves intact their inherent power to protect their territory.").

[24] *Screws* analyzed 18 U.S.C. § 52, a prior iteration of § 242.

person of a federal right *made definite by decision or other rule of law*."[25] *Screws* is still good law. *See, e.g., Lanier*, 520 U.S. at 267, 272 n.7. In the case of a state actor acting to repel an invasion, any such specific intent would inherently be lacking. Invaders have no right to invade, and state actors assisting in repelling invasions thus lack any specific intent to deprive invaders of their equal protection rights. As pointed out above, such state actors would be acting for the entirely distinct purpose of ensuring the territorial integrity of the United States and their State.

In *United States v. Garza,* the Fifth Circuit addressed the "*willful*" standard,[26] holding that "*willfully*" in Section 242 means "that the act was committed voluntarily and purposely with the *specific intent to do something the law forbids*. That is to say, discrimination with a bad purpose either to disobey or to disregard the law."[27] The simple defense to this element is once again that, until there is a legal case to the contrary, the basic fact that the officer in question is engaged in repelling an invasion defeats the existence of this element.

Finally, note that even if federal prosecutors could show that a border State was abusing its discretion by calling a non-invasion an invasion *and* could otherwise satisfy the elements of Section 242, it remains far from clear that a federal court would even entertain the relevant indictment or criminal information as opposed to dismissing it as inherently raising a political question inappropriate for an Article III court to resolve:

> Again; suppose a State should keep troops or ships of war, in time of peace, or should engage in war, when neither actually invaded, nor in imminent danger. Here would be alarming violations of the constitution, assailing too directly the federal powers; it would be a most serious question arising under the constitution, *and yet clearly such a case as this does not belong to the judicial tribunal.*

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 304–05 (1821) (emphasis added).

V. History of Section 242 Prosecutions

Proving willful violations in Section 242 prosecutions is exceedingly difficult. While there have been a significant number of Section 242 cases brought over the decades, a Syracuse University report released on December 1, 2004 shows that the vast majority of potential prosecutions under

[25] *Id.* at 103 (emphasis added). As previously noted in Section III, *supra,* this element is identical to the core requirement of qualified immunity. To pierce qualified immunity, a clear decision *already establishing* the illegality of the underlying conduct is required. *See, e.g., Taylor v. Riojas*, 592 U.S. at 165 (2020) (citing *Hope*, 536 U.S. at 741 (explaining that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question") (citation omitted))).

[26] 754 F.2d 1202 (5th Cir. 1985).

[27] *Id.* at 1210 (5th Cir. 1985).

Section 242 are *not* pursued, since from FY1986 through FY2003, federal prosecutors declined 98.2 percent of all "color of law" charges brought to them.

In that time frame, federal prosecutors received 43,331 referrals and declined 42,641 of them. Only 423 "color of law" convictions occurred in that 17-year window for an average of roughly 25 convictions per year across the entire country. A more recent follow-up study at Syracuse released after the death of George Floyd found that in FY2019, federal prosecutors brought only 49 cases nationwide involving Section 242 color of law violations. The declination rate of color of law violations did show a drop-off to 89 percent in FY2019, though even that rate is quite high and thus continues to underscore the difficulty federal prosecutors face in successfully convicting defendants charged with such violations.

According to data found in both of these wide-ranging studies, the vast majority of declinations occur due to four specific reasons:

1. Lack of evidence of criminal intent;
2. Minimal federal interest;
3. No federal offense evident;
4. Weak or insufficient admissible evidence.

The key takeaway is that the extremely high prosecutorial declination rate of "color of law" charges underscores the difficulty of proving that a defendant "willfully" deprived an individual of their rights due to a person's alien status or race, while the defendant was acting under the color of law. This high prosecutorial threshold is rooted in the historical context in which these particular provisions were enacted, which is as a very broad post-Civil War legislative response to prevent racial discrimination by state actors seeking to undermine the Reconstruction Amendments. The breadth of the language used has caused the Supreme Court to react by strictly construing the willfulness element and by first requiring fair notice that the conduct at issue was known in advance by law enforcement officers and agents to be unlawful.

VI. Anticipated Counterarguments

This Part disposes of two potential counterarguments: (1) even if the Type 2 offense in Section 242 cannot be used to successfully prosecute state agents repelling an invasion, the Type 1 offense could be; and (2) the 18 U.S.C. § 241 criminal conspiracy statute can be used to the same end. Both of those counterarguments fail.

Prosecution Under Section 242 Type 1 Authority Would Not Significantly Change the Analysis.

Biden Administration prosecutors may try to take refuge in a line of Section 242 precedent concerning the first crime Section 242 defines, which requires more simply only that they show that (1) a person (2) acted under color of law, (3) in a fashion that willfully subjects any person (4) to deprivation of any of their rights, privileges, or immunities protected by the U.S. Constitution or other sources of United States law. *See, e.g., United States v. Buntyn*, No.

1:20-cr-708-KWR, 2020 WL 7481244 (D.N.M. Dec. 18, 2020) (collecting Fifth, Tenth, and Eleventh Circuit precedent). This sort of argument would fail for several reasons.

First, Section 242's targeting of defective law-enforcement activity is simply not triggered when a State exercises its lawful Article I self-defense powers.

Second, as a matter of the constitutional logic and the harmonious construction canon, no part of Section 242 can be construed to be repugnant to the Article I state self-defense power—not even Section 242 Type 1 offenses.

Third, even if there were potential repugnance between Section 242 and Article I, Article I would trump Section 242 because the latter is a mere statute, even if one adopted via a constitutional grant of authority.

Fourth, even if there were potential repugnance between Section 242 and Article I *and* Section 242 could somehow be read to dominate over Article I, the resulting conflict would pose a political question under *Cohens*.

Fifth, even if all constitutional considerations were set aside or overcome, we have identified no Section 242 cases of any kind involving an exercise of the Article I state invasion power, meaning that any state agent charged with violating Section 242 Type 1 or 2 offenses would clearly be entitled to qualified immunity.

Sixth, in light of the fact that any use of the Article I power would be in good faith, the willfulness element of Section 242, which applies equally to Type 1 offenses, would be an insuperable barrier to successful prosecution.

Seventh, as can be seen from a few examples, looking in detail at past cases federal prosecutors might try to latch onto because they involve aliens does not change the result.

In *Buntyn*, for instance, a state officer subjected alien prisoners to unnecessary tasing or was deliberately indifferent to their conditions of confinement. And in the Fifth Circuit case relied on in *Buntyn*, deportation officers were convicted of violating Section 242's first criminal prohibition because they had sprayed a detainee that had a broken neck with pepper spray and delayed getting him medical care after doing so. *See United States v. Gonzales*, 436 F.3d 560 (5th Cir.) (abrogated on other grounds), *cert. denied sub nom. Reyna v. United States*, 549 U.S. 823 (2006).

The defendant in *Buntyn* argued that the government failed to prove as an element of the offense that the prisoners were subjected to this unlawful treatment because they were aliens. The court

rejected this argument because the first offense defined in Section 242 prescribes no such element, which was clearly the correct result. In the situation relevant to this Primer, however, those without authorization to enter the country, if they are properly (or even just colorably) being treated as invaders within the meaning of Article I's power of self-defense for States, are not being subjected to anything like the constitutional violations of cruel tasing or leaving detainees to suffer in inhumane conditions of confinement or deliberately worsening their ailments). All of the conduct properly punished criminally in *Buntyn* and *Gonzales* are indeed freestanding constitutional violations. Here, individuals acting as invaders would simply be rounded up and then marched back across the border. And *Gonzales*, which would be binding precedent in the Fifth Circuit where Texas is located, is even less relevant because the defendant did not even argue there that federal prosecutors had failed to prove as an element of the Section 242 crime that the victim's alien status was a motivating factor in the pepper spraying.

Our search did identify one Fifth Circuit case in a footnote that construed Section 242 as follows: "18 U.S.C. § 242 provides, in pertinent part, that any person who, under color of law, deprives any alien of any rights, privileges, or immunities protected by the Constitution or federal law 'on account of such person being an alien,' shall be fined or imprisoned." *United States v. Sipe*, 388 F.3d 471, 474 n.6 (5th Cir. 2004). *Sipe* was a simple excessive force case, involving alien victims to be sure, but there was no need in *Sipe* for prosecutors to prove that the defendant was guilty of the second crime defined by Section 242 instead of the first. *Sipe*'s footnote was a sloppy summary of how Section 242 works, failing to understand that the Supreme Court in *Classic* had parsed the existence of *two* separate crimes present in the statute, not just one. Most importantly, this sloppiness is irrelevant because *Sipe* reversed the conviction on grounds of a *Brady* violation, so the footnote is also pure non-binding *dicta*.

Prosecution Under Section 241 Instead of 242 Would Not Significantly Change the Analysis Either.

Section 241 provides as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an

> attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Section 241 also defines two separate offenses: (1) conspiracies to injure, oppress, threaten, or intimidate the exercise or enjoyment of federal constitutional rights, privileges, or other federal rights; and (2) conspiracies of two or more persons either going in disguise on the highway or on the premises of another to violate the same rights.

The second type of offense could well falter out of the gate because state agents repelling an invasion are unlikely to go in disguise and in many instances would have the actual or implied consent of landowners to repel invaders damaging or traversing through private rangelands and the like. The unprecedented invasion declarations recently issued by Texas state judges, reacting to cries of help from their constituents on the border, tell us that much.

But even beyond that, application of Section 241 still faces all of the same obstacles that Section 242 prosecutions would face: (a) there is no constitutional right to enter the country illegally; (b) Section 241 is not applicable to Article I-based invasion repulsions; (c) Section 241 cannot be construed to be repugnant to the Article I self-defense powers; (d) Article I would supersede Section 241 even if Article I and Section 241 were somehow deemed repugnant to one another; (e) even if such repugnance nevertheless existed, a political question would arise that would cause courts to dismiss any Section 241 prosecutions; (f) we have identified no Section 241 cases involving an exercise of the Article I state invasion power, meaning that any state agent charged with violating Section 241's two categories of offenses would clearly be entitled to qualified immunity (Section 241 and 242 are *both* subject to qualified immunity defenses, *see Lanier*, 520 U.S. at 265-66); and (g) in light of the fact that any use of the Article I power would be in good faith, the willfulness element of Section 241 would prevent successful prosecution.

VII. The Policy-Oriented Bottom Line

Based on the logic of Article I, the textual elements of a Section 242 offense, the legislative history and evolution of the statute, the case law track record, and the available data concerning federal prosecutions under Section 242, there would not appear to be a significant threat of such prosecutions in the event that a border-state governor declared an invasion under current circumstances, and used state personnel to repel that invasion. Law enforcement officers and state guardsmen would thus have many defenses to Section 242 prosecutions for carrying out a State's Article I authority to secure its borders against invasion.

The extremely high historical declination rate of "color of law" charges reflects the difficulty federal prosecutors would face in demonstrating all of Section 241 or Section 242's textual elements, if bringing such prosecutions were used to deter States from using their constitutional

powers to resist invasion. Coupled with the *Screws* precedent's stringent interpretation of the term "*willfully,*" even more barriers to successful prosecution arise. Thus, it would seem that state agents removing invading aliens back across the border to Mexico face a very-low risk of successful prosecution. Hampering States' invasion responses is simply not what the Fourteenth Amendment Section 5's expanded statutory rights generally or 18 U.S.C. §§ 241-242, particularly, were designed to do. Neither Sections 241 and 242, nor Section 5 of the Fourteenth Amendment, were designed to cramp the powers of state officers responding to external invasions.

In sum, both the Constitution and the text of the statute synergize to dispel concerns about the risks of the federal government successfully using Sections 241-242 to blunt counter-invasion efforts undertaken by the relevant border States.

Furthermore, as the Arizona AG opinion explores in great depth, the presence of large-scale, stateless transnational criminal organizations ("TCOs") operating along the U.S. southern border to facilitate the current invasion provides a strong substantive justification for the invocation of Article I authority to repel that invasion. These violent and murderous cartels earn millions of dollars[28] each day trafficking humans and drugs into the United States, driving an increase in crime and death. Their active facilitation of human trafficking, drug smuggling, and coordination with criminal illegal alien gangs inside the United States, further raises the practical burden on federal prosecutors who might try to illegitimately criminalize a State's exercise of its express constitutional powers to repel invasions.

If federal law enforcement officials arrest active-duty Texas DPS, other law enforcement officers, or military guardsmen under Section 242 "color of law" charges, those prosecutions would face numerous, unprecedented political, policy, logistical, and legal hurdles the federal government would find difficult to surmount.

A sampling of the practical hurdles federal officials would face include:

1. Attempting to arrest and prosecute state law enforcement for following and carrying out an order (assumed to be issued by a governor acting pursuant to his State's constitutional Article I authority) to repel an invasion.
2. Securing warrants and then attempting to arrest state law enforcement officers while on the job at the border, at their place of work, or at their places of residence across the States of Texas or Arizona. The terrible optics of this would catch the Nation's attention quickly.

[28] William La Jeunesse, *U.S.-Mexico Border Traffickers Earned As Much as $14 Million A Day Last Month: Sources: Ex-Tucson Border Patrol Chief Roy Villareal says 'trafficking is a multibillion-dollar industry'*, Fox News (Mar. 22, 2021).

3. Proving that state law enforcement officers are detaining and removing illegal immigrants based solely on *willful* violations of the prohibitions found in Sections 241-242 as opposed to based on a governor's lawful and constitutional Article I authority.

4. Proving in court that a governor does not have the authority to invoke Article I powers to secure his State's borders, particularly in light of the federal government's refusal or inability to carry out its Article IV, Section 4 responsibilities. Such proof would require the federal government to prove a negative, namely, that America is not being invaded as a matter of constitutional law. And again, even if that negative could be proved, under the *Cohens* precedent, the issue may be deemed a political question that the courts will not touch.

5. Convincing the American people (and thus criminal juries) that the federal government is acting appropriately by sending federal agents to arrest state law enforcement officials for carrying out a constitutional order to do the job that Washington refuses to do: secure the U.S. southern border and defend American communities from being overwhelmed, from streams of illegal aliens, violent crime, illegal drugs, and sexual exploitation. This can be encapsulated in the rhetorical question: The Biden Administration lacks the resources to better seal the border but it somehow possesses the resources to enforce *against* state authorities trying to better seal the border; how does that make sense?

6. Turning the federal government's enforcement eye on States resisting the cartels and repelling the invasion rather than on the cartels themselves who are fomenting the invasion. This is worsened by the fact that the organized crime impetus that facilitates the invasion is being driven by transnational criminal organizations operating in derogation of the integrity of America's southern border. Indeed, such organizations are even functioning as *de facto* governments in areas of Mexico not under the full control of the official Mexican federal government.

The lines of legal defenses that state officials possess to resist federal attempts to carry out Section 242 criminal prosecutions are also myriad and render the likelihood of successful prosecution slim. These defensive lines include:

A. The independent textual reservation in the federal Constitution allowing States to repel actual invasions;

B. The textual barriers to meeting all of the elements of the crimes defined in Sections 241 & 242;

C. The difficulty of overcoming qualified immunity defenses in light of the absence of cases already holding that invasion-repulsion activities violate Sections 241 or 242;

D. The political question doctrine; and

E. The need for federal prosecutors to meet the strict and demanding scienter requirements (the "willfully" requirement) of Section 242 as those requirements have been developed in the case law.

* * *

Simply put, concern about federal prosecutions of state law enforcement and state military officials should not serve as a basis for inaction by border-state governors in deciding to invoke their Article I powers to repel the current invasion. Fears of Section 241 and 242 prosecutions of state agents who carry out their governor's lawful and constitutional orders are thus misplaced. It will be exceedingly difficult, if not impossible, for such cases to even reach a jury, much less result in successful convictions that could be sustained on appeal.

Note: a technical correction was made on July 27, 2022.